

# **Is the United Kingdom Becoming a Federal State?**

Volume 1

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## **Declaration**

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## Summary

This thesis aims to determine whether the United Kingdom has become, or is becoming, a federal state due to the constitutional impact of devolution processes in Wales, Scotland, and Northern Ireland since 1998. It evaluates the merits of the argument that these processes have led to the division of the exercise of British sovereignty in accordance with federal principles. However, since the entrenchment of these principles into a formal canonical constitution has long been deemed essential to the formation of a federal state, it was often assumed that the United Kingdom could not be characterised as such. Indeed, the peculiar British constitution, which is an aggregate of statutes, common law devices, and conventions, has structured state governance in a primarily informal and non-hierarchical manner. Therefore, the claim that the British constitution guarantees the supremacy and the implementation of federal principles is not only counter-cultural, but also doubtful.

Based upon an in-depth analysis of British constitutionalism and a close examination of the Welsh, Scottish, and Northern Irish devolution arrangements, I argue that the United Kingdom has now become a federal state. Since its constitution does not entrench federal principles formally, I enter the caveat that it is not a fully-fledged 'federation'. Therefore, the central claim of this thesis is that the United Kingdom has become a federal state in substance but not in form. Reaching beyond a formalistic understanding of both federalism and constitutionalism, I appreciate the role of informal norms and constitutional conventions in shaping constitutional governance on the ground. In coming to this conclusion, I situate the British devolution arrangements in their respective historical, social, and political

contexts, assessing what makes devolution work in a composite multinational polity.

This thesis is divided into three parts. I first examine its three core concepts: federalism, British constitutionalism, and devolution. I argue that since the fundamental attribute of federalism is the division of state sovereignty, the establishment of a framework of multi-level governance through the implementation of devolution arrangements can make the United Kingdom a federal state. It is yet uncertain whether a sovereign British Parliament can be bound normatively by these arrangements.

In the second part, I appraise the federal character of British governance by evaluating whether and how self-rule of the substate nations and shared rule between them and the central British Government are institutionalised in practice. While substate entities hold extensive normative powers to self-rule, the structures by which they can rule the British state jointly are lacking, despite their potential. Moreover, federal principles are intended to be safeguarded by devices like the Sewel Convention, but their insufficient legal entrenchment raises questions on their permanent and binding character.

Having assessed the impact of some contemporary evolutions on the British system of governance, I draw, in the third part of this thesis, the strands of the analysis together, grappling with the central question of this thesis: has the United Kingdom become a federal state? I conclude that it has. Since multiple legal orders coexist within this multinational polity in which federal principles have been implemented gradually and pragmatically over time, I discern the crucial substantive elements of a federal state.

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## **1. Prolegomena**

### **1.1. Theoretical and Practical Background**

Diverse and conflicting trends shape contemporary constitutional governance. States shall ensure that they can conciliate divergent interests to secure their legitimacy, their authority, and, ultimately, their longevity. Accordingly, their constitutional frameworks shall be responsive to their intrinsic societal characteristics so that all their citizens can feel included and recognised as members of a cohesive polity. Still, that can hardly be fulfilled solely by formalistic and legalistic means. The latter shall be supplemented by informal, and substantively political, constitutional mechanisms and norms.

The main question guiding this thesis is whether the United Kingdom is becoming a federal state given the implementation of devolution arrangements since the end of the twentieth century. To answer this question, I shall analyse what devolution is in the British constitutional context, mainly while testing it against the standards implicit in the federal idea. I shall then find if a balance between federalism, British constitutionalism, and devolution, which are the three core concepts of this thesis, can be struck. That is why it is crucial to define these concepts accurately.

#### **1.1.1. Federalism**

States are the constitutional embodiments of the human will to settle communities and polities that transcend the individuality of their members in specific contexts. However, numerous states are the aggregate of multiple diverse polities. Therefore, their constitutional frameworks must recognise their plural entities so that their existence can be legitimate and sustainable. A federal

system of governance can uphold the unity of a state in a manner that permits it to recognise the diversity and the autonomy of the entities that constitute it. Federal states are the products of aggregative or disaggregative socio-political processes through which their constituent entities have consented to exercise together a divided state sovereignty.

One shall thus apprehend federalism as a system that balances the interests of the whole with those of the parts. This system does so by conciliating contradictory values, such as unity and diversity. In practice, federal governance is characterised by the institutionalised mediation of the conflicts between individual and collective interests within a composite state. Transcending the antagonisms between divergent interests and identities is then at the core of the federal spirit. Still, considering its pragmatic essence, this spirit cannot be actualised if it is grasped univocally and abstractly. Federal principles shall then be implemented within a state in a way that is attentive to its constitutional peculiarities.

### **1.1.2. British Constitutionalism**

The British constitutional framework displays why and how states implement constitutional principles and devices with responsiveness to their societal characteristics. Although it is famously 'unwritten' or, at least, uncoded, the British constitution has succeeded in protecting the rights and powers of citizens, as well as in establishing robust and stable institutions. British constitutionalism has worked so well over time because it could channel the wills of a diverse population and meet its changing needs. It can do so by upholding firm structuring principles through operable and versatile mechanisms.

Since the Middle Ages, a unique conception of constitutional power has shaped the British constitution and distinguished it substantially from other Western constitutional traditions. This constitution is not a posited document that supersedes any other norm. Rather, it is an aggregate of the norms and principles that rule how sovereignty shall be exercised.

For instance, British constitutionalism relies heavily on the complex concept of common law. Moreover, courts are empowered to shape its evolution by making sense of its substance. These institutions can then fill the gaps of this constitution, which become apparent in specific cases, and set authoritative precedents regarding its proper operation.

Another distinctive characteristic of British constitutionalism is that, at least in principle, sovereignty lies within Parliament rather than in a canonical text. This institution, to which the Executive is accountable, holds the authority to enact the norms structuring state governance. Since the will of Parliament and that of the people shall be conflated, this institution would safeguard liberties and democracy more properly than formal constitutional provisions. The centrality of parliamentary sovereignty explains why counter-powers, like these of courts to review statutes, have historically been weak or non-existent.

Still, in contemporary times, the relatively unitary character of the British Parliament would have compromised its ability to address several intricate constitutional issues. To remedy this problem, parliamentary sovereignty, and British constitutionalism, shall be apprehended from a pluralistic perspective. A long-standing, but long neglected, defining characteristic of the United Kingdom, its multinational essence, should then receive greater attention.

### **1.1.3. Devolution**

As tautological as this reasoning might sound, it should never be overlooked that the United Kingdom is a union of polities, of nations, that have retained their distinct identities. Despite the existence of a shared British identity, the sense that British citizens are also English, Welsh, Scottish or Northern Irish has not waned over time. Upholding, and even accentuating, the constitutional unity of the United Kingdom could not be achieved without recognising, albeit imperfectly sometimes, the existence of the nations that make this state up. British constitutionalism has had to adapt so that it could meet the wills and the needs of its constituent nations and especially those of the Welsh, Scottish, and Northern Irish nations.

Throughout the twentieth century, numerous proposals were devised to recognise the defining legal and political characteristics of these nations within the British constitutional order. They always fell short until, under the leadership of Tony Blair's New Labour Government, devolution processes were triggered at the end of the 1990s. As autonomous national institutions were established, the constituent nations gained the capacity to make their own choices on specific matters. Although the Westminster Parliament has formally retained its status as the backbone of British constitutionalism, it surrendered its omnipotent role when transferring some of its normative powers to substate institutions. It has empowered the constituent nations to act as fully-fledged entities within the Union without them having to become independent states. So, norms and policies can be devised by the Welsh, Scottish, and Northern Irish institutions without them being under the tutelage of central parliamentary institutions.

In practice, the implementation of the devolution processes has neither been unvarying nor devoid of challenges. Since each constituent nation had its very own realities, its proper constitutional recognition can only be tailor-made. Furthermore, the 2014 Scottish independence referendum highlighted that, in many Scots' opinion, devolution would not provide enough autonomy to their nation. Nevertheless, the unionist side prevailed after promises to deepen and broaden devolution were made (and mostly kept). Consequently, in contemporary times, it would not just be a social fact, but also a legal and political one, that the United Kingdom remains united because its multinational essence is recognised constitutionally, mainly through devolution.

### **1.2. The Central and Corollary Research Questions**

To determine whether the United Kingdom is becoming a federal state (which is the central research question of this thesis), I investigate the links between federal principles, the fundamental components of British constitutionalism, and the legal and socio-political embodiments of devolution. In practice, I seek to demonstrate that there are close and significant links between the three core concepts (federalism, British constitutionalism, and devolution) of this thesis. An exhaustive, plural, and, even more importantly, joint analysis of this trinity of concepts shall be done so that I can answer the central research question of this thesis rigorously and comprehensively.

Still, to do so, I shall also answer some corollary, though necessary, research questions about the substance of the three core concepts. First, what are the fundamental legal and socio-political elements that shape federalism, beyond the consideration

of specific societal contexts? Second, how can political and legal actors be bound by a British constitution that is neither codified nor canonical? Third, what impact has devolution had on British constitutionalism? Despite their subsidiary nature, the answers to these questions are instrumental in providing the substantive elements that are needed to make an original contribution to constitutional scholarship. Hence, it can be determined whether the United Kingdom has been moving, formally and substantively, towards federalism in contemporary times.

Certainly, numerous inputs, which have shaped many insightful reflections, were made on multiple themes related to the core concepts. Whether it is statutory, case-based, or doctrinal, the literature on them is very wide. It provides varied and valuable information and perspectives that help to devise innovative arguments. Nonetheless, drawing together the interconnection between the three core concepts of this thesis is ground-breaking. The resulting investigation examines thoroughly whether the disparate devolution arrangements amount to federal ones as they would have acquired this characteristic gradually and incrementally. It then becomes possible to argue that this interconnection is critical in answering my central research question in an affirmative manner. It enables me to envisage a federal state beyond the confines of a formal constitution.

In fact, federalism has often been conceptualised in essentially legalistic and formalistic perspectives. The existence of a canonical and codified constitution, which shall be normatively supreme, would be instrumental in the establishment of a federal state whose sovereignty shall be divided. Since there is no such constitution in the United Kingdom, this state could not be characterised as federal, even if it implemented federal principles

by alternative means. So, based upon such a formalistic understanding of federalism and British constitutionalism, devolution cannot be conceptually related to federalism. The case would then be closed before it could even be thoroughly assessed.

However, since I aim to investigate the constitutional nature of the core concepts, and the links between them, off the beaten track, new horizons can be reached. I consider that the power and the legitimacy of norms do not only come from legal sources but also from political and social ones. I also evaluate whether informal constitutional mechanisms can be instrumental in the efficient implementation of federal principles, in a manner that dovetails the intrinsic characteristics of British constitutionalism. The latter can then be grasped more comprehensively if a pluralistic understanding of constitutional law was adopted and even privileged.

Accordingly, I re-examine several theoretical assumptions that have become prominent and somewhat hegemonic over time. I shall not merely determine the United Kingdom is a federal state on a purely typological and superficial basis. An abstract assessment of the federal nature of the British constitutional order would not be fundamentally original. In fact, I reflect more broadly on constitutionalism and on the authority of diverse norms in a composite and multinational state. I also analyse contemporary British societal realities beyond a strictly legal perspective. Furthermore, I investigate the links between the core concepts pragmatically and holistically. Indeed, connecting the core concepts of this thesis challenges numerous long-standing constitutional postulates and leads to a significant scientific breakthrough.

### 1.3. Methodological Considerations

In a pluralistic discipline like constitutional law, no single method paves alone the way to answer any research question. Consequently, I make use of theoretical, doctrinal, jurisprudential, and socio-legal methods to devise a fruitful methodological approach that is tailor-made to interdisciplinary work.

This thesis is primarily a conceptual work, based upon an analysis of the three core concepts underpinning the central research question. To decipher their sense, which is complex and multi-faceted, I draw on diverse schools of legal thought, including legal theoretical and constitutional inputs. However, I shall bridge the gaps between theory and practice and between principles and doctrines so that my analyses can be relevant. Accordingly, I also use doctrinal methods to understand how statutes, legal doctrines, judicial decisions, and constitutional conventions can make the devolution arrangements work. Moreover, beyond studying primary legal materials, I engage extensively with the broad legal literature on each core concept.

Furthermore, I deem it essential to view the British constitution *in context* by examining the social, historical, legal, and political realities shaping the multi-layered British state. Given that the British constitution lacks a canonical embodiment, it is also vital to grasp the constitutional mindset underlying the British constitutional order. To avoid the dangers of an overly abstracted approach, I study the historical foundations of British constitutionalism and its interactions with political and sociological considerations. Consequently, while my thesis is primarily a legal piece of work, it also has salient historical and socio-legal dimensions. I then apply contextual, historical, political, and legal

analyses to my study of all three devolution processes to appreciate the differences and the asymmetries between them. I indeed deem that a broad assessment of devolution shall be privileged to probe the federal nature of the whole British constitutional order. That is key in grasping the core concepts comprehensively. However, to avoid making syncretic and unfocused reasonings, my thesis focus on the contextual elements that are directly related to a research question. For instance, although I situate the diverse devolutionary experiences in the broader context of an evolving British constitutional order, they are not studied beyond what I need to answer the research questions.

#### **1.4. Thesis Outline**

This thesis is divided into three parts. In the first part, I define the core concepts from both practical and theoretical perspectives and provide answers to the corollary research questions, which, in turn, permit to make sense of the central one. A chapter is devoted to each of the three core concepts and to their associated research questions.

In the second part, I evaluate the federal nature of the contemporary British constitution since devolution. To characterise the United Kingdom as a federal state, I investigate the powers of its constituent nations to self-rule and rule it in a shared manner, as well as the firm entrenchment of federal principles. A chapter is devoted to each of these elements. Building on the findings made in the first part, the three chapters of this part provide crucial elements enabling to answer the central research question.

I fulfil this crucial task in the third and last part of this thesis. Still, before completing my argument, I assess the existence of a

federal United Kingdom from broader perspectives that transcend devolution. I also examine the complementarity of the legal and political sides of British constitutionalism considering the potential implementation of federal principles. In the two chapters of this last part, I can then evaluate the potential place of federal principles within the British constitutional order and the actual federal character of the United Kingdom.

More precisely, in the second chapter, I discuss the merits of the diverse formalistic and socio-political understandings of federalism to conceptualise it accurately. This discussion highlights that these understandings are complementary, although formal features are mainly instrumental in the implementation of federal principles within a polity. In fact, especially by considering the valuation of the principle of self-determination in contemporary times, I find out that states and nations cannot be inexorably conflated. The balance between unity and diversity, which is a core federal principle, can be key in actualising the internal side of self-determination while being entrenched through the operation of structuring legal devices. Diversity shall not automatically be negated in the name of state unity; it should even be recognised constitutionally.

In fact, federal frameworks shall be apprehended as the embodiment of pacts between these entities, which coexist without having hierarchical relationships. Accordingly, federalism shall be defined primarily as the system of constitutional governance that divides state sovereignty instead of consolidating its exercise. The constituent entities of a federal state foster and share a constructive engagement to implement federal principles with responsiveness to the wills and needs of each entity. A federal constitution must then entrench these principles by guaranteeing

that the constituent entities are treated fairly, not only in law but also in fact. The institutionalisation of federal principles shall then be achieved on a concrete, case-based, perspective. Therefore, determining whether the United Kingdom has become a federal state shall be done considering its precise constitutional characteristics rather than purely theoretical inputs.

The third chapter studies the peculiarity of British constitutionalism. I shed light on the devices and processes by which federal principles can be safeguarded and actualised in the United Kingdom. Although the nature of the arguments displayed in this chapter is primarily legal, political, historical, and sociological realities are also considered thoroughly since they have shaped British constitutionalism for centuries. In practice, any constitution shall draw its authoritativeness from its legal and political components, which are as indissociable as the two sides of a coin. While there is no British canonical code, the political and somewhat intangible aspects of the British constitution are not trivial, but fundamental.

Although it did not emanate from a definite constitutional moment but from a steady evolution, British constitutionalism has been implemented and safeguarded flexibly to be easily adapted to changing times. Over time, it has found ways to set authoritative behavioural standards without them being formally enforced. It has relied not strictly on the assertion of legal and statutory powers but also on the valuation of societal responsiveness and the legitimacy of politically constitutional norms and conventions. However, since legal and political powers have historically been concentrated within the Westminster Parliament, they have been exercised in an essentially unitary manner. Parliamentary sovereignty would then compromise the recognition that the United Kingdom is a

composite state constituted by autonomous and distinct nations. Consequently, I shall examine how the opposition between parliamentary sovereignty and the multinational essence of the British state can be mitigated.

In the fourth chapter, I argue that the United Kingdom is a union of nations whose recognition, by various means, has always been central in its constitutional order. Despite the influence of strong unitary and centralising dynamics, the United Kingdom has been shaped by the need to accommodate the English, Welsh, Scottish, and Irish national wills. Tony Blair's New Labour Government made devolution a reality and contributed to achieving this aim in contemporary times. Although the legal foundations of devolution appear somewhat shaky, the constituent nations have been endowed with normative autonomy in a substantively constitutional manner. The multinational essence of British constitutionalism is then recognised constitutionally. British governance would even tilt towards federalism due to devolution.

The fifth chapter examines the existence and the extent of a British federal self-rule. I note that the core purpose of devolution has been to implement pragmatic and tailor-made national arrangements. In practice, normative powers have been divided between central and substate institutions so that both can make decisions autonomously and without subordination. Although the devolution arrangements were not devised following a uniform pattern, they have the merit of dovetailing specific national realities, which increases their efficiency and their legitimacy. Accordingly, the substate institutions established by Devolution Acts have empowered the British constituent nations to self-rule as extensively as most federated entities can.

The sixth chapter probes the existence of shared rule in a federal sense in the United Kingdom. Despite its transformative, I discover that devolution was hardly intended to reform the whole British constitution in full conformity with federal principles. Certainly, the role of central institutions had to be rethought to some extent due to the establishment of a multi-level framework of constitutional governance. However, the essential characteristics of these institutions, like Parliament, have not changed enough so that they could be placed on an equal footing with substate institutions and exercise a divided British sovereignty jointly. Moreover, the imperfect interjurisdictional cooperation between state and substate entities and the persistence of unitary patterns and norm-making mechanisms have limited the role that substate institutions can play within state frameworks. Consequently, I argue that while there is a great potential to operationalise federal relationships between diverse entities and institutions, the current British institutional practice hampers this breakthrough from becoming a reality.

The seventh chapter evaluates whether the informal British constitution is sufficiently supreme to entrench federal principles properly. Their implementation should not be at the whim of the will of a sovereign central Parliament that could disregard the distinct legal status of the constituent nations. In that vein, I demonstrate that British constitutionalism stands because citizens and institutions consent to abide by norms, whose substance and form are highly varied, that are not posited within a canonical code. Informal and innovative devices, such as the Sewel Convention, can set binding duties and uphold devolution, and potentially federal principles, by limiting politically parliamentary sovereignty, even though their authoritativeness is not ensured by purely legal means. However, doubts can legitimately be raised on the ability

of these devices to counter systemic unitary forces that threaten the multinational character of the British polity. Accordingly, despite the effective unlikelihood that Parliament could take back all the powers it devolved, it is uncertain that the Devolution Acts have acquired a supreme status akin to the one that a federal constitution should have, at least theoretically.

The eighth chapter contextualises devolution by studying the importance of other processes, such as European integration and the formal entrenchment of guarantees on human rights. In this regard, I contend that the contractual nature of British constitutionalism has then become increasingly recognised and institutionalised due to the introduction of legal constraints to the sovereignty of Parliament. Still, its persistent supremacy and the resurgence of centralising, mainly English, claims that this institution should take back the control it has lost has highlighted a certain reluctance to extensively federalise British governance. Bearing in mind the consequential impact of Brexit, asserting that devolution processes have genuinely divided British sovereignty based upon multinational lines seems quite uncertain.

The final chapter of this thesis goes at the heart of the matter. I determine whether the United Kingdom has become a federal state since the turn of the millennium. I first assess if there is such thing as a British federation that institutionalises a definite set of legal devices and formally constitutionalise federal principles. Since no formal British constitution could absolutely safeguard the intrinsic components of devolution from undue parliamentary interventions, a British federation has not been established so far.

Nonetheless, since federalism shall be conceptualised as a spectrum, a federal state does not ineluctably have to be a

federation if it entrenches federal principles in a substantive, and primarily political, manner. That is the case in the United Kingdom. Federal principles have become integral parts of British constitutionalism since they have shaped and structured it in contemporary times. Despite the tenuousness of the formal devices that could entrench and safeguard federal principles, the devolution of powers to the constituent nations has institutionalised a division of British sovereignty. The latter is no longer unitary in practice and can be exercised with responsiveness to substate national needs and wills.

Consequently, this thesis argues that the United Kingdom is becoming a federal state, albeit not a federation. That is coherent with the decisive finding that constitutional concepts only make sense when their legal and political sides, which are intrinsically complementary, are studied. The peculiar British constitution can hardly be characterised as federal in a legal sense. Nevertheless, its substance has been shaped by federal principles. They have been politically constitutionalised since the enactment of the Devolution Acts. Therefore, the British constitution is that of a state that is not only drifting towards federalism, but that is substantively federal. In practice, there is such thing as a British federal state, but it can only be discernible if constitutionalism is apprehended from a diverse and holistic perspective.

## **Part 1: Understanding the Core Concepts**

## **2. The Nature of Federalism**

Over time, an important debate on the nature of constitutional sovereignty has been about its absolute and irreducible character. Since sovereignty cannot be limited substantively, it could never be shared, and its exercise could not be divided. A state, which embodies sovereignty institutionally, would necessarily be unitary and could never be adequately ruled by several sovereigns. However, particularly since the advent of the internal right to self-determination, assumptions on the indivisibility of sovereignty have been challenged. In practice, federal sovereignty would not inexorably threaten the principles underlying statehood and constitutionalism. It could instead actualise them pragmatically and optimise the soundness and the responsiveness of constitutional governance. Still, grasping what federalism is requires conceptualising it beyond received wisdom.

In this chapter, I first assess how state sovereignty has evolved towards becoming less and less indivisible and mononational. Second, I highlight that the enhanced valuation of diversity and dialogue in contemporary times can be done through the division of sovereignty in accordance with federal principles. Third, I identify and analyse what are, beyond given contexts, the fundamental principles structuring substantively a federal constitutional order. Hence, as the nature of federalism could be clarified, I investigate how federal principles can be institutionalised and fostered in a specific polity.

### **2.1. The Rise and Fall of the Nation-State**

In modern times, sovereign states were intended to reflect the unity of a community, of a nation, and to embody its

distinctiveness. Since sovereignty can only be unitary from this perspective, statehood and nationalism were conflated and became indissociable. Accordingly, sovereigns do not only hold (theoretically) absolute powers over a territory. They would also hold a monopoly on the assertion of the wills of a nation. Nonetheless, a constitutional framework centred exclusively on the nation-state no longer fits the realities and the needs of contemporary polities, whose sovereignty can no longer be exclusively unitary.

### **2.1.1. The Orthodox Understanding of Constitutional Sovereignty**

Since the Peace of Westphalia of 1648, states have been the basic units, the core subjects, and even the atoms, of both internal and international public law.<sup>1</sup> Modern unitary statehood has widely been characterised as the most suitable and efficient mode of constitutional governance. Coming into existence through conquest, organic development, or covenant,<sup>2</sup> a state can be defined as a centralised unit that sets a direct link between the members of a polity and the institutions by which they govern themselves. More precisely, a state has, according to Lluç, seven core attributes: the distinctiveness of its sovereign legal and constitutional orders; the distinctiveness of its political order; the distinctiveness of its civil society; the distinctiveness of its governmental institutions and of its citizenship; the international recognition of its existence; and the development of an integrative

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<sup>1</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 139; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 165.

<sup>2</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 2.

civic identity.<sup>3</sup> Lluch's input brilliantly highlights that statehood is not simply about the establishment of a unique and coherent legal order, but also about that of a united and integrated polity. A state is then both the legal and the political embodiment of the will of citizens to live together.<sup>4</sup>

Although, before modernity, political units were often the aggregates of multiple groups, statehood was then deemed fundamentally unitary since 'political and cultural centralization and powerful centrifugal forces' conflated political, legal, and sociological identities.<sup>5</sup> The need to cultivate and safeguard state unity was particularly acute to modernising Western societies. In fact, the establishment of unitary states represented the most appropriate solution to optimise the organisation of power (through centralisation) and to actualise social solidarity (through the development of a shared sense of belonging).<sup>6</sup> Moreover, international law protects the integrity of a state,<sup>7</sup> even from groups within it that seek to secede,<sup>8</sup> unless it renounces this protection,<sup>9</sup> which has happened seldom.<sup>10</sup> Therefore, from a modern

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<sup>3</sup> Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 144.

<sup>4</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 42-43.

<sup>5</sup> Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 31.

<sup>6</sup> Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 55.

<sup>7</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 112 and 350.

<sup>8</sup> *ibid* 122.

<sup>9</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 103; Sergio Ortino, 'Functional Federalism between Geopolitics and Geo-economics' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 290.

<sup>10</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 167.

perspective, a well-governed state should be as integrated and cohesive as possible and the functioning of institutions should be as uniform as possible.

However, I can hardly apprehend well the impacts of unitary statehood on constitutional governance if I gloss over the definition of the concept of sovereignty. Sovereignty is the power of a person or an institution, the sovereign, to take the initiative of establishing a state and devise its constitutional framework. In practice, the most decisive power that a sovereign can exercise is the constituent power. Accordingly, the sovereign should have the exclusive ability to enact and amend constitutional norms, from which spring all other norms, and even, ultimately, the existence of the state. Studying how constituent power can be exercised within a state is key to understanding the constitutional importance of sovereignty.

In this regard, it is noteworthy that the traditional and modern senses of sovereignties were fundamentally unitary. Indeed, Preston King considers that traditional sovereignty was 'absolute, indivisible, illimitable and ultimate'.<sup>11</sup> Sovereignty is deemed absolute when its holder has the last word on any constitutional issue; something that can hardly be reducible and divisible concretely.<sup>12</sup> In modern states, the omnipotent constituent power of the sovereign, which would be unchallengeable, was firmly asserted and entrenched, since this omnipotence was at the core of their constitutional structures.<sup>13</sup> Moreover, these states were

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<sup>11</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 133.

<sup>12</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 8.

<sup>13</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 87; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 1.

usually ruled by a unique societal group whose members monopolised the use of constituent power and, thus, the exercise of state sovereignty in their own undivided name. Since modern unitary sovereignty was also characterised as unshareable because it was argued that its division would foment division and lead to chaos, its sense was very similar to the traditional one.<sup>14</sup> Even nowadays, it is extremely coherent that a unitary state, which rejects any legal, political, or societal differentiation, should be ruled by a single sovereign whose sovereign status is irreducible, as the state itself.

Still, many functional states could be established through the integration of diverse heterogeneous groups. This reality highlights that a unitary state does not necessarily have to be established through organic processes. Certainly, processes of political integration within state borders<sup>15</sup> have often been engaged for instrumental purposes,<sup>16</sup> and unitary constitutional narratives have

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<sup>14</sup> Alpheus Thomas Mason, 'Federalism: Historic Questions and Contemporary Meanings - The Role of the Court' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 13; George Carey, 'Federalism: Historic Questions and Contemporary Meanings - A Defence of Political Processes' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 50.

<sup>15</sup> Henry Teune, 'The Future of Federalism: Federalism and Political Integration' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 223.

<sup>16</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 73; LJ Sharpe, 'British Regionalism and the Link with Regional Planning - A Perspective on England' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 122; Keith G Banting, 'Social Citizenship and Federalism: Is a Federal Welfare State a Contradiction in Terms?' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 55; Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 5; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 154.

frequently repressed inner state diversity.<sup>17</sup> But beyond the effect of coercive legal provisions, state unity has mainly relied on the ideal that citizens should be like-minded and share identity traits, despite their apparent differences.<sup>18</sup> That explains why the alliance between the concepts of nationalism and statehood, when it is desired rather than strictly imposed, has permitted to uphold state unity in plural polities.

### **2.1.2. The Modern Conflation between Nationalism and Statehood**

Unitary statehood has become a common mode of constitutional governance because it is based upon a strong and transcendent desire: belonging to a nation. A modern state was populated by an 'indivisible and homogeneous' *demos* that could exercise absolute sovereignty within it.<sup>19</sup> Modern unitary sovereignty would be primarily exercised by a nation that could shape a state in accordance with its characteristics and, even more importantly, its interests. The conflation between statehood and nationalism, which was hardly a matter of constitutional interest in ancient times, entails that each nation has its own state and that a state belongs exclusively to one nation.<sup>20</sup> It has long been feared that

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<sup>17</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 16.

<sup>18</sup> Thomas Fleiner, 'The Challenge of Ethnic Diversity to Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 175.

<sup>19</sup> Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 196.

<sup>20</sup> Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 16; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 17.

national differentiation within a state would ineluctably compromise its efficient governance and social cohesion.<sup>21</sup> For instance, bearing in mind that language is a structuring feature for a nation beyond its symbolic value,<sup>22</sup> the citizens of a state should use a common language to keep it united and well-governed.<sup>23</sup> Accordingly, the language of the most prominent national group within a state should become the state official language.<sup>24</sup> This reasoning entails that, from a modern statist perspective, nations either have to establish their own state or to assimilate into another nation-state.<sup>25</sup>

Still, before going further, it is essential to define the concept of nation more exhaustively. A nation has frequently been characterised as being a group that enjoyed statehood, enjoys statehood, or seeks to enjoy statehood.<sup>26</sup> However, this simple

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<sup>21</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 12; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 328; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 190.

<sup>22</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 68; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 37; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 146.

<sup>23</sup> Cillian McBride, 'Postnationalist Democratization: Rethinking Nationality, Trust, and Accountability' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 164.

<sup>24</sup> Ferran Requejo, 'Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain, and the European Union' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 314.

<sup>25</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 21; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 190.

<sup>26</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 28; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 67.

definition does not permit grasping nationalism beyond tautologies on its association with statehood. It unduly confuses the defining features of a nation with one of their potential uses. Defining nationalism legally and politically is yet rather complex. Beyond the fact that nationalism is clearly not akin to ethnicism,<sup>27</sup> this concept cannot be meaningfully construed in univocal and totalising terms.<sup>28</sup> Certainly, structuring and objective features such as 'geography, history, race, language and culture'<sup>29</sup> can hold citizens together and foster a national feeling based upon these features.<sup>30</sup> Moreover, shared pragmatic interests, such as economic interdependence and common societal institutions, have consistently been key to fostering unity.<sup>31</sup> Nonetheless, the presence of such features within a polity cannot prefigure that a nation will inevitably arise and thrive.

In fact, a nation is not only made of purely objective legal and political components, but also of quite subjective, and intangible, elements.<sup>32</sup> It shall never be overlooked that most citizens desire, and even need, to belong to a transcendent whole.<sup>33</sup> Nationalism helps them to fill the crucial need to belong to a group that is

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<sup>27</sup> Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 16 and 26.

<sup>28</sup> Dimitrios Karmis and Wayne Norman, 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 13; Michael Keating and Malcolm Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2<sup>nd</sup> edn, Luath 2015) 12.

<sup>29</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) para 326.

<sup>30</sup> Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 64.

<sup>31</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 39; Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 66.

<sup>32</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 194.

<sup>33</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 66.

greater than themselves on an individual basis.<sup>34</sup> A nation embodies the cohesive unity of a polity that is worth more than the sum of its members.<sup>35</sup> The citizens of a nation are then bound together by the desire to further a 'common project with a common future'.<sup>36</sup> A nation can then be defined as a unique entity whose citizens are part of a distinct *demos* whose substance would be peculiar, (somewhat) homogeneous, and irreducible.<sup>37</sup> Consequently, nationalism should simultaneously be the outcome of a visceral need for belonging and the way to channel the structuring unifying forces that constitute cohesive political units.<sup>38</sup> Statehood has endowed nations with constitutional frameworks through which their existence can be institutionalised, so that their citizens can exercise sovereignty beyond rhetorical statements.<sup>39</sup>

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<sup>34</sup> *ibid* 67; Ferran Requejo, 'Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain, and the European Union' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 314; Ephraim Nimni, 'Nationalism, Ethnicity, and Self-Determination: A Paradigm Shift' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 28.

<sup>35</sup> Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 61; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 80 and 85.

<sup>36</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 41; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 46; Robert Colls, 'What Is British National Identity and How Do We Get It?' (2012) 52(52) *Soundings* 100, 103.

<sup>37</sup> Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 66; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 196; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 2-3.

<sup>38</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 30; Wayne Norman, 'Justice and Stability in Multinational Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 92.

<sup>39</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 4; Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge

Still, as noted by Colls, it must be kept in mind that ‘national identity is not something governments can invent according to their convenience’.<sup>40</sup> A nation cannot be the mere outcome of legal and social constructs, even though these constructs may readily contribute to institutionalise its collective life.<sup>41</sup> Statehood hardly makes nationalism thrive without there being a genuinely popular will to do that within a polity. Despite the original utilitarian and constructivist intents underlying the establishment of several nation-states,<sup>42</sup> the foundations of those which last cannot rest only on constitutional texts.<sup>43</sup> In fact, statehood and nationalism are far from being interconvertible synonyms. They have instead been effectively complementary so that their respective societal roles can be fulfilled optimally. On the one hand, statehood has been instrumental in the ability of a nation to secure its interests both in law and in fact. On the other, nationalism can strengthen the legitimacy and the resilience of modern unitary statehood. It can then rely on more than the pure assertion of sovereign constitutional powers regardless of societal contexts.

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University Press 2001) 43; Miquel Caminal and Ferran Requejo, ‘Democracy and Federalism in Plurinational Societies’ in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 3.

<sup>40</sup> Robert Colls, ‘What Is British National Identity and How Do We Get It?’ (2012) 52(52) *Soundings* 100, 101.

<sup>41</sup> Eugenie Brouillet, *La negation de la nation: L’identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 71; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 103 and 140.

<sup>42</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 45.

<sup>43</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 31; Thomas Fleiner, ‘The Challenge of Ethnic Diversity to Federalism’ in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 175; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 44.

Although, for reasons that are displayed and discussed later, an absolute conflation between nationalism and statehood would neither be possible nor opportune anymore, the concept of nation-state still stands in the contemporary era.<sup>44</sup> Nationalism has remained one of the most prominent forces that shape constitutionalism nowadays. Both its legal and societal impacts cannot be underestimated or loathed. When everything changes, nationalism continues to fill the fundamental human desire to share a transcendent identity that protects from global uncertainties and mitigates varied threats. Moreover, state constitutions have mostly remained the embodiments of national claims. It shall yet be noted that the hegemony of nation-states has faded over the last decades since the sense of sovereignty has evolved considerably both within and outside state borders. The unitary state whose citizens belong exclusively to a single and homogeneous nation is an endangered species. Hence, the constitutional institutionalisation of nationalism shall evolve if this concept is to remain actual and legitimate.

### **2.1.3. The Crumbling of Unitary Sovereignty**

While the state might remain ‘the dominant vehicle of political organisation’,<sup>45</sup> it is no longer hegemonic in contemporary times. The supremacy of unitary nation-states has crumbled in contemporary times because absolute conceptualisations of nationalism, statehood, and sovereignty have become disconnected from constitutional realities. Unitary statehood is no

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<sup>44</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 172-173; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 16 and 66.

<sup>45</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 1.

longer the golden standard of constitutional governance that can meet the needs of any polity. The increased defiance towards such states can be explained by their coinciding inabilities to be responsive to varied substate matters and to address global issues efficiently.<sup>46</sup> Certainly, centripetal forces, such as these triggered by military, geopolitical, and economic shared interests, have always influenced constitutional governance significantly.<sup>47</sup> However, the most recent wave of globalisation has displayed the rising powerlessness of states to deal with problems that do not know borders. The correlative enhanced powers of international organisations have then shed light on the opportunity to apprehend the exercise of sovereignty beyond strict state settings.<sup>48</sup>

Still, it is crucial to note that challenges to overarching state sovereignty do not only come from entities above state level. Since decisions are increasingly taken at a larger, and even at a global, scale, most citizens want counterweights ensuring that they can participate in governing processes.<sup>49</sup> Instead of weakening identity claims through a process of homogenisation, globalisation would have instead strengthened them because they could be seen as reassuring anchors amidst troubled times.<sup>50</sup> To be responsive to

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<sup>46</sup> John Kincaid, 'Confederal Federalism and Citizen Representation in the European Union' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 44; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 91; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 157.

<sup>47</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 37.

<sup>48</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 12.

<sup>49</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 2.

<sup>50</sup> Claire Dupuy and Patrick Le Galès, 'The Impact of Regional Governments' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 121; Thomas Fleiner, 'The Challenge of Ethnic Diversity to Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 180;

these identity claims, states shall act in accordance with the principle of subsidiarity, which involves that the institutions that are the closest to citizens shall meet their needs unless that would be inefficient.<sup>51</sup> In practice, contemporary sovereignty can be exercised by substate entities within a state. Decentralisation processes empower the rulers of these entities to hold substantial responsibilities and to implement differentiated policies that are adapted to their realities.<sup>52</sup> In that vein, devolving powers to regions, such as capital regions, urban areas, and substate nations,<sup>53</sup> has made differentiated governance possible without compromising state unity effectively.<sup>54</sup>

Accordingly, it is broadly accepted nowadays that a nation and a state are not necessarily made from a monolithic and irreducible

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Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 36.

<sup>51</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 43-44; Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 16; Michael Keating and Malcolm Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2<sup>nd</sup> edn, Luath 2015) 38; Mira Bachvarova and Margaret Moore, 'A Conceptual and Normative Analysis of Territorial Pluralism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 66; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 8-9.

<sup>52</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 339; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 4.

<sup>53</sup> Miquel Caminal and Ferran Requejo, 'Democracy and Federalism in Plurinational Societies' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 1; Richard Simeon, 'Is Federalism like Snow, and Is It Exportable? Some Cautionary Notes on the Study of Federalism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 102; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 119; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 596-97.

<sup>54</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 12.

block.<sup>55</sup> As nationalism is a multifaceted concept that cannot be totalising and essentialising,<sup>56</sup> the national homogeneity underlying the model of the nation-state can no longer be an absolute.<sup>57</sup> Furthermore, it has been increasingly acknowledged that homogeneous *demos*, which have consistently justified and legitimised the establishment of nation-states,<sup>58</sup> could not exist sociologically beyond theory. The establishment of purely unitary states is then impossible and potentially morally problematic if state unitarism is fostered through coercion. Since the institutional existence of substate entities directly clashes with their intended irreducible character,<sup>59</sup> unitary nation-states cannot be the sole embodiments of statehood beyond abstract considerations. Consequently, the unitary nation-state could have never truly met all its theoretical promises in practical cases.

In that vein, nation-states that have aggregated minority nations, which would have had to assimilate themselves to larger nations, could not even be characterised as unitary.<sup>60</sup> The resilience of substate nations, which are 'historically settled and territorially

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<sup>55</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 186; *ibid* 114; Philip Resnick, 'What Theorists of Nationalism Have to Learn from Multinational States' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 70; Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 4.

<sup>56</sup> Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 18.

<sup>57</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 192.

<sup>58</sup> Peter A Kraus, 'Caught in the Minority Trap: Limits of Territorial Autonomy' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 78.

<sup>59</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 327; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 57.

<sup>60</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 18.

concentrated societies that have developed national consciousness but do not have their own sovereign state',<sup>61</sup> invalidates the argument that a nation can only thrive if a state is its constitutional embodiment.<sup>62</sup> For instance, substate nations, such as Wales, could preserve their distinct identities over time, albeit quite imperfectly,<sup>63</sup> even though they could not have control over their own state or an autonomous substate political unit.

Furthermore, a state can hardly thrive concretely if the operation of its institutions or its sociological composition is not differentiated to some extent.<sup>64</sup> Claiming that statehood is naturally and inexorably unitary is inaccurate because the importance of multi-level governance is nothing less than a societal reality. That is particularly true, bearing in mind that the rising will to recognise diversity and subsidiarity constitutionally limits the conflation between nationalism and statehood, especially when these concepts are construed in absolute terms.<sup>65</sup> The decline of the hegemony of unitary nation-states is then reflective of their concrete limits.

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<sup>61</sup> Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 4.

<sup>62</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 45; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 78; Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 28-29.

<sup>63</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 17.

<sup>64</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 122 and 125.

<sup>65</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 11; Keith Breen and Shane O'Neill, 'Introduction' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 3; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 155.

It is yet noteworthy that the evolution of sovereignty does not solely follow from consequential socio-political findings or transformations. Since the middle of the twentieth century, the maturation of the principle of self-determination has provided the theoretical and practical tools to apprehend constitutional governance beyond the framework of unitary statehood.<sup>66</sup> As noted by Tierney, this principle entails that 'each *demos* within the state possesses a qualified right to determine its own constitutional future'.<sup>67</sup> A nation can be legally entitled to assert its distinctiveness beyond what an exclusively statist framework provides.

However, the practical efficiency of the principle of self-determination has been curbed by its numerous substantive ambiguities.<sup>68</sup> The main reason underlying them can be found in the weak legal status of a principle whose enforceability is at best lacking. As it is a principle of international law, its implementation primarily depends on the good will of states to abide by commitments that they see more as guidelines than as mandatory duties.<sup>69</sup> Although the right of peoples to self-determination has been provided by many statements, covenants, and resolutions,<sup>70</sup> its components have never been posited in a manner that could

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<sup>66</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 1; Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 61.

<sup>67</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 125.

<sup>68</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 2; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 1.

<sup>69</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 254.

<sup>70</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 31.

make this right extensive and authoritative.<sup>71</sup> So, even though the existence of self-determination is recognised and secured by international norms, its implementation is rather flexible and potentially uncertain, especially from an internal legal perspective.

Another element that makes the substance of the principle of self-determination quite imprecise is that its subject, a people, can only be defined equivocally and indirectly concretely.<sup>72</sup> Yet, that has not prevented some authors from identifying some attributes that a people must have so that it can hold a right to self-determination. For instance, it would be essential that the members of a people ‘think of themselves as a distinct group’<sup>73</sup> and share identity characteristics related to, among others, language, history, or religion.<sup>74</sup> The ability of a group to self-rule on a delineated territory has also been mentioned.<sup>75</sup> Still, beyond these primarily doctrinal considerations, there is no definite and univocal legal definition of a people, which entails that the nature and the scope of self-determination cannot be delineated precisely.

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<sup>71</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 42.

<sup>72</sup> *ibid* 326-27.

<sup>73</sup> Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1, 35.

<sup>74</sup> *ibid*; Hans-Joachim Heintze, ‘On the Legal Understanding of Autonomy’ in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 9; Thomas Benedikter, *The World’s Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 34.

<sup>75</sup> Hans-Joachim Heintze, ‘On the Legal Understanding of Autonomy’ in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 18 and 21; Michael Keating, ‘So Many Nations, So Few States: Territory and Nationalism in the Global Era’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 44; Thomas Benedikter, *The World’s Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 266; Michael Keating, ‘Rethinking Territorial Autonomy’ in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 22; Karlo Basta and Richard Simeon, ‘Conclusion: The Continuing Relevance of Territorial Pluralism’ in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 319.

Nonetheless, there is no ambiguity that the establishment of a nation-state is far from being the only way through which a people can exercise its right to self-determine.<sup>76</sup> The principle of self-determination is far from being antagonistic to the safeguard of a statist, and somewhat conservative, understanding of sovereignty. Independence is neither an ineluctable nor an absolute embodiment of this principle, primarily if it is pursued at the expense of the integrity of an existing state.<sup>77</sup> Consequently, substate peoples, except when they were colonised or oppressed in particular cases,<sup>78</sup> are not legally entitled to secede from their host states;<sup>79</sup> even if these states may recognise constitutionally that their sovereignty is multinational, divisible, or reducible.<sup>80</sup>

The opportunity to implement an international right to secession for all peoples to tear down a hegemonic concept of state sovereignty, which would inherently jeopardise substate and

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<sup>76</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 32; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 42; Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 20.

<sup>77</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 179; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 119.

<sup>78</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 31 and 68; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 119 and 278; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 13, 36 and 265.

<sup>79</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 278; Michael Keating and Nicola McEwen, 'The Scottish Independence Debate' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 1.

<sup>80</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 251.

national interests, has been discussed extensively.<sup>81</sup> However, all seducing this idea can be theoretically, it is faulty for three reasons. First, granting a state to each nation would hardly be manageable and realistic in terms of global governance (there would then be around 3500 states).<sup>82</sup> Second, recognising an absolute right to secession would compromise the right to self-determination of the peoples whose polity would be fractured due to secession, which would amount to very little progress.<sup>83</sup> Third, easing the crumbling of state boundaries would likely trigger more conflicts, instead of preventing or solving them, since the benefits of self-determination could never be firmly safeguarded legally.<sup>84</sup> Consequently, while all peoples hold a right to self-determination, they are not entitled to establish unitary and homogeneous nation-states,<sup>85</sup> and that should remain as such. Certainly, many substate nations have long claimed that they shall secede to self-determine,<sup>86</sup> and some states have even acknowledged their divisibility. The opportunity and the legal feasibility of this option are discussed more extensively later. Nonetheless, considering the contemporary evolution of the meaning of sovereignty, self-determination shall

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<sup>81</sup> Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 23.

<sup>82</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 10.

<sup>83</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 41 and 68; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 6 and 328; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 198; Ephraim Nimni, 'Nationalism, Ethnicity, and Self-Determination: A Paradigm Shift' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 33.

<sup>84</sup> Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 23.

<sup>85</sup> id, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 46.

<sup>86</sup> ibid 235; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 5.

be apprehended, more than ever, beyond the statist equation that each people shall have its own nation-state.

In conclusion, although nationalism and statehood are still standing despite the transformative effects of globalisation,<sup>87</sup> these concepts can no longer be construed in a manner that overlooks internal state diversity.<sup>88</sup> Accordingly, states can no longer be considered as the sole entities that can exercise sovereignty properly, if they have ever been.<sup>89</sup> In practice, state constitutional governance could, and even should in plural polities, be multi-level and provide the division of the exercise of sovereignty to optimise the legitimacy and the efficiency of legal and political powers.<sup>90</sup> In contemporary times, substate entities shall hold, as much as possible, the tools needed for them to exercise those powers in their own name. Consequently, sovereignty can be construed beyond absolutes that systematically negate its divisibility or simply cannot be.

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<sup>87</sup> Keith Breen and Shane O'Neill, 'Introduction' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 4-5.

<sup>88</sup> Thomas D Lancaster, 'Complex Self-Identification and Compounded Representation in Federal Systems' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 79.

<sup>89</sup> Michael Keating and Nicola McEwen, 'The Scottish Independence Debate' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 4-5.

<sup>90</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 265; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 187; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 196; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 3; Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 14.

## **2.2. The Accommodating Virtues of a Divided Sovereignty**

In the previous section, I argued that the modern concept of unitary sovereignty does not enable us to address contemporary constitutional issues satisfactorily. The division of state sovereignty must then be envisioned as a way, albeit not limitatively, to secure the accommodation of substate nations within multinational states. Concretely, dividing sovereignty would be key in conciliating, theoretically and practically, the protection of state unity with the recognition of the diversity that characterises numerous contemporary states. Therefore, to institutionalise a contemporary understanding of sovereignty according to which a state is not an irreducible and uniform entity, I contend that the constitutionalisation of federal principles may be opportune and potentially necessary.

### **2.2.1. The Increasing Constitutionalisation of Multinationalism**

Studying more extensively the principle of self-determination helps to understand how a constitutional framework in which plural entities coexist can strengthen the governance of a state instead of threatening its existence. Despite its ambiguous character, the constitutional substance of the principle of self-determination can make more sense if its internal and external components are distinguished.<sup>91</sup> They are normatively equal and they are more complementary than they are concurrent, but it cannot be overlooked that they fulfil very different purposes.<sup>92</sup> While the

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<sup>91</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 39; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 43.

<sup>92</sup> Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 158.

external side of self-determination empowers (some) peoples to determine the constitutional status of the polity they live in, its internal side is far from being less relevant concretely. Indeed, the right to internal self-determination endow citizens with the power to govern themselves within a polity. Moreover, composite states shall secure the attributes of internal self-determination so that their substate entities could participate in state institutional processes in their own names.<sup>93</sup>

In practice, the distinction between the external and internal sides of self-determination highlights that a people does not need to establish its own state to control its destiny.<sup>94</sup> Holding a right to internal self-determination can empower substate peoples to self-rule extensively and autonomously on some issues that are vital to their existence.<sup>95</sup> Accordingly, the great majority of substate

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<sup>93</sup> Genevieve Nootens, 'Autonomy, Boundaries and Trust: Preliminary Remarks' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 46.

<sup>94</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 193; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 34; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 58 and 141; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 45.

<sup>95</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 101; Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 7; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 37; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 242; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 205; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 634; Malcolm Harvey, 'The Small State Argument' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 163.

peoples, which do not hold a unilateral right to secede, could make decisive and consequential societal choices without having to compromise the integrity of existent states.<sup>96</sup> Moreover, the valuation of internal self-determination underlines a clear intent to reject overarching and domineering state identities since this principle cannot be invoked in a manner that jeopardises minority rights.<sup>97</sup> The internal side of self-determination then sets the guidelines determining how sovereignty can be exercised beyond unitary perspectives. The guarantees that substate entities can hold this right shall even be entrenched into constitutional arrangements.<sup>98</sup> However, the efficiency of internal self-determination is considerably limited by two issues related to its precarious status in international law.

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<sup>96</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 36, 39 and 69; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 59 and 349; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 61, 12, 141 and 145; Alain-G Gagnon, 'Reconciling Autonomy, Community and Empowerment: The Difficult Birth of a Diversity School in the Western World' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 54; Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 31; Richard Simeon, 'Introduction' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 3.

<sup>97</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 244; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 319; Markku Suksi, 'Introduction' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 1; Shane O'Neill, 'Mutual Recognition and the Accommodation of National Diversity: Constitutional Justice in Northern Ireland' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 223-24; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 10, 32, 42, 45 and 48.

<sup>98</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 66; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 101; Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 28; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 28.

First, the right to self-determination, especially in its internal dimension, is not the outcome of a norm that is intrinsically binding, but rather the intended corollary of an international principle that cannot be enforced authoritatively. No judicial or political institution can force states to abide by their commitments to uphold a right to internal self-determination. The only exception to this assertion would be that individual political rights easing political participation are explicitly safeguarded by international norms; while guarantees about collective self-rule would not.<sup>99</sup> In fact, from a legal perspective, the right to internal self-determination primarily secures substate participation within a state, but does not guarantee that substate peoples can be recognised constitutionally as normatively autonomous entities.<sup>100</sup> If the general implementation of the principle of self-determination essentially relies on the good will of states, that is, even more, the case concerning its collective and internal implications. The guarantee that substate entities can be recognised constitutionally within a state could only be provided internally by the constitution of this state, over which international institutions have no direct control. Consequently, the right to internal self-determination can hardly be implemented more than how existing states want.

The second, and somewhat corollary, limit to the efficiency of this right is based upon the absence of a definite normative framework that sets, beyond state level, how this right shall be defined, implemented, and enforced.<sup>101</sup> States hold the exclusive power to

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<sup>99</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 8 and 58.

<sup>100</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 42.

<sup>101</sup> Markku Suksi, 'Introduction' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 1; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial*

determine the opportunity and the feasibility of granting a special status to substate entities within their constitutional orders.<sup>102</sup> It goes without saying that the substance of this right might vary substantially depending on the extent to which a state is open to give substate peoples the ability to self-determine while staying within it. For instance, some states deem that they should establish and safeguard exclusive substate normative jurisdictions to uphold democratic values and multi-level governance.<sup>103</sup> It can also be considered that the representation of a substate entity within central institutions is at least as important as its power to govern itself if it wants so that it can hold a right to self-determination.<sup>104</sup> This assertion is particularly interesting because it relies on the idea that, when a state gathers several peoples within it, they should consent to be integral parts of an aggregative polity and to be actively involved in its governance processes.<sup>105</sup> However, other states interpret the scope of internal self-determination more narrowly and only implement measures guaranteeing political participation from an individualistic perspective. Ultimately, the internal side of this principle, whose substance is relatively imprecise, cannot be studied based upon only on some limited criteria, such as the extent of substate exclusive jurisdictions.<sup>106</sup>

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*Autonomies* (Rev edn, Euras 2009) 43 and 47; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 197.

<sup>102</sup> Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 41.

<sup>103</sup> Lauri Hannikainen, 'Self-Determination and Autonomy in International Law' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 90.

<sup>104</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 270; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 10.

<sup>105</sup> Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 16.

<sup>106</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 255, 332 and 352; Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 20; Thomas Benedikter, *The*

It might yet be argued that the ambiguity surrounding this principle, which is a weakness normatively speaking, can be a strength in providing constitutional recognition to substate nations with pragmatism. Considering the need for differentiated constitutional governance that is responsive to varied peculiar realities, the embodiments of the internal right to self-determination cannot be devised uniformly.<sup>107</sup> It is even appropriate that international instruments do not set strict and uniform norms regarding the exercise of state constituent powers so that it can be done flexibly. Such norms would contradict the recognition of diversity and the valuation of subsidiarity that characterise the nature of internal self-determination. Nonetheless, states cannot use their latitude to constitutionalise this right to negate it or to construe it opportunistically. States cannot deprive substate entities of the powers and resources that empower them to exercise their right to self-determine beyond mere rhetoric,<sup>108</sup> regardless of how that is done precisely. To make sense of internal self-determination, it shall be institutionalised in junction with multinationalism and substate autonomy, whose substance shall be studied exhaustively. That is a decisive reason why states must grasp sovereignty beyond its unitary sense.

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*World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 37 and 268; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 3; Michael Keating, 'Rethinking Territorial Autonomy' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 17.

<sup>107</sup> Ferran Requejo, 'Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain, and the European Union' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 312.

<sup>108</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 47.

Multinationalism has indeed been increasingly valued amidst the transformation of constitutional governance that has led to the contemporary crumble of the conflation between statehood and nationalism. Multinationalism provides the opportunity, without negating the persistent importance of statehood, to apprehend how sovereignty can be exercised with enhanced responsiveness to diversified national realities.<sup>109</sup> Multinationalism should not be seen as a problem to mitigate since multinational states are the institutional responses to, rather than the causes of, high levels of legal or socio-political differentiation within polities.<sup>110</sup> In that vein, multinationalism recognises existent societal diversity within a polity and makes its accommodation possible instead of attempting to eradicate it to construct an ideal, albeit effectively fake, unitary polity. Multinationalism is then consistent with a contemporary understanding of identity according to which citizens shall not feel compelled to choose between multiple identities because they seldom belong to an exclusive social group.<sup>111</sup> Legitimate doubts have yet been cast that multiple national

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<sup>109</sup> *ibid* 237; Eugenie Brouillet, *La negation de la nation: L'identite culturelle quebecoise et le federalisme canadien* (Editions du Septentrion 2005) 72; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 190; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 58; Ephraim Nimni, 'Nationalism, Ethnicity, and Self-Determination: A Paradigm Shift' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 22 and 32; Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 181.

<sup>110</sup> John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 40.

<sup>111</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 192; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 150-51; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 88; Michael Keating and Malcolm Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2<sup>nd</sup> edn, Luath 2015) 37.

identities could coexist harmoniously within a state, because identity multiplicity has been deemed overly individualistic, abstract, or elitist.<sup>112</sup> The institutionalisation of multinationalism helps to avoid such traps. The concept of identity multiplicity is far from being atomistic and is not antagonistic to nationalism and, more widely, to the recognition of collective identities. Many nations could come together to establish a state and govern it jointly without there being a single mononational *demos*.<sup>113</sup> Multinational states are then valued and valuable because they are not established according to the inaccurate assumptions that states are the outcomes of zero-sum games and that nations must either assimilate or be assimilated.<sup>114</sup>

However, establishing multinational states is highly complex in practice because that requires carefully balancing the protection of the unity of a state with the recognition of its constitutive national diversity. Multinational states can only be functional and legitimate if a shared sense of belonging to the state is not opposed to the recognition of national traits, needs, and wills.<sup>115</sup> As noted by Birch, the political integration of diverse groups should rely on the existence of a shared loyalty towards the state, beyond the

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<sup>112</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 233; David Miller, 'Nationality in Divided Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 305.

<sup>113</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 14; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 206; Philip Resnick, 'What Theorists of Nationalism Have to Learn from Multinational States' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 77.

<sup>114</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 31; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 5.

<sup>115</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 41.

existence of mostly utilitarian common interests.<sup>116</sup> Still, this process shall not deliberately lead to the assimilation of minority nations following the systemic negation of their defining characteristics.<sup>117</sup> Moreover, since nationalism is not exclusively socio-cultural, but also political, its constitutional recognition cannot only be achieved within private and community spheres.<sup>118</sup> If an unconditional cultural recognition of minority nations is essential to ensure their dignity,<sup>119</sup> political recognition is critical for their survival as entities that can self-rule at least to some extent. Therefore, in line with the core substance of internal self-determination, the citizens of a multinational state shall be empowered to express the multiple national wills that shall shape the governance of their state.<sup>120</sup>

A concern has yet been raised by several scholars that multinationalism, if it overly essentialises national identities, might exacerbate group differences and fuel bitter divisions at the

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<sup>116</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 32 and 34.

<sup>117</sup> *ibid* 32.

<sup>118</sup> David Miller, 'Nationality in Divided Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 307; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 87; Philip G Roeder, 'Ethnofederalism and the Mismanagement of Conflicting Nationalisms' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 20.

<sup>119</sup> Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 272; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 162.

<sup>120</sup> David Miller, 'Nationality in Divided Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 307; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 87; Philip G Roeder, 'Ethnofederalism and the Mismanagement of Conflicting Nationalisms' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 20.

expense of state unity.<sup>121</sup> Still, this concern relies exceedingly on the myth, which has been dispelled by Gagnon with relevance, that political unity necessarily has a unitary character.<sup>122</sup> It also underestimates the importance, for several citizens, of the nation to which they belong to be constitutionally recognised. However, I acknowledge that a multinational state cannot remain united simply because a state constitution provides so and because judges uphold that. Nations must want to coexist within the same state, and this desire cannot be decreed statutorily. Moreover, as it is crucial that their coexistence does not engender overly intense chaos or conflicts, a participative political culture shall be fostered to avoid this outcome.<sup>123</sup>

Such a political culture fulfils essentially three purposes. First, it counters the uniformising tendencies that systematically conflate state identity with that of the majority nation, unless all national identities are genuinely recognised and protected constitutionally.<sup>124</sup> Second, and this consideration must be at the

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<sup>121</sup> John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 299; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 14; John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 44; Philip G Roeder, 'Ethnofederalism and the Mismanagement of Conflicting Nationalisms' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 14 and 27.

<sup>122</sup> A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 59.

<sup>123</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 17; Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 11; James Tully, 'Introduction' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 2-3.

<sup>124</sup> Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill

centre of every multinational constitutional structure,<sup>125</sup> the relationships between majority and minority nations shall not be based upon subordination.<sup>126</sup> Instead, as much as possible, an 'equal-to-equal' partnership shall be set and upheld to preserve harmony among all the nations and their citizens.<sup>127</sup> They shall be treated with fairness not only formally, but also substantively, since factual inequalities must never be tolerated, especially if they benefit the majority nation.<sup>128</sup> Third, a multinational political culture ensures that the principle of subsidiarity is implemented in a manner that values institutional responsiveness to the realities of substate nations.<sup>129</sup> Since there is no single and homogeneous *demos* within a multinational state, it shall be accepted and respected that multiple, and potentially contradictory, understandings of the common good must coexist within such a state. Nations shall hold some degree of liberties to act with respect for their interests without blindly following a rigid set of uniform state norms.

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(eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 200.

<sup>125</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 125-26.

<sup>126</sup> Ephraim Nimni, 'Nationalism, Ethnicity, and Self-Determination: A Paradigm Shift' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 32 and 34; Mira Bachvarova and Margaret Moore, 'A Conceptual and Normative Analysis of Territorial Pluralism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 68.

<sup>127</sup> Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 142; Alain-G Gagnon, 'Reconciling Autonomy, Community and Empowerment: The Difficult Birth of a Diversity School in the Western World' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 55.

<sup>128</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 124.

<sup>129</sup> *ibid* 127.

Nevertheless, multinationalism cannot be actualised only through the valuation of specific standards of political behaviour. While norms and institutions are worthless when citizens do not recognise their authority, they are yet key to ensuring that multinationalism is not merely a theoretical concept. Substate nations shall be endowed with an 'institutional network of agencies that implement aspects of identity [that] are important for both centre and periphery'<sup>130</sup> to actualise their legal and political existences.<sup>131</sup> In practice, although that cannot be an absolute, nations should hold exclusive and fixed jurisdictions that cannot be overstepped by central institutions.<sup>132</sup> Self-governing nations should also hold all the corollary legal and material resources that are necessary to exercise their normative powers in accordance with their unique character and societal choices.<sup>133</sup> Hence, substate nations can exercise their right to internal self-determination in a highly concrete and consequential way.<sup>134</sup>

Still, it is crucial to determine how multi-level frameworks of governance can be and remain functional over time. In this regard,

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<sup>130</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 68.

<sup>131</sup> Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 245; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 33; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctional Theory of Governance*, vol 2 (Oxford University Press 2016) 19.

<sup>132</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 27; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 9.

<sup>133</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 68.

<sup>134</sup> *ibid* 166; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 19-20 and 34; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 24; Richard Simeon, 'Introduction' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 5.

three things are particularly important. First, the exclusive jurisdictions of substate entities and their participation within state processes of governance shall be guaranteed, and even entrenched, with respect for the core attributes of internal self-determination.<sup>135</sup> Second, so that any unitary tendency can be quashed, no entity shall hold a unilateral power to enact and amend constitutional provisions related to the extent of substate jurisdictions.<sup>136</sup> Third, an impartial arbiter shall solve legal conflicts in a manner that all substate entities characterise as fair.<sup>137</sup> Then, substate entities, regardless of their national character, can be autonomous within existent states.<sup>138</sup> Indeed, it is also worth noting that the inputs on multinational governance that are used to implement the principle of self-determination can be used to devise multi-level frameworks beyond multinational contexts. Consequently, multi-level governance can conciliate the constitutional recognition of substate entities with the consolidation

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<sup>135</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 15 and 239; John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 42; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 262; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctional Theory of Governance*, vol 2 (Oxford University Press 2016) 104 and 111.

<sup>136</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 243; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 43, 245 and 251.

<sup>137</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 50.

<sup>138</sup> *ibid* 270; Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 149; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 28 and 242; Peter A Kraus, 'Caught in the Minority Trap: Limits of Territorial Autonomy' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 77.

of the interdependent links between them.<sup>139</sup> Striking such a balance can allow contemporary frameworks of constitutional governance to transcend the long-standing cult of unitarism, and to acknowledge that state sovereignty can, and potentially should, be deemed divisible.

### **2.2.2. Fundamental Federal Principles**

The division of state sovereignty fits very well with the contemporary redefinition of statehood. Bearing in mind the challenges underlying this redefinition, there is no direct adequation between the concepts of statehood and legal order.<sup>140</sup> Through the division of sovereignty, the values underlying the principle of internal self-determination and the ideal of multinationalism can then be actualised more easily in states whose essence is diverse. Accordingly, different normative frameworks can coexist within a state and its citizens would not have to be systematically bound by the same rules.<sup>141</sup>

Certainly, the division of sovereignty clashes with modern postulates on the irreducibility of state sovereignty and constituent powers. Still, it is decisive in making constitutional governance more pluralistic, especially in contemporary times. A state can be seen as the outcome of several balances between diverse and often divergent interests. For instance, state power shall be exercised with great consideration for the protection of individual

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<sup>139</sup> Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 150-51; Jaime Lluch, 'Sovereignists and Associationists: Explaining the Origins of National Movements' *Political Orientation* (2011) 17(2) *Nationalism and Ethnic Politics* 203, 206 and 220.

<sup>140</sup> Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 140; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 78 and 182.

<sup>141</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 26.

liberties and collective rights.<sup>142</sup> Even more fundamentally, sharing out the exercise of constituent powers among various entities and institutions can, both theoretically and concretely, quash any hegemonic power within diverse states.<sup>143</sup> In fact, it is crucial that, in a composite polity, the legal existence and the rights of each entity (or nation) can be safeguarded from the assertion of the unitarizing wills of a majority.<sup>144</sup> Substate entities are then the most direct beneficiaries of the division of state sovereignty. Operationally, dividing sovereignty diffuses state power, instead of merely limiting it, so that these entities can hold the legal and political means to make their own choices.<sup>145</sup> That is an efficient way to implement the principle of subsidiarity since citizens' needs can be addressed more responsively by entities that are closer to them than by an overarching, and actually distant, state.<sup>146</sup>

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<sup>142</sup> Ivo D Duchacek, 'Federalist Responses to Ethnic Demands: An Overview' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 70; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 51.

<sup>143</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 224.

<sup>144</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 20; James Tully, 'Introduction' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 30 and 32; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 33, 44 and 268; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 199; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 16.

<sup>145</sup> Ferran Requejo, 'Decentralisation and Federal and Regional Asymmetries in Comparative Politics' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 2.

<sup>146</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 12; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 5; Scott Greer, 'The Politics of Divergent Policy' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western*

Although the division of sovereignty is more a response to an existing situation than the trigger of extensive societal changes,<sup>147</sup> it is key to understanding why, and more importantly how, the ideal of the nation-state can be transcended.

In a state whose sovereignty is divided, substate entities do not only exercise direct normative powers with autonomy,<sup>148</sup> but are also the partial sovereign of the whole state with regard to the distinct share of sovereignty that they hold.<sup>149</sup> However, state institutions hold the upper hand to ensure that all substate entities can exercise their right to internal self-determination, especially since that is not the object of clear and enforceable universal duties.<sup>150</sup> There is a high risk that they can monopolise the exercise of a formally divided state sovereignty due to their effectively dominant position. To avoid this outcome, no simple national, popular, or institutional majority shall ever be able to assert its wills unless each sovereign entity has had the

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*Democracies* (Palgrave Macmillan 2005) 157; Sergio Ortino, 'Functional Federalism between Geopolitics and Geo-economics' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 290; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 15; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctional Theory of Governance*, vol 2 (Oxford University Press 2016) 51-52.

<sup>147</sup> Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 7.

<sup>148</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 355; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 19-20 and 26.

<sup>149</sup> Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 634; Michael Keating and Alain-G Gagnon, 'Introduction' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 4.

<sup>150</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 189.

opportunity to consent to constitutional changes affecting them.<sup>151</sup> Accordingly, each entity holding a part of sovereignty shall also hold constituent powers, which is the corollary of the division of sovereignty. The latter is then primordial to safeguard the unity of compound states whose existence is based upon the recognition of diverse substate entities, rather than despite it.<sup>152</sup>

Concretely, sovereignty shall be divided flexibly, in a manner that is not dictated by abstract theoretical postulates, as long as that is achieved with responsiveness to substate realities.<sup>153</sup> Dividing sovereignty following a rigid template that looks like a straitjacket would make such a division neither constraining nor legitimate.<sup>154</sup> An overly formalistic division of sovereignty might threaten the unity of a state whose diversity is not adequately recognised and,

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<sup>151</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 188; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 53; Shane O'Neill, 'Mutual Recognition and the Accommodation of National Diversity: Constitutional Justice in Northern Ireland' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 227-29; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 93; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 13 and 269; David Miller, 'Against Global Democracy' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 143; Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 168.

<sup>152</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 132.

<sup>153</sup> Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 202-203; Michael Keating and Alain-G Gagnon, 'Introduction' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 3 and 13.

<sup>154</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 242 and 248; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 109.

ultimately, trigger its disaggregation.<sup>155</sup> Especially in multinational states,<sup>156</sup> the division of sovereignty is primarily instrumental in the institutionalisation of fair power relationships in a manner that suits a specific polity.<sup>157</sup> Consequently, it is better to devise formally imperfect or asymmetrical constitutional arrangements that work in practice rather than arrangements that only work on paper,<sup>158</sup> mainly when they are meant to uphold internal self-determination in priority.<sup>159</sup>

Still, the flexibility characterising the constitutional governance of a divided polity shall not be unprincipled. Implementing federal principles can then be highly opportune to structure the division of state sovereignty. Although their implementation has raised serious legal questions,<sup>160</sup> federal principles, and more broadly

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<sup>155</sup> Daniel Weinstock, 'The Moral Psychology of Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 226; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 4; Michael Keating and Alain-G Gagnon, 'Introduction' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 1; Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 19.

<sup>156</sup> Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 246.

<sup>157</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 230.

<sup>158</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 359; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 10; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 10 and 254; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 5; Richard Simeon, 'Introduction' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 7.

<sup>159</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 243.

<sup>160</sup> Ferran Requejo, 'Political Liberalism in Multinational States: The Legitimacy of Plural and Asymmetrical Federalism' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 124; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 153; Thomas Benedikter, *The*

federalism, are key in actualising a division of sovereignty embodying an equanimous spirit.

A core, if not the most important, federal principle is that a central (federal) entity shares sovereignty with peripheral (federated) entities without there being hierarchical relations or zero-sum games between them.<sup>161</sup> In a federal state, sovereignty is divided and exercised concurrently by the multiple entities that constitute it.<sup>162</sup> The constitutional division of sovereignty, which shall be intrinsic to federalism, ensures that state power does not emanate

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*World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 24 and 49; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 139; Jaime Llach, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 197.

<sup>161</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 310; William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 154; Lauri Hannikainen, 'Self-Determination and Autonomy in International Law' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 90; Maxwell Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 264; Roderick Macdonald, 'Kaleidoscopic Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinis (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 267; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 193; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 47 and 264; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 164; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 200.

<sup>162</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 34; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 276; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 31; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 14; Glenn A Moots, 'The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 400.

from a single, absolute, and overarching source and shall not be exercised domineeringly.<sup>163</sup>

In that vein, it is opportune to distinguish the entities, federal and federated, that hold shares of a divided federal sovereignty. A federal entity is the entity that oversees matters of interest for the whole state. Still, despite its central position, it shall be independent and have a status that is equal to that of federated entities, both in law and in fact. For its part, a federated, substate, entity holds jurisdiction over a part of the state and its legal existence and personality shall be recognised constitutionally so that they cannot be compromised by unilateral federal action.<sup>164</sup> Although that does not fit together with the orthodox American understanding of federalism,<sup>165</sup> a federated entity does not necessarily represent only a territory, but also a polity whose citizens are deeply attached to their cultural distinctiveness.<sup>166</sup> In

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<sup>163</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 8; Preston King, *Federalism and Federation* (Croom Helm 1982) 56; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 231; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 139; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 91; Daniel Weinstock, 'The Moral Psychology of Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinas (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 213; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 69.

<sup>164</sup> Michael Burgess, 'Federalism and Federation: A Reappraisal' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 3; Alain-G Gagnon, 'The Political Uses of Federalism' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 22; Paul Chen, 'Federalism and Rights: A Neglected Relationship' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 299; David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 176.

<sup>165</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 18.

<sup>166</sup> Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 280; Ferran Requejo, 'The Lack of National Pluralism in

all cases, a federated entity shall hold the legal and political tools that its rulers need to exercise its fraction of normative state sovereignty in accordance with its distinctive traits. The latter are indeed constitutive of state unity instead of threatening it.<sup>167</sup> Federated entities then embody the constitutive diversity of a federal state institutionally.

Although a federal entity could feel entitled to hold supreme powers over the whole state without regard for federated jurisdictions, it shall never act overarchingly.<sup>168</sup> Avoiding this trap is crucial when a federal entity considers that the identity and the interests of a majority nation shall be conflated with those of the whole state.<sup>169</sup> Operationally, nobody or nothing should hold a monopoly on the exercise of sovereignty and constituent powers, which directly challenges fundamental elements of the modern

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Federal Theory and Federations: *Plurinational Federalism* in a Comparative and Value Pluralist Approach' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 109.

<sup>167</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 38; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 18; Bruno Theret, 'Du principe fédéral à une typologie des fédérations: quelques propositions' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 127; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 57; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 441.

<sup>168</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 101; Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 14; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 17.

<sup>169</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [43]; Richard Simeon, 'Federalism and Social Justice: Thinking through the Tangle' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 30; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 190.

conception of sovereignty.<sup>170</sup> In fact, from a Bagehotian perspective, a federal entity shall pool the serviceable elements of a state constitution for efficient, and instrumental, purposes while federated entities shall protect the dignified elements of an intrinsically heterogeneous state.<sup>171</sup>

However, looking for the core substance of federal principles beyond the importance of dividing state sovereignty is very complex because the structure of each division shall be tailor-made to a given polity. Federalism is fundamentally a plural concept from an epistemological perspective. Federalism is valuable because of, rather than despite, its capacity to internalise apparent conceptual ambiguities due to its multi-faceted, legal and political, nature.<sup>172</sup> Certainly, the versatility of federal arrangements may limit their ability to last or to be more than last resort and incomplete constitutional solutions.<sup>173</sup> Nonetheless, the

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<sup>170</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 48; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 128 and 225; Dimitrios Karmis and Wayne Norman, 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 8; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 353; Glenn A Moots, 'The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 408.

<sup>171</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 290.

<sup>172</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 16.

<sup>173</sup> id, *Exploring Federalism* (University of Alabama Press 1987) 154; John Redwood, *The Death of Britain? : The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 47 and 192; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 153; Jaime Lluich, 'Varieties of Territorial Pluralism: Prospects for the Constitutional and Political Accommodation of Puerto Rico in the USA' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 21; Richard Simeon, 'Is Federalism like Snow, and Is It Exportable? Some Cautionary Notes on the Study of Federalism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial*

pragmatism that characterises federalism beyond exclusively formalistic considerations permits it to conciliate unity and diversity within a polity, which is another defining federal principle. While state unity is principally guaranteed by the federal entity, diversity is entrenched through the recognition of federated entities,<sup>174</sup> but also through the safeguard of minority rights and interests throughout the state.<sup>175</sup> In practice, states shall have great latitude to strike this balance, with respect for their peculiar societal realities.

Still, federalism is not the only system of constitutional governance that aims to harmonise divergent interests or that implements multi-level arrangements. Whether it is federal or not, every state shall embody an institutional equilibrium of conflicting forces.<sup>176</sup> A federal state is fundamentally different from a unitary one because it internalises the complementarity, and ultimately the alliance, between its unity and the diversity of its components. In fact, federalism is rooted in the idea that the integration of diverse entities does not directly lead to legal and political homogenisation.<sup>177</sup> In that vein, Smith argues that federalism is about the actualisation of a federal idea 'generally conceived as a compromise, conveyed by the image of checks and balances between unity and diversity, autonomy and sovereignty, the

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*Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 114.

<sup>174</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 238; Paul Chen, 'Federalism and Rights: A Neglected Relationship' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 298; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 15.

<sup>175</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 88.

<sup>176</sup> *ibid* 67; JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 1.

<sup>177</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 5.

national and regional'.<sup>178</sup> Considering Burgess' input that federalism is a 'distinctive pattern of normative values, interests, and identities'<sup>179</sup>, it can be argued that federalism cannot be reduced to the formal constitutional arrangements that entrench federal principles. That is consistent with Elazar's argument that federalism is a moral concept that primarily actualises a conception of justice.<sup>180</sup> Accordingly, federal principles are not be ends in themselves,<sup>181</sup> since they essentially foster liberty, citizen participation, and sound governance by means that are not exclusively formal.<sup>182</sup> Following this principled understanding of federalism, which is also Burgess', federal arrangements shall guarantee that diverse citizens and groups are treated fairly and that legal and socio-political behaviour fosters the ensuing federal fairness.<sup>183</sup>

In practice, there is no genuine constitutional authority when constitutional power is devoid of any perceived or actual legitimacy. Purely legal norms are worthless when they cannot implement federal principles and uphold federal values not only efficiently, but also legitimately. Of course, in any polity, the

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<sup>178</sup> Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 5.

<sup>179</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 260.

<sup>180</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 45.

<sup>181</sup> John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 300; Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 256; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 186.

<sup>182</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 91.

<sup>183</sup> *ibid* 1; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 23; Michael Burgess, 'Multinational Federalism in Multinational Federation' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 26.

legitimacy of the exercise of constituent powers and of its outcomes is crucial to make governance sound and harmonious.<sup>184</sup> As citizens participate in democratic processes, whether directly or indirectly, they can consent to the decisions that affect them, which is essential to make them legitimate.<sup>185</sup> That is yet particularly important in a federal state because the trust of its constituent entities (and of their citizens) that their voices are heard and that their interests are upheld can never be taken for granted. In this regard, it cannot be overlooked that conflicts on the essence of federal principles and on their implementation between these very diverse entities might abound. These conflicts could even threaten the whole existence of a federal state if they are not solved fairly and efficiently. Democratic processes, which help to institutionalise and to pacify the resolution of these conflicts, enable the rulers and the citizens of the constituent entities to find common grounds and to consider that state institutions make responsive and legitimate decisions.<sup>186</sup>

However, and this argument is developed more extensively later, the necessity to apprehend federalism beyond formalism does not entail that formal devices are irrelevant. Federal institutionalism is instrumental, though not properly said primordial, to the safeguard of values, such as liberty and equality, that are central to federalism.<sup>187</sup> Since, as noted by Rokkan and Urwin, federalism is

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<sup>184</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 172; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 8.

<sup>185</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 1.

<sup>186</sup> James Tully, 'Introduction' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 13; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 340.

<sup>187</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 139 and 145; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 235-36.

characterised by the division of 'shared autonomous powers between a central government and all provinces'<sup>188</sup>, the institutionalisation of multi-level governance is another key federal principle. The instruments by which the division of sovereignty can be operationalised are instrumental in ensuring that each constituent entity can hold its share of sovereignty without interference and exercise its normative powers autonomously.<sup>189</sup> Otherwise, federalism would be nothing more than a virtuous, but impractical, idea.<sup>190</sup> A synthesis between the substance of federal principles and the ways by which they are implemented shall be found so that these principles are not exclusively theoretical.

Despite the heterogeneity characterising federal arrangements,<sup>191</sup> two pairs of concepts should shape, at least ideally, the institutional structure of every federal state. First, to prevent the centralisation or the dislocation of the state, both federal comity (a

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<sup>188</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 141.

<sup>189</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 10; Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 96; Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 3; Thomas D Lancaster, 'Complex Self-Identification and Compounded Representation in Federal Systems' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 63; Guy Peters, 'The United Kingdom Becomes the United Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 73; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 18.

<sup>190</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 87; Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 7; Roderick Macdonald, 'Kaleidoscopic Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinis (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 276; Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 201.

<sup>191</sup> A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 57.

commitment to ensure that the constituent entities are treated fairly) and federal loyalty to the whole polity should be simultaneously valued and guaranteed.<sup>192</sup> Second, a federal constitutional order should empower its constituent entities to self-rule integrally within their jurisdictions and share the rule of a state whose sovereignty is partially held by them.<sup>193</sup> Although self-rule and shared rule are conceptualised more exhaustively in chapters that are focused on them, I can already assert that upholding their alliance is a fundamental federal principle. This alliance makes the one between unity and diversity possible.

In sum, the prime purpose of a federal constitutional framework is to guarantee that its constituent entities can exercise their share of sovereignty without subordination.<sup>194</sup> Accordingly, the divisibility of sovereignty entails that a federal state does not exist *per se*, but only if all federal and federated entities want to abide by its constitutional norms. That is how an alternative to the unitary nation-state can not only be thought out, but also be functional, successful, and durable. The essence of a federal state and of its constitutional devices then appears akin to that of contracts.

### **2.2.3. The Contractualistic Essence of Federalism**

The relationship between federalism and contractualism is far from being new or revolutionary. It is instead the source of the federal idea. As highlighted by Burgess, ‘the etymological derivation of the

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<sup>192</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 175; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 21-22.

<sup>193</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 21; Daniel Elazar, ‘The Role of Federalism in Political Integration’ in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 41.

<sup>194</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 159.

term “federal” comes from the Latin word *foedus* which was originally associated with the biblical idea of *covenant*.<sup>195</sup> It is also noteworthy that, in medieval times preceding the establishment of unitary nation-states, many states were composite entities united by a contractualistic constitution.<sup>196</sup> Therefore, comparing federal states to contractual arrangements is coherent with the original etymology of federalism and goes back to an ancient understanding of sovereignty that has since found a second life.

An essential characteristic of a contractual federal constitution is that its binding force relies on the free and informed consent of all the constituent entities to be integral parts of the state that embodies a federal pact. Making consent the backbone of the constitution of a federal state, whose sovereignty shall be held jointly by multiple constituent entities, requires that the latter are treated fairly, as partners.<sup>197</sup> Conflating the concept of consent with that of federal sovereignty is then crucial to make its exercise efficient and legitimate and to ensure that its exercise does not engender or accentuate bitter societal divisions.

Apprehending federalism from a contractualistic perspective first requires finding what motivated the constituent entities to give their consent to the establishment of a federal state. A federal system is primarily devised to meet societal needs that are peculiar to a given composite polity. As observed by Livingston, ‘federalism is a complex and cumbersome system [that] has value because people

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<sup>195</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 7.

<sup>196</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 29.

<sup>197</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 127.

think it has value'.<sup>198</sup> While many states were established through deterministic modes such as conquest or pure organic development, federal states result from the initiatives of their constituent entities.<sup>199</sup> Rational choices explain why federal principles shape a certain state constitutional order. Accordingly, the motives underlying these choices shall be studied to grasp what was initially sought by the parties to a federal pact.<sup>200</sup>

Distinguishing the decisions that can be at the genesis of a federal state permits understanding the causes of any process of federalisation. On the one hand, aggregated federal states embody a compromise made by existent states that consented to come together without yet surrendering all of their sovereignty.<sup>201</sup> In these states, common interests have favoured unification more than identity differences could justify the preservation of previously independent states.<sup>202</sup> On the other, disaggregated federal states are the outcomes of the dislocation of unitary states whose central institutions had to transfer sovereignty to substate entities so that

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<sup>198</sup> William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 139.

<sup>199</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 13; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 2; Michael Burgess, 'Federalism and Federation: A Reappraisal' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 6; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 23.

<sup>200</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 7; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 116; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 77.

<sup>201</sup> Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 249; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 146.

<sup>202</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 60.

state unity could be preserved.<sup>203</sup> Certainly, considering the simultaneous and concurrent effects of centrifugal and centripetal forces on polities, Watts notes that, concretely, no state is entirely aggregated or disaggregated.<sup>204</sup> Still, this typology highlights why federal principles are constitutionalised and whether integrative or devolutionary dynamics are stronger within a particular state.<sup>205</sup>

Another important typology regarding the origins of federal states is the one about the organic or mechanical nature of the process through which they were established. Federalism can be organic when the constituent entities already shared some links before gathering into a common state. It can also be mechanical when elites established a federal state that is primarily a social construct devised following a transformative constitutional moment.<sup>206</sup> Nonetheless, despite the usefulness of this distinction to assess the natural character of a federal state, I note that its existence

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<sup>203</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 238; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 249.

<sup>204</sup> Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 249.

<sup>205</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 206; Peter H Russell, 'The Future of Europe in an Era of Federalism' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 5; Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 258; Ferran Requejo, 'Three Theories of Liberalism for Three Theories of Federalism: A Hegelian Turn' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 57.

<sup>206</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 181; Jaime Lluch, 'Introduction: The Multiple Dimensions of the Politics of Accommodation in Multinational Democracies' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 6.

shall rely on more than purely legalistic statements.<sup>207</sup> In practice, a federal arrangement likely crumbles if it only stands because legal provisions asserting the sanctity of state unity are enforced regardless of their societal legitimacy.

From those typological assessments, one crucial idea arises, which enriches the conceptualisation of federalism. When taken as a whole, a federal state is intrinsically inferior to the sum of its constituent parts. A federal constitution is nothing else than the institutional embodiment of the will of the constituent entities to abide by the same covenant.<sup>208</sup> Federal and federated entities are not simply subdivisions of a state, but rather its key components without which it cannot exist. The parties to a federal pact are then regarded as sovereign entities (within their jurisdictions) that have stand-alone legal personalities.<sup>209</sup>

Therefore, it is opportune to investigate more thoroughly not only how federal consent can be given but also how it can be substantively free and informed. According to Burgess, a federal state shall set four guarantees so that consent can be free and informed.<sup>210</sup> These are the valuation of self-restraint; the limitation of the impacts of an entity on other entities; the requirement to abide by written and unwritten norms and the conduct of

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<sup>207</sup> Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 47.

<sup>208</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 33.

<sup>209</sup> id, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 18; *ibid* 166; Glenn A Moots, 'The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 400; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 127.

<sup>210</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 20.

relationships based upon empathy; and mutual trust.<sup>211</sup> What arises from Burgess' brilliant analysis is that institutional constraints are essentially guidelines ensuring that the rights of each constituent entity are respected. The only strict limits to the powers of any constituent entity are these to which they had consented to be bound when they entered a federal pact. In practice, the consent given by the constituent entities to be bound by the constitution shall not be overridden, legally or politically and directly or indirectly, during the execution of a federal pact.<sup>212</sup> Still, like any contractual provision, the provisions of a federal constitution shall be enforced so that it can entrench these consented norms and then be worth more than the paper on which it is posited.

To avoid breaches of a federal pact, all constituent entities shall be treated with fairness through mutual respect and understanding.<sup>213</sup> A constituent entity shall understand and respect the wills, the needs, and the interests of its fellow entities and refrain from acting opportunistically.<sup>214</sup> Autonomy cannot be invoked as a blank cheque. The sovereignty, and thus the liberty, held by the constituent entities cannot be exercised to limit the free exercise by another constituent entity of its share of sovereignty collaterally.

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<sup>211</sup> Ibid 7-8 and 20-21.

<sup>212</sup> Ivo D Duchacek, 'Federalist Responses to Ethnic Demands: An Overview' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 69; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 127.

<sup>213</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 157; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 202; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 7-8.

<sup>214</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 191; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 57.

Although federal pacts cannot be authoritative unless they recognise their distinctiveness and grant them sufficient normative autonomy, federated entities are not entitled to act egoistically.<sup>215</sup> The parties to a federal covenant shall adopt congenial and constructive behaviour so that the implementation of its provisions could be done correctly. Otherwise, the consensual nature of federal covenants and, ultimately, the constitutional foundations of federalism could be seriously undermined. In practice, since no constraint shall be imposed unilaterally on the constituent entities, it can even be contended that each constituent entity should hold a constitutional veto.<sup>216</sup> Although unanimity would not necessarily be required (since it would likely lead to stalemates), such a constitutional requirement signals the need to prevent a federal entity (or a few federated entities) from controlling normative processes for their egocentric benefits through simple majority rule.<sup>217</sup>

Consequently, a federal constitution embodies a common endeavour by the constituent entities, which may not always be like-minded, to rule jointly a composite state.<sup>218</sup> The consent given

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<sup>215</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 164 and 258; Ferran Requejo, 'Three Theories of Liberalism for Three Theories of Federalism: A Hegelian Turn' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 46.

<sup>216</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 247; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 132; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 17.

<sup>217</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 251; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 248 and 250; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 236.

<sup>218</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 35; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 122.

by these entities also reflects the will of their *demoi*, of the people living within them to live together.<sup>219</sup> As noted by Elazar, federal constitutions 'are not simply compacts between the rulers and the ruled but involve the people, the general government, and the polities constituting the federal union'.<sup>220</sup> Federalism empowers citizens to participate in governance processes and to have a decisive say on the conduct of state and substate matters.<sup>221</sup> The implementation of federal principles would be vain if it relied exclusively on the consent of the constituent entities, but not on the consent of the citizens who populate these entities.

However, bearing the evolutive nature of federal pacts in mind, the constituent entities shall be able to reconsider their belonging to a federal pact when their provisions are not implemented as planned initially.<sup>222</sup> Accordingly, a member of a federal pact shall have the

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<sup>219</sup> Paul Chen, 'Federalism and Rights: A Neglected Relationship' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 308; James A Gardner, 'Devolution and the Paradox of Democratic Unresponsiveness' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 219; Bruno Theret, 'Du principe fédéral à une typologie des fédérations: quelques propositions' in Jean-François Gaudreault-Desbiens and Fabien Gelinat (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 124; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 172.

<sup>220</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 157.

<sup>221</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 231; Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 3; Thomas D Lancaster, 'Complex Self-Identification and Compounded Representation in Federal Systems' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 63; David Cameron, 'The Paradox of Federalism: Some Practical Reflections' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 117.

<sup>222</sup> Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 45; Jan Erk and Lawrence M Anderson, 'The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 6; Cillian McBride, 'Postnationalist Democratization: Rethinking Nationality, Trust, and Accountability' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical*

right to leave it freely when it no longer consents to be part of it.<sup>223</sup> For example, that could happen if a federated entity does not consider itself respected within a federal state or if it deems that the federal pact is irremediably broken.<sup>224</sup> Additionally, substate nations could envision becoming independent if they do not feel adequately recognised within the federal state they are in.<sup>225</sup> Nonetheless, the capacity of the constituent entities to leave a federal state has been quite restrained concretely. Although it shall entrench the right of the constituent entities to internal self-determination, a federal constitution seldom empowers them to self-determine externally, in other words to secede. Some federal pacts provide a right to secession under some very precise conditions,<sup>226</sup> but others, such as the American one, unambiguously forbid the unilateral dismantlement of the original covenant.<sup>227</sup> The division of sovereignty that is intrinsic to a federal pact does not automatically entail that a federal state is necessarily divisible. Therefore, the concrete ability of a constituent entity to rescind its consent can hardly be a core attribute of federal constitutionalism. Nevertheless, that shall not entail that consent

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*Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 168; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 7.

<sup>223</sup> Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 285; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 116; Ferran Requejo, 'Three Theories of Liberalism for Three Theories of Federalism: A Hegelian Turn' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 58; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 11.

<sup>224</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 117.

<sup>225</sup> A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 9.

<sup>226</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 24; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 79.

<sup>227</sup> Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 30.

cannot be considered the backbone of authoritative federal constitutional frameworks.

In conclusion, and in fact, a federal pact can only last if it empowers its collective or individual parties to address critical societal issues while simultaneously preserving the integrity of state unity and the constitutional recognition of their diversity. Still, following Friedrich's argument that federalism is a process that is inherently fluid and evolutive,<sup>228</sup> federal constitutions cannot be apprehended as fixed and abstract instruments. It is yet crucial to study whether there are essential attributes of federal sovereignty without which it cannot be exercised proficiently and legitimately.

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<sup>228</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 54; Eugenie Brouillet, *La negation de la nation: L'identité culturelle quebecoise et le federalisme canadien* (Editions du Septentrion 2005) 72.

### 2.3. The Quest for the Essence of Federal Sovereignty

In the previous section, I found that federal sovereignty is intrinsically divided and shaped by contractualistic features. However, federal principles can hardly be construed and implemented uniformly for them to make sense. Federalism is a concept whose essence is not reducible to the existence of a definite set of legal and political devices within any potential federal polity. Consequently, the mechanisms by which federal principles are implemented are primarily instrumental in guaranteeing their concrete societal relevance.

#### 2.3.1. Federalism and Fair Recognition

While institutional considerations can certainly not be overlooked while studying federalism, it is essential to consider in priority that federal polities are intrinsically divided polities.<sup>229</sup> In a federal state, a united and unified *demos* cannot exist. As the people constituting a federal state is, in fact, an aggregate of plural *demos*, multiple popular wills coexist within a federal state, despite the potential divergences between them. To prevent antagonisms from becoming irreconcilable, constituent entities shall be treated fairly both in law and in fact. The constitutional recognition that no constituent entity shall be superior to another is even a principle that all functional federal states shall entrench. Delperee's and Verdussen's assertion that the efficiency of federal frameworks shall be primarily evaluated based upon the extent to which they value and uphold equality substantiates this finding.<sup>230</sup> Although

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<sup>229</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 36; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 28.

<sup>230</sup> Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le federalisme*

fairness shall be privileged analytically over a concept of equality that is overly rigid and formalistic, the latter helps to set a clear federal moral ideal. If that is a (crucial) thing to talk about equality and assert it as a cardinal federal value, it is another to operationalise it beyond good will. That is by the theoretical yardstick that the recognition that the constituent entities must have the same rights and opportunities shall be assessed since fairness is a more pragmatic and concrete concept.<sup>231</sup>

Securing fairness shall not be a distant and abstract aim. That shall guide any action or consideration related to the implementation of other federal principles. Particularly from a contractualistic perspective, the constituent entities cannot be considered as fully-fledged parties to a federal pact if the relationships among them were shaped by subordination.<sup>232</sup> The status of the constituent entities should not be hierarchised,<sup>233</sup> whether in law or in fact. Federal fairness indeed requires state constituent power to be held jointly by federal and federated entities without there being any undue link of subordination or hierarchisation between them.<sup>234</sup> To institutionalise the need for the constituent entities to develop

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*dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 195 and 198.

<sup>231</sup> Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 158.

<sup>232</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 57.

<sup>233</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 27; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 116; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 13; Jaime Lluç, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 201.

<sup>234</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 166; Francis Delperee and Marc Verdussen, 'L'égalité: mesure du fédéralisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 198 and 203; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 13.

cordial and fair relationships, Halberstam's concept of heterarchy should be constitutionalised.<sup>235</sup> Heterarchy, which is meant to rely on cooperation beyond any institutional yoke,<sup>236</sup> is based upon the matrix idea that 'there are no higher or lower power centers, only larger or smaller arenas of political decision making and action'.<sup>237</sup> This assertion is consistent with the federal principle requiring the constituent entities to work together as partners. No constituent entity shall perceive itself as more powerful and legitimate than another and act as such.

On a more tangible basis, federal fairness entails that federated entities are empowered to assert, without being subjected to the authority of a federal entity, their particularities through the operation of their own institutions.<sup>238</sup> Federal fairness only becomes a reality if an entity does not interfere in the exercise of the shares of sovereignty that belong to other entities.<sup>239</sup> In practice, to ensure that they are treated fairly, the constituent entities have similar opportunities to exercise self-rule and shared rule.<sup>240</sup> There shall not be unjustified substantial discrepancies regarding the extent of the normative powers that the constituent entities hold to control their destiny at the legal and political

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<sup>235</sup> Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press 2009) 328.

<sup>236</sup> *ibid* 337 and 355.

<sup>237</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 37.

<sup>238</sup> Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 74.

<sup>239</sup> Francis Delpérée and Marc Verdussen, 'L'égalité: mesure du fédéralisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 195-96 and 208; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 215.

<sup>240</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 33.

levels.<sup>241</sup> As explained more extensively later, the need for interdependence and the valuation of state unity shall not serve as mere alibis justifying the edification of a normative hierarchy favouring a particular entity over others.<sup>242</sup> Imbalanced relationships vitiate the ability of a constituent entity to provide free and informed consent in the operation of a federal pact, which would jeopardise the viability of this pact. The unitarizing tendencies of federal entities, even though they are rather natural, shall then be quashed vigorously.<sup>243</sup>

Furthermore, valuing federal fairness requires the rejection of exclusivist identity claims to ensure that the claims to recognition of federal and federated entities are intrinsically worth the same.<sup>244</sup> In a fair federal polity, the opposition between sociological majorities and minorities is transcended and majoritarian

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<sup>241</sup> Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinas (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 198.

<sup>242</sup> Daniel J Elazar, 'The State System + Globalization (Economic Plus Human Rights) = Federalism (State Federations Plus Regional Confederations)' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 19; Bruno Theret, 'Du principe federal a une typologie des federations: quelques propositions' in Jean-François Gaudreault-Desbiens and Fabien Gelinas (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 123.

<sup>243</sup> William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 134; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 61; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 41.

<sup>244</sup> Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 227; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 162; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 12; Jaime Lluch, 'Introduction: The Multiple Dimensions of the Politics of Accommodation in Multinational Democracies' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 8.

tendencies are repressed.<sup>245</sup> As noted by the Canadian Supreme Court, a federal state is indeed constituted of 'different and equally legitimate majorities'.<sup>246</sup> Accordingly, all popular majorities within a federal state, whether federal or federated, shall have a somewhat equal ability to defend their interests.<sup>247</sup> The logical implication of this reasoning is that no majority group shall be empowered to dominate other groups since it shall always consider minority entities, groups, and interests earnestly and respectfully.<sup>248</sup> Consequently, every majority within a federal state shall be the outcome of a dialogue between diverse collective entities that hold no monopolies on truth or virtue.<sup>249</sup>

In practice, Delperee and Verdussen are right to argue that the institutionalisation of federal equality cannot be genuine if it is overly formal and glosses over socio-political power struggles that could compromise fairness.<sup>250</sup> In other words, federal fairness should be a factual matter in priority. This input insightfully sheds light on the fact that constitutional arrangements, although their text might provide expressly that all constituent entities are equal,

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<sup>245</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 316-17; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 78.

<sup>246</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [66].

<sup>247</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 2.

<sup>248</sup> Thomas Fleiner, 'The Challenge of Ethnic Diversity to Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 182; Sergio Ortino, 'Functional Federalism between Geopolitics and Geoeconomics' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 282; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 1.

<sup>249</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [68]; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 1.

<sup>250</sup> Francis Delperee and Marc Verdussen, 'L'égalité: mesure du fédéralisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 195 and 198.

could be effectively misbalanced due to systemic disparities.<sup>251</sup> Conversely, especially in multinational states, recognising formal situations of inequality might be needed to engender substantive fairness, which is essential to secure the recognition of persistently disadvantaged constituent entities.<sup>252</sup> Accordingly, the extent of federal fairness within a polity should not be measured according to what formal norms, and even political arrangements, provide. The constituent entities cannot necessarily be endowed with the same number of resources, but rather with these that make them concretely recognised and powerful to the extent they want.<sup>253</sup> That explains why fairness shall be sought more than an overly formalistic concept of equality, which is overly abstract to be valuable in practice.

It can also be noted that there shall be as few factual discrepancies (e.g., population, wealth, territorial size, etc.) as possible between the constituent entities so that they have the same opportunities to exercise their share of sovereignty autonomously and meaningfully.<sup>254</sup> The concern that some constituent entities could take advantage of their societal characteristics to become domineering and potentially hegemonic, despite formal guarantees of the opposite, motivates this stance. Although his argument on this matter is analysed more extensively later, Watts doubts that the United Kingdom could be a federal state essentially because one of its constituent entities, England, overwhelms the

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<sup>251</sup> *ibid* 202.

<sup>252</sup> Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 98; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 75.

<sup>253</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 26.

<sup>254</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 170; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 14.

others so markedly.<sup>255</sup> This concern is also acute in federal states within which a minority of constituent entities can impose its views on the others simply because a majority of state citizens inhabits them. These examples prove that, regardless of what formal legal norms provide, federal fairness means nothing if it does not lead to the repression of anything that empowers an entity to assert majoritarian claims.<sup>256</sup>

Certainly, securing fairness between the constituent entities should not lead to trivialising, or even accepting systematically, inequalities between citizens.<sup>257</sup> However, if the recognition of some constituent entities is endangered, equality between these entities shall take precedence over that between citizens so that the essence of a fair federal pact among the constituent entities can be preserved.<sup>258</sup> Equalitarian and cooperative relationships between the constituent entities are indeed constitutive of a functional federal state.<sup>259</sup> Despite their lacunas and beyond their

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<sup>255</sup> Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 222-23.

<sup>256</sup> David Miller, 'Against Global Democracy' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 147.

<sup>257</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 185; Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 100.

<sup>258</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 91; Eugenie Brouillet, *La negation de la nation: L'identite culturelle quebecoise et le federalisme canadien* (Editions du Septentrion 2005) 74-75; Genevieve Nootens, 'Nations, Sovereignty, and Democratic Legitimacy: On the Boundaries of Political Communities' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 199; Miquel Caminal and Ferran Requejo, 'Democracy and Federalism in Plurinational Societies' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 7; Ferran Requejo, 'Three Theories of Liberalism for Three Theories of Federalism: A Hegelian Turn' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 56.

<sup>259</sup> Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 2; A-G

specific formal features, federal institutions are vital in establishing and consolidating these relationships.<sup>260</sup> Making federal fairness a reality is only one reason why federal principles shall be institutionalised, and even constitutionalised. Hence, taking a closer look at the institutional core of federalism, which cannot be a list of pernickety formalistic attributes, becomes particularly appropriate.

### 2.3.2. The Institutional Core of Federalism

Feeley and Rubin contend that the fundamental operational aim of federal arrangements is to empower diverse entities, and often diverse nations, to coexist within a state through the institutionalisation of multi-level governance.<sup>261</sup> Institutional and behavioural devices, which make self-rule or shared rule possible to varying extents, must be implemented to conciliate diverse, and often contradictory, views within a federal state.<sup>262</sup> When they are conceived and operated with responsiveness to societal realities, institutions actualise the federal spirit with due respect for the intrinsically pragmatic nature of federalism.<sup>263</sup> Accordingly, the absence or the incompleteness of institutional frameworks within

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Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 3

<sup>260</sup> Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 2.

<sup>261</sup> Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 3.

<sup>262</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 5-6; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 131.

<sup>263</sup> Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 4; Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 4-5; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 12.

a state would jeopardise the impact of federal principles and would prevent them from being upheld genuinely.<sup>264</sup>

To avoid such a grim outcome, Bednar asserts that a 'robust' system of institutions shall be devised and implemented to make federal constitutional governance both efficient and legitimate.<sup>265</sup> Its robustness shall rely on its ability to stand tall regardless of circumstances and the variability of political will. More precisely, it shall have mechanisms ensuring that the constituent entities abide by its norms and that its components are simultaneously resilient and adaptable so that they can evolve at the same pace as society.<sup>266</sup> It shall also be designed comprehensively because institutional features cannot be devised in isolation, from a solely formalistic perspective.<sup>267</sup> In practice, each institutional device shall play a clear and instrumental, albeit not essential by itself, role.<sup>268</sup> A federal constitution shall then have, as a primary duty, to establish, entrench, and articulate this robust system.<sup>269</sup> Consequently, the whole constitutional architecture of a functional federal state shall be shaped by federal principles and ensure that they are implemented through the operation of institutional devices.<sup>270</sup>

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<sup>264</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 20; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 95.

<sup>265</sup> Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 16 and 214.

<sup>266</sup> *ibid* 13.

<sup>267</sup> Susan E Clarke, "'Thinking Federally" from a Governance Perspective' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 55.

<sup>268</sup> Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 252.

<sup>269</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 101; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 213.

<sup>270</sup> Ralph JK Chapman, 'Structure, Process and the Federal Factor: Complexity and Entanglement in Federations' in Michael Burgess and Alain-G Gagnon

Numerous authors have set what can be labelled as institutional checklists enumerating what are the fundamental institutions of a functional federal state. For instance, Bednar considers that a robust institutional system should divide sovereignty not only structurally, but also politically (from both popular and partisan perspectives) and judicially.<sup>271</sup> In that vein, Brouillet asserts that, besides a divided legislative sovereignty, federated autonomy; constitutional supremacy; and judicial neutrality should necessarily be institutionalised in a proper federal state.<sup>272</sup> Moreover, Karmis and Norman rate self-rule; shared rule; integrated markets and legal systems; and rigid amending formulas as constituting the core institutional components of federalism.<sup>273</sup> These insights are certainly valuable to understand its essence more accurately.

However, all useful the items on these institutional checklists can be individually, they have been inordinately construed in absolute terms. That overlooks a defining trait of federalism, which is its conceptual pragmatism. A broad doctrinal agreement on what should absolutely be a core institution within any federal constitutional order could hardly exist. As highlighted by Livingston, a definite set of institutions cannot be established in any state regardless of its societal context.<sup>274</sup> If only purely formalistic considerations were considered when investigating the federal character of a state, Canada might not even be a federal

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(eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 77.

<sup>271</sup> Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 96.

<sup>272</sup> Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 151.

<sup>273</sup> Dimitrios Karmis and Wayne Norman, 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 14.

<sup>274</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 6.

state.<sup>275</sup> It is quite hazardous to find out the exact institutional features without which a federal state would be doomed to fail.

Consequently, I agree with the argument, which was first made by Livingston, that federal institutions are not ends in themselves but instruments permitting the implementation of federal principles.<sup>276</sup> This argument is completed by Burgess' insight that, regardless of their formal characteristics, federal institutions primarily seek to conciliate divergent interests, such as unity and diversity, within a state.<sup>277</sup> Accordingly, the best way to evaluate the relevance of an institution within a federal constitutional order is to determine how crucial it is to make a federal polity thrive. This assertion is coherent with the finding that institutions shape the citizens' appreciation of federal principles and arrangements at least as much as citizens shape institutions through the exercise of constituent powers.<sup>278</sup>

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<sup>275</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [55].

<sup>276</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 2, 6, 9 and 318; Alain-G Gagnon, 'The Political Uses of Federalism' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 15; Ralph JK Chapman, 'Structure, Process and the Federal Factor: Complexity and Entanglement in Federations' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 72; David Cameron, 'The Paradox of Federalism: Some Practical Reflections' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 117; Richard Simeon, 'Is Federalism like Snow, and Is It Exportable? Some Cautionary Notes on the Study of Federalism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 111.

<sup>277</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 61.

<sup>278</sup> Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 13; Jaime Lluich, 'Introduction: The Multiple Dimensions of the Politics of Accommodation in Multinational Democracies' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 7.

In practice, institutions shall constrain the ability of the constituent entities to act in a manner that contradicts intrinsic federal principles and values. If institutions do not strengthen a constitutional framework that can easily be compared to a house of cards, any socio-political pressure or power struggle might lead to its collapse. Indeed, a federal state is the tailor-made and fragile outcome of a precarious equilibrium between conflicting forces and interests. When conciliation is not valued or, worse, effectively possible, some constituent entities can take advantage of institutional voids to assert their interests egoistically<sup>279</sup> and, ultimately, to act in opposition to the essence of federalism.

To study the multi-faceted complex essence of federal institutionalism, investigating how sovereignty can be divided by institutional means, which fulfils a core federal principle, is particularly insightful. The division of state sovereignty is embodied normatively by the constitutional division of powers, whether it be vertical (between federal and federated entities) or horizontal (between legislative, executive, and judiciary orders).<sup>280</sup> While federal sovereignty is necessarily divided vertically, it shall also be separated horizontally within each constituent entity, so that it can be endowed with its own distinct and complete normative order.<sup>281</sup>

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<sup>279</sup> John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 300; Maxwell Cameron and Tulia Falletti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 267; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 88.

<sup>280</sup> Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 95; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 213.

<sup>281</sup> George Carey, 'Federalism: Historic Questions and Contemporary Meanings – A Defence of Political Processes' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 43; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 182; Malcolm

Sovereignty does not only have to be divided to prevent any unconsented breach of constitutional jurisdictions by another entity but also to prevent any abuse of normative power from within the boundaries of a given entity.

It can then be discussed whether some constitutional systems can just not be federal. For instance, since parliamentary systems do not tightly separate powers horizontally (especially compared to presidential systems), a perfect diffusion of normative powers within constituent entities can hardly be done.<sup>282</sup> Still, if there exist horizontally separated institutions, which should be relatively watertight, within each constituent entity, nothing inexorably prevents a state with a parliamentary system from being characterised as federal.<sup>283</sup> It can also be asked whether the establishment of a legislative chamber specifically representing the interests of federated entities is essential to empower them to exercise shared rule within central institutions. However, arguing that a state must establish such a legislative chamber so that it can be federal is overly theoretical and formalistic. Certainly, a state that does not provide direct federal legislative powers to representatives of federated entities can be characterised as

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Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 245, 246, 248, 255, 258 and 271.

<sup>282</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 68; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 108; DV Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) *Publius: The Journal of Federalism* 81, 96; Malcolm Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 251-53; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 41, 59 and 216.

<sup>283</sup> William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 115-16.

*demos*-constraining, but it could yet be federal.<sup>284</sup> In fact, since federal governments are seldom held accountable by the members of the legislative chambers in which federated entities are represented, these institutions would only have limited actual effects on federal governance.<sup>285</sup> Therefore, all relevant they can be, ‘second chambers’ (their usual label is very telling) would not fundamentally have to be established in any federal polity.<sup>286</sup>

On another yet decisive note, it is opportune for federal constitutional frameworks to set mechanisms by which conflicts between the constituent entities can be solved fairly and peacefully. Dicey’s input that ‘federalism substitutes litigation for legislation’ must not simply be words.<sup>287</sup> It shall also be ensured that political and legal actors abide by the content of the federal pact to which they have consented to be bound and that each constitutional norm is consistent with federal principles.<sup>288</sup> An

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<sup>284</sup> Alfred Stepan, ‘Federalism and Democracy: Beyond the US Model’ in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 267.

<sup>285</sup> William Livingston, ‘Canada, Australia and the United States: Variations on a Theme’ in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 110; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 59 and 192; Stephen Tierney, ‘Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017’ in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 117.

<sup>286</sup> William Livingston, ‘Canada, Australia and the United States: Variations on a Theme’ in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 102; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 1.4 and 3.29; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 68; Ronald L Watts, ‘Multinational Federations in Comparative Perspective’ in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 242.

<sup>287</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 103.

<sup>288</sup> Haig Patapan, ‘Australian Federalism: An Innovation in Constitutionalism’ in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 495; Matt Qvortrup, ‘“Let Me Take You to a Foreign Land”: The Political and the Legal Constitution’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 60.

institution shall then be empowered to enforce the provisions of this pact<sup>289</sup> and to solve constitutional conflicts by making assertive and legitimate decisions.<sup>290</sup> In most federal states, judges, who serve as the guardians of the constitution, play the role of final arbiters.<sup>291</sup> A third party that does not draw its authority from electoral support, and that is then less prone to support majoritarian claims, can fulfil this duty more rationally and impartially than elected officials.<sup>292</sup> Certainly, the fact that unelected officials can review acts or decisions that are meant to embody the popular will challenges assumptions on democratic governance, especially in states whose sovereignty has traditionally been parliamentary.<sup>293</sup> However, that is crucial to uphold federal principles beyond good will. Constitutional interpretation and adjudication have to be placed beyond the reach of potentially opportunistic and biased political actors.<sup>294</sup> That

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<sup>289</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 58 and 62; Francis Delpere and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 198; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 119; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 56.

<sup>290</sup> Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 203; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 120; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 173; Matt Qvortrup, 'Let Me Take You to a Foreign Land': The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 60.

<sup>291</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 276-77.

<sup>292</sup> Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 112 and 123.

<sup>293</sup> Eugenie Brouillet, *La negation de la nation: L'identite culturelle quebecoise et le federalisme canadien* (Editions du Septentrion 2005) 162.

<sup>294</sup> William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 100; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 183; Roland Sturm, 'The Adventure of Divergence: An Inquiry into the Preconditions for Institutional Diversity and Political Innovation after Political Decentralization' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 144; Thomas O Hueglin and Alan

shows compellingly how and why the horizontal separation of powers is complementary to the vertical division of sovereignty between constituent entities.<sup>295</sup> A federal pact can then be upheld and enforced in a manner that counters absolute powers.

Concretely, constitutional guardians shall bear in mind three things. First, considering the multi-faceted essence of federalism, they shall apprehend a federal constitution beyond its legal and formal provisions by also considering impactful socio-political factors.<sup>296</sup> Second, they shall safeguard federal principles from being threatened by simple political majorities.<sup>297</sup> Third, they shall never be biased, systematically or seemingly, for or against a constituent entity or nation when they settle constitutional questions or conflicts.<sup>298</sup> The robustness of a federal system falters if constitutional guardians overlook these considerations,

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Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 275; Elisenda Casanas Adam and François Rocher, '(Mis)recognition in. Catalunya and Quebec: The Politics of Judicial Containment' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 47.

<sup>295</sup> Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 124 and 195.

<sup>296</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 276-77.

<sup>297</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 254; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 278.

<sup>298</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 65; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 121; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 237; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 119 and 122; Haig Patapan, 'Australian Federalism: An Innovation in Constitutionalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 495; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 82-83; Elisenda Casanas Adam and François Rocher, '(Mis)recognition in. Catalunya and Quebec: The Politics of Judicial Containment' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 46 and 51.

regardless of the substance of their decisions.<sup>299</sup> Indeed, constituent entities and their citizens shall never doubt that institutions will treat them with fairness and equanimity.

In practice, the entrenchment of federal principles, by various means, has been vital in conciliating divergent interests without ineluctably making winners or losers.<sup>300</sup> Nonetheless, institutionalising mechanisms easing the resolution of constitutional conflicts and the valuation of principles like dialogue is not sufficient alone to foster harmonious relationships between the constituent entities.<sup>301</sup> Altogether, the efficiency of federal institutions relies on the willingness of diverse citizens and entities to live together, beyond what formal norms provide. That is what truly makes federal polities thrive.

### **2.3.3. The Crucial Role of a Federal Political Culture**

As noted previously, since federalism is a complex concept that cannot be construed or embodied uniformly, its essence cannot only be found in overarching constitutional and institutional structures.<sup>302</sup> To find the substantive core of federalism, I shall

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<sup>299</sup> Elisenda Casanas Adam and François Rocher, '(Mis)recognition in Catalunya and Quebec: The Politics of Judicial Containment' in Jaime Lluç (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 50.

<sup>300</sup> Keith G Banting, 'Social Citizenship and Federalism: Is a Federal Welfare State a Contradiction in Terms?' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 55; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 251.

<sup>301</sup> Alain-G Gagnon, 'The Political Uses of Federalism' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 18.

<sup>302</sup> Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 48; Michael Burgess, 'Multinational Federalism in Multinational Federation' in Michel Seymour and Alain-G Gagnon

conceptualise the latter by considering the necessity of upholding a federal political culture. According to Burgess, a federal culture 'is equivalent to the political environment in which federal values and ideas about the state and the political system circulate and flourish'.<sup>303</sup> When they are implemented with responsiveness to the constitutive elements of this culture, federal principles can exist beyond normative assertions and rhetorical statements that cannot necessarily be enforced effectively.<sup>304</sup> Federal political integration can only be achieved when considerations that are related to political culture are assessed and reckoned at least as much as purely legal considerations.<sup>305</sup> The essence of federalism is then found in the ways through which it is valued within a polity rather than in abstract and universal postulates.<sup>306</sup> This finding is shared by Livingston, who proved that social and cultural factors that are

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(eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 25.

<sup>303</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 261.

<sup>304</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 243; Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 4-5; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 89.

<sup>305</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 41; Richard Simeon, 'Federalism and Social Justice: Thinking through the Tangle' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 19; Genevieve Nootens, 'Autonomy, Boundaries and Trust: Preliminary Remarks' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 45.

<sup>306</sup> Henry Teune, 'The Future of Federalism: Federalism and Political Integration' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 213 and 216; Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 4; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 230.

peculiar to polities explain why they are federal more than how their sovereignty is divided formally.<sup>307</sup>

Although constitutionalism is conceptualised exhaustively in the next chapter, it is already worth highlighting Barber's brilliant input that a constitution 'is the whole assemblage of rules that define the structure of the state'.<sup>308</sup> Despite their importance within a constitutional framework, formal and legal norms are insufficient to establish a state all by themselves, especially if it is federal. In practice, the features of a federal political culture can compensate for the intrinsic limits of formal legal constitutionalism. Indeed, according to Elazar, the provisions of a federal constitution cannot make sense 'unless institutional, procedural, cultural, and political arrangements and mechanisms serve to reinforce them in practice'.<sup>309</sup> A federal state is the outcome of interdependent formally constitutional and socio-political processes<sup>310</sup> whose operational components only work efficiently in a specific polity.<sup>311</sup> Consequently, grasping federal constitutionalism only by considering the legal nature of its structuring constitutional norms, regardless of how they are implemented societally, is inadequate.<sup>312</sup> That is why, as noted by Sturm and Gagnon, a

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<sup>307</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 2.

<sup>308</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 174.

<sup>309</sup> Daniel J Elazar, 'The State System + Globalization (Economic Plus Human Rights) = Federalism (State Federations Plus Regional Confederations)' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 22.

<sup>310</sup> id, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 38.

<sup>311</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 1.

<sup>312</sup> George Carey, 'Federalism: Historic Questions and Contemporary Meanings – A Defence of Political Processes' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 59; Peter H Russell, 'The Future of Europe in an Era of Federalism' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester

thriving federal culture, whose essence is mostly socio-political, permits to override both the law of the strongest and laws devoid of concrete grounds.<sup>313</sup>

In fact, a state, even though its constitution entrenches federal principles, can hardly be federal unless its constituent entities share a constructive engagement to act in accordance with these principles. For instance, the lack of a sincere constructive engagement in Spain has hampered the efficiency of formal legal norms whose decentralising and autonomist essence could yet have been characterised as federal.<sup>314</sup> This example demonstrates that what Wheare characterises as ‘the extension of the general government’s powers by judicial decision or by constitutional amendment, and the extension of its power by financial participation’ has triggered in several federal states a centralising dynamic that express constitutional provisions do not reflect.<sup>315</sup> As highlighted by Burgess, this outcome can be avoided by the upholding of a ‘formal commitment to design and construct constitutions, political institutions, and decision-making procedures that can foster and perpetuate a distinctly federal political culture’.<sup>316</sup> A federal political culture indeed sets the

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University Press 2005) 7; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 4; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 174; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 32.

<sup>313</sup> Roland Sturm, ‘The Adventure of Divergence: An Inquiry into the Preconditions for Institutional Diversity and Political Innovation after Political Decentralization’ in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 141; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 118.

<sup>314</sup> Ferran Requejo, ‘Political Liberalism in Multinational States: The Legitimacy of Plural and Asymmetrical Federalism’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 131.

<sup>315</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 151.

<sup>316</sup> Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 3.

behavioural standards ensuring the proper, fair, and harmonious implementation of federal principles within a composite polity.<sup>317</sup>

Therefore, understanding and constitutionalising federalism with due consideration for socio-political and cultural perspectives is vital to apprehend more accurately the dynamics that shape its substance. That also enables us to grasp why the operation of federal constitutional frameworks shall be done with pragmatism and realism, beyond deciphering the content of formal postulates or norms. The institutional mechanisms through which federal principles take form can hardly be transplanted handily since, in line with their instrumental nature, they are intrinsically more contextual than universal. As noted by Lenaerts, there is a duty, in a federal polity, to strike a balance between unity and diversity that dovetails the specific societal realities that characterise it and make it unique.<sup>318</sup> Consequently, to determine whether a state is federal concretely, I shall investigate whether federal principles can be implemented in keeping with the defining features of its constitutional order and of its society.

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<sup>317</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 192; *ibid* 269; Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 199.

<sup>318</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 263.

### **3. The Nature of the British Constitution**

To determine accurately whether the mode of constitutional governance of a particular state is federal, two substantive points shall be evaluated. It is crucial to look for the substantive essence of its constitution and to examine how it can be functional and legitimate. Consequently, ascertaining whether federal principles have shaped the United Kingdom constitution in contemporary times cannot be done without uncovering the true nature of its constitution.

This investigation is conducted in three steps that permit to grasp fundamental constitutional concepts and issues, which are both universal and British. First, I assess the central role of a constitution within a polity, which highlights the duties that what is primarily an instrument shall perform. Hence, I study the two-folded, legal and political, character of constitutionalism, which is particularly outstanding in the United Kingdom. Accordingly, there would be no such thing as a British legal normative order, at least if it is conceptualised in purely formalistic and hierarchic terms. This finding is yet the corollary of the sovereign status of the Westminster Parliament, whose powers are exercised democratically and pragmatically by political actors. Finally, considering the sovereign character of this institution, I observe that the operation of a peculiar British constitution is systematically shaped by it, in keeping with its peculiar characteristics.

### **3.1. The Substance and Role of a Constitution**

A constitution can only make sense when its structure and its role are apprehended beyond its tangible and often overly formalistic embodiments. Failing to acknowledge that a constitution is inherently multi-faceted leads to incompletely and imperfectly comprehending the ins and outs of critical societal issues. Consequently, constitutional principles shall be implemented, and more importantly actualised, beyond the texts on which they are often posited.

#### **3.1.1. The Multi-Faceted Essence of Constitutionalism**

Conceptualising constitutionalism requires defining a constitution according not only to what it is but also to what it does. Anthony King's input in this regard is precious. He argues that 'a constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country'.<sup>1</sup> A constitution is then the device that ensures that the rule of law supplants the assertion of raw power as the main source of both legal and political authorities within a polity. More precisely, a constitution sets the bases of state governance as it arranges how sovereigns and rulers exercise their powers.<sup>2</sup> This function is particularly crucial when a constitution is apprehended from a Kelsenian perspective. According to the latter, which is dominant nowadays, a constitution

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<sup>1</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 1.

<sup>2</sup> Maxwell Cameron and Tulia Falletti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 247; John Laws, 'The *Miller* Case and Constitutional Statutes' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 15.20.

is viewed as the top rule of a normative hierarchy with which all other norms and behavioural standards shall comply.<sup>3</sup> Accordingly, a constitution constitutes the institutional framework of state governance and sets mechanisms ensuring that citizens play by the rules it sets, which are the cardinal and non-derogable foundations of the rule of law.<sup>4</sup>

Undeniably, a constitution performs essential normative duties. However, purely legalistic and formalistic considerations do not alone shape its role within a polity. Recognising their significance, as crucial as it is, shall not lead to overlooking that a constitution has an intrinsically plural essence that cannot be reducible to its formal representations.<sup>5</sup> Constitutional norms, principles, and institutions contribute to the safeguard of the values and societal characteristics that make a polity unique.<sup>6</sup> A constitution is then vital in entrenching the common rules, the terms of the social contract, that empower citizens to govern themselves harmoniously and efficiently and to live together within a political unit that transcends their individualities.<sup>7</sup>

Two conclusions follow from these assertions. First, a constitution shall structure the institutionalisation of state power in a balanced manner. For instance, as the need to avoid the abuse of state power has been emphasised since the beginning of modern

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<sup>3</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 76 and 78.

<sup>4</sup> John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper 2009*, 22 and 25.

<sup>5</sup> David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 335-36.

<sup>6</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 48; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 62-63.

<sup>7</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 346; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 277; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 25 and 50.

times,<sup>8</sup> people's liberties shall be valued constitutionally as much as sound governance to make a polity thrive. Second, any constitutional norm lacks sense and likely becomes worthless when its constitutive socio-political role is insufficiently appreciated. The legal devices of a constitution shall be apprehended as instruments permitting to obtain and preserve greater societal goods. In sum, Bogdanor considers that a constitution accomplishes three core duties: providing 'a sense of purpose'; providing 'an organising chart of government' (which 'has been the traditional function of constitutions'); and limiting the extent of state power.<sup>9</sup> Consequently, apprehending constitutionalism from a single outlook is not only short-sighted but also deeply flawed.

In that vein, a constitution cannot solely proclaim standards. Citizens abide by norms primarily because they have consented to be ruled under a common constitutional framework rather than because the sovereign wants them to obey.<sup>10</sup> Accordingly, norms and standards should be implemented and enforced in a manner that secures and nurtures their social acceptability. The continental approach in this regard is quite far-reaching since it implies a constitution is the 'legal embodiment of the will of a sovereign

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<sup>8</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 7.

<sup>9</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 53.

<sup>10</sup> Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 117 and 332; Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 141 and 174; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 30; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 5 and 53; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 21; Dawn Oliver, 'The Politics-Free Dimension to the UK Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 90; Stephen Tierney, 'Parliament and the Brexit Process: The Battle for Constitutional Supremacy in the United Kingdom' (2022) 12(1) *Notre Dame Journal of International and Comparative Law*, Article 3, 3.

people'.<sup>11</sup> In all cases, a constitution shall fit sociologically with the polity in which it is intended to be the fundamental norm.<sup>12</sup> Moreover, a constitution can only function properly and remain legitimate when is not an unalterable straitjacket. Although it should have some endurance so that it can become and remain authoritative, and somewhat sacralised, over time,<sup>13</sup> a constitution shall be sufficiently versatile to evolve in line with societal changes.<sup>14</sup> Beyond the existence of specific constitutional norms or institutions, the ability to exercise constituent powers to adapt a constitution to changing realities is decisive in ensuring that this instrument can last and thrive. In practice, ensuing constitutional amendments can be made through the operation of diverse mechanisms, which are not exclusively formal.<sup>15</sup>

The study of the notion of constitutional change sheds light on the dual nature of constitutionalism and, more precisely, on an essential distinction between its legal and political dimensions. A legal constitution chiefly relies on the operation of a mostly ideal normative framework of governance that is rather univocal and rigid. A political constitution mainly relies on the continuous undertaking of deliberative processes that enable citizens and rulers to address substantive issues with flexibility. As underlined by Gee and Webber, a political constitution is devised with

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<sup>11</sup> Hugues Dumont, 'The European Union, a Plurinational Federation *in Sensu Cosmopolitico*' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 89.

<sup>12</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 66.

<sup>13</sup> Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17(2) *King's Law Journal* 255, 260; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 10.

<sup>14</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 295; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 17; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 208.

<sup>15</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 295.

particular consideration for 'its constant liability to the possibility of change effected through the ordinary political process'.<sup>16</sup> In sum, while legal constitutionalism implies that a constitutional text sets in stone, at least for a certain time, the normative and institutional systems of governance, political constitutionalism is substantively adaptable as it sets few formal constraints on institutions.<sup>17</sup> Still, despite their operational differences, the legal and political aspects of constitutionalism share several constitutive functions, particularly as they are meant to be both prescriptive and normative.<sup>18</sup>

A functional and legitimate constitution cannot be intrinsically and solely legal or political. No constitution can be simultaneously enforced and legitimate if this duality is negated.<sup>19</sup> Consequently, the two senses of a constitution should be balanced so that the latter can be binding without being unalterable and unresponsive to social realities. They are like two sides of the same coin that are substantively distinct but indissociable concretely. Although a legalistic understanding of constitutionalism has been privileged since modern times, a constitution that is not Kelsenian, such as the British one, is not fundamentally lacking or inadequate.<sup>20</sup>

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<sup>16</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 287.

<sup>17</sup> Peter Oliver, 'Abdicating and Limiting Parliament's Sovereignty – Reply to Goldsworthy' (2006) 17(2) *King's Law Journal* 281, 285; *ibid* 288-89; Peter Oliver, 'Change in the Ultimate Rule of a Legal System: Uncertainty, Hard Cases, Commonwealth Precedents and the Importance of Context' (2015) 26(3) *King's Law Journal* 367, 408; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 10.

<sup>18</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 286 and 289.

<sup>19</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 5; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 294.

<sup>20</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 6.

Hence, analysing more exhaustively the two senses of constitutionalism is essential to find out its true nature.

### 3.1.2. Legal Constitutionalism

In any functional constitutional framework, norm-making shall be authoritative and consequential rather than rhetorical and societally impactless.<sup>21</sup> A legal constitution, through its structuring provisions and the institutions it establishes, highly contributes to implementing, beyond mere wills, the principles that make sound governance possible. Accordingly, Bogdanor notes that a constitution is frequently defined as the sum of 'the rules regulating the relationship between the government and the individual',<sup>22</sup> and that this shall be so. As asserted by Jennings, a constitution should be 'the express embodiment of the doctrine of the rule of law in one of its senses'.<sup>23</sup> The rule of law, as well as efficient and legitimate governance, means nothing, and cannot even exist, in a state that has no constitution that enshrines them securely.<sup>24</sup> It is also possible to define a legal constitution as the sum of all devices that organise and limit the exercise of power within a polity. So, although reasonable doubts can be raised about the possibility of identifying what are its fundamental components, a legal constitution certainly helps to make constitutionalism leave the ambit of abstraction.

The modern valuation of Kelsenian constitutionalism astutely highlights the importance of apprehending a constitutional system

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<sup>21</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 45 and 51.

<sup>22</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 9.

<sup>23</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 62.

<sup>24</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 31.

as a cohesive whole created and shaped by a legal constitution. From a Kelsenian perspective, it is vital to entrench the rules and principles that are intended to constitute a legal framework into a sacralised text that precedes and supersedes any other legal device.<sup>25</sup> As noted by Baker, a canonical constitutional text can assert expressly and as univocally as possible what are the legal foundations of a state, which enhances their operability and their legitimacy.<sup>26</sup> Still, such a text, as valuable as it might be concretely, is not a panacea for guaranteeing that some fundamental values and principles are upheld within a polity. A constitutional text, regardless of its worth, cannot work well if its provisions are not enforced through the coordinated work of a set of institutions.<sup>27</sup> As an institution is 'both seat and source of authority',<sup>28</sup> it shall be an integral part of any coherent and systematised constitutional order.<sup>29</sup> Any legal order, whether Kelsenian or not, should be composed of a constitution that structures it and of legislative, executive, and judicial institutions, which are established by this constitution, that exercise constituted powers and shape state governance on a daily basis.

In practice, a constitutional system only stands if it relies on some constituent and structuring rules, which might take diverse forms,

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<sup>25</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 2; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 75; Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 286.

<sup>26</sup> John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 19.

<sup>27</sup> Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 148; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 76.

<sup>28</sup> Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 166.

<sup>29</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 76.

that are at the basis of its internal logic.<sup>30</sup> As originally observed by Hart and often reiterated afterwards, constituent and constituted powers shall be exercised in conformity with rules of recognition.<sup>31</sup> Such a rule, whose enforcement contributes to ensuring the coherence and the authoritativeness of a constitutional system, 'is the fundamental or ultimate rule of the system which states the criteria for identifying valid rules of law [...]'.<sup>32</sup> Rules of recognition are complemented by legal norms that provide the tools through which state institutions are established and made functional. Ahmed and Perry have labelled them 'governing norms', even though they are not necessarily posited or endowed with a supralegislative status.<sup>33</sup> The existence of these norms signals that, as noted by Dicey and Wheare, the antagonism between written and unwritten constitutional norms is less salient than the one opposing legally enforceable norms to practices based upon interpersonal or institutional agreements.<sup>34</sup> So, what Bellamy considers to be the two claims underlying legal constitutionalism (the rationalisation of decision-making and the guarantee that its outcomes are genuinely implemented)<sup>35</sup> can be fulfilled even when a state does not have a canonical constitution.

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<sup>30</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 4; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 49.

<sup>31</sup> Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17(2) *King's Law Journal* 255, 259; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 15.

<sup>32</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 71.

<sup>33</sup> Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 469.

<sup>34</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 279; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 14.

<sup>35</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 3.

Thereupon, Gardner's investigation of the roots of constitutional powers is particularly insightful.<sup>36</sup> It displays that it is unclear whether constitutional authority fundamentally rests on its formal legal embodiments or in its understanding from a socio-political perspective. At first glance, this sounds like a complex chicken-and-egg situation. It is yet possible to make sense of it. That is done by asserting that a legal constitution is not a stand-alone instrument as it is not intrinsically antagonistic to political constitutionalism.<sup>37</sup>

### 3.1.3. Political Constitutionalism

Due to its somewhat intangible and informal character, political constitutionalism seems more vacuous and weaker than its legal counterpart. However, recognising the importance of the political side of constitutionalism avoids apprehending this concept from an exclusively legalistic perspective, which makes it look overly abstract and simplified.<sup>38</sup> Legal and political constitutionalisms are operationally complementary, especially since the institution that holds the legal power to make a decision can be different from the one that holds the political power to proceed.<sup>39</sup> These apparently

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<sup>36</sup> John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper 2009*, 39.

<sup>37</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 2; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 4-5.

<sup>38</sup> HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 197; JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 16; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 289; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 876; Richard Albert and David Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Practice' (2018) 16(3) *International Journal of Constitutional Law* 880, 881; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 128.

<sup>39</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 74.

concurrent institutions shall then interact in a spirit of interdependence so that no side of constitutionalism can dominate or overshadow the other.

While Bellamy soundly contends that a legalistic understanding of constitutionalism is lacking if constitutional politics are overlooked,<sup>40</sup> his argument confirms, instead of refuting, the dual nature of constitutionalism. As highlighted by Kavanagh's thoughtful criticism of his stance, Griffith's overvaluation of political constitutionalism is inappropriate because it unduly conflates the valuation of political constitutionalism with a lack of normativity.<sup>41</sup> In fact, normativity is not an exclusively legal concept since norms can be devised and enforced through political devices.<sup>42</sup> Constitutional frameworks can neither be made exclusively of formal norms nor be made of 'unspoken, deeply internalised, rules'<sup>43</sup>, if they are to be functional.<sup>44</sup> Consequently, it is inaccurate to assert that political constitutionalism is antagonistic to norm-making.

The main normative virtue of political constitutionalism is its ability to articulate the link between the institutionalised expression of the popular will within a state and the enactment of substantively constitutional norms. From a political perspective, democratic processes strengthen constitutionalism instead of undermining it. They shall be at the core of a constitutional order, and judges shall

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<sup>40</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 3.

<sup>41</sup> Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 51.

<sup>42</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 290.

<sup>43</sup> Nick Barber, 'Laws and Constitutional Conventions' (2009) 125 *Law Quarterly Review* 294, 302.

<sup>44</sup> *ibid* 302; Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 286-87.

not systematically override their outputs on the sole basis of legalistic considerations.<sup>45</sup> Accordingly, a genuinely democratic state shall not constrain and separate powers beyond what is needed to quash absolutism.<sup>46</sup> In that vein, Bellamy asserts that a 'democratic public culture' is fundamental to guarantee that all citizens can participate, directly or not, in the governance of their polity.<sup>47</sup> Concretely, to actualise this culture, ordered and consequential political debates are held to settle constitutional questions. During these debates, legitimate consensuses can emerge from the clashes between the competing understandings of the common good that shape a pluralistic state.<sup>48</sup> These consensuses are indeed essential sources of the norms governing this state.

However, legal constitutionalists have feared, often rationally, that empowering political institutions to address constitutional issues, primarily these related to the rule of law, could subject constitutional principles to opportunistic and majoritarian considerations.<sup>49</sup> To avoid this outcome, power shall be constrained through the operation of formalistic and judicial devices that significantly limit how it is exercised.<sup>50</sup> In short, the

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<sup>45</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 4, 27, 147 and 153.

<sup>46</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 16; *ibid* 2; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 47; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 132.

<sup>47</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 7 and 152.

<sup>48</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 12; *ibid* 3, 166 and 169; Martin Loughlin, 'In Search of the Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 332.

<sup>49</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 281.

<sup>50</sup> Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 3.

exercise of political constitutional powers should not only be feared but also scorned. Nonetheless, a prominent blind spot of legal constitutionalism is that, although formal norms can engender duties, the latter cannot be executed if citizens do not consent to execute them.<sup>51</sup> Consent can only be fostered if there exists a sincere concern for the legitimacy of normative decisions and if trust in political institutions is cultivated beyond the assertion of declaratory legal statements.<sup>52</sup> Ultimately, conciliating the letter (the law) and the spirit (the politics) of a constitution shall be sought even when they appear fundamentally contradictory.<sup>53</sup>

In practice, the text of a constitution should not be sacralised in a manner that prevents any political debate on its substance and any evolution ensuring its responsiveness to societal realities.<sup>54</sup> Accordingly, politically constitutional devices, such as customs, practices, and conventions, shall be used to apprehend constitutionalism beyond its somewhat narrow legal sense.<sup>55</sup> They can also set the mechanisms by which constituted deliberative institutions make decisions, although they shall not prescribe too exhaustively their normative substance.<sup>56</sup> While some institutions may seem omnipotent from a strictly legal perspective, their

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<sup>51</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 19; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 53.

<sup>52</sup> Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 31; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 131.

<sup>53</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 4.

<sup>54</sup> Stephen Tierney, 'The Constitution of an Independent Scotland: Popular Empowerment or Judicial Supremacy?' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 149.

<sup>55</sup> Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 51.

<sup>56</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 289.

powers can be considerably limited politically.<sup>57</sup> In fact, politically constitutional devices uphold the authoritativeness of a constitution whose structuring principles are more important than the norms that it formally entrenches.<sup>58</sup>

In conclusion, I contend that legal and political constitutionalisms seek the same outcomes but fulfil them through different means. While legal norms set the functioning of institutions and constrain political initiative, political norms empower them to conduct decisive debates by setting behavioural standards in the conduct of essentially political processes.<sup>59</sup> Still, assessing how the political side of a constitution completes its legal side shall be done considering the peculiar characteristics of a constitutional framework. This assessment is then more concrete, thorough, and consequential.

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<sup>57</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 328; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 49.

<sup>58</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 6.

<sup>59</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 279 and 290; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 61.

### **3.2. British Constitutional Exceptionalism**

A significant reason why the alliance between the legal and political sides of constitutionalism is so opportune is that it permits apprehending this concept beyond theoretical assumptions. That is remarkably accurate in the United Kingdom, whose constitution can even be characterised as exceptional. It does not rest on a canonical written text that prioritises, because of its form, the legal dimension of constitutionalism over the political one. In fact, the sources of the British constitution are scattered in statutes and in devices, such as common law principles and conventions, whose constitutional essence is primarily political. Accordingly, British constitutionalism incorporates, arguably more than any other, the dual nature of constitutionalism. That has considerably shaped how the British Union is governed.

#### **3.2.1. The Versatility of British Constitutionalism**

The institutional architecture of the British constitution has been unique for centuries. Its peculiarity signals a rejection of continental European constitutionalism, for which Britons would have a continuous aversion, to use Lane Scheppelle's concept of aversive constitutionalism,<sup>60</sup> motivating them to pursue their own, unique, path.<sup>61</sup> Especially from a continental perspective, the most distinct feature of British constitutionalism is the non-existence of an overarching, supreme, constitutional text. Very few states, and

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<sup>60</sup> Kim Lane Scheppelle, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1(2) *International Journal of Constitutional Law* 296, 300.

<sup>61</sup> Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 156.

no federal state,<sup>62</sup> have such an intangible constitution.<sup>63</sup> Nothing formally sets in stone the rules and principles that have shaped the United Kingdom and constrained the exercise of its sovereignty. Certainly, the non-existence of a British constitution in the Kelsenian sense can be viewed as the object of pernicky considerations. Still, it has been very impactful on how Britons govern themselves legally and politically, especially since it has highlighted the distinctiveness of their constitution and state.

Beforehand, it can be noted that British constitutional exceptionalism follows from its quite singular emergence. The British constitution does not embody the will of a clear single sovereign since it is instead the reflection of a polity that has grown and evolved organically.<sup>64</sup> Instead of being built according to an exhaustive, immutable, perfectly symmetric, and coherent plan devised statutorily,<sup>65</sup> British constitutionalism emerged naturally as the outcome of socio-political forces that already existed.<sup>66</sup> That is consistent with the dominant empiricist British philosophical tradition and with the relative distrust of rational and idealistic

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<sup>62</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 175.

<sup>63</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 1.

<sup>64</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 116; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 308; JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 19; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 187.

<sup>65</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 3; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 33; Robert Colls, *Identity of England* (Oxford University Press 2002) 50-51; David Butler, 'The Changing Constitution in Context' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 7; Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 16.8.

<sup>66</sup> JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 16.

theses that has characterised it.<sup>67</sup> Concretely, constitutional devices have to fit into a constitutional framework that is piecemeal and haphazard at worst or pragmatic at best.<sup>68</sup> They are primarily intended to address specific issues with few regards for their place within normative and institutional frameworks, which would not have to be rethought exhaustively before being amended.<sup>69</sup> Accordingly, Jeff King contends that the British constitution lacks coherence and that it is substantively fragile because it would insufficiently rely on firm principles.<sup>70</sup> Nonetheless, this instrument is very consistent with the empiricist philosophical tradition that has shaped how Britons think for centuries. It is not rooted in overwhelming and abstract theories or social constructs but rather in adaptable institutions and principles that draw their authoritative character from their socio-political worth.

The peculiarities of the British legal system are very much akin to these of the British constitution as they both revolve around the common law. In fact, the United Kingdom and this complex concept flourished at the same pace, following similar principles. A common law system is shaped by the disparate assemblage of structuring values, norms, and conventions that have been construed and gathered over time, beyond the existence of

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<sup>67</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 165; Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 13; Jeff King, 'The Democratic Case for a Written Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 422.

<sup>68</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 113; House of Lords Select Committee on the Constitution, *Constitution – First Report* (2001) para 18; Robert Colls, *Identity of England* (Oxford University Press 2002) 54.

<sup>69</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 8-9.

<sup>70</sup> Jeff King, 'The Democratic Case for a Written Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 431.

deliberate and holistic constituent wills.<sup>71</sup> This system was established in England during the Middle Ages as an institutional response to two concomitant processes: the centralisation of power around the English Crown and the correlative delegation of its powers to courts, which could devise norms while adjudicating specific cases.<sup>72</sup> A law that would be ‘common’ throughout the English state could emerge organically without being the outcome of a deliberate initiative or of a thorough thought process.<sup>73</sup> Local customs, acts of political will like writs, and judicial precedents, rather than exhaustive and normatively superior statutes, then made English constitutional law.<sup>74</sup> The pragmatism that characterises the common law has effectively been decisive in securing the authoritativeness of the latter, even when it was challenged or substantively unclear.<sup>75</sup> The common law has become the core of British constitutionalism when it consolidated, and institutionalised, English law and was transplanted within the other polities constituting the British Union.

The organic and evolutive development of the common law is perfectly coherent with the fact that there never was, correctly said, a ‘constitutional moment’ during which the United Kingdom and its

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<sup>71</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 30; Robert Colls, *Identity of England* (Oxford University Press 2002) 82.

<sup>72</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 107 and 252.

<sup>73</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 38.

<sup>74</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 34; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 116; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 7.

<sup>75</sup> Patrick Birkinshaw and Mike Varney, ‘Britain Alone Constitutionally: Brexit and *Restitutio in Integrum*’ in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 19.

constitution would be constructed from scratch.<sup>76</sup> At no time the citizens of what would become England or, later, the United Kingdom, gathered to set the bases of a brand new constitution, of a social contract, by which they would consent to abide.<sup>77</sup> Moreover, a homogeneous and cohesive British identity could not be constructed meaningfully by statutes or statements regardless of historical precedents and long-standing realities.<sup>78</sup> Although there were some constitutional turning points, such as the Glorious Revolution and the enactment of the Reform Acts, they built on what existed instead of breaking with past norms or structures.<sup>79</sup>

It could be feared that this constitution that can be amended quite easily could not cross the ages because its authoritative character would be overly shaky, especially from a legal perspective.<sup>80</sup> Still, as highlighted by Beatson, the British constitution has evolved effortlessly and informally to meet the changing needs of the British polity.<sup>81</sup> While that contradicts modern liberal postulates,

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<sup>76</sup> Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 34.

<sup>77</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 99; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 11.

<sup>78</sup> Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 35.

<sup>79</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 7-9 and 308; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 9-10; Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 78; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 41; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 176-77; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 44; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 9; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 5.

<sup>80</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 48.

<sup>81</sup> *ibid.*

the British constitution can easily be adapted to fit what the people wants in a specific time instead of being kept out of reach from it.<sup>82</sup> Thanks to its adaptability, British constitutionalism has thrived and lasted over centuries because it could be, and remain, legitimate and responsive to the wills of citizens.<sup>83</sup> Claims that only a unitary nation-state endowed with a canonical constitutional statute could be well-governed can then be refuted. However, the successes of British material constitutionalism can hardly be explainable while glossing over the clear acceptance that constitutional law is shaped by its dual (legal and political) nature.<sup>84</sup> This duality, which also characterises the common law, has been vital in making a mostly informal constitutional framework work properly. Hence, it is relevant and essential to study more extensively how British norms can be devised, enforced, and safeguarded even if they are not enshrined into a Kelsenian constitution.

### **3.2.2. The Statutory Embodiments of British Sovereignty**

While highlighting the salience of British political constitutionalism, considering that British legal constitutionalism is insignificant or simply non-existent is a trap to avoid. Every state should have an institution that enacts formal norms and exercises the legislative function, which is crucial as it ‘involves the enactment of general rules determining the structure and powers of public authorities

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<sup>82</sup> Jo Murkens, ‘The UK’s Reluctant Relationship with the EU: Integration, Equivocation, or Disintegration?’ in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 167.

<sup>83</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 66; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 162.

<sup>84</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [12]; Graham Gee and Gregoire Webber, ‘What Is a Political Constitution?’ (2010) 30(2) *Oxford Journal of Legal Studies* 273, 298.

and regulating the conduct of citizens and private bodies'.<sup>85</sup> Doubts can legitimately be raised that an uncoded legal constitution can constitute an institution fulfilling these legislative duties adequately.<sup>86</sup> Nonetheless, as noted by Jennings, 'rules determining the creation and operation of governmental institutions', which are yet frequently set out by a formal constitution, certainly exist in the United Kingdom.<sup>87</sup> The merits of legal constitutionalism, especially in this state, shall be assessed substantively, with few regards for the formal status of norms.<sup>88</sup> In fact, British legal constitutional devices are worthy because they actualise and safeguard values and principles concretely rather than because they top a normative hierarchy that does not even exist formally.

In this regard, a distinctive aspect of the British constitution, in both its legal and political aspects, is its reliance on the principle of parliamentary sovereignty.<sup>89</sup> In the United Kingdom, parliamentary institutions, rather than a canonical constitutional text as in almost all states, are sovereign.<sup>90</sup> According to the orthodox British constitutional doctrine, Parliament holds inherent powers that can certainly be delegated, but not revoked without revolutionising

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<sup>85</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 97.

<sup>86</sup> Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 176; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 2; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 81.

<sup>87</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 36.

<sup>88</sup> David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 331.

<sup>89</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 3.3; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 29.

<sup>90</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 61 and 315; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 277.

British constitutionalism.<sup>91</sup> in line with the Hobbesian tradition according to which constitutional power is 'impermeable, indivisible and unshareable',<sup>92</sup> Parliament holds both constituent power and constituted powers.<sup>93</sup> In practice, British constitutional law simultaneously empowers Parliament and follows from its acts.<sup>94</sup>

Parliament is the cornerstone of British constitutional governance. Accordingly, Parliament has been both the pillar of the British institutional system and the pedestal of British statehood and nationalism.<sup>95</sup> Since the enactment of the Magna Carta in 1215, the Westminster Parliament has made the norms through which English and, eventually, British citizens could rule themselves.<sup>96</sup> Parliament has consistently played an active and trailblazing role to devise a framework of democratic constitutional governance. Its authoritativeness, especially in ancient times, has relied on the alliance between the monarch (the Crown), the elected representatives of the people (the House of Commons), and the members of nobiliary or religious elites (the House of Lords).

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<sup>91</sup> Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17(2) *King's Law Journal* 255, 259; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper 2009*, 15 and 25.

<sup>92</sup> David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 179.

<sup>93</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 184; Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17(2) *King's Law Journal* 255, 259; *ibid* 179; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 21-22.

<sup>94</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 314; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 27-28; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 126.

<sup>95</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 858; Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 122.

<sup>96</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 1.2.

These institutions have jointly held, though not necessarily cohesively, what can be characterised as parliamentary powers. Although the Crown retained the last word until the Glorious Revolution, the people has had for centuries the guarantees that (some of) its liberties would be upheld and that elected officials would have a decisive say on the governance of the state.<sup>97</sup> Furthermore, since modern times, Parliament has held the exclusive power to translate into law the will of the British people through the enactment of statutes.<sup>98</sup>

Normatively, the principle of parliamentary sovereignty, in its orthodox sense, provides that Parliament can make and unmake any law and that no other institution can prevent or inhibit it from doing so. According to Blackstone, a statute enacted by Parliament 'is the exercise of the highest authority that this kingdom acknowledges upon earth'.<sup>99</sup> The legal British constitution is then embodied by a corpus of statutes instead of being enshrined in a single canonical text, which is what makes it so singular both in Europe and in the world. This assertion is coherent with Wheare's finding that the most significant British constitutional rules 'are scattered about in a number of documents' that are neither entrenched nor completely safeguarded from never being amended by Parliament.<sup>100</sup>

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<sup>97</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 3-4; Robert Colls, *Identity of England* (Oxford University Press 2002) 3, 4 and 16.

<sup>98</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 52; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 137; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 232; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 1.1.

<sup>99</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 129.

<sup>100</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 5.

It has been recognised that some statutes are more influential and somewhat equal than others within the British constitutional order.<sup>101</sup> Some statutes are characterised as constitutional because they have substantively and substantially constituted the British state and polity. Elazar observes that these constitutional statutes have been crucial to establish the British state, to institutionalise its mechanisms of governance, and to assert its defining societal values and characteristics.<sup>102</sup> For instance, constitutional statutes are the devices by which most British institutions, such as all courts except the High Court,<sup>103</sup> have been constituted as well as shaped and reshaped through a single, standardised, process of enactment.<sup>104</sup> Moreover, Blackstone considers that decisive protections of individual rights and of the liberties that are intrinsic to parliamentary democracy have been provided in statutes endowed with a distinct authority.<sup>105</sup> Courts have given, especially in contemporary times, a preponderant interpretative weight to the content of these statutes.<sup>106</sup> They have also considered that the legislative intents underlying the enactment of these statutes reflect the exercise of a parliamentary constituent power that is yet devoid of formally supreme, entrenched, embodiments.<sup>107</sup> That is consistent with the fact that statutes only make sense when they are grasped beyond their literal sense and when their societal impact is assessed

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<sup>101</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 65.

<sup>102</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 163.

<sup>103</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 105; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 105 and 109.

<sup>104</sup> Andrew Le Sueur, 'The Foundations of Justice' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 212.

<sup>105</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 95 and 104.

<sup>106</sup> David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 202.

<sup>107</sup> *ibid.*

comprehensively and substantively.<sup>108</sup> Consequently, although statutes are the primary embodiments of British parliamentary sovereignty, they are essentially instrumental in the achievement of larger aims, which they cannot pursue if they are apprehended in isolation.

The exercise of British constituent powers by parliamentarians and through essentially political deliberative processes has consolidated the particularly close link between legal and political constitutionalisms.<sup>109</sup> The importance of the political dimension of statutory law is far from compromising their normative and legal characters since that is what provides and guarantees its authority.<sup>110</sup> Parliamentary powers cannot be exercised efficiently when their embodiments (statutes) cannot be enforced concretely, regardless of what is posited or asserted rhetorically, because citizens do not regard them as legitimate and, thus, binding.<sup>111</sup> The authority of Parliament then relies on the citizens' trust that this institution can uphold their interests and act in conformity with the democratic principles that are at the heart of British constitutionalism.<sup>112</sup>

Although that is studied more extensively later, it is crucial to remember that the democratic dimension of parliamentary powers

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<sup>108</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 271; John Bell and George Engle, *Cross – Statutory Interpretation* (3<sup>rd</sup> edn, Butterworths 1995) 22 and 49.

<sup>109</sup> Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 286 and 298.

<sup>110</sup> Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 134-35 and 141.

<sup>111</sup> Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 117; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 381.

<sup>112</sup> *R (Jackson) v Attorney General* [2005] UKHL 56 [126]; Peter Oliver, 'Abdicating and Limiting Parliament's Sovereignty – Reply to Goldsworthy' (2006) 17(2) *King's Law Journal* 281, 283; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 11.3.

has not always been as salient as in contemporary times. Initially, parliamentary sovereignty was primarily aristocratic since core powers were held by the monarch and by those whom she appointed to sit in the House of Lords. The House of Commons, which has always been the sole elected parliamentary institution, could not bypass the will of these influential elite institutions within a parliamentary system whose components had to work in synergy.<sup>113</sup> Still, over time, the relevance of the aristocratic components of British parliamentarism and constitutionalism, despite their continuous existence with few formal alterations, has been significantly limited to maximise the power of elected parliamentarians.<sup>114</sup> The House of Commons has progressively become the genuine holder of parliamentary sovereignty,<sup>115</sup> and its members, who are directly accountable to the people, have had to exercise it with respect for its interests.<sup>116</sup> Ultimately, the exercise of parliamentary sovereignty has become instrumental to both empower and constrain parliamentarians and is nowadays hardly dissociable, albeit mostly indirectly, from the exercise of popular sovereignty.<sup>117</sup>

In that vein, the most concrete contemporary counterpower to the power of Parliament to enact statutes is not formally legal or

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<sup>113</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 50.

<sup>114</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 51.

<sup>115</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 286; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 3.5.

<sup>116</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 199.

<sup>117</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 29; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 149; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 542; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 46-47 and 271; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 141-42.

institutional, but political or, more accurately, electoral. At least theoretically, the constitutional sovereignty of Parliament entails that, legally speaking, it can do no wrong. Still, Gordon notes and demonstrates that principles like the rule of law have shaped the exercise of parliamentary powers to prevent them from being used against the popular will and, thus, abused.<sup>118</sup> This will emerges as a compromise following debates between different groups that are represented within the state and its deliberative institutions, especially since the people is not a monolithic block.<sup>119</sup> Gordon then argues that the British institutional framework, within which Parliament is sovereign, can internalise the requirements of political constitutionalism without having to circumscribe the formal scope of legislative power.<sup>120</sup> This argument is coherent with Anthony King's ideas and reinforces the claim that the core virtues of British constitutionalism (stability, moderation, and effectiveness) can only be upheld when they are grasped beyond formalism.<sup>121</sup>

Accordingly, statutes are far from being the sole normative sources of British constitutionalism. In any state, as highlighted by Macdonald, there is 'a multiplicity of normative forms' that can certainly be statutory, but also judicial, customary, or political.<sup>122</sup> Considering the peculiar dual nature of the British constitutional tradition, it has been broadly accepted that the substance of

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<sup>118</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 30.

<sup>119</sup> John Bell and George Engle, *Cross – Statutory Interpretation* (3<sup>rd</sup> edn, Butterworths 1995) 24-25 and 27.

<sup>120</sup> Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 133 and 141.

<sup>121</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 47.

<sup>122</sup> Roderick Macdonald, 'Kaleidoscopic Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 271.

statutes is complemented by other normative devices.<sup>123</sup> That is how the British constitutional order, which is devoid of a supreme constitutional text, can be efficient, pragmatic, and versatile. Concretely, unposited, and rather intangible, sources like equity,<sup>124</sup> case law, parliamentary practices, and constitutional conventions are essential to make sense of British law, especially when statutes are ambiguous or incomplete.<sup>125</sup> Secondary constitutional sources such as governmental documents, memoranda, reports, and codes can also be very useful to interpret statutes pragmatically, without textualist rigidity.<sup>126</sup> Furthermore, the ability of judges to shape the British constitution is notable. British courts can devise norms out of particular cases and set binding precedents from them.<sup>127</sup> Although judges should not contradict parliamentary will, strike down statutes, and prevent their decisions from being overturned by subsequent statutes, their rulings have filled critical statutory voids and then produced substantial norms.<sup>128</sup> As a result, the normative authority of judicial rulings and precedents is comparable to that of enacted statutes,

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<sup>123</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 107.

<sup>124</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 59; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 7.

<sup>125</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 66 and 107; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 4.

<sup>126</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 44.

<sup>127</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 3; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 137.

<sup>128</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 116; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 109; Robert Colls, *Identity of England* (Oxford University Press 2002) 53.

customs, or conventions,<sup>129</sup> particularly regarding the assertion and the upholding of constitutional principles<sup>130</sup>.

Ultimately, all these sources make up for the absence of a canonical British legal constitution and complete statutory law as they set the behavioural standards that are expected from political and societal institutions and permit grasping statutory provisions holistically.<sup>131</sup> These mostly intangible sources can conciliate the flexibility of the British constitution with the meeting of the reasonable expectation that its norms are precise and responsive to the popular will. They are integral parts of a hybrid British constitutional system whose essence is very coherent with that of the common law. Nonetheless, it shall be ensured that the diverse components of this system can be operated jointly in a coherent and efficient manner.

### **3.2.3. The Absence of a British Normative Hierarchy**

Despite the plural nature of British constitutionalism, it is crucial to recognise that there is no such thing, as noted previously, as a British normative hierarchy from a formal perspective. Indeed, the fact that Parliament is both the sovereign and the legislator entails that there are few distinctions between constituent and constituted powers and that there can be no canonical constitution.<sup>132</sup> While

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<sup>129</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 12-13.

<sup>130</sup> John Bell and George Engle, *Cross – Statutory Interpretation* (3<sup>rd</sup> edn, Butterworths 1995) 42.

<sup>131</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 284-85; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 3; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 10.

<sup>132</sup> Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 168-69; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 461.

Parliament holds constituent powers substantively, it exercises them through the same mechanisms by which it enacts any 'ordinary' statute.<sup>133</sup> Since statutes cannot be subordinate to constitutional provisions, there would be no ultimate constitutional rule of recognition, at least formally speaking.<sup>134</sup> According to Elliott and Thomas, what explains British constitutional exceptionalism is not as such its unposited or non-canonical character, but rather the absence of formally supralegislative norms.<sup>135</sup> Concepts like amending formulas and supermajorities, which increase the threshold required to enact constitutional norms, complexify their production, and sacralise their status, are foreign to British constitutionalism.<sup>136</sup> In practice, a single, ordinary, mechanism is used to enact statutes regardless of their potentially constitutional worth, which directly clashes with any idea of constitutional supremacy.<sup>137</sup> From an orthodox perspective, no British norm can directly constrain the subsequent exercise of legislative powers to ensure that it is done in compliance with other norms. That would be the case even if those norms were intended to have structuring and binding constitutional effects. For instance, if two statutes contradict themselves, regardless of their substantive importance, it has long been considered that the most

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<sup>133</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 39-40; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 65; Robert Colls, *Identity of England* (Oxford University Press 2002) 54; Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 168; Richard Gordon, 'Constitutional Change and Parliamentary Sovereignty – The Impossible Dialectic' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 155.

<sup>134</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 313; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 16.

<sup>135</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 78.

<sup>136</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 37; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 169.

<sup>137</sup> House of Lords Select Committee on the Constitution, *Constitution – First Report* (2001) para 18.

recent one would repeal the older one, even if Parliament did not explicitly express its intent to do so.<sup>138</sup> Therefore, supralegislativity, and more broadly formal constitutionalism, cannot exist in the United Kingdom as the legislative and sovereign powers of Parliament are deemed absolute.<sup>139</sup>

According to orthodox constitutional principles, the societal value of a statute shall not impact on whether it should be safeguarded from being amended by a simple parliamentary majority. The traditionalist primacy of statutory law implied that no constitutional statute could be more equal than another in the absence of a formal Kelsenian normative hierarchy.<sup>140</sup> That has been famously exemplified by the Diceyan assertion that there would be no normative difference between the Act of Union with Scotland and the Dentists Act, 1878.<sup>141</sup> If a founding statute of the British state was not meant to have a higher normative value than a rather mundane one, it could legitimately be asked whether some norms could legally bind the conduct of political actors after their enactment. Certainly, some statutes, such as the Magna Carta, the Bill of Rights, or the Act of Settlement, are clearly constitutional substantively because they have constituted the modern British

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<sup>138</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 23.

<sup>139</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 65; *ibid* 296; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 5, 16 and 18; Richard Gordon, 'Constitutional Change and Parliamentary Sovereignty – The Impossible Dialectic' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 155.

<sup>140</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 38; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 12; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 15.

<sup>141</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 37 and 78.

polity and have been revered by most Britons.<sup>142</sup> Still, it can never be overlooked that these statutes were not enacted through specific, complex, and legally constituent mechanisms. Consequently, British constitutional statutes cannot be identified unambiguously by legal means,<sup>143</sup> which prevents delimiting the contours of an essentially informal British constitution.

However, it has been considered that, although they complement statutes, secondary sources of law are normatively subsidiary to them.<sup>144</sup> These sources only have a suppletive and residual nature, since they cannot set new independent duties, and are only authoritative when statutory law is imprecise or non-existent. Sources like judicial rulings, prerogatives, conventions, or the common law are helpful to interpret statutes, but they should not contradict them.<sup>145</sup> Moreover, as long as such intent is clearly expressed,<sup>146</sup> a statute may extinguish these sources as it can narrow (or nullify) their effects or integrate their substance within its text.<sup>147</sup> Nonetheless, there is no Kelsenian British normative hierarchy. In fact, the primacy of statutes over politically constitutional sources does not entail that political initiative on normative matters can be curbed systematically by statutes as well as a formal constitution could.

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<sup>142</sup> Haig Patapan, 'Australian Federalism: An Innovation in Constitutionalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 494; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 5.

<sup>143</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 44-45.

<sup>144</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 132.

<sup>145</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 75; *ibid* 23.

<sup>146</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 18.

<sup>147</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 73; Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 136.

Ultimately, the simplicity that characterises the enactment and the amendment of British constitutional norms simultaneously reflects its pragmatic versatility and its inner fragility. It also highlights the essence of a constitutional tradition of which the absolute character of fundamental, supralegislative, constitutional norms can hardly be a staple.<sup>148</sup> The foundations of the British state are somewhat shaky since its constitution can hardly entrench, as it should from a formalistic perspective, its defining norms and principles in rather absolute terms.<sup>149</sup> The legally unconstrained power of Parliament to revolutionise British constitutionalism by the vote of a simple majority is far from being trivial.<sup>150</sup> Nevertheless, it cannot be ruled out that political devices and processes can (somewhat) set in stone core constitutional principles and features and ensure that they can only be altered following diligent deliberation.<sup>151</sup> The British constitutional order could then quash absolutistic and abusively legalistic claims and secure a balance between conflicting interests by political, rather than by formally legal, means. Hence, in the next section, I investigate more exhaustively the veracity and opportunity of this rather peculiar and unique prospect.

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<sup>148</sup> John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 21.

<sup>149</sup> *ibid* 38.

<sup>150</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.2.

<sup>151</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 271; John Laws, 'The Miller Case and Constitutional Statutes' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 15.66.

### **3.3. The Peculiar British Constitutional Structure**

To grasp the tangible effects of the non-existence of a British normative hierarchy due to the supremacy of statutory law, I shall study the role of Parliament as the cornerstone of the British constitutional structure more thoroughly. The fact that, both legally and politically, Parliament is the pillar of the state has critical implications on the safeguard of constitutional devices and principles. The great normative value of ordinary legislative statutes can only help to understand how British constitutionalism works if the latter is apprehended comprehensively. That is particularly opportune since the implementation of democratic principles in the United Kingdom has consolidated the powers of its parliamentary institutions instead of narrowing their scope and their extent. However, it shall ultimately be asked if the wills of Parliament can genuinely be conflated with these of the people.

#### **3.3.1. The British Combination rather than Separation of Powers**

The sovereignty of a supreme British Parliament has prevented the rise of horizontal watertight separation of constitutional powers as well as that of checks and balances like those set by judicial review.<sup>152</sup> Still, that does mean that the British constitution has not separated powers among several legal and political institutions, especially since such a separation is a fundamental element of any system based upon the rule of law.<sup>153</sup> Although the British separation of powers is not rigid and Montesquieuan, it relies on the need to prevent groups, whether elite or grassroots, from

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<sup>152</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 86.

<sup>153</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 287.

becoming hegemonic<sup>154</sup> within institutions that shall work cohesively. That is coherent with Blackstone's argument that the best way to diffuse power consists in sharing out powers flexibly between the institutional components of Parliament instead of establishing a complex network of institutional counterpowers.<sup>155</sup> The British model of separation of powers seeks more to optimise the role of these institutions through the valuation of their reciprocal actions than to limit their respective powers as such.<sup>156</sup> The lines of separation in British constitutionalism are primarily based upon the relationships between the members of the polity rather than on the functions exercised by state institutions.<sup>157</sup> Concretely, the separation of British constitutional powers is achieved through an overlap of powers within the Westminster system.

In that vein, Bagehot conceptualises British constitutionalism as the outcome of an alliance between dignified and efficient components that shall be operationally combined rather than tightly separated. From his perspective (which was previously glimpsed), the British constitution is made of two complementary parts that are as indissociable as the legal and the political sides of constitutionalism are. The dignified parts of a constitution foster

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<sup>154</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 195-96.

<sup>155</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 53, 111-12, 132 and 163; Maxwell Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 253.

<sup>156</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 71; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 207.

<sup>157</sup> Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 66; Alison Young, 'The Relationship between Parliament, the Executive and the Judiciary' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 352.

a citizen sense of belonging that is crucial to uphold its legitimacy, while its efficient parts ensure that authoritative norms are devised and implemented functionally.<sup>158</sup> In practice, the dignified parts of the British constitution consolidate the socio-political grounds on which power has emerged in the United Kingdom and the efficient parts set how this power should be organised, exercised, and appropriately limited.<sup>159</sup> The Bagehotian separation of powers is commodious because, as highlighted by Bogdanor, it recognises that constitutional power, which should be apprehended beyond legalism, should be cultivated societally before being exercised.<sup>160</sup> For instance, although institutions like the Crown and the House of Lords hold very circumscribed decisional powers nowadays, they have retained a considerable amount of influence and a substantial constitutional value because they fulfil dignified duties.<sup>161</sup> This brilliant observation is consequent with the nature of a British constitution, whose sense and operational logic cannot only be found within its formal and technical arrangements.

Hence, it is opportune to examine on which precise bases British constitutional powers are separated concretely. A particularly salient division is the one between aristocratic and democratic institutions. Certainly, monarchical absolutism was never genuinely favoured in the United Kingdom since the monarch has always had to abide by the law, and British parliamentarism provided normative powers to the people earlier and more

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<sup>158</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 72.

<sup>159</sup> *ibid* 73.

<sup>160</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 21.

<sup>161</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 157 and 165; *id*, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 62, 76, 301, 303 and 307; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 24.

significantly than elsewhere.<sup>162</sup> However, over time, the popular, democratic, component of parliamentarism has become prominent, both from dignified and efficient perspectives. Although the Glorious Revolution did not lead to extensive formal changes to the British constitutional architecture,<sup>163</sup> the powers and prerogatives of the Crown have been exercised by a government that is accountable to the House of Commons.<sup>164</sup> While the monarch officially remains the head of the British state, she ‘reigns but does not rule’,<sup>165</sup> to use Bogdanor’s words. In fact, her powers are effectively held by a government that must earn Parliament’s trust to act.<sup>166</sup> Considering that the government holds vast powers in key policy areas,<sup>167</sup> Parliament has a decisive say not only on the enactment of statutes but also on the identity of those who execute them and devise corollary policies. The principle of ministerial accountability and responsibility then blurs a formal

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<sup>162</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 3.

<sup>163</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 20; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 45.

<sup>164</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 211, 269, 286 and 311; *Blackburn v AG* [1971] 1 WLR 1037 [5]; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 65-66; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 2; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 369; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 24; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [43]; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 242; Thomas Poole, ‘The Executive in Public Law’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 200.

<sup>165</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 1.

<sup>166</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 143; *ibid* 10 and 14; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 22; Robert Blackburn, ‘Queen Elizabeth II and the Evolution of the Monarchy’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 168.

<sup>167</sup> Thomas Poole, ‘The Executive in Public Law’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 188.

separation of powers between Parliament (legislative power) and a government officially headed by the monarch (executive power).<sup>168</sup> The rise of this principle in modern times entails that Parliament has seldom served as a counterpower to the government, and vice-versa.<sup>169</sup>

In practice, the extent of executive powers and the modalities of their exercise have been essentially set conventionally to ensure that Parliament and the government can cooperate harmoniously and effortlessly.<sup>170</sup> Otherwise, the obstruction of one of these institutions by the other only leads to a stalemate that condemns both to impotence. More precisely, the members of the government are subjected to parliamentary scrutiny, which pressures them never to lose sight of the public interest, and must rely on members of Parliament to convert its policies into statutes.<sup>171</sup> Consequently, legislative and executive powers shall be exercised cohesively, which is crucial to enhance the efficiency

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<sup>168</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 107.

<sup>169</sup> Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 866; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 24; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [55]; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 58.

<sup>170</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 102; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 196; Thomas Poole, 'The Executive in Public Law' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 190.

<sup>171</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 303; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 132; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 3.4; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [46].

of British constitutionalism from a Bagehotian perspective.<sup>172</sup> Although the conflation between the roles and the legitimacy of Parliament and these of the government has permitted to quash absolute monarchical claims, it has since consolidated the dominant positions of these institutions. When the government earns the trust of the House of Commons, which it must do, it can take advantage of its narrowed, albeit commanding, prerogative and of the elected officials' broad legislative powers to effectively become omnipotent.<sup>173</sup> As a result, considering the growing polarisation between Government and Opposition MPs in the House of Commons,<sup>174</sup> parliamentary sovereignty would amount to be, at least politically, the supremacy of the current Government.<sup>175</sup> Nonetheless, to avoid that its successor feels entitled to dismantle its legacy, that Government makes sure that the norms it devised are legitimate and rely on sufficiently broad societal consensuses.<sup>176</sup>

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<sup>172</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 78; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 3.

<sup>173</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 283 and 310; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 101 and 197; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 14 and 75; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 23; Alison Young, 'The Relationship between Parliament, the Executive and the Judiciary' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 339.

<sup>174</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 16; John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 12.

<sup>175</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 3.6; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 29; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 50; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 58.

<sup>176</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 139.

While McHarg accurately notes that parliamentary institutions do not hold ‘a monopoly over norm production’,<sup>177</sup> they yet exert a tentacular influence on the composition and the functioning of any British institution. Despite their dignified or efficient role, no institution could challenge the prominence of Parliament, at least from a legal perspective.<sup>178</sup> The institutional changes resulting from the Glorious Revolution have simply shifted the balance of powers from the Crown to the House of Commons instead of separating them formally in accordance with liberal-republican, Montesquieuian, postulates.<sup>179</sup> In fact, parliamentary sovereignty has kept up and has been held almost exclusively by the House of Commons. The legally absolute powers of Parliament, which are still shared *de jure* between its three components, have been exercised almost exclusively by elected officials since modern times.<sup>180</sup> Although ‘bills may originate in either House’, the exclusive powers of the House of Commons to hold the government accountable; ‘to grant supply’; and to ‘impose and appropriate all charges upon the people’ explain why this House has overshadowed the Crown and the Lords as the central parliamentary, and thus constitutional, institution.<sup>181</sup>

Nonetheless, the British separation of powers could be more rigid than it has long appeared. Since the 1990s, several reforms have been proposed and undertaken to reinforce this separation,

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<sup>177</sup> Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 865.

<sup>178</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 80.

<sup>179</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 5 and 8; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 125 and 131.

<sup>180</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 31; Andreas Rahmatian, ‘Brexit and Scotland: Centralism, Federalism or Independence?’ (2018) 26(4) *European Review* 616, 621.

<sup>181</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 26.4.

especially to narrow the scope of parliamentary sovereignty.<sup>182</sup> The British combination of powers could increasingly become a reality devoid of any conceptual or effective confusion. Notably, while the House of Lords held the ultimate appellate jurisdiction until then,<sup>183</sup> an independent Supreme Court was established in 2009 following a Montesquieuan pattern.<sup>184</sup> Since then, Parliament no longer holds legislative and judicial powers simultaneously. As it has consistently aimed to secure the independence of courts, it is normal that one of its components ceased to be a court.<sup>185</sup> Considering the essence of a common law system, it can be expected that Parliament and courts can work constructively as partners without being indistinct. However, while courts can interpret and enforce statutes, they cannot strike them down due to a continuous reluctance to jeopardise parliamentary sovereignty by judicial means.<sup>186</sup> Accordingly, especially from an orthodox perspective, parliamentary powers cannot be formally constrained by other institutions, even when they are exercised dubiously.<sup>187</sup> In fact, as long as the constitutional role of Parliament

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<sup>182</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 289.

<sup>183</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 7.

<sup>184</sup> Matt Qvortrup, "Let Me Take You to a Foreign Land": The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 59.

<sup>185</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 270; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 28.

<sup>186</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 3-4, 58 and 71; HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 174; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 147; *Blackburn v AG* [1971] 1 WLR 1037 [15]; John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper 2009*, 8; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 348; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 235; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 54.

<sup>187</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 19-20; Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 49; John Baker,

is not comprehensively rethought, there can hardly be a formal separation of powers in the United Kingdom.

Furthermore, despite the progressive democratisation of British constitutionalism, citizens have not become the British sovereigns since their rights and powers are exercised indirectly by their representatives in the Westminster Parliament.<sup>188</sup> The powers of these representatives are legally unlimited and politically circumscribed by the need to exercise them in accordance with the popular will.<sup>189</sup> These representatives then hold the last word on several political and constitutional matters and make consequential decisions through the deliberative processes that have fostered a collaborative political culture.<sup>190</sup> So, as long as the people consents to be ruled by members of the House of Commons who were elected to uphold its interests, nothing can counter them from making authoritative norms.

### **3.3.2. The Lack of Genuinely Institutional Counterweights to British Parliamentary Sovereignty**

At this point, I have made it quite clear that Parliament is the absolute British sovereign whose will can hardly be constrained formally or institutionally.<sup>191</sup> This institution holds significant

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'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 12.

<sup>188</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 17; Robert Colls, *Identity of England* (Oxford University Press 2002) 23.

<sup>189</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 285; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 39.

<sup>190</sup> Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 60; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 5.

<sup>191</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 39; HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 186.

privileges that empower it to rule itself independently and to fully exercise its central constitutional role.<sup>192</sup> Moreover, due to the conflation between its constituent and constituted powers, it has drawn its status from a source that, in other states, could have constrained or contradicted its extensive powers: the prerogative. Indeed, May has observed that ‘the legal existence of Parliament results from the exercise of royal prerogative’, which has been at the basis of British constitutionalism.<sup>193</sup> British constitutional powers have been traditionally held by the Queen-in-Parliament rather than by totally independent legislative institutions.<sup>194</sup> These monarchical powers were neither natural, nor absolutistic, but instead rooted in fundamental structuring principles that have grown institutionally.<sup>195</sup> For instance, it quickly became a British constitutional staple that the monarch could never use her powers, all extensive they might be, for opportunistic or despotic purposes, since she has always had to comply with the rule of law.<sup>196</sup>

However, despite the role of the prerogative to establish functional institutions,<sup>197</sup> its normative worth has been drastically limited

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<sup>192</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) paras 11.14, 12.1 and 16.1.

<sup>193</sup> *ibid* para 1.5.

<sup>194</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 162; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 282; AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 7; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 137.

<sup>195</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 177; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 8.

<sup>196</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 159 and 168; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 6; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 196.

<sup>197</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 284-85; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 237; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 8.31; Michael Gordon, *Parliamentary*

since the Glorious Revolution. Its scope, especially when it is held by the Crown (which is also a parliamentary institution), has been significantly circumscribed since its existence and its relevance have been subjected to the will of the elected members of the House of Commons.<sup>198</sup> As asserted in several cases since the landmark *Case of Proclamations*, prerogative powers must fit together with the content of statutory and common laws and cannot be used to overshadow Parliament or to contradict its will.<sup>199</sup> The prerogative is indeed a residual power that has been progressively, as stated in the *Burmah Oil* ruling, ‘altered and curtailed’<sup>200</sup> by the exercise of the constitutional supremacy of Parliament.<sup>201</sup> Although the prerogative provides vast discretionary powers to their holders, they can never be exercised in a manner that contradicts statutory provisions.<sup>202</sup> In fact, the prerogative only remains a commanding legal source as long as it is held by officials that are members of Parliament (such as

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*Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 23.

<sup>198</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 174; *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508, 526; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 110 and 196; Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79(6) *Modern Law Review* 1019, 1027; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 267; Anne Tworney, ‘Miller and the Prerogative’ in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 9.69; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 1.6.

<sup>199</sup> *The Case of Proclamations* (1610) 12 Co. Rep. 74; *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508, 526; Andreas Rahmatian, ‘Brexit and Scotland: Centralism, Federalism or Independence?’ (2018) 26(4) *European Review* 616, 622; Paul Craig, ‘Brexit in the UK Constitution’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 100; Thomas Poole, ‘The Executive in Public Law’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 202-3; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [41] and [42].

<sup>200</sup> *Burmah Oil Co. (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 [932/46].

<sup>201</sup> *ibid*; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 267.

<sup>202</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 492.

members of the government), that have been appointed by it or that act on its behalf. Consequently, Parliament has added within its normative ambit a power that could have been used to check or limit its power and to compromise its central constitutional role.

Furthermore, the government has been empowered to exercise directly considerable legislative powers because of the British conception of responsible government and its corollary combination of powers. Parliament can delegate statutorily some of these powers, that are more precise and adaptable than general statutes and over which it formally has a monopoly, to the government, which can enact complementary secondary legislation.<sup>203</sup> For instance, the enactment of Henry VIII clauses within enabling statutes empowers the government to amend these statutes unilaterally under the strict conditions set by these clauses.<sup>204</sup> It can be anticipated that transferring such legislative powers to the government would contradict parliamentary sovereignty and undermine democratic and deliberative norm-making processes since their scrutiny is concretely limited.<sup>205</sup> However, this concern is unfounded because delegated legislation can only be enacted when Parliament wants so. Any delegation of legislative power must follow from an express statutory clause and not go beyond, and not against, what it provides.<sup>206</sup> Besides,

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<sup>203</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 595 and 600; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 31.1.

<sup>204</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 600; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 31.1.

<sup>205</sup> John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 91; Adam Tucker, 'Brexit and the Problem with Delegated Legislation' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 240-41.

<sup>206</sup> *The Zamora* [1916] 2 AC 77 (14/29); Anne Tworney, 'Miller and the Prerogative' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 9.17.

secondary legislation can be reviewed judicially, which fundamentally differentiates it from statutes, to ensure that its substance complies by the enabling clauses included in statutes<sup>207</sup>. Consequently, it is improbable that the delegation of legislative powers to members of the executive branch by Parliament jeopardises its central constitutional role.

Still, the absence of significant legal counterweights to the sovereignty of Parliament is explained by one of its attributes. Although that can sound paradoxical at first glance, Parliament can do anything except relinquish its sovereignty. Certainly, this institution can, on its explicit terms, narrow the scope of its powers statutorily.<sup>208</sup> Still, it is doubtful, and heretical from an orthodox perspective, that Parliament can deliberately abandon its normative powers permanently.<sup>209</sup> Even when this overarching institution enacts statutes that are intended to constrain its powers, they are neither absolute nor immutable because it should always have, at least theoretically, the power to take back control over what it previously relinquished.<sup>210</sup> All sovereign and omnipotent Parliament might be, its powers are then legally limited by its inability to bind its successors and to surrender its substantively absolute jurisdiction.<sup>211</sup> What might look like an intricate paradox yet makes much sense considering the logic underlying British constitutionalism. Indeed, relying on Wade's contemporary arguments, which differ from his previous orthodox stances, Elliott and Thomas argue that the legal and political limits to the extent of

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<sup>207</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 31.4.

<sup>208</sup> *ibid* para 11.8.

<sup>209</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 60.

<sup>210</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 125.

<sup>211</sup> HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 174; *ibid* 57.

parliamentary sovereignty should be distinguished to be properly understood.<sup>212</sup> Legally speaking, if the sovereignty of Parliament is to mean something, this institution should not be empowered to cut its wings or those of its successors. It could not constrain its normative powers in a manner that prevents it from exercising its constituent powers, which shall be absolute (at least theoretically). Nonetheless, from a political perspective, Parliament can set conditions to the enactment of statutes that would change the substance of the British material constitution, so that their legitimacy can be secured.<sup>213</sup> Although such constraints to its legislative powers are devoid of any formally constitutional value,<sup>214</sup> Parliament can impose that what effectively constitutes the United Kingdom can only be altered deliberately, following careful political deliberation.

This reality, which has become increasingly conspicuous in contemporary times, is consequent with the fact that British core constitutional features are safeguarded by the operation of political institutions and processes rather than despite them.<sup>215</sup> Parliamentary sovereignty, more than that of a formal constitution, values the exercise of power and the worth of deliberative political devices instead of fearing them or seeking to undermine their societal importance.<sup>216</sup> In fact, British constitutionalism relies less

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<sup>212</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 234-35.

<sup>213</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 108 and 310.

<sup>214</sup> *ibid* 8.

<sup>215</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 29 and 97; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 273; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 6 and 325.

<sup>216</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 10; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 21; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 102.

on a desire to prevent the rise of liberticidal popular majoritarianism than on that to prevent the absolute rule of unelected monarchs.<sup>217</sup> Especially since the Glorious Revolution, Britons have considered that they enjoy liberties because of, and not despite, Parliament.<sup>218</sup> Consequently, the concern that this institution, which is the pillar of British democracy, might exercise its broad powers against the people has been considerably less acute than in other states. Nevertheless, it is uncertain that this consideration has always been deemed accurate throughout the United Kingdom.

### **3.3.3. The Centralising Effects of Parliamentary Supremacy**

At least in strict constitutional theory, Parliament can make of its will the law of the whole United Kingdom and no institution, whether local, administrative, or judicial, can stop it from doing so.<sup>219</sup> As Bogdanor considers that this institution is like ‘the sun around which every planet revolves’,<sup>220</sup> its omnicompetence has triggered a powerful dynamic of centralisation within the British constitutional order. The hegemony of Parliament within it would entail that the operation of the British constitution is fundamentally unitary or at the very least centralised. In that vein, Bagehot argues

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<sup>217</sup> *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 568; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 46.

<sup>218</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 16.

<sup>219</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 24-25; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 57; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 33; David Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ (2005) 64(2) *Cambridge Law Journal* 329, 334; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 56.

<sup>220</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 1.

that 'the excellence of the British Constitution is that it has achieved this unity; that its sovereign power is single, possible, and good'.<sup>221</sup> Accordingly, the powers of Parliament, which is a single omnipotent institution, should be exercised unitarily and uniformly.<sup>222</sup> It then goes without saying that parliamentary sovereignty appears fundamentally antagonistic to divided or differentiated sovereignty.<sup>223</sup>

Certainly, the legal British constitution is built on the frame of unitary states. Still, and that is studied thoroughly in the next chapter, the United Kingdom, from a socio-political perspective, is far from being a homogeneous state. British constitutionalism has a sedimentary character, which has permitted to establish a united kingdom made out of several nations with distinctive histories and societal traits.<sup>224</sup> Despite the Anglo-centrism that has characterised traditional British jurisprudence,<sup>225</sup> its core integrative processes have not led to the assimilation of the English, Welsh, Scottish and Irish nations into an overarching and homogeneous nation. The inequation between legal and societal unitarisms is the cause of several British constitutional peculiarities that cannot be glossed over to understand why the United Kingdom is not a unitary nation-state.

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<sup>221</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 297.

<sup>222</sup> Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 226.

<sup>223</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 53; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 87; Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179, 186.

<sup>224</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 73.

<sup>225</sup> Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 542.

Nonetheless, there indeed was an English nation-state, on whose foundations a British state that has long been governed as a unitary state without being one sociologically was established.<sup>226</sup> The birth of an English nation, which was the sum of several 'warring kingdoms' that decided to come together to reach common goals and to fight common enemies,<sup>227</sup> is one of the first milestones of British history. Especially during the Tudor Era, a genuinely unified English nation could emerge sociologically as well as politically and legally.<sup>228</sup> The unitary essence of the English nation is particularly outstanding because it was upheld and consolidated centuries before the advent of the Westphalian nation-state. Consequently, it can be argued that England became a nation-state before this term became a definite constitutional concept. The United Kingdom, which is an aggregate of multiple nations, still has the constitutional structure of the former English nation-state. In fact, the constitutional practice of the British state has been shaped by the unitary ideal that characterised English constitutionalism.<sup>229</sup>

For centuries, it was deemed in England that any power, and especially sovereignty, had to be exercised uniformly. During the Middle Ages, a unique English system of governance was devised as the monarch held 'central control over the administration of

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<sup>226</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 133; Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 228.

<sup>227</sup> JC Banks, *Federal Britain?* (Harrap 1971) 23.

<sup>228</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 7.

<sup>229</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 135; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 26.

justice throughout his Realm'.<sup>230</sup> After the English Civil War, it became widely accepted that what would become the United Kingdom had to be ruled by a single sovereign Parliament following the traditional English model.<sup>231</sup> The importance of Parliament in the edification of the United Kingdom has been very significant since it has not only been the constituent of the British legal order, but also that of a composite British polity.<sup>232</sup> The Westminster Parliament enacted the Acts of Union between England and the other constituent nations, which are the normative foundations of the United Kingdom. Still, as this sovereign institution was empowered to act on behalf of all Britons,<sup>233</sup> its legislative powers could not be exercised in a differentiated manner to accommodate substate national interests.<sup>234</sup>

The unitarizing British status quo was hardly challenged during modern times because English citizens had no interest in changing it due to their effective dominance. Indeed, British political unitarism was never genuinely challenged in England, even in the sociologically Celtic region of Cornwall.<sup>235</sup> Although some

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<sup>230</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 53.

<sup>231</sup> Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 9.

<sup>232</sup> Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 141; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 45.

<sup>233</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 209; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 7; *Martin v Most* [2010] UKSC 10 [68].

<sup>234</sup> *Burmah Oil Co. (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 [27/46]; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 25; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 277.

<sup>235</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) para 329; Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 96; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 109.

elements of cultural regionalism remained valued,<sup>236</sup> the societal homogenisation of this nation was not stopped by their upholding in mostly private settings. Despite the establishment of relatively powerful local authorities in the nineteenth century,<sup>237</sup> the will to decentralise constitutional governance or to grant recognition to English regions or former realms was relatively weak.<sup>238</sup> Moreover, since 'local government derives its power and authority from parliament and exists as its creature',<sup>239</sup> it complemented the sovereignty of Parliament more than restraining it. No alternative to societal unitarism could be seriously considered in England as its citizens valued this reality.

For their part, the citizens of the Welsh, Scottish, and Irish nations generally felt correctly accommodated within the modern British constitutional order since British parliamentarism upheld their liberties more efficiently than their previous modes of constitutional governance.<sup>240</sup> Still, most citizens considered that their interests were even better protected by the Crown than by a House of Commons that could be very sensitive to (English) majoritarian impulses that could disserve them.<sup>241</sup> Since both institutions were parliamentary, their powers could yet be balanced politically to prevent minority nations from being assimilated due to the assertion of hegemonic English wills and overly centralising

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<sup>236</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 16.

<sup>237</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 208; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 26.

<sup>238</sup> JC Banks, *Federal Britain?* (Harrap 1971) 25; Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 32.

<sup>239</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 56.

<sup>240</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 46.

<sup>241</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 56.

dynamics.<sup>242</sup> The pragmatic implementation of the unionist doctrine and the implementation of (relative) political constraints on parliamentary sovereignty could safeguard the interests of the substate nations without granting them a particular status formally.<sup>243</sup> Therefore, at least in early modern times, the ability of the British constitutional framework to foster societal integration without assimilation ensured its stability and its durability.

Certainly, a sovereign Parliament can hardly provide the substate nations the opportunity to rule themselves within a multi-level governance framework. However, despite the unitary essence of British constitutionalism and parliamentarism, their effective multinational characters can hardly be disregarded in practice. Indeed, the role of Parliament was not apprehended uniformly throughout the United Kingdom. It was understood as being national in England, supranational in Wales and Scotland, and imperial in Ireland.<sup>244</sup> Attempting to conciliate legally and politically these varied understandings of British constitutionalism and parliamentarism has consistently been structuring but also challenging in practice.

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<sup>242</sup> Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 218; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 348.

<sup>243</sup> Michael Keating, 'Territorial Autonomy in Nationally Divided Societies: The Experience of the United Kingdom, Spain, and Bosnia and Herzegovina' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 138.

<sup>244</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 79-80.

#### **4. The Alliance between Multinationalism and British Constitutionalism**

For its meaning to be properly understood, the British constitution shall be apprehended with due consideration for the intrinsically multinational character of the British polity. This polity is the outcome of the alliance of the English, Welsh, Scottish and Irish nations within a cohesive British state. Its rulers have always had to find ways to ensure that diverse national identities coexist harmoniously. Depending on the ability of the British constitutional framework to balance the protection of state unity with the recognition of national diversity, it could either stand over time or be doomed to crumble. Consequently, I shall investigate what has structured the alliance between multinationalism and British constitutionalism, and how this alliance has evolved amidst changing times.

I first highlight that British unionism cannot be conflated with unitarism. Since there is no such thing as a homogeneous British *demos*, British unionism has to be construed from a pluralistic and multinational perspective. However, to substantiate this argument, I shall go back in time and study the legal and socio-political processes through which the United Kingdom was established. Finally, I examine the clashes between state unity and national diversity while considering how they can be conciliated, or not, since modern times, especially through devolution and, potentially, through the implementation of federal principles.

## 4.1. The Plurality of the United Kingdom

As I highlighted previously, the unitary nature of the British constitution has never really dovetailed the core characteristics of a multinational British polity. Unionism can only be a legitimate constitutional doctrine if it helps to uphold state unity without requiring the members of state institutions to negate substate national diversity. Indeed, the United Kingdom cannot be a state whose entities are effectively deemed inferior and subsidiary to a transcendent and uniform whole. Furthermore, an encompassing and accommodative understanding of statehood, which transcends the framework of the nation-state, has the merit of dovetailing the pragmatism and the flexibility that characterise British constitutionalism.

### 4.1.1. The Non-Existence of a Homogeneous British *Demos*

In the previous chapter, I noticed that the British constitution was not devised following a decisive constituent moment, and that the unitary character of parliamentary sovereignty clashed with the multinational societal nature of the United Kingdom. Despite the influence of multiple and commanding centripetal factors, this state and its constitutional framework have been devoid of a clear uniform subject (*demos*), which has reinforced their exceptional character.<sup>1</sup> The British state embodies an intrinsically aggregative and diverse polity that is constituted by distinct entities whose identities transcend strict ethnocultural lines.<sup>2</sup> The British Union,

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<sup>1</sup> Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 68.

<sup>2</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 2; Tom Nairn, *After Britain: New Labour and the Return of Scotland*

especially from a socio-political perspective, is heterogeneous as several distinctive traits of the nations composing it have historically been recognised. Consequently, British nationalism, if such a thing even exists, is neither organic nor irreducible.

In fact, the United Kingdom is more akin to a composite empire (regardless of the actual British Empire) than to a homogeneous nation-state.<sup>3</sup> It is a political ensemble that has been assembled through varied means, such as conquest, legal agreement, and colonisation.<sup>4</sup> Its constitutional framework was not devised based upon a deterministic and overarching plan that was meant to engender centralisation and whose finality was the establishment of a British nation-state.<sup>5</sup> It is rather the outcome of a contractual process that has been carried out in several distinct phases with respect for the distinctiveness of its components.<sup>6</sup>

Besides, the constitutional identity of the nation that has been at the heart of the British polity, England, has few substantive defining features.<sup>7</sup> At the opposite of the citizens of other

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(Granta Books 2000) 250; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 217.

<sup>3</sup> Krishan Kumar, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1, 4.

<sup>4</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 20; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 235; Robert Colls, *Identity of England* (Oxford University Press 2002) 35; Krishan Kumar, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1, 3.

<sup>5</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 2; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 250; Martin Loughlin, 'In Search of the Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 333.

<sup>6</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 73.

<sup>7</sup> Krishan Kumar, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1, 10; Andrew Mycock, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388, 390; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 200.

constituent nations,<sup>8</sup> the English people, as such, has been voiceless over the last centuries and somewhat unable to make clear claims about its destiny.<sup>9</sup> The lack of an exhaustive and carefully thought-out definition of its collective existence is coherent with the incremental and sedimentary nature of English, and also British, common law and constitutions. Although recent turmoil may force the English nation to assert what it wants more precisely,<sup>10</sup> there is no clear and unique English *demos*. Accordingly, a well-defined British *demos* could not emerge based upon the one of the most dominant constituent nation. Instead, British identity has primarily been shaped by an imperialist pride that relied more on a shared sense of belonging than on the existence of shared substantive identity features.<sup>11</sup>

However, the tenuousness of English nationalism does not entail that the constituent nations could always be properly recognised, and that England never attempted to use its dominant position domineeringly.<sup>12</sup> Although the argument that England has deliberately wanted to assimilate Wales, Scotland, and Ireland into a unitary, essentially Anglo-Saxon, state, should be nuanced, it cannot be dismissed out of hand. Indeed, it sheds light on two important realities. First, English rulers have not always grasped

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<sup>8</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 276.

<sup>9</sup> Guy Lodge and James Mitchell, 'Whitehall and the Government of England' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 96.

<sup>10</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 196; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 170.

<sup>11</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 27 and 56; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 14; Robert Colls, 'What Is British National Identity and How Do We Get It?' (2012) 52(52) *Soundings* 100, 102.

<sup>12</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 321; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 39.

and appreciated very well the societal and constitutional identities of Wales, Scotland, and Ireland. As these nations shared a Celtic heritage that clashed with the Anglo-Saxon English one, their citizens were systematically patronised and their singular traits were often overlooked,<sup>13</sup> especially those that were related to religion and language.<sup>14</sup> Second, since the British constitutional practice was mostly based upon English norms and principles,<sup>15</sup> they triggered strong centralising dynamics whose effects were considerable.<sup>16</sup> For instance, in everyday language, England, Great Britain, and the United Kingdom have frequently been characterised as pure synonyms.<sup>17</sup> Such dynamics could not even be counterbalanced by what can be coined as Celtic solidarity, because the constituent nations had few common interests effectively and, concretely, hardly had leverage on British governance.<sup>18</sup> Ultimately, beyond the fact that Parliament was sovereign, British constitutionalism was mostly construed unitarily in modern times, regardless of its plural and multinational origins.<sup>19</sup> Still, a deeper study of the concept of unionism broadens

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<sup>13</sup> JC Banks, *Federal Britain?* (Harrap 1971) 195; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 32; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 73; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 128.

<sup>14</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 62.

<sup>15</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 203; Robert Colls, *Identity of England* (Oxford University Press 2002) 73.

<sup>16</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 25.

<sup>17</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 23; Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 229; Michael Keating, 'The End of Union? Scottish Nationalism and the UK State' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 105.

<sup>18</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 14.

<sup>19</sup> Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 220.

perspectives and underlines how it can be implemented flexibly, with responsiveness to substate interests.<sup>20</sup>

#### **4.1.2. The Clash between Primordial and Banal Unionisms**

While the unification of England has been achieved mostly through the fostering of atavistic and teleological feelings,<sup>21</sup> that would not have been the case regarding the edification of the British polity. Determining whether the establishment of the United Kingdom was done through purposefully assimilatory politics so that a single nation with a substantively English identity could arise has been the subject of tense debates. Grasping the roots of the underlying doctrinal controversies is then crucial to conceptualise unionism accurately and to apprehend its constituent societal role.

On the one hand, in conformity with their argument that the British state is a union state, Rokkan and Urwin consider that ‘the peripheries tended to be ignored rather than actively integrated’ into a societal whole.<sup>22</sup> This finding concurs with Bulpitt’s, who notes that central institutions could rule indirectly the substate nations without having to subject them directly and expressly to, for instance, uniform linguistic and religious norms.<sup>23</sup> Unlike the

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<sup>20</sup> Michael Keating, ‘Reforging the Nation: Britain, Scotland and the Crisis of Unionism’ in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 109; Michael Burgess, ‘Constitutional Change in the United Kingdom: New Model or Mere Respray’ in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 189; David Marquand, ‘Federalism and the British: Anatomy of a Neurosis’ (2006) 77(2) *Political Quarterly* 175, 181; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 33.

<sup>21</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 138.

<sup>22</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 74.

<sup>23</sup> Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 86.

French 'Etat-nation',<sup>24</sup> the British state did not institutionalise a Jacobin ideal, according to which substate national diversity should be crushed to safeguard state unity against autonomist, and potentially secessionist, claims.<sup>25</sup> In practice, British unionism was deemed compatible with the persistent existence of substate nations, whose assimilation into a state effectively dominated by England was not openly sought.

On the other hand, it can be argued that seeking their assimilation has been an ineluctable corollary of the establishment of a British polity. Although it was achieved less violently and more consensually than in France or Spain, the national homogenisation of the United Kingdom has already been achieved, even by rather oppressive means.<sup>26</sup> Moreover, the increased links of interdependence between the constituent nations progressively lessened the differences between them.<sup>27</sup> In fact, the supremacy of the United Kingdom over an Empire on which the sun never set required to prevent differentiation for its internal constitutional governance to be efficient.<sup>28</sup> This British Empire would have effectively relied on the strong cohesion of the citizens of its

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<sup>24</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 96.

<sup>25</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 42; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 6; Michael Keating, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 108; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 130.

<sup>26</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Prueger Publishers 1968) 55; Krishan Kumar, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1, 7.

<sup>27</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 162.

<sup>28</sup> Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 87; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 5.

mainland.<sup>29</sup> So, despite the impossibility of proving their deliberate character, attempts to conduct national uniformization can certainly not be overlooked when investigating the nature of British unionism.

The aim of this thesis is neither to arbitrate between these outlooks, which relate more to history than to law epistemologically, nor to choose one over the other. They reflect varied and contradictory, albeit somewhat complementary, views on the genesis of British constitutionalism. Understanding both permits to conceptualise unionism in coherence with its plural essence. This doctrine cannot be grasped if the elements of the conflict over the two senses, primordial and banal, it has taken over history are not examined extensively.

The main distinction between these two perspectives on the nature of British unionism draws its source in the debate on the main purpose that it should fulfil. When it is characterised as primordial, unionism is seen as a good in itself that justifies overriding any other sense of identity belonging, as that has consistently been the case, for example, in Northern Ireland.<sup>30</sup> Primordial unionism has been principally defined and upheld by the Conservatives, who apprehended British identity from an Anglo-centric perspective from which centralisation at the expense of peripheral interests was fundamentally valuable.<sup>31</sup> For primordial unionists, who have

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<sup>29</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Prueger Publishers 1968) 55; JC Banks, *Federal Britain?* (Harrap 1971) 29 and 38; Krishan Kumar, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1, 7.

<sup>30</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 54; Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 35-36; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 34.

<sup>31</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 103; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe*

traditionally been hostile to any constitutional recognition of multinationalism, the British Union relied on the alliance between imperialism, Protestantism, and unitary parliamentary sovereignty.<sup>32</sup> In their view, securing distinct powers to the substate nations would inexorably lead to the dismantlement of the United Kingdom as these nations would inexorably seek to become independent.<sup>33</sup>

Unionism is deemed banal if the Union is apprehended in essentially contractualistic terms.<sup>34</sup> While primordial unionism relies on the argument that identities cannot be multiple and conciliated within a polity,<sup>35</sup> banal unionism is more pragmatic and resolutely accommodative. Understanding the opposition between primordial and banal unionisms requires to determine whether the nations constituting the British state should choose between being part of a large encompassing state or upholding their defining identity traits. Regardless of how influential staunch primordial

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(Harvester Press 1988) 190; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 188; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 127; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 185.

<sup>32</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 302; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 294; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 13 and 113; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 185; Andrew Gamble, 'The Conservatives and the Union: The "New English Toryism" and the Origins of Anglo-Britishness' (2016) 14(3) *Political Studies Review* 359, 360 and 362.

<sup>33</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 10; James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 284.

<sup>34</sup> Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 36.

<sup>35</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 128.

unionist arguments can be, even nowadays, they have mostly been theoretical and rhetorical since they are not coherent with the actual nature of the British polity. They would not even have convinced English citizens that the British state is mononational.<sup>36</sup> In fact, the substantively plural character of banal unionism is not only more coherent with British constitutional principles, but also more suitable to safeguard the cohesion of the United Kingdom.

In fact, banal unionism, which has long-standing roots and has been particularly prominent in contemporary times, is based upon the idea that the recognition of substate nationalism strengthens state unity instead of imperilling it. Banal unionism, which is far from being Jacobin, could not be upheld simply by the work of omnipotent central institutions.<sup>37</sup> The British Union, when it is characterised as banal, is seen as a composite polity,<sup>38</sup> as illustrated by the Union Jack.<sup>39</sup> Despite the variable and uncertain character of the nature and the scope of their constitutional recognition or accommodation, the substate nations could define themselves as standing-alone entities that were not constituted by Parliament.<sup>40</sup> Although the Union was certainly intended to accentuate interdependence on specific matters, such as the

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<sup>36</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 49.

<sup>37</sup> Michael Keating, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 109.

<sup>38</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Prueger Publishers 1968) 54-55; Michael Gallagher, 'How Many Nations Are There in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715, 720; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 374.

<sup>39</sup> JC Banks, *Federal Britain?* (Harrap 1971) 23.

<sup>40</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 43; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 162.

economy and public safety, the entities constituting it were not overtly expected to give up what made them unique.<sup>41</sup>

Still, some authors and politicians fear, somewhat rationally, that apprehending British unionism from a multinational perspective leads to asserting that the Union would, sooner or later, become an empty shell.<sup>42</sup> However, unionism can simply not be relevant and resilient if it is viewed as a straitjacket that cannot evolve to fulfil the diverse and changing needs of the substate nations.<sup>43</sup> For instance, the inflexibility that characterised primordial unionism regarding Irish matters in modern times compromised the integrity of the British state more than the contemporary concessions to Irish republicans actually did.<sup>44</sup> In conformity with the principles underlying British constitutionalism, normative and conceptual flexibility ease the devising of adaptable, innovative, and responsive frameworks that can provide substate national recognition.

In that vein, the evolution of unionism in Scotland displays how instrumental the pragmatism that characterises banal unionism

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<sup>41</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 377.

<sup>42</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 57; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 17; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 17.

<sup>43</sup> Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 139; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 3; John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jürgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 37.

<sup>44</sup> JC Banks, *Federal Britain?* (Harrap 1971) 237; John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 172; Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 35.

has been to ensuring the sustainability of the British Union.<sup>45</sup> Despite uprisings like the Jacobite rebellions of 1715 and 1745, which were easily vanquished, most Scots have continuously thought that their nation could simultaneously be an integral part of the United Kingdom and retain its identity.<sup>46</sup> In practice, despite the unitarizing character of parliamentary sovereignty, the existence of a distinct Scottish nation within the British state was not widely considered to be an acute matter of concern in the modern era.<sup>47</sup> This brief case study, which is completed subsequently, highlights that distinguishing primordial from banal unionism only makes sense when this doctrine, as for any British constitutional concept, is grasped beyond its formal sense.

#### **4.1.3. Contrasting Political and Constitutional Unionisms**

Belonging to a state is different from belonging to a nation, whose allegiance is mainly based upon a substantive identity rather than on a purely civic and legal sense of citizenship.<sup>48</sup> While a state needs to institutionalise its existence so that it can thrive, that is

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<sup>45</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 25; Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 137.

<sup>46</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 98; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 67; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 14; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 33; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 259.

<sup>47</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 121.

<sup>48</sup> Liam O'Dowd, "New Unionism", British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 79; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 57.

not as vital for a nation.<sup>49</sup> A fundamental and consequential difference between political and constitutional unionisms relies on the fact that national recognition can be granted without being formally entrenched. Nationalism can be actualised through the channelling of socio-political and cultural forces without being necessarily embodied by functional legal devices or mechanisms.<sup>50</sup> The survival of the Welsh and Scottish nations over centuries, among others, has demonstrated that the British substate nations could thrive without being endowed with autonomous state or substate norm-making institutions.<sup>51</sup>

Considering that the constituent nations of the United Kingdom were gathered within a legislative Union that relied on both legal and political constitutional features permits to conciliate the divergent understandings of unionism.<sup>52</sup> In this regard, there is a large discrepancy between how the citizens of the British polity and constitutional lawyers understand unionism. Legally, the Acts of Union subjected the constituent nations to the sovereignty of a unique Parliament, established national state churches, and fostered economic integration.<sup>53</sup> Still, they were meant to be bilateral statutory agreements that could conciliate politically state unionism with substate nationalism.<sup>54</sup> Political unionism can then

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<sup>49</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 136.

<sup>50</sup> Andrew Mycock, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388, 389.

<sup>51</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 412.

<sup>52</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 126; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 185; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 9.

<sup>53</sup> Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 93-94.

<sup>54</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 6.

provide a framework of governance that permits to overcome the unitarism and the homogeneity characterising parliamentary sovereignty and, as a corollary, British constitutional unionism. So, despite the supremacy of the British Parliament, which enacted the Acts of Union,<sup>55</sup> these norms set 'a variety of legal orders'<sup>56</sup> that were tailor-made to each constituent nation.

However, the establishment of the United Kingdom by the enactment of normatively ordinary legislation raises serious constitutional issues. The Acts of Union are neither substantively mundane and ordinary statutes, nor inherently executory and legally binding contractual treaties.<sup>57</sup> As noted by Marquand, these statutes were not different from other substantively constituent pieces of legislation that could not bind present and future parliaments.<sup>58</sup> By enacting these statutes, the Westminster Parliament would have simply extended its jurisdiction to these nations and clearly rejected any challenge to its sovereignty.<sup>59</sup> Although the Acts of Union are the constituent devices of a multinational British polity, they did not shake the foundations of the orthodox principles of parliamentary sovereignty. In fact, these

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<sup>55</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 79 and 88.

<sup>56</sup> *ibid* 78.

<sup>57</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 206; *MacCormick v Lord Advocate* [1953] SC 396 [3]; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 204; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 227; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 309; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 37.

<sup>58</sup> David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 181.

<sup>59</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 21-22; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 170; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 103; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 187.

statutes did not establish a new polity (beyond a piecemeal approach) and an institutional framework that could supersede or diffuse the authority of Parliament for the benefit of autonomous constituent nations.<sup>60</sup> Still, if Parliament can alter or repeal the Acts of Union at its will, their alterability would also imply that of the United Kingdom and, somewhat paradoxically, that of its authority.<sup>61</sup> Parliament could not repeal or significantly alter these statutes without jeopardising the existence of the state on which it holds jurisdiction and, ultimately, its sovereign status. Accordingly, as noted by Dicey and Rait, repealing an Act of Union like the one between England and Scotland undermines ‘the unshakable foundation of British power and liberty’.<sup>62</sup> Consequently, the Acts of Union should be entrenched and have compulsory effects beyond strictly formal or legal considerations.<sup>63</sup> To do so correctly, the societal and specifically national characteristics and realities that have shaped these constituent acts cannot be glossed over.

So, while the United Kingdom appears irreducible and unitary from a legal perspective,<sup>64</sup> its multinational character has not only been recognised, but also consolidated, by socio-political means that are peculiar to British constitutionalism.<sup>65</sup> British unionism could

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<sup>60</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 85; Robert Schutze, ‘Introduction: British “Federalism”?’ in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 18.

<sup>61</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 50; Iain McLean and Alistair McMillan, ‘England and the Union since 1707’ in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 27.

<sup>62</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 320.

<sup>63</sup> John Gardner, ‘Can There Be a Written Constitution?’ (2009) *Oxford Legal Studies Research Paper* 2009, 3; Stephen Tierney, ‘The United Kingdom as a Plurinational State’ in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 188.

<sup>64</sup> Aileen McHarg and James Mitchell, ‘Brexit and Scotland’ (2017) 19(3) *The British Journal of Politics and International Relations* 512, 514.

<sup>65</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 53; Michael Keating, *The Independence of Scotland: Self-*

not be mononational without being deemed illegitimate by the constituent nations.<sup>66</sup> Moreover, any overarching constitutional framework cannot be devised symmetrically, without regard for substate national particularities.<sup>67</sup> The British political culture has then accommodated the substate nations and counterbalanced centralising dynamics.<sup>68</sup> Indeed, the existence and the upholding of multiple national senses of belonging has consistently been accepted by the British rulers.<sup>69</sup> Taking good note of these facts makes it possible for substate national constitutional traditions to cross time despite the impact of strong centripetal forces,<sup>70</sup> which has constituted what Keating identifies as the 'efficient secret of unionism'.<sup>71</sup>

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*Government and the Shifting Politics of Union* (Oxford University Press 2009) 11 and 34; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 278.

<sup>66</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 232; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 194; Philip Resnick, 'What Theorists of Nationalism Have to Learn from Multinational States' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 75; Guy Laforest and Michael Keating, 'The Future of Federalism and Devolution in Canada and the United Kingdom' in Michael Keating and Guy Laforest (eds), *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan 2018) 105.

<sup>67</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 11.

<sup>68</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 47.

<sup>69</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 24; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 49; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 347; *ibid* 11 and 125; *id*, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 113, 115 and 125.

<sup>70</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 13; Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 6 and 17; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 54.

<sup>71</sup> Michael Keating, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 108.

## **4.2. The Making of the United Kingdom**

A corollary of the plural essence of the United Kingdom is that this state was not established in fulfilment of an overarching plan devised by its central constituent institutions. It has instead grown organically through the union of diverse nations that came together over time and sealed statutory alliances. The United Kingdom is the outcome of an aggregative process that was conducted through the ratification of essentially bilateral agreements rooted, at least to some extent, in mutual consent. Consequently, I shall investigate why and, the case being, how each constituent nation became a part of the intrinsically composite British polity. I can then apprehend more properly its multinational nature and the complexity of recognising it constitutionally.

### **4.2.1. The Union of England and Wales**

The first stone of the constitutional edifice that would become the United Kingdom was laid when England and Wales tied their destinies. As it was geographically enclaved within Great Britain and surrounded by the dominant English nation, Wales could hardly thrive as a distinct nation if it remained on its own. It can even be argued that England and Wales have effectively become indissociable. Still, the union between these nations is the outcome, at least initially, of military conquest. Its impact have lasted centuries and shaped a complex relationship between submission, interdependence, and accommodation.

During the Middle Ages, a feudal English nation sought to conquer a tribal Welsh nation to expand its territory, its power and its

prestige.<sup>72</sup> For a long time, Welsh resisted tooth and nail, since they wanted to preserve their distinct Celtic national and constitutional identities.<sup>73</sup> However, after the Norman conquest of England in 1066, and even more decisively after the English conquest of Wales in 1282, Wales was subjected to the English Crown and became increasingly anglicised.<sup>74</sup> Although Wales retained some political autonomy, its legal and economic systems were widely considered to be less efficient than the English ones and the making of a common normative order appeared both opportune and ineluctable.<sup>75</sup> Davies argues that Wales became an internal colony that was effectively ruled by England even though it could retain its unique character.<sup>76</sup> From then on, according to Rawlings, Wales would simultaneously be 'England's first colony' and 'the junior partner in the UK's "state of unions"'.<sup>77</sup>

In 1536 and 1542, Acts of Union were enacted to make Wales an even more integral part of a cohesive British polity. These statutes were intended to preserve substantive substate autonomy to some extent, especially with regard to local customs,<sup>78</sup> to deepen political integration with England, and to impose the Reformation.<sup>79</sup> Regarding this last aspect, England sought to ensure that

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<sup>72</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 26.

<sup>73</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 1; *ibid* 27.

<sup>74</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 84.

<sup>75</sup> *ibid*.

<sup>76</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 61.

<sup>77</sup> Richard Rawlings, 'The Welsh Way / Y Ffordd Gymreig' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 300.

<sup>78</sup> Laws in Wales Act 1542 (c 26) s 31.

<sup>79</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 1.

Protestantism would have strong and legitimate roots in Wales.<sup>80</sup> Concretely, the Acts of Union sealed the legal alliance between England and Wales since these statutes amalgamated what were still somewhat distinct legal orders.<sup>81</sup> They provided that Wales was 'incorporated with England' and that its citizens 'shall enjoy all liberties as other in England do'.<sup>82</sup> The English Crown also aimed to 'turn [Welsh] into Englishmen'<sup>83</sup> as the use of their national language was prohibited in the performance of any legal or political duty.<sup>84</sup> Although such changes were extensive and transformative, they were met with relative indifference by Welsh.<sup>85</sup> In fact, these statutes did not revolutionise the Anglo-Welsh relationship as much as they formalised and rationalised 'a process of incorporation which had been underway for several centuries'.<sup>86</sup> Constitutional law would then fit statutorily with a long-standing state of fact. Nevertheless, at least symbolically, the Acts of Union confirmed the legal and political integration of Wales into a larger societal whole and accentuated the dominance of English social and linguistic norms in the southern part of Great Britain.<sup>87</sup> Therefore, Welsh nationalism, since it could not be actualised by

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<sup>80</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 36.

<sup>81</sup> Laws in Wales Act 1542 (c 26) s 2.

<sup>82</sup> *ibid* s 1.

<sup>83</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 49.

<sup>84</sup> Laws in Wales Act 1542 (c 26) s 20; *ibid* 49; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 1; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 10.

<sup>85</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 1.

<sup>86</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 84-85.

<sup>87</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 42; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 28; Barry Jones, 'Welsh Politics and Changing British and European Contexts' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 57; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 46, 78 and 91.

legal and institutional normative means, essentially survived within the British polity by cultural means.<sup>88</sup>

In modern times, the inability of the Welsh nation to self-rule autonomously within a distinct and exclusive institutional framework restricted its ability to be a genuine political unit.<sup>89</sup> Furthermore, mercantilism and industrialism highlighted the efficient virtues of centralised governance and accentuated the societal integration of Wales into a larger British whole.<sup>90</sup> Asserting that such outcomes were achieved deliberately by English politicians who wanted to wreck the assertion of any Welsh national claim is highly debatable. Still, these outcomes have normalised the sentiment that Welsh citizens could not hold any kind of sovereignty that they could exercise without let or hindrance.<sup>91</sup> Accordingly, claims for the (re)establishment of a Welsh political nation, whether it be embodied by a distinct state or not, had few echoes.<sup>92</sup> The non-existence of a structured Welsh

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<sup>88</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 136; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 2; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 175.

<sup>89</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 54; Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 116; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 10.

<sup>90</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 155; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 8, 23 and 42; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 65; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 21, 75 and 122; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 22.

<sup>91</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 60 and 221; Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 153 and 155.

<sup>92</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 53.

normative nationalism would then be a decisive reason why Brooks contends that 'Wales never was'.<sup>93</sup> However, as he tends to conflate nationalism with statehood, his analyses overlook that the worth of nationalism, especially from a contemporary perspective, should not be evaluated by an overly Westphalian yardstick. That is not because Welsh nationalism was not very politically demanding that it was doomed to be insignificant.

In practice, the relative apathy of Welsh citizens regarding the (lack of) constitutional status of their nation did not entail that Wales was plainly and simply assimilated into an English-dominated United Kingdom. Beyond the needs for economic and political interdependence, the members of the Welsh nation would not have been directly and unambiguously pressured to relinquish their distinctive identity traits.<sup>94</sup> As noted by Melding, a Welsh doctrine of unionism was developed to pave a third way between a complete subjection to central institutions dominated by English rulers and self-rule.<sup>95</sup> This doctrine notably contributed to recognise the existence of peculiar Welsh religious institutions.<sup>96</sup> Indeed, in the nineteenth century, nonconformist churches of, by, and for the Welsh people were established despite the persistent legal primacy of British state Anglicanism.<sup>97</sup> Furthermore, despite the considerable anglicisation of the Welsh nation and the difficulties related to the use of the Welsh language elsewhere than

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<sup>93</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 1, 20, 38 and 141.

<sup>94</sup> *Ibid* 19.

<sup>95</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 76.

<sup>96</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 52; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 83.

<sup>97</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 158; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 11.

in the private sphere,<sup>98</sup> Welsh citizens remained attached to their peculiar linguistic identity.<sup>99</sup> Ultimately, although that would not have necessarily been tangible, Morgan contends that Welsh citizens could uphold their distinctive national traits while also being British.<sup>100</sup>

Still, regardless of its links with the concept of statehood, nationalism shall be actualised beyond mere wills or declaratory statements. The lacking institutionalisation of the unique characteristics of Welsh nationalism has consistently hampered the optimisation of its place within the British constitution and society.<sup>101</sup> At the turn of the twentieth century, it was increasingly argued that the establishment of national institutions was essential to secure the existence of a resilient Welsh nation.<sup>102</sup> That goal could potentially be achieved by empowering Wales to self-rule and by establishing the somewhat different normative institutions through which it could do so.

#### **4.2.2. The Royal and Parliamentary Unions of Great Britain**

Scottish and Welsh nationalisms and unionisms differ significantly. Scotland, at the opposite of Wales, still was an independent polity after the Middle Ages and could then consolidate and

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<sup>98</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 170; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 85.

<sup>99</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 51.

<sup>100</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 154.

<sup>101</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 36.

<sup>102</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 153 and 162; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 13.

institutionalise more significantly what made its identity unique.<sup>103</sup> Moreover, as it is situated in the northern part of Great Britain, Scotland is geographically remote from its southern English neighbour and could resist to its dominance more than Wales could.<sup>104</sup> Although increased economic interdependence and societal anglicisation became more acute over time due to mutual exchanges,<sup>105</sup> it quickly became apparent that Scotland could hardly be assimilated to England after a forceful conquest.<sup>106</sup> Even if these nations ultimately came together within a multinational state (which has been the case since 1707), that would hardly lead to the crumble of a Scottish national sense of belonging.

Constitutionally, Scotland developed a legal and political governance system that relied on principles that were different from these of English constitutionalism. Although the influence of Roman law on the Scottish legal system did not really make its common law substantively dissimilar to the English common law,<sup>107</sup> the foundations of those systems are very dissimilar. The Scottish parliamentary system, whose functioning was akin to the

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<sup>103</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 10; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 96.

<sup>104</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 63; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 64.

<sup>105</sup> Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 16.

<sup>106</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 352; Jack Brand and James Mitchell, 'Home Rule in Scotland – The Politics and Bases of a Movement' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 41; Robert Colls, *Identity of England* (Oxford University Press 2002) 35; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 139; Michael Keating, 'The Political Economy of Small States in Europe' in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 3.

<sup>107</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 153 and 182.

English one,<sup>108</sup> did not have an inherent authority and a sovereign status. The Declaration of Arbroath, which asserted to the Pope the independence of Scots in 1320, provided that Scottish sovereignty had to be popular rather than parliamentary.<sup>109</sup> Beyond its nationalist purpose, this Declaration primarily stated that the will of the Scottish people, while ruling itself, was superior to that of any other institution, be it the Crown or Parliament.<sup>110</sup> Moreover, most Scots deemed that the General Assembly of the Scottish Church (the Kirk) was a more legitimate institution than the Scottish Parliament.<sup>111</sup> The Kirk could nullify parliamentary statutes that contradicted religious duties and serve, to some extent, as a more potent counterpower to royal authority than Parliament.<sup>112</sup> The popular nature of Scottish sovereignty hampered the rise of a distinct parliamentary power that could optimise the powers held by the monarch, the nobility, and the people, and secure their complementarity.<sup>113</sup> It was then progressively considered that Scottish constitutional governance had to evolve for it to be more efficient.

In 1603, a first direct constitutional link was established between Scotland and England as both nations would then be ruled by the same monarch.<sup>114</sup> Still, the ensuing Union of the Crowns was not

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<sup>108</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 8.

<sup>109</sup> Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 30; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 4.

<sup>110</sup> Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 124; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 723.

<sup>111</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 92.

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid* 72-73; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 146 and 185.

<sup>114</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 118; Vernon Bogdanor, *The Monarchy and the*

meant to establish a unitary state or even a union of the Scottish and English legal and constitutional systems.<sup>115</sup> It is also noteworthy that this Union was far from being an act of conquest since the English and Scottish peoples both consented to it.<sup>116</sup> As James VI of Scotland became King of England as James I, the English people was relieved to have a Protestant as their head of state and the Scottish people estimated that it could take the upper hand within this loose unionist framework.<sup>117</sup> Most Scots hardly saw the Union of the Crowns as a threat to their distinctiveness since this Union had little impact on their daily life and on their ability to uphold their peculiar national traits.<sup>118</sup>

However, this royal Union had become constitutionally inadequate from the end of the seventeenth century for essentially three reasons. First, it was noticed that a dynastic union that merely relied on unposited claims 'based upon descent' would have an overly tenuous legal worth and sustainability over time.<sup>119</sup> Second, it was deemed essential, especially in England, to set in stone statutorily the rules of royal succession to ensure that only a Protestant could hold the Crown.<sup>120</sup> Third, since the Glorious

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*Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 303; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 175.

<sup>115</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 10; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 8.

<sup>116</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 175.

<sup>117</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 82.

<sup>118</sup> *ibid.*

<sup>119</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 2.

<sup>120</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 129; Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 105; *ibid* 7; Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 12.

Revolution made the English monarch accountable to Parliament, a Union of the Crowns could not work well and coherently without establishing a Union of Parliaments.<sup>121</sup> In sum, Scottish and English rulers had to choose whether their states should remain independent while scuttling the Union or gather into a united kingdom within which they would share more than a monarch.

Certainly, the rivalry and the fear (will) of conquest that shaped the relationship between the English and the Scots for centuries had long made Scots reluctant to merge their nations into a single state.<sup>122</sup> Nonetheless, English and Scottish elites started to support, despite a relative public disinterest for this option, the establishment of a union state to address the emergent legal issues about the Union of the Crowns and to guarantee prosperity and security from external threats.<sup>123</sup> Moreover, for many Scots, deepening the links between Scotland and England could have numerous virtues. They would be sure, among other things, that their monarch would always be a Protestant, that they would trade freely with their southern neighbours, and that they would participate in a worldwide imperial enterprise.<sup>124</sup> In practice, the

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<sup>121</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 10; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 8.

<sup>122</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 207, 244 and 347; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 12-13.

<sup>123</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 112, 129, 160-61, 328 and 353; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 140; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 31 and 180; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 68 and 134; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 5.

<sup>124</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 126, 161-62, 240, 349 and 358; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 47; JC Banks, *Federal Britain?* (Harrap 1971) 95; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 39; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 59; Richard Simeon and Daniel-Patrick

uncertainty about Queen Anne's succession provided an opportunity to take legal, and more precisely statutory, action to bring England and Scotland closer.<sup>125</sup>

English and Scottish elites quickly agreed that establishing united British state and polity would be done by contractual means.<sup>126</sup> The Parliaments of both nations consented to merge into an overarching parliamentary institution. Still, this Union, at least officially, was far from being intended to legitimise the domination of one nation over the other. As the Glorious Revolution had, albeit indirectly, increased the constitutional importance of the Scottish Parliament to a level comparable to the English one,<sup>127</sup> both Parliaments and nations could be apprehended as equals.<sup>128</sup> Accordingly, there could be no legislative union if the Scottish Parliament, and then the English Parliament, did not consent to it.<sup>129</sup> Although the works of a Joint Commission in 1702-3 ended in failure,<sup>130</sup> they laid the foundations of what became in 1707 the Act of Union between Scotland and England.

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Conway, 'Federalism and the Management of Conflict in Multinational Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 357; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 37; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 9; Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 12 and 39.

<sup>125</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 129.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid* 68.

<sup>128</sup> Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 188.

<sup>129</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 208 and 319; Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 112.

<sup>130</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 126.

In Scotland, the Act of Union was enacted not because there was a cohesive unionist parliamentary majority supporting it but because anti-unionist parliamentarians, which yet constituted a disparate majority, could not assert univocally their opposition to this Act.<sup>131</sup> Determining whether the Scottish Parliament consented without coercion to its dissolution and to the corollary establishment of a parliamentary union with England has been quite controversial. Still, it is inaccurate to claim that England plainly imposed unionism against the will of the Scottish people and set the conditions of unification unilaterally. In fact, once the Scottish Parliament enacted the Act of Union, the English Parliament also enacted it without amending its provisions and thus abided by the terms consented by its Scottish counterpart.<sup>132</sup>

The enactment of the Act of Union in 1707 became the constituent act by which the United Kingdom was formally established as a state, as an empire, and as a polity.<sup>133</sup> Constitutionally, the Act of Union provided that England and Scotland no longer existed as states and have different legislative and executive institutions.<sup>134</sup> There would only be single Crown<sup>135</sup>, Parliament<sup>136</sup> and appellate jurisdiction (the House of Lords)<sup>137</sup> within a British state whose multinational essence had yet to be officially recognised. Concretely, the parliamentary system set by the Act of Union would neither be English nor Scottish but British. Since this statute

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<sup>131</sup> *ibid* 228.

<sup>132</sup> *ibid* 212 and 234.

<sup>133</sup> Union with England Act 1707 (c 7) s 1; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 205.

<sup>134</sup> Union with England Act 1707 (c 7) s 25; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 63; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 6.

<sup>135</sup> Union with England Act 1707 (c 7) s 2.

<sup>136</sup> *ibid* s 3.

<sup>137</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 254; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 181.

was enacted amidst the consequential constitutional evolutions following the Glorious Revolution, it became possible to challenge orthodox postulates on which long-standing English institutional practices relied. Indeed, it was increasingly considered that Parliament should respect, and even institutionalise, popular sovereignty so that its power could be legitimate and authoritative.<sup>138</sup> The popular nature of Scottish sovereignty would not be intrinsically antagonistic to the upholding of parliamentary sovereignty. It was then generally accepted that the British Parliament could be constrained, at least politically, more stringently than an English Parliament that was deemed to be sovereign in absolute terms.<sup>139</sup> Therefore, British parliamentarism, although it still functioned following a predominantly English pattern, integrated some constitutional principles that were intrinsic to a primarily popular Scottish sovereignty.

Nevertheless, it can be wondered if the Act of Union ensured that Scotland and England were treated fairly within British institutions. In practice, the British Parliament would have never ceased to be 'a substantially English body'<sup>140</sup>, bearing in mind its functioning and the decisions it made.<sup>141</sup> Moreover, Scotland was socio-demographically underrepresented in the Westminster Parliament and the ensuing concern that it would have a precarious and negligible place within the British constitutional order was systematically overlooked.<sup>142</sup> In that vein, the power of the British House of Lords to serve as the ultimate jurisdiction of Appeals led

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<sup>138</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 518.

<sup>139</sup> *MacCormick v Lord Advocate* [1953] SC 396 [1].

<sup>140</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 239-40.

<sup>141</sup> *ibid* 239.

<sup>142</sup> *ibid* 221; Robert Colls, *Identity of England* (Oxford University Press 2002) 39.

to the anglicisation of Scottish law, as its normative content was interpreted mainly by English officials.<sup>143</sup>

Certainly, the conquest of Scotland by England, which it had aimed to accomplish for centuries without succeeding militarily, was not the core intent underlying the Act of Union.<sup>144</sup> As noted by Nairn, Scotland was made by this statute 'a satellite of one of the metropole-states' way more than an 'oppressed nationality'.<sup>145</sup> However, since Scotland had less social and economic resources than England, it was on the wrong side of a power struggle that made it dependent first socially and economically as well as, ultimately, politically and constitutionally.<sup>146</sup> Furthermore, the formally shaky bindingness of statutes like the Act of Union have made the legal efficiency of the safeguard of Scottish national characteristics beyond good will quite doubtful.<sup>147</sup> Consequently, as for Wales, England could take advantage of the structural weaknesses of Scotland to shape the British state in accordance with its interests. Effectively, the union between England and Scotland would have been an act of conquest,<sup>148</sup> but it would have been achieved by socio-political means.

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<sup>143</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 66; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 115; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 174.

<sup>144</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 249 and 361-62; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 12.

<sup>145</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 231.

<sup>146</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 61.

<sup>147</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 344; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 207.

<sup>148</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 207 and 260.

In another vein, I note that the Act of Union did not provide that British sovereignty was divided in accordance with federal principles. While the possibility of preserving distinct national legislatures within a confederal system was advocated by Scottish nationalists who acknowledged the multinational nature of the United Kingdom,<sup>149</sup> the opportunity to enact an overarching British federal constitution was not evaluated seriously.<sup>150</sup> The Scottish proposal on this matter was deemed incoherent with the principle of parliamentary sovereignty, and was thus deemed inapplicable.<sup>151</sup> Nonetheless, due to its minority status within the British polity, it was crucial for the Scottish nation to obtain guarantees regarding the preservation of its identity for unionism to be considered functional and legitimate.<sup>152</sup> This concern would have been addressed so well that Scottish unionism would have concretely been more antagonistic to the establishment of a unitary and mononational British state than to the resolute upholding of Scottish nationalism.<sup>153</sup>

Contrary to Wales, Scotland has benefited from the existence of somewhat differentiated norms that could provide the recognition of its core national traits within the British constitutional framework.<sup>154</sup> Traditionally, Scottish substate nationalism

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<sup>149</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 67.

<sup>150</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 223, 292 and 348.

<sup>151</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 109.

<sup>152</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 132; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 206

<sup>153</sup> JC Banks, *Federal Britain?* (Harrap 1971) 34; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 129; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 43 and 301; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 120.

<sup>154</sup> David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 181.

essentially relied on three pillars: religion, law, and language. While Protestantism was the British state religion, that did not entail that there was a unique British state Church. Religion was indeed at the heart of the traditional and modern Scottish national identity.<sup>155</sup> Accordingly, the Act of Union constitutionally obliged the British monarch to preserve the authority of the Scottish Kirk.<sup>156</sup> Although that could have potentially jeopardised the unity of the British polity,<sup>157</sup> this national accommodation proved itself necessary to quash sentiments of Scottish alienation. Scots dearly valued the Kirk and the faith because they empowered them to institutionalise, and then to articulate, their unique national character. Providing in the Act of Union that a 'Presbyterian system of church government' would retain its authoritativeness and hold secular normative powers has proven key to perpetuating a distinct Scottish societal sphere.<sup>158</sup>

A similar finding can be made regarding the importance of Scots law to mould Scottish nationalism and unionism.<sup>159</sup> Safeguarding the distinctiveness of Scots law was another meaningful way by which the institutional recognition of the Scottish nation could be secured.<sup>160</sup> Scottish elites even conditioned their support to the Act of Union with England to 'the retention of Scots of law and of the Scottish Law Courts', which was viewed, for instance, as the guarantee of crucial freedoms of trade.<sup>161</sup> Consequently, Scotland

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<sup>155</sup> Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 110; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 297.

<sup>156</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 7.

<sup>157</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 99 and 258.

<sup>158</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 199.

<sup>159</sup> *ibid* 216.

<sup>160</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 174 and 202.

<sup>161</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 211.

retained a somewhat distinct legal system, which had several characteristic civilist features<sup>162</sup> although it was not endowed with autonomous norm-making institutions that could enact purely Scottish norms.<sup>163</sup> The residual Scottish legal autonomy only had a limited value, particularly since it was strictly limited to private law, whose substantive scope was imprecisely delimited.<sup>164</sup> This reality displays the hazard for a nation to hold legal powers if it cannot exercise them through self-rule. Moreover, while Scottish law could remain authoritative, the nation could not maintain its distinct linguistic identity. The establishment of the United Kingdom led to the hegemony of the English language throughout Great Britain, which promptly became an undisputed and uncontroversial fact.<sup>165</sup> In fact, choosing English as a common language at the expense of preserving Gaelic was widely seen, even by Scots, as a normal corollary of the Union between Scotland and England.

In sum, coexisting with a fellow nation that was so much mightier than it pressured Scotland to subdue most of its peculiar national traits concretely.<sup>166</sup> Nevertheless, this nation could uphold and institutionalise, by various and diverse legal and political means, its national existence at a degree that Welsh nationalists could only dream of. Several authors have found that unionism has endowed

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<sup>162</sup> Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 627.

<sup>163</sup> Union with England Act 1707 (c 7) s 18; William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 80-81; TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 206; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 176.

<sup>164</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 173.

<sup>165</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 89; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 21.

<sup>166</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 18; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 34 and 56.

Scotland with broader political and economic opportunities without coercing it to relinquish its singular identity.<sup>167</sup> Although it could not self-rule, Scotland was recognised, societally though not necessarily formally, as a legitimate distinct substate polity within the United Kingdom; contrary to Ireland, for instance.

#### **4.2.3. The Union of Great Britain and Ireland**

While England looked down on Welsh nationalism and had to consider Scottish nationalism from a rather equanimous outlook, it systematically scorned Irish nationalism for centuries. Ireland could hardly obtain the status of an associate nation since its subordination to an English, and later British, polity has consistently been deemed axiomatic.<sup>168</sup> Although this power struggle was mitigated by attempts to manufacture consent statutorily, the latter relied on very weak bases, especially considering its lacking legitimacy.

From the Middle Ages, England sought not only to conquer Ireland but also to limit its ability to consider itself as a distinct nation. Following the invasion of 1169 and the setting of the Irish Lordship in 1171, England vassalised Ireland and subjected its citizens to its authority, whether they be ruled, depending on the epochs, directly by English bureaucrats or indirectly by Irish loyalists.<sup>169</sup>

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<sup>167</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 327; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 8; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 181; Liam Connell, 'Scottish Nationalism and the Colonial Vision of Scotland' (2004) 6(2) *Interventions* 252, 253-54.

<sup>168</sup> Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 11.

<sup>169</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 3; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 40 and 78.

Irish law was characterised as mediocre by English rulers and had to be made subsidiary to the English common law.<sup>170</sup> Nonetheless, the continuous existence of an Irish Parliament and the enactment of the Statutes of Kilkenny in 1360, which recognised, despite their assimilatory intents, the distinctiveness of Irish law, consolidated the constitutional existence of the Irish nation.<sup>171</sup> Still, in 1495, as many Irish started to claim legislative independence,<sup>172</sup> the Irish Parliament enacted the Poynings' Law. This statute conditioned the study of any bill to its certification by a Lord Lieutenant nominated by the English rulers, which considerably constrained the scope of Irish parliamentary powers.<sup>173</sup> As noted by Blackstone, although England and Ireland were formally distinct states, Ireland was normatively powerless and dependent on domineering English institutions.<sup>174</sup> Consequently, Ireland progressively became an English colony due not only to the enactment of the Poynings' Law, but also to the imperious rule of the Tudors and the imposition of the Reformation on a predominantly Catholic Irish population.<sup>175</sup> In this regard, the immigration of Protestant Scottish planters to the northern province of Ulster was encouraged for reducing the demographical dominance of Catholics in Ireland.<sup>176</sup> That process of migration structurally transformed the Irish polity forever.

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<sup>170</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 52.

<sup>171</sup> *ibid* 59 and 72.

<sup>172</sup> *ibid* 72.

<sup>173</sup> Poynings' Law 1495 (10 Hen. 7 c 4) s 1; *ibid* 147-48.

<sup>174</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 81-82.

<sup>175</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 176; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 138.

<sup>176</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 178; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 101.

Accordingly, from the seventeenth century, the antagonism between Catholics and Protestants became the main element that shaped the constitutional relationship between Ireland and England, which markedly soured after the Glorious Revolution. After James II, a Catholic, had to surrender his crown, he endeavoured to take it back with the support of Irish Catholics.<sup>177</sup> They paid for his failure to do so. Despite what was provided in 1691 by the Treaty of Limerick, the Catholics' religious freedoms were consistently flouted, particularly since, as highlighted by Deacon, 'Catholics were excluded from the Irish Parliament in 1692 and disenfranchised in 1727'.<sup>178</sup> Moreover, the enactment of the Declaratory Act in 1720 condemned the Irish Parliament to impotency since the British Parliament could legislate on its behalf and serve as the final Irish Court of Appeal from then on.<sup>179</sup> Since the doctrine of ministerial responsibility had not been transplanted in Ireland, the Irish Parliament became an empty shell that held no consequential normative powers.<sup>180</sup> So, although Ireland was not formally assimilated into England as it kept its established Church and its autonomous Parliament,<sup>181</sup> the Irish nation could only assert its wills and its interests as long as they concurred with those of English Protestants.<sup>182</sup> The institutions of the British state could, albeit indirectly, have the last word on Irish matters without

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<sup>177</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 40.

<sup>178</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 187.

<sup>179</sup> Declaratory Act 1720 (c 5) Preamble and s 1; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 148.

<sup>180</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 146.

<sup>181</sup> Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 17; *ibid* 144.

<sup>182</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 78; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 70; Robert Colls, *Identity of England* (Oxford University Press 2002) 40; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 19.

there being a holistic constitutional unionist project.<sup>183</sup> Concretely, the survival of Irish nationalism looked at best like a mirage.

However, in 1782, the Declaratory Act was repealed, and the Poynings' Law was substantially amended. As a result, the British Parliament recognised that the Irish Parliament would be autonomous and gain complete legislative independence, although the principle of ministerial responsibility was not implemented.<sup>184</sup> The intent underlying these statutory changes was to foster cooperation, rather than subordination, between the United Kingdom and Ireland.<sup>185</sup> Nonetheless, since the Catholics' rights were not protected after these changes, they were seen as a way to consolidate a Protestant, essentially English, hegemony and fuelled popular resent instead of being deemed accommodative to substate nationalism.<sup>186</sup> Social unrest, which relied on Catholic alienation though very not only, culminated with the Rebellion of 1798. The resulting threats to public order, as well as the concern that Bonaparte could use Ireland as a launching base to attack the United Kingdom,<sup>187</sup> led the British rulers to evaluate the opportunity of uniting Great Britain and Ireland into a single state.<sup>188</sup> Irish unionism could also optimise economic and

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<sup>183</sup> Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 18.

<sup>184</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 16; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 19.

<sup>185</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 16.

<sup>186</sup> *ibid* 16; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 148.

<sup>187</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 16; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 110; Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 322.

<sup>188</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 32; Douglas Kanter, *The Making of*

fiscal interdependence, which was a decisive element of British imperial successes.<sup>189</sup> Furthermore, it was expected that the end of Irish legislative autonomy would help to mitigate the tensions intrinsic to what became a Protestant rule that teared the Irish nation up.<sup>190</sup> Consequently, after years of tensions, the Catholic and Protestant Irish communities would be integrated into a Union in which they could coexist orderly and peacefully.<sup>191</sup>

Although this turn seems quite paradoxical nowadays, expanding the Union was part of a British strategy, which proved successful, to earn the confidence of Irish Catholics. It can be explained rationally by the Catholics' appreciation of this helping hand from British central institutions. In 1792 and 1793, Catholic Relief Acts were enacted, with the support of English rulers, to empower them to sit in the British Parliament and were instrumental in securing the Irish consent to the enactment of an Act of Union.<sup>192</sup> Most Catholics thought that their rights would be better safeguarded within a British Union than within an autonomous Irish polity dominated by Protestants.<sup>193</sup> So, as ironic as it might sound in contemporary times, Irish unionism initially relied on the consent of Catholics who saw it as a profitable deal for them.

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*British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 22, 138 and 320.

<sup>189</sup> Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 22, 54 and 320; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 229.

<sup>190</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 73; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 31; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 228-29.

<sup>191</sup> Act of Union (Ireland) 1800 (c 38) s 6(1); Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 206 and 228.

<sup>192</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 322; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 227 and 241.

<sup>193</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 227.

The Act of Union 1800 established the United Kingdom of Great Britain and Northern Ireland.<sup>194</sup> Select Irish constituencies were provided, a single British Parliament<sup>195</sup> and an Anglican state Church were established, and fiscal and trade integration were furthered.<sup>196</sup> However, just after the enactment of an Act of Union that was supposed to foster religious concord, George III, who was then the British monarch, vetoed provisions on Catholic emancipation to abide by his duty to uphold Protestantism as the state religion.<sup>197</sup> This veto fuelled religious intolerance, beyond what statutes provided, and ultimately legitimised an imperious Protestant domination in Ireland.<sup>198</sup> Although the civil rights of Irish Catholics were recognised and entrenched in 1829, that could not ease their feeling of having been fooled by unionists' promises.<sup>199</sup> In fact, the bitter conflict between Catholics and Protestants was not ended by the Union; it has instead been transplanted into the British polity, at the risk of its own constitutional survival.<sup>200</sup>

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<sup>194</sup> Act of Union (Ireland) 1800 (c 38) Preamble and s 2.

<sup>195</sup> *ibid* s 3.

<sup>196</sup> Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 11.

<sup>197</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 88; Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 28; Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 7.

<sup>198</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 19.

<sup>199</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 89; Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 28; Jonathan Tonge, *Northern Ireland* (Polity 2006) 13; Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 7; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 77.

<sup>200</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 75; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 11.

In practice, unionism did not lead to the demise of Irish nationalism, even from an institutionalist perspective. Since there still was a separate Irish executive branch, whose members were yet nominated by the English Crown, there was a space, albeit limited, for national legal differentiation.<sup>201</sup> Furthermore, as Protestantism has been a defining element of British unionism since the Reformation,<sup>202</sup> the presence of a Catholic majority in Ireland consolidated its national uniqueness within the British polity.<sup>203</sup> The complex coexistence of Catholics and Protestants highlighted the singularity of the Irish polity beyond the existence of shared national traits like a common language.<sup>204</sup> Despite the multifarious nature of the Rebellion of 1798, the opposition between nationalists and unionists became increasingly structured on the same lines of the one between Catholics and Protestants.<sup>205</sup> Although the ensuing conflicts were far from being intrinsically religious,<sup>206</sup> they reflected an intricate multinational power struggle between the English, the Protestant Irish, and the Catholic Irish. The divisions between them were the seeds of harsh and consequential societal and constitutional turmoil.

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<sup>201</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 77.

<sup>202</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 368-69.

<sup>203</sup> *Ibid* 8.

<sup>204</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 89.

<sup>205</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 123; FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 475; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 107.

<sup>206</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 19-20 and 49; Alan Finlayson, 'Nationalism as Ideological Interpellation: The Case of Ulster Loyalism' (1996) 19(1) *Ethnic and Racial Studies* 88; Pamela Clayton, 'Religion, Ethnicity and Colonialism as Explanations of the Northern Ireland Conflict' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 44.

Over the nineteenth century, Ireland looked societally like a colony within a global Empire.<sup>207</sup> Beyond their feeling of being betrayed and disrespected, many Irish nationalists considered that their basic needs could not be fulfilled within the Union, especially following a brutal and mismanaged famine in the middle of this century.<sup>208</sup> To feel better recognised within the United Kingdom, Irish nationalists increasingly claimed that an autonomous, substantively federal, Irish Parliament within which Catholics and Protestants would be treated equally should be established.<sup>209</sup> However, this constitutional project failed because most Irish unionists viscerally rejected any Irish autonomist proposal.<sup>210</sup> In parallel, as the English yet viewed them as Irish and patronised them, Irish unionists, who mostly lived in Ulster, developed a unique, primordial unionist, irredentist identity that was centred on Protestantism and British exceptionalism.<sup>211</sup> Thus, a complex identity stalemate arose and the challenge to keep both Ireland united and within the United Kingdom became a decisive test for the British multinational polity.

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<sup>207</sup> FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 465.

<sup>208</sup> Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 325.

<sup>209</sup> *ibid* 278; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 28.

<sup>210</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 135; FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 470.

<sup>211</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 61; Michael Gallagher, 'How Many Nations Are There in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715, 728; Alan Finlayson, 'Nationalism as Ideological Interpellation: The Case of Ulster Loyalism' (1996) 19(1) *Ethnic and Racial Studies* 88, 101-3 and 108; Pamela Clayton, 'Religion, Ethnicity and Colonialism as Explanations of the Northern Ireland Conflict' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 47 and 51; Jonathan Tonge, *Northern Ireland* (Polity 2006) 25; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 157; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 104.

### **4.3. The Federal Idea in the United Kingdom since Modern Times**

British unionism continuously had to evolve to remain legitimate and efficient over centuries. The balance between the unity of the United Kingdom and the recognition of the distinct character of its diverse constituent nations, and thus of its multinational nature, could only be maintained if it was in line with its time. From the middle of the nineteenth century, the opportunity of implementing federal principles within British constitutionalism started to be discussed to optimise such a balance. However, seeking to undertake such transformative changes proved highly complicated and uncertain.

#### **4.3.1. The Decline of Empire and Rise of the Federal Idea**

Although the might of the British Empire reached its zenith in the middle of the nineteenth century, the United Kingdom looked like a colossus with feet of clay. The impact of powerful legal and socio-political centrifugal forces compromised the steadiness of the British constitutional arrangements. Although all British citizens officially enjoyed equal rights and duties, Colls highlights that those of the constituent nations were effectively subjected to the assertive power of central institutions ruled in accordance with mostly English interests.<sup>212</sup> As it could hardly recognise concretely the normative autonomy and the identity distinctiveness of all the constituent nations, the British legal constitutional framework, mainly because of its unitary nature, was increasingly

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<sup>212</sup> Robert Colls, *Identity of England* (Oxford University Press 2002) 200.

challenged.<sup>213</sup> The idea that the constituent nations should be treated like dominions, which had sovereign Parliaments that were deemed sovereign on domestic matters, gained traction.<sup>214</sup> Federal proposals were even thought out by some authors and politicians to improve the conciliation between state unity and national diversity.<sup>215</sup> It was contended that they could translate into law the intrinsically multinational and composite character of the British polity and prevent orthodox parliamentary sovereignty from compromising it.<sup>216</sup> However, the effective dominance of England within the United Kingdom hampered the making of an overarching federal framework.<sup>217</sup> Since British rulers were somewhat reluctant to settle whether parliamentary sovereignty should be constrained to accommodate national differentiation, federalism remained a mostly theoretical idea.<sup>218</sup> In fact, they considered federalism to be

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<sup>213</sup> JC Banks, *Federal Britain?* (Harrap 1971) 276; Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 9.

<sup>214</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 96-97.

<sup>215</sup> John Kendle, 'Federalism and the Irish Problem in 1918' (1971) 56 *History* 207, 208; Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 5; *ibid* 3; *id*, *The British Tradition of Federalism* (Leicester University Press 1995) 83; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 40; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 28; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 31-32.

<sup>216</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 14-15.

<sup>217</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 97; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 49; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 13; Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 36.

<sup>218</sup> Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 2 and 4-5; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 11; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 269; Adam Evans, 'An Interlude of Agreement? A Reassessment of the Conference on Devolution's "Consensus" on Powers' (2015) 29(4) *Contemporary British History* 421, 435;

substantively imprecise, impractical, and, thus, irreconcilable with core British constitutional principles.<sup>219</sup> Consequently, if federal principles were to be implemented, that would be, at the very best, on an incremental and piecemeal basis.

Nonetheless, it was widely acknowledged that the peculiar societal issues that Ireland faced threatened state unity and had to be addressed diligently.<sup>220</sup> Implementing Home Rule, which could empower Ireland to self-rule within the British Union, was seen as a potentially suitable unionist and accommodative solution.<sup>221</sup> Accordingly, Gladstone's Liberal Government proposed in 1886 to abolish Irish representation in the Westminster Parliament and to establish Irish parliamentary institutions that would have an exclusive control on domestic affairs.<sup>222</sup> However, Home Rule was

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Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 43; John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 418.

<sup>219</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 25; JC Banks, *Federal Britain?* (Harrap 1971) 154; Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 1-2; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 135; John Pinder, 'Multinational Federations: Introduction' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 14; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 280; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 16; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 46.

<sup>220</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 80; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 314.

<sup>221</sup> John Kendle, 'Federalism and the Irish Problem in 1918' (1971) 56 *History* 207, 209; James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 284.

<sup>222</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 87; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 207.

rejected, especially by Irish unionists.<sup>223</sup> It was feared that implementing this proposal, which was deemed overly accommodative towards Irish nationalists, would threaten a state unity relying on an undifferentiated exercise of legislative and executive powers.<sup>224</sup> Orthodox constitutionalists argued that any attempt of Parliament to transfer its powers to Irish institutions, and to limit its, was doomed to fail because it would surrender its sovereignty, which was deemed impossible.<sup>225</sup> Still, the debates on Home Rule planted the seeds of a reflection on some opportunities to diffuse power towards autonomous Welsh and Scottish institutions and, thus, to rethink British constitutional governance.<sup>226</sup> For instance, implementing Home-Rule-All-Round

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<sup>223</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 123 and 128; Andrew White, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118, 119; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 12 and 14; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 374; FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 471; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 26.

<sup>224</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 221-22; John Kendle, 'Federalism and the Irish Problem in 1918' (1971) 56 *History* 207, 214 and 230; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 119; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 87; Pamela Clayton, 'Religion, Ethnicity and Colonialism as Explanations of the Northern Ireland Conflict' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 49; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 24; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 10; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 267; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 47.

<sup>225</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 22; HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 194.

<sup>226</sup> WE Gladstone, *The Irish Question: I. The History of an Idea. II. Lessons of the Election* (John Murray Albemarle Street 1886) 36-37; Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 222-23; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 91 and 94; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 303; Constitution Unit, *An Assembly for Wales* (1996) 14; Iain

would have provided constitutional recognition and autonomy to the constituent nations and prevented the British Parliament, which retained its constituent prominence,<sup>227</sup> from enacting norms on precise substate national issues.<sup>228</sup> In sum, at the beginning of the twentieth century, Britons became increasingly open to, albeit calmly, revolutionise their constitutional framework of territorial governance.<sup>229</sup> To meet this rising expectation, George V summoned in July 1914 a Conference on Irish Home Rule that had the potential of being a game changer.<sup>230</sup>

However, two events prevented the actualisation of Home Rule: the First World War (WW1) and the Irish struggle towards independence. As Parliament conditioned the enactment of a statute on Home Rule to the end of WW1, Irish nationalists progressively considered that any autonomy arrangement would be insufficient and then sought to establish a Republic.<sup>231</sup> While Home Rule proposals were intended to foster Irish cohesion and unionism, their crumble polarised Irish citizens between republicans and primordial unionists (who would rather partition Ireland instead of ceasing to be British).<sup>232</sup> While a constitutional

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McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 111.

<sup>227</sup> JC Banks, *Federal Britain?* (Harrap 1971) 81; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 48-49.

<sup>228</sup> John Kendle, 'Federalism and the Irish Problem in 1918' (1971) 56 *History* 207, 229; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 100; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 75.

<sup>229</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 115 and 122; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 147.

<sup>230</sup> Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 77.

<sup>231</sup> KC Wheare, *The Constitutional Structure of the Commonwealth* (Clarendon Press 1960) 15; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 108.

<sup>232</sup> Eamon Phoenix, *Northern Nationalism: Nationalist Politics, Partition and the Catholic Minority in Northern Ireland, 1890-1940* (Ulster Historical Foundation 1994) 58 and 391; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 376-77 and 395.

reform that could have implemented, albeit limitatively, federal principles in the United Kingdom seemed within reach, Irish partition and independence changed the course of history.<sup>233</sup>

Still, the claims of Welsh and Scottish nationalists did not come to nought amidst WW1. In 1919, the Speaker of the British House of Commons called a parliamentary Conference to reform constitutional governance in accordance with a concept that would later become key: devolution.<sup>234</sup> According to Bogdanor, devolution to the substate nations implied ‘the transfer to a subordinate elected body, on a geographical basis, of functions at present exercised by ministers and Parliament’.<sup>235</sup> The contemporary links between devolution and federalism, whose assessment is the crux of this thesis, are studied more thoroughly later. It can yet be highlighted that Lluch notes that devolution shall be distinguished from federalism because, despite their substantive and institutional similarities, the devolution of powers to the substate nations could not be entrenched since it could always be scaled back unilaterally.<sup>236</sup> That explains why the participants at this Conference could hardly find a compromise between the implementation of federal principles and the upholding of orthodox British parliamentary sovereignty.<sup>237</sup> A compromise came close to being approved, but the participants’ inability to agree on the role of England within this framework, on

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<sup>233</sup> John Kendle, ‘Federalism and the Irish Problem in 1918’ (1971) 56 *History* 207, 207; Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 6.

<sup>234</sup> JC Banks, *Federal Britain?* (Harrap 1971) 82.

<sup>235</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 2.

<sup>236</sup> Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 168.

<sup>237</sup> Adam Evans, ‘An Interlude of Agreement? A Reassessment of the Conference on Devolution’s “Consensus” on Powers’ (2015) 29(4) *Contemporary British History* 421, 426.

the fiscal powers of the constituent nations, and on the composition of devolved legislatures prevented reaching it.<sup>238</sup> Moreover, since past proposals on Home Rule were primarily devised to meet the devolutionist claims of Irish nationalists, Irish independence diminished the need to rethink British constitutional governance comprehensively.<sup>239</sup>

Irish secession and partition triggered significant and consequential turmoil that significantly affected the United Kingdom. The independence of an Irish state, which was not initially deemed foreign under British law, was recognised in 1922.<sup>240</sup> Furthermore, Ireland was partitioned because the population of the province of Ulster, which was predominantly Protestant and supported primordial unionism, wanted it to remain British.<sup>241</sup> Autonomous Northern Irish parliamentary and executive institutions, which were metonymized as Stormont, were then established.<sup>242</sup> Although the British central institutions retained a

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<sup>238</sup> JC Banks, *Federal Britain?* (Harrap 1971) 82 and 120; *ibid* 422, 424, 430, 432 and 434.

<sup>239</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 332-33; Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 5; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 255; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 190; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 40-41.

<sup>240</sup> Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 112.

<sup>241</sup> Eamon Phoenix, *Northern Nationalism: Nationalist Politics, Partition and the Catholic Minority in Northern Ireland, 1890-1940* (Ulster Historical Foundation 1994) 133-34 and 393.

<sup>242</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 118; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 237; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 412; Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 241.

residual authority over the Stormont Parliament, which held no inherent powers,<sup>243</sup> establishing this substate institution proved that the constituent nations could exercise normative powers in their own names. Consequently, as noted by Pilkington, the Irish nation, taken as a whole, 'was the last to join and the first to leave' the United Kingdom, and Northern Ireland was the first constituent entity to challenge constitutional unitarism and to experiment devolution.<sup>244</sup> But despite the extensiveness of an unprecedented process of devolution,<sup>245</sup> most Northern Irish citizens loathed being part of a distinct political entity and would have preferred British direct rule.<sup>246</sup> Considering their staunch opposition to Home Rule, Irish unionists hardly sought national recognition. In fact, if they could not reverse Irish independence, they rather wanted Irish partition and their complete integration into the United Kingdom, even more than British rulers did.<sup>247</sup>

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<sup>243</sup> Government of Ireland Act 1920 (c 67) s 6(2); KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 31; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 116; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 113; Mike Tomlinson, 'Walking Backwards into the Sunset: British Policy and the Insecurity of Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 101; Paul Bew, 'Myths of Consociationalism: From Good Friday to Political Impasse' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 57-58.

<sup>244</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 29.

<sup>245</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 118; Robert Colls, *Identity of England* (Oxford University Press 2002) 195.

<sup>246</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 61; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 434 and 438; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 245; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 190.

<sup>247</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 11; Jonathan Tonge, *Northern Ireland* (Polity 2006) 18.

Nevertheless, Irish unionists quickly took control and advantage of Stormont institutions. They used the British politicians' relative indifference towards them to assert their primordial unionist interests and to fight Irish republicanism statutorily.<sup>248</sup> Although courts were empowered to invalidate the acts of substate institutions if they flouted religious freedoms,<sup>249</sup> unionists took advantage of their socio-demographic majority position to act domineeringly and systematically against nationalists and Catholics.<sup>250</sup> They thought that the Union could only be safeguarded if they firmly rejected republican, nationalist, and Catholic claims, which would ineluctably jeopardise British unity.<sup>251</sup> Although Northern Ireland was initially spared from communitarian confrontations after partition,<sup>252</sup> the risk that the exercise of devolved powers to repress any opposition to primordial unionism would backfire constitutionally and socially was high.

For their part, Welsh and Scottish nationalisms were not very demanding after the 1920s.<sup>253</sup> Although Welsh and Scots still

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<sup>248</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 135; Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 42; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 404-405.

<sup>249</sup> Government of Ireland Act 1920 (c 67) s 5(1); Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 115.

<sup>250</sup> Liam O'Dowd, 'New Unionism', British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 72; Robert Colls, *Identity of England* (Oxford University Press 2002) 157; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 435; Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 19.

<sup>251</sup> Pamela Clayton, 'Religion, Ethnicity and Colonialism as Explanations of the Northern Ireland Conflict' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 49; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 506.

<sup>252</sup> Jonathan Tonge, *Northern Ireland* (Polity 2006) 4.

<sup>253</sup> Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 168.

considered themselves distinct from the English and the Labour Party devised Home Rule proposals for their benefit,<sup>254</sup> the constitutional accommodation of the constituent nations became a second-rank issue. It must yet be highlighted that, since the end of the nineteenth century, distinct Welsh and Scottish Offices were established and could make some discretionary administrative, though rarely normative, decisions autonomously.<sup>255</sup> As a relative differentiation of the exercise of power within the British polity was progressively institutionalised, although it was constrained, democratically unaccountable,<sup>256</sup> and subjected to the approval of central institutions,<sup>257</sup> it would have limited the will to undertake full-scale constitutional change.<sup>258</sup> Furthermore, after the Second World War (WW2), the rise of a centralised welfare state, which could address socio-economic inequalities through the

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<sup>254</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 12 and 114; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 277.

<sup>255</sup> JC Banks, *Federal Britain?* (Harrap 1971) 154; Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales* (Cm 6348, 1975) 42; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 127-28 and 130; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 17 and 86-88; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 8; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 157; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 3 and 130; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 197; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 11; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 405.

<sup>256</sup> Barry Jones, 'Welsh Politics and Changing British and European Contexts' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 61.

<sup>257</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 60; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 188; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 81.

<sup>258</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 28; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 14.

implementation of uniform state policies, clashed with the decentralising ideas shaping both federalisation and devolution.<sup>259</sup> In fact, post-war British rulers were not eager to endow local or subnational institutions with genuine and authoritative constitutional powers<sup>260</sup> and to implement substantively federal principles such as the principle of subsidiarity. While Britons used federal principles to build common European frameworks and the Commonwealth, they did not intend to reshape their constitution in fulfilment with them.<sup>261</sup>

However, in the 1960s, renewed claims by substate nationalists for an enhanced constitutional recognition of distinct national traits made discussions on federal ideas prominent again.<sup>262</sup> Although the British polity never was homogeneous socio-culturally and demographically, that became even more salient when the British

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<sup>259</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 414; Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 32; JC Banks, *Federal Britain?* (Harrap 1971) 33, 43, 72 and 154; Michael Burgess, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988) 6; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 183; Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 72; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 240.

<sup>260</sup> JC Banks, *Federal Britain?* (Harrap 1971) 117; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 21.

<sup>261</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 172; Michael Keating, 'The End of Union? Scottish Nationalism and the UK State' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 106; Peter Riddell, 'The Constitution and the Public – How Voters Forgot the Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 40.

<sup>262</sup> JC Banks, *Federal Britain?* (Harrap 1971) 28; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 318; James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 283; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 65.

Empire crumbled as that reignited substate nationalism.<sup>263</sup> The fall of the Empire, whose mightiness and the pride it generated were decisive reasons why the constituent nations came and remained together,<sup>264</sup> led to a decline of primordial unionism.<sup>265</sup> The constituent nations increasingly wanted to revalue their distinct identity traits.<sup>266</sup> Without necessarily seeking independence,<sup>267</sup> substate nationalists sought to redefine constitutionally what it means and implies for them to be part of the United Kingdom. Concretely, they wanted the uniqueness of their nations to be safeguarded beyond mere wills so that it could be substantive and actual legally and politically.<sup>268</sup> What Burgess characterises as ‘the institutionalisation of executive and administrative centralisation’

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<sup>263</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 336; Harold John Hanham, *Scottish Nationalism* (Faber 1969) 212; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 13; Barry Jones, ‘Welsh Politics and Changing British and European Contexts’ in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 56; Liam O’Dowd, ‘“New Unionism”, British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland’ in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 82; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 16; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 55; Michael Keating, ‘The End of Union? Scottish Nationalism and the UK State’ in Keith Breen and Shane O’Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 107.

<sup>264</sup> Michael Keating, ‘The Political Economy of Small States in Europe’ in Harald Baldersheim and Michael Keating (eds), *Small States in the Modern World* (Edward Elgar 2015) 3.

<sup>265</sup> David Miller, ‘Nationality in Divided Societies’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 312; Iain McLean and Alistair McMillan, ‘England and the Union since 1707’ in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 37.

<sup>266</sup> Michael Keating, ‘The End of Union? Scottish Nationalism and the UK State’ in Keith Breen and Shane O’Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 107.

<sup>267</sup> WP Grant and RJC Preece, ‘Welsh and Scottish Nationalism’ (1968) 21(3) *Parliamentary Affairs* 255, 260; David Miller, ‘Nationality in Divided Societies’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 312; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 17.

<sup>268</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 84; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 125-26.

could no longer continue at the same pace in an essentially multinational British polity.<sup>269</sup>

Gaining autonomy became the priority of nationalist Welsh and Scottish parties, whose rising strength spotlighted the growing inability of British parties to meet the expectations of the constituent nations.<sup>270</sup> Nationalist parties primarily sought a devolution of powers and a fair treatment by central institutions more than independence *per se*.<sup>271</sup> Still, the reasons to demand a furthered constitutional recognition varied significantly. Since Wales was more closely integrated with England than Scotland, its quest for recognition was mostly linguistic, cultural, and social rather than legal or political.<sup>272</sup> While Scottish nationalism was certainly cultural and social, it was principally focussed on the building of distinct normative, political, and economic spheres, particularly so that Scots could benefit from the boost of oil production.<sup>273</sup> Nonetheless, these nations shared wills to

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<sup>269</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 3.

<sup>270</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 286.

<sup>271</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 163; Kenneth Morgan, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153, 166.

<sup>272</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) paras 335 and 359; Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 42; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 7, 14, 72, 316 and 331-35; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 14, 46, 54 and 84; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 126; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 176; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 164.

<sup>273</sup> WP Grant and RJC Preece, 'Welsh and Scottish Nationalism' (1968) 21(3) *Parliamentary Affairs* 255, 258; Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 107 and 123; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 37; David McCrone,

institutionalise their societal difference, to defend their national interests, and to gain autonomy from central British institutions that were deemed distant and unresponsive.<sup>274</sup>

It was then discussed whether the Scottish and Welsh constituent nations could, or should, be endowed with autonomous norm-making institutions within the British constitutional framework. The establishment of distinct national legislatures was no longer seen as a constitutional heresy since Stormont had been constituted.<sup>275</sup> Furthermore, as the British Parliament enacted statutes by which, amidst the collapse of the Empire, it surrendered permanently and unconditionally its exclusive normative authority over its former colonies.<sup>276</sup> Ultimately, despite their persistent distrust of federal or radically decentralising ideas,<sup>277</sup> several British politicians, both Labour and Conservative, wanted to accommodate substate nationalists.<sup>278</sup> Numerous constitutional proposals about their

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*Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 118 and 189; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 176.

<sup>274</sup> JC Banks, *Federal Britain?* (Harrap 1971) 187-88; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 84; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 43, 97 and 101; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 9; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 13.

<sup>275</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 18.

<sup>276</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 172, 201 and 205; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 63; Peter Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 69.

<sup>277</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 169.

<sup>278</sup> WP Grant and RJC Preece, 'Welsh and Scottish Nationalism' (1968) 21(3) *Parliamentary Affairs* 255, 262; Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 287-88; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh*

parliamentary representation, the establishment of autonomous normative substate institutions, and an extensive devolution of powers were devised and assessed.<sup>279</sup> However, implementing such ambitious constitutional reforms would be easier said than done.

#### 4.3.2. The Beginnings of Devolution

The United Kingdom, as a polity, came to a crossroads in the 1970s as the unitary staples of British constitutionalism could hardly be used to devolve powers to the Scottish and Welsh nations. Despite its accommodating outlook and, for example, the transfer of powers on Education to Wales, the Conservative Prime Minister Edward Heath fast became overwhelmed by the pressures of influential primordial unionists within his party.<sup>280</sup> Even when the Labour Party governed, from 1964 to 1970 and from 1974 to 1979, the conflicts between its centralising and regionalist wings prevented it from making devolution a priority and a reality.<sup>281</sup> Still, since this party could hardly obtain a plurality of support, and thus govern, without the support of Welsh and Scottish nationalists,<sup>282</sup> the Labour Party needed to make devolution fit together with unionism.

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*Nationalism* (University of Wales Press 1991) 1; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 15; Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 8; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 155.

<sup>279</sup> JC Banks, *Federal Britain?* (Harrap 1971) 244.

<sup>280</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 301.

<sup>281</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 15; Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 225.

<sup>282</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 129-130; Atsuko Ichijo, *Scottish*

In terms of advancing a devolutionary agenda, the main achievements of the 1970s' British governments were the creation of the Kilbrandon Commission and the attempt to implement its proposals. The Kilbrandon Report was issued in 1973. It concluded that directly elected assemblies should be established in Wales and in Scotland and that advisory regional councils should be established in England to institutionalise regionalism within this nation.<sup>283</sup> The Report highlighted that the English, who largely viewed the Union as a centralised and cohesive whole, had an understanding of unionism that considerably differs from that of the Welsh and the Scots, who mostly apprehended it from a multinational perspective.<sup>284</sup> The Report also confirmed that most Welsh and Scots staunchly rejected centralisation processes that fostered English interests at the expense of their national identities and ways of life, despite the non-existence of a definite constitutional alternative.<sup>285</sup> In that vein, distinct Scottish and Welsh Offices, which held relative administrative autonomy, were vassalised to central institutions since they could not empower these substate nations normatively.<sup>286</sup> The establishment of elected substate institutions was then meant to make the governance of the Welsh and Scottish nations more legitimate to their citizens, who could choose their substate rulers, and more responsive to their needs.<sup>287</sup> The democratic character of

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*Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 45.

<sup>283</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 15.

<sup>284</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) paras 331, 333 and 357.

<sup>285</sup> *ibid* paras 331-32, 358 and 373.

<sup>286</sup> *ibid* paras 362, 380 and 387.

<sup>287</sup> Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 341.

devolution proposals was particularly valued by Scots, whose nationalism was chiefly rooted in the will to establish a distinct political culture.<sup>288</sup> Although the Welsh did not resent as much as Scots the central control over the Welsh Office,<sup>289</sup> most of them supported the idea that they should have a decisive say in the making of the decisions shaping their nation.<sup>290</sup> In sum, the Kilbrandon Report was intended to bring the United Kingdom back to its contractual and consensual roots and to quash any claim for English hegemony.<sup>291</sup>

Still, although that point was made in a Memorandum of Dissent, it was considered that devolution should not lead to 'set a new tier of government'.<sup>292</sup> While substate nations should hold more political and legal powers, it was contended the British constitutional framework should not be rethought comprehensively from a multinational perspective.<sup>293</sup> There also was a reluctance to institutionalise federalism unless a federal arrangement could be deemed fair to all the constituent entities, which was considered doubtful due to the weak English desire for decentralisation.<sup>294</sup> Indeed, England and its regions hardly characterised themselves as distinct polities and, since they already held significant influence

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<sup>288</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) para 368; Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 10.

<sup>289</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Report (Cm 5460, 1973) para 366.

<sup>290</sup> Ibid para 376; Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 120.

<sup>291</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 129.

<sup>292</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Memorandum of Dissent (Cm 5460-1, 1973) para 277; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 190.

<sup>293</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Memorandum of Dissent (Cm 5460-1, 1973) paras 298, 304 and 306.

<sup>294</sup> Ibid para 128.

on the work of central institutions, did not really seek to gain more power or recognition for themselves.<sup>295</sup> So, proposals to dismantle the British Union due to the secession of its constituent nations and to divide state sovereignty formally were rejected.<sup>296</sup> Still, as much as the status quo, secessionism, and federalism were clearly deemed unrealistic and inopportune, the extent that devolution should have remained subject to intense debates.<sup>297</sup> Consequently, political actors had to take the initiative of giving effect to devolution beyond what the Kilbrandon Report provided as solutions.

In 1975, the Labour Government issued a White Paper on devolution in which it asserted its intent to devolve power to Scotland and Wales, to decentralise the exercise of power substantially, and thus to make British constitutionalism evolve.<sup>298</sup> The most significant proposal was the transfer of the powers held by the Scottish Office to a directly elected Scottish Assembly.<sup>299</sup> A Welsh Assembly would be established following this pattern, but its powers, at least for some time,<sup>300</sup> would only be executive since the popular Welsh demand for a distinct legislative institution was deemed insufficient.<sup>301</sup> Courts would solve issues related to the

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<sup>295</sup> *ibid* paras 321 and 328; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 16.

<sup>296</sup> Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973*, Volume I, Memorandum of Dissent (Cm 5460-1, 1973) para 118.

<sup>297</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 10 and 21; Constitution Unit, *An Assembly for Wales* (1996) 16.

<sup>298</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 7-8 and 11.

<sup>299</sup> *ibid* 30; Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 62.

<sup>300</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 46.

<sup>301</sup> *ibid* 42 and 44; Constitution Unit, *An Assembly for Wales* (1996) 29.

implementation of devolution arrangements,<sup>302</sup> which would have to be amended regularly so that they could remain responsive to peculiar national realities.<sup>303</sup>

However, the proposed devolution arrangements were substantively limited in three critical aspects. First, they did not challenge the sovereign status of Parliament, which would operationally transfer power to nations instead of relinquishing them, and provided it a right of life or death on devolution.<sup>304</sup> Second, since devolved powers would be enumerated in a statute enacted by the British Parliament, this central institution could significantly constrain and control substate normative powers and initiatives.<sup>305</sup> British central institutions would then retain all the critical powers, such as these on foreign and European affairs, that are essential to uphold state unity and cohesion, which could legitimise domineering jurisdictional oversteps.<sup>306</sup> Furthermore, national Secretaries of State would retain a veto power to counter any exercise of substate power that could be deemed inopportune.<sup>307</sup> Third, the constituent nations would not be fiscally autonomous as they would be financed by block grants calculated according to the 'Barnett Formula', which equalised state governing spending from a centralist perspective.<sup>308</sup> Therefore, in

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<sup>302</sup> Constitution Unit, *An Assembly for Wales* (1996) 82.

<sup>303</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 67.

<sup>304</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 11-12, 19 and 21; Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 167.

<sup>305</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 12, 39 and 47; Constitution Unit, *An Assembly for Wales* (1996) 30 and 34; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 32.

<sup>306</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 24.

<sup>307</sup> Constitution Unit, *An Assembly for Wales* (1996) 82.

<sup>308</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 28 and 51; Constitution

Bagehotian terms, devolution would hardly transform the efficient components of British governance and could hardly change how it worked concretely. The proposed devolution arrangements received mixed reviews because they were substantively limited despite their ground-breaking character.<sup>309</sup> While they were seen as an improvement by most nationalists, especially in Wales,<sup>310</sup> some Scottish nationalists were disappointed by them as their scope would be too narrow.<sup>311</sup> In sum, the proposed devolution arrangements were characterised as insufficient by crypto-independentist nationalists (especially in Scotland where they constituted an influential minority) and as overly decentralising by primordial unionists.<sup>312</sup> This at best lukewarm support for these arrangements significantly complicated their implementation.

After an integrated devolution bill could not be adopted in 1977, James Callaghan's Labour Government made sure that separate Welsh and Scottish Devolution Acts would be enacted in 1978 and that they would come into effect in 1979, though only if they were approved by referendum.<sup>313</sup> As the Welsh and Scottish devolution

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Unit, *An Assembly for Wales* (1996) 31; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 169.

<sup>309</sup> Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 70; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 16.

<sup>310</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 323; Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 18.

<sup>311</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 177; Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 32, 59, 61 and 125.

<sup>312</sup> Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 26; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 20.

<sup>313</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 91; Constitution Unit, *An Assembly for Wales* (1996) 27; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 17.

arrangements were structurally different, enacting separate Acts was sound, especially since that could optimise their responsiveness and their legitimacy.<sup>314</sup> Still, it was feared that the normatively 'ordinary' status of the Devolution Acts would compromise their steadiness and their authoritativeness.<sup>315</sup> It was then meant to mitigate this concern by setting informal duties by which legal and political actors would feel compelled to abide, whether by the effect of a constitutional convention or due to the intended bindingness of referendum mandates.<sup>316</sup>

However, the unpopularity of the Labour Government and an economic downturn made electors reluctant to establish a new tier of government, which doomed devolution in referendums.<sup>317</sup> Particularly since 40% of all the registered voters within each nation had to support the implementation of the devolution arrangements in compliance with the Cunningham amendment,<sup>318</sup> this high threshold was not met. Since 52% of Scottish voters, but only 33% of Scottish electors, supported devolution,<sup>319</sup> this amendment had a decisive effect on its rejection. Meanwhile, the Welsh referendum highlighted the weakness of Welsh

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<sup>314</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 32.

<sup>315</sup> Jonathan Bradbury, 'The Blair Government's White Papers on British Devolution: A Review of Scotland Parliament and a Voice for Wales' (1997) 7(3) *Regional and Federal Studies* 115, 130.

<sup>316</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 202; Constitution Unit, *An Assembly for Wales* (1996) 30.

<sup>317</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 92; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 46.

<sup>318</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 17.

<sup>319</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 91.

nationalism<sup>320</sup> since only 20% of the electorate supported devolution.<sup>321</sup> These referendum defeats were difficult to swallow for nationalists, who subsequently became increasingly independentists and sceptical of devolution.<sup>322</sup> Still, the Labour Party became an even stauncher advocate for devolution afterwards and sought to accentuate administrative devolution at the end of its term.<sup>323</sup> Nonetheless, two unrelated albeit consequential events prevented it from doing so.

First, although British rulers mostly dealt with substate national issues separately,<sup>324</sup> the Northern Irish Troubles showed the threats engendered by unbridled substate nationalism. As Northern Irish unionists exercised their devolved powers domineeringly,<sup>325</sup> British governments had to leave the sidelines and decided to stop primordial unionist excesses.<sup>326</sup> In 1972, Edward Heath, despite the traditional Conservative sympathy towards unionists, prorogued Stormont, implemented direct rule by

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<sup>320</sup> *ibid* 18; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 134; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 166.

<sup>321</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 91.

<sup>322</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 187; Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 84-85 and 123; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 64.

<sup>323</sup> Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 94; Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 111; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 12.

<sup>324</sup> Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 246-47.

<sup>325</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 110-11.

<sup>326</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 97 and 192; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 79; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 150.

establishing a Northern Ireland Office and rolled back Northern Irish devolution.<sup>327</sup> These radical decisions were not made by central institutions to take back power, but rather to prevent the escalation of the conflict between irredentist Irish republicans and unionists.<sup>328</sup> In fact, Northern Irish autonomy had worsened this conflict that jeopardised both British safety and stability.<sup>329</sup> Implementing direct rule was then essential to avoid stalemate, especially after the Sunningdale Agreement, which would have institutionalised power-sharing among communities, was rejected in 1974.<sup>330</sup> Despite the very peculiar nature of the policy choices that shaped Northern Irish arrangements, it was proved that

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<sup>327</sup> Northern Ireland (Temporary Provisions) Act 1972 (c 22) s 1 and Schedule, s 1(1); Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 197; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 193-94; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 150; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 131.

<sup>328</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 153; Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 46-48; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 247; Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 20-21.

<sup>329</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 199; John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 81; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 285; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 487.

<sup>330</sup> Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 47; Andrew White, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118, 120; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 516; Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 20-21.

devolution arrangements could, and even should, be repealed if they empowered elected officials to achieve dubious purposes.<sup>331</sup>

Second, a Conservative Government led by Margaret Thatcher was elected in 1979 and removed devolution from political agendas. Thatcher was a staunch unionist who was individualistic and distrustful of any distinct tier of government, whose functioning would ineluctably be inefficient or liberticidal.<sup>332</sup> Furthermore, she sacralised both unitary parliamentary sovereignty and state unity, and fought against any perceived threat to them, whether they be internal or European.<sup>333</sup> Thatcherism was antagonistic to

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<sup>331</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 198; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 41.

<sup>332</sup> Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 97; Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 36 and 618; Vernon Bogdanor, *The Monarchy and the Constitution* (2<sup>nd</sup> edn, Oxford University Press 1995) 305; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 17; John Mawson and Ken Spencer, 'The Origins and Operation of the Government Offices for the English Regions' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 162; Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 294; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 131; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 405.

<sup>333</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 188; Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 385 and 618; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 18; Barry Jones, 'Welsh Politics and Changing British and European Contexts' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 64; Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 223; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 85.

multinational unionism state since its valuation of parliamentary sovereignty was based upon the rejection of any normative differentiation.<sup>334</sup> In practice, Thatcher's governance effectively favoured the interests of southern England at the expense of these of other nations or regions (especially Scotland<sup>335</sup>) as they clashed with her ideological doctrine.<sup>336</sup> However, her intransigent stances towards the claims of the substate nations ultimately accentuated their distinctiveness from England and revealed the excesses of centralisation, which were increasingly denounced.<sup>337</sup> In fact, instead of consolidating British unity, Thatcher's inflexible unionism shook its foundations.

Nonetheless, Thatcherite unionism was remarkably non-primordial and flexible regarding Irish issues. Thatcher considered (though

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<sup>334</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 22; Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 223; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 4.

<sup>335</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 91, 104 and 159; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 145; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 286.

<sup>336</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 107 and 122; Michael Keating, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 116.

<sup>337</sup> Jack Brand and James Mitchell, 'Home Rule in Scotland – The Politics and Bases of a Movement' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 53; John Mawson and Ken Spencer, 'The Origins and Operation of the Government Offices for the English Regions' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 159; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 88; Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 138; Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 262.

ultimately rejected<sup>338</sup>) to establish a joint sovereignty arrangement with Ireland over Northern Ireland within a potentially confederal system,<sup>339</sup> condemned the unionists' recourse to violence and breaches of human rights,<sup>340</sup> and sought a compromise between unionists and republicans.<sup>341</sup> She also wanted to re-establish the Northern Irish devolution framework, but only if it was not used to devise exclusionary policies towards Irish nationalists and worsen the Troubles.<sup>342</sup> Reaching a power-sharing agreement, which would be based upon the stillborn Sunningdale Agreement, including an Irish dimension was then seen as the way to optimise the Northern Irish framework of constitutional governance.<sup>343</sup> The signature of the Anglo-Irish Agreement in 1985 was a sensible, albeit minimal, attempt to balance republican and unionist interests and to guarantee the right of Northern Irish citizens to choose their constitutional future.<sup>344</sup> This Agreement displayed Thatcher's pragmatic grasp that incrementalism and accommodation were essential to restore order and concord in Northern Ireland,<sup>345</sup> and

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<sup>338</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 395.

<sup>339</sup> *ibid*; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 105.

<sup>340</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 384.

<sup>341</sup> *ibid* 385; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 284.

<sup>342</sup> Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) paras 41 and 63; Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 385-87.

<sup>343</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 82; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 227-28; Martin Mansergh, 'The Background to the Irish Peace Process' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 31; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 518-19; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 105.

<sup>344</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 402; Christopher Norton, 'Renewed Hope for Peace? John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 109; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 556.

<sup>345</sup> John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 237.

that irredentism and terrorism should be renounced by both unionists and republicans.<sup>346</sup> Thatcher's moderation, which contrasted with her usual intransigence, alienated primordial unionists,<sup>347</sup> but it has ultimately proved decisive in restoring peace.<sup>348</sup> It can then be asked what results could have been achieved if she had apprehended substate nationalism with a similar pragmatism.

John Major, also a Conservative, succeeded Thatcher in 1990 and had a more moderate and accommodating approach towards constitutional governance. His unionism was flexible and more responsive to both European and substate national wills, needs, and interests.<sup>349</sup> Perceiving a rising constitutional malaise within the Union, he wanted to reignite the contractualistic and multinational character of the British polity through decentralisation and the empowerment of the substate nations.<sup>350</sup> The Major Government established ten Government Offices for the English regions (GORs),<sup>351</sup> increased the powers of the Scottish and

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<sup>346</sup> *ibid* 212 and 225; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 222; Christopher Norton, 'Renewed Hope for Peace? John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 110; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 151.

<sup>347</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 402 and 415; Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 50; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 559.

<sup>348</sup> Christopher Norton, 'Renewed Hope for Peace? John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 111.

<sup>349</sup> J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 138.

<sup>350</sup> Scotland Office, *Scotland in the Union. A Partnership for Good* (Cm 2225, 1993) 5, 23, 29-30, 35 and 39-40; *ibid* 133, 135 and 137.

<sup>351</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 3; John Mawson and Ken Spencer, 'The Origins and Operation of the Government Offices for the English Regions' in

Welsh Offices and strengthened the legal protection of the Welsh language<sup>352</sup>. Moreover, regarding Northern Ireland, he issued the Downing Street Declaration, in which he signalled his will for a negotiated, fair, and balanced settlement; and a ceasefire followed by it.<sup>353</sup> Still, the end of this ceasefire<sup>354</sup> and the challenge of synthesising the diverse senses of unionism<sup>355</sup> made Major's conciliatory initiatives crumble.<sup>356</sup> Nationalists, federalist Liberal Democrats, and devolutionist Labourites considered that Major's initiatives to value unionism were too cautious and insufficiently responsive to the growing societal desire for devolution and decentralisation.<sup>357</sup> Indeed, the Major Government did not want to

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Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 174.

<sup>352</sup> J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 135.

<sup>353</sup> Christopher Norton, 'Renewed Hope for Peace? John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 114-15, 117-18 and 122-25; Arthur Aughey, 'The 1998 Agreement: Three Unionist Anxieties' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 89; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 561; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 116.

<sup>354</sup> Liam O'Dowd, "New Unionism", British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 92; Christopher Norton, 'Renewed Hope for Peace? John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 108, 120 and 123-24.

<sup>355</sup> John Kingdom, 'Centralisation and Fragmentation: John Major and the Reform of Local Government' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 67; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 126 and 145.

<sup>356</sup> J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 144; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 192.

<sup>357</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 3-4; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major*

devolve powers to elected substate institutions, to implement asymmetric multi-level governance, to end top-down centralisation, and even less to implement federal arrangements.<sup>358</sup> Nevertheless, as the winds of constitutional change started to blow,<sup>359</sup> Major's premiership, albeit somewhat indirectly, was instrumental in the making of major reforms.<sup>360</sup>

#### 4.3.3. The Cautious Constitutional Revolution of New Labour

At the dawn of a new millennium, the political will to engage in constitutional debates, especially on the constitutional recognition

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*Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 132.

<sup>358</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 17; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 4; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 130; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 30; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 139.

<sup>359</sup> J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 128-29; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 177; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 104; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 247; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 159.

<sup>360</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 189; J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 144; Jonathan Tonge, *Northern Ireland* (Polity 2006) 123; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 192; Dennis Kavanagh, 'The Blair Premiership' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 5.

of the constituent nations, was revived. In preparation for a consequential general election in 1997, the Labour Party, which was led by Tony Blair who branded it as the 'New Labour', aimed to open a bright new horizon. In practice, Labour wanted to counter Conservative unitary unionism by making British sovereignty compatible with both European integration and the institutionalisation of multinationalism.<sup>361</sup> Norton considers that this project was very ambitious as the core structure of British constitutionalism had not evolved substantially since the Glorious Revolution.<sup>362</sup> To make the United Kingdom an actual union-state, Blair argued that he could walk his talk by implementing devolution arrangements,<sup>363</sup> in contrast to his predecessors who shared his aim though without acting decisively.

Although substate national institutions, such as the Welsh and Scottish Offices, already existed, they did not endow the constituent nations with genuine and legitimate representation since their members were neither elected, not able to make final and autonomous normative decisions.<sup>364</sup> Devolution cannot only

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<sup>361</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 274; John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 49.

<sup>362</sup> Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 104.

<sup>363</sup> Roger Levy, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990) 137-38; Charlie Jeffery, 'Devolution and Social Citizenship: Which Society, Whose Citizenship?' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 84.

<sup>364</sup> Constitution Unit, *An Assembly for Wales* (1996) 92; LJ Sharpe, 'British Regionalism and the Link with Regional Planning – A Perspective on England' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 133; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing*

be administrative to work well, but also executive and legislative.<sup>365</sup> Accordingly, devolution needs to empower the citizens of the constituent nations to choose the members of substate institutions and to hold them accountable.<sup>366</sup> New Labour both intended to secure a distinct place for the constituent nations within a multi-textured British constitutional order and to improve the efficiency of state governance in accordance with the principle of subsidiarity.<sup>367</sup> Furthermore, as the Conservatives were very unpopular in the constituent nations, Labour saw in devolution a proposal that, beyond its programmatic soundness, could enable it to gain crucial votes and, climactically, power.<sup>368</sup>

Still, to earn the confidence of British citizens, Tony Blair's New Labour had to adapt the devolution proposals devised in the 1970s to contemporary realities. The Labour proposals were built on a

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*Difference in Multinational States* (University of British Columbia Press 2015) 15-16.

<sup>365</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 9-10.

<sup>366</sup> Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 7; Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 3; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 46.

<sup>367</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 1 and 123; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 559; Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) paras 125 and 169; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 17; Jo Hunt, 'Subsidiarity, Competence and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 21.

<sup>368</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 125; Jack Brand and James Mitchell, 'Home Rule in Scotland – The Politics and Bases of a Movement' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 50; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 38; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 53; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 273.

similar frame,<sup>369</sup> but they were adjusted to address the issues that explained why Welsh and Scots voted against devolution in 1979. First, Labour took note that since senses of identity belonging varied significantly throughout the United Kingdom,<sup>370</sup> devolution should not be conceptualised following a uniform pattern. Moreover, it mitigated long-standing uncertainties regarding the powers and the legitimacy that substate elected officials would have.<sup>371</sup> For instance, it made clear that the members of substate assemblies would be elected through an additional voting system and that the Scottish Parliament would hold limited tax-raising powers (up to 3 pence in the pound).<sup>372</sup> Finally, distinct national or regional referendums would be held before, rather than after, the enactment of the Devolution Acts to provide a Labour Government with clear and direct mandates based upon the support of simple national majorities.<sup>373</sup> Although referendums are only advisory in

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<sup>369</sup> Jack Brand and James Mitchell, 'Home Rule in Scotland – The Politics and Bases of a Movement' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 50.

<sup>370</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 289 and 293; Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 168; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 138; Barry Jones, 'Welsh Politics and Changing British and European Contexts' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 57.

<sup>371</sup> Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 168.

<sup>372</sup> Jack Brand and James Mitchell, 'Home Rule in Scotland – The Politics and Bases of a Movement' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 49; Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 300; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 53.

<sup>373</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 181; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 56-57; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 95; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 322;

British constitutional law,<sup>374</sup> the Labour Party refused to undertake extensive reforms without having secured the consent of the people by referendum before proceeding.<sup>375</sup> Ultimately, a Blair Government could make decisions that would come into effect more quickly and predictably while having obtained a guarantee that the people would consider them legitimate. The common trait of those changes was the need to make devolution work, during its institutionalisation and after, for the benefit of citizens.

In this regard, the Labour Party acknowledged that legitimate and functional devolution arrangements had to be tailor-made to the polities in which they would be implemented. It considered that devolution should be asymmetrical to meet the needs of every territory, which made any proposal for a holistic and uniform constitutional territorial reform both impractical and inopportune.<sup>376</sup> Devolution was rather apprehended as a progressive evolution of British constitutionalism that should be flexible and accommodative more than overarchingly revolutionary.<sup>377</sup> It was

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Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 83-84.

<sup>374</sup> Constitution Unit, *An Assembly for Wales* (1996) 137; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 51.

<sup>375</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 301; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 56-57; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 107; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 334; Eoin Daly, 'Populism and Popular Sovereignty in the UK and Irish Constitutional Orders' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 180.

<sup>376</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 300; HL Deb 10 April 2000, vol 612, col 6 (Baroness Ramsay of Cardvale).

<sup>377</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 82; Anthony King, *Does the United Kingdom Still Have a*

not meant to clash directly with core principles of British constitutionalism like parliamentary sovereignty.<sup>378</sup> In sum, pragmatism characterised the Labour's approach towards constitutional change so that, concretely, a multinational unionism could be upheld.

In that vein, besides his commitment to implement the Welsh and Scottish devolution arrangements, Tony Blair also wanted to end the Troubles in Northern Ireland and thought that devolution could help to restore peace and institute power-sharing devices.<sup>379</sup> Although his sympathy for Northern Irish unionists raised doubts about his ability to forge compromises,<sup>380</sup> Blair thought that re-establishing devolution, with hard constraints on communitarian claims, was a sensible solution. Updated devolution arrangements of Northern Ireland then had to be devised with respect for the

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*Constitution?* (Sweet and Maxwell 2001) 64; Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 229; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 115; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 192 and 197; Iain McLean, 'The National Question' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 487-91.

<sup>378</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 51 and 189; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 193.

<sup>379</sup> Desmond Bell, 'Modernising History: The *Real Politik* of Heritage and Cultural Tradition in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 240; Paul Gillepsie, 'From Anglo-Irish to British-Irish Relations' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 331.

<sup>380</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 7 and 10; Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 53; Frank Millar, 'Ireland: The Peace Process' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 516;

societal characteristics of this nation and for the needs to quash majoritarianism and intolerance.

Furthermore, Blair was aware and respectful of a broad popular reluctance to establish fully-fledged devolution arrangements in the English regions.<sup>381</sup> There was no question of imposing devolution where it was not wanted.<sup>382</sup> The Labour Government proposed to establish distinct regional English institutions<sup>383</sup> so that the English regions could have more powers and be governed more democratically,<sup>384</sup> but that would not be imposed on them. That was coherent with the Labour postulate that undertaking incremental, differentiated, and potentially piecemeal, constitutional reforms was crucial to make them function and last.

Ultimately, devolution was intended to reinforce unionism by the constitutional recognition of distinct entities instead of providing them the tools to secede.<sup>385</sup> While some feared that devolution could serve as a stepping-stone for independentists and make the British Union crumble,<sup>386</sup> the Labour approach towards devolution

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<sup>381</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 199.

<sup>382</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 299.

<sup>383</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 30.

<sup>384</sup> Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 58.

<sup>385</sup> Jonathan Bradbury, 'The Blair Government's White Papers on British Devolution: A Review of Scotland Parliament and a Voice for Wales' (1997) 7(3) *Regional and Federal Studies* 115, 123; HC Deb 21 October 1999, vol 336, col 670-71 (Dr John Reid); Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 21; Arthur Aughey, 'The Challenges to English Identity' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 51.

<sup>386</sup> Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 78; Richard Simeon and Daniel-Patrick Conway, 'Federalism and the Management of Conflict in Multinational Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies*

was as antagonistic to independentist nationalism as it was to primordial unionism. These doctrines relied on inflexible and essentialist identity claims that clashed with multinational citizenship, which was central in Blair's constitutional thought.

In 1997, the stars were aligned for making ambitious reforms,<sup>387</sup> even though constitutional issues were not central during the electoral campaign,<sup>388</sup> as Blair's New Labour was elected in a landslide after this election. In September 1997, pre-legislative referendums on the principle of devolution, rather than on precise arrangements, were held in Scotland and Wales.<sup>389</sup> 74.3% of Scots supported the establishment of a Scottish Parliament and 63.5% voted for conferring it a limited tax-varying power.<sup>390</sup> The Welsh referendum was held one week later, which enabled devolutionists to capitalise on the clear Scottish mandates.<sup>391</sup> 50.3% of Welsh supported devolution,<sup>392</sup> a thin majority that yet indicated a rising support for nationalism since the 1979 referendum. The circumstantial alliance between Labourites and nationalists, despite their disagreements on the appropriate scope

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(Cambridge University Press 2001) 356; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 94; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 92.

<sup>387</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 252; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 62.

<sup>388</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 62; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 53-54.

<sup>389</sup> J Barry Jones, 'Devout Defender of the Union: John Major and Devolution' in Peter Dorey (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999) 126; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 111.

<sup>390</sup> Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 54.

<sup>391</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 122.

<sup>392</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 2.2.4.

of devolution and on its finality, was decisive.<sup>393</sup> Parliamentary debates on the future Devolution Acts went quite smoothly since parliamentarians consented to stand by the governmental commitment that had been ratified by referendum.<sup>394</sup> Accordingly, Welsh and Scottish Acts were enacted in 1998 and the first substate national elections were held in May 1999.<sup>395</sup>

Since the multinational essence of the British state was better recognised, and even constitutionalised, following the implementation of the Welsh and Scottish devolution arrangements, it became simpler to institutionalise Northern Irish self-government<sup>396</sup> and to enhance the identity recognition of Northern Irish unionists.<sup>397</sup> A peace settlement in Northern Ireland was within reach when Tony Blair became Prime Minister,<sup>398</sup> and it became a reality. On Good Friday 1998, an Agreement was reached to foster equal and respectful relationships between the United Kingdom, Ireland, and Northern Irish unionists and nationalists.<sup>399</sup> Devolution would be vital in implementing power-sharing arrangements and safeguarding the unionists' distinct

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<sup>393</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 263.

<sup>394</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 202; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 97; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The Scotland Act 1998' (2011) 30(1) *Parliamentary History* 85, 87.

<sup>395</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 174.

<sup>396</sup> Arthur Aughey, 'The 1998 Agreement: Three Unionist Anxieties' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 90.

<sup>397</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 109; Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 146.

<sup>398</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 565.

<sup>399</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Declaration of Support, s 3; Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 36.

identity and right to choose their constitutional status in a border poll.<sup>400</sup> Although, in a subsequent referendum, only 55% of unionists supported the Good Friday Agreement (GFA), it was endorsed by 75% of Northern Irish citizens.<sup>401</sup> Devolution then had the potential to restore concord and order within a divided polity.

Still, it remained unclear how devolution would fit within a multinational British constitutional order,<sup>402</sup> especially if Parliament remained formally sovereign<sup>403</sup>. In accordance with the Blairite evolutionary understanding of devolution, it was hard to precisely apprehend how it would transform British constitutionalism. While

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<sup>400</sup> Desmond Bell, 'Modernising History: The *Real Politik* of Heritage and Cultural Tradition in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 239; Jonathan Tonge, *Northern Ireland* (Polity 2006) 27; John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 47.

<sup>401</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 568; Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 24; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 116.

<sup>402</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 34; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 244; Michael Keating, 'Reforging the Nation: Britain, Scotland and the Crisis of Unionism' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 121 and 123; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 15; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 469; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 6; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 120; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 253-54.

<sup>403</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 302; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 92.

regionalism can be functional or political,<sup>404</sup> there was a risk that devolution would merely be dignified if it was conceptualised from an orthodox legal constitutional perspective. In fact, despite the extensiveness of their norm-making powers, substate institutions would simply exist because Parliament wanted so, mainly because it could still abolish them unilaterally.<sup>405</sup>

In that vein, although the British polity would have come back to its multinational roots as a union-state, claiming that it has unambiguously become federal is controversial. Certainly, devolution was not intended to be a synonym of federalism, at least in its inception, since parliamentarians did not want to divide the exercise of British state sovereignty.<sup>406</sup> Since federalism was then primarily apprehended by Britons as the corollary of a centralising European integration, linking federalism to decentralisation could easily seem contradictory.<sup>407</sup> Although Elazar contends that undertaking devolution would have ‘launched a federalization process’,<sup>408</sup> Alt, among others, argues that the persistent centralisation of a British constitutional governance shaped by parliamentary sovereignty fundamentally has prevented the proper implementation of federal principles.<sup>409</sup> For his part, Melding

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<sup>404</sup> Michael Keating, ‘From Functional to Political Regionalism: England in Comparative Perspective’ in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 143-44.

<sup>405</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 287.

<sup>406</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 249; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 13.

<sup>407</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 3.

<sup>408</sup> Daniel J Elazar, ‘The State System + Globalization (Economic Plus Human Rights) = Federalism (State Federations Plus Regional Confederations)’ in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 18.

<sup>409</sup> James Alt, ‘The Constitutional Revolution of Tony Blair’ in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 231.

suggests that since the nature and the scope of devolved legislative powers varies very significantly, only some initial devolution arrangements, at best, could be characterised as federal on a substantive basis.<sup>410</sup> Nonetheless, it is clear that devolution has institutionalised the existence of the constituent nations and constitutionalised British multinationalism at an unprecedented level. Examining thoroughly whether the United Kingdom has become a federal state because of this process is highly relevant. To reach meaningful conclusions, I shall focus my investigation on the core substantive components of federal principles and determine if they have been integrated into the devolution arrangements beyond abstract considerations.

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<sup>410</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 13-14.

## **Part 2: Assessing the Federal Nature of Devolution**

## **5. The Existence of Federal British Self-Rule?**

To determine whether the United Kingdom is a federal state, which is the crux of this thesis, I shall ascertain whether its constituent nations share a constructive engagement to uphold a federal pact and abide by its terms. Still, considering the unposited and organic essence of British constitutionalism, looking for an explicit recognition that federal principles shape it is vain. What would make the United Kingdom a functional federal state is the institutionalisation of three core federal features. These are the guarantee of self-rule, the valuation of shared rule, and the constitutional safeguard of a divided sovereignty. I evaluate their existence in the United Kingdom in the following three chapters.

In this chapter, I argue that, since the enactment of Devolution Acts, various British nations have held the ability to self-rule. This argument is made in three parts. First, I highlight the importance of ensuring that each constituent entity can exercise its share of a divided federal sovereignty autonomously. Second, after having proved that asymmetrical self-rule may be vital to the actualisation of federal fairness, I underline that asymmetry characterises federal British self-rule that is intrinsically adaptable. Third, I display more accurately how the devolution arrangements have institutionalised self-rule in accordance with federal principles.

## 5.1. The Importance of Self-Rule

As self-rule has frequently been described as a pillar of federalism, it is vital to determine precisely why and how it is so concretely. It must never be overlooked that a federal state is intrinsically the aggregate of several diverse polities living together. These constituent entities need to be empowered to make normative decisions within their jurisdictions without undue interventions from central institutions. Depriving these entities of the power to govern themselves would be a significant breach of any federal pact. Nonetheless, the extent of federal self-rule and the ways by which it is exercised may vary significantly in practice.

### 5.1.1. Self-Rule in a Federal State

Constructive engagement between central and substate entities cannot exist without valuing the multi-level essence of federal governance. Although these entities are parts of a united state whose sovereignty is divided, they are entirely sovereign on a definite set of policy matters. Constituent entities can only self-rule if they have the last word on anything within their jurisdiction. Institutional frameworks shaped by federal principles must endow the constituent entities with the tools they require to fully exercise their share of sovereignty. Moreover, to entrench the right to self-rule, a federal constitution delineates unambiguously the sphere of autonomy that is exclusive to each federal and federated entity.<sup>1</sup>

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<sup>1</sup> *Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Company Ltd.* [1914] AC 237, 246; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 76-77; George Carey, 'Federalism: Historic Questions and Contemporary Meanings – A Defence of Political Processes' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 45; *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [58]; Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even

Consequently, the constituent entities, and the citizens who inhabit them,<sup>2</sup> shall, as noted by Kelso, ‘control aspects of their lives in their local communities without having to persuade a majority of citizens nationwide to adopt the same policies’.<sup>3</sup>

When the constituent entities do not have the means to hold such a control, federal principles can hardly be implemented meaningfully.<sup>4</sup> That explains why a corollary of self-rule is the allocation of distinct normative powers to each constituent entity so that it can control how it governs itself.<sup>5</sup> In fact, the division of powers is the backbone of federal self-rule.<sup>6</sup> In a state whose sovereignty is divided, a constituent entity shall not be able to override the jurisdiction of another one or to hamper, directly or through spillover, the exercise of its powers.<sup>7</sup> Indeed, federal multi-level governance only functions well when multiple polities can make independent decisions and coexist within the same state, although federal and federated entities might hold similar powers

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Possible?’ (2001) 3(1) *British Journal of Politics & International Relations* 71, 77.

<sup>2</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 16.

<sup>3</sup> R Randall Kelso, ‘A Post-Conference Reflection on Federalism, Toleration, and Human Rights’ in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 270.

<sup>4</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 42-43.

<sup>5</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 17; Michael Burgess, ‘Federalism and Federation: A Reappraisal’ in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 5.

<sup>6</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 33; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 68.

<sup>7</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 34; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 44.

with regard to their functional attributes (e.g. legislative, fiscal, spending, etc.) or concurrent jurisdictions<sup>8</sup>.

Still, as for anything related to federalism, there is no uniform way to actualise and entrench self-rule.<sup>9</sup> Certainly, Suksi's argument that a federal constitution usually enumerates federated powers is insightful because that can signal that federated entities hold a fraction of state sovereignty and that their formalised jurisdiction is definite rather than unduly malleable.<sup>10</sup> However, the existence of such an enumeration, despite its functional appropriateness, does not permit alone to characterise a state as federal. In practice, that does not matter whether constitutional powers are conferred directly on the federal entity, on federated entities, or both.<sup>11</sup> Nonetheless, I contend that a fundamental component of self-rule is the ability of each constituent entity to enact its own statutory norms by the exercise of some fixed legislative powers.<sup>12</sup> The resulting statutes are crucial, and even vital, to embody the legal response to peculiar societal issues within an autonomous polity beyond rhetorical statements.

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<sup>8</sup> George Carey, 'Federalism: Historic Questions and Contemporary Meanings – A Defence of Political Processes' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 45.

<sup>9</sup> Paul Chen, 'Federalism and Rights: A Neglected Relationship' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 304; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 353; David Armitage, 'Conclusion: We Have Always Been Federal' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 282.

<sup>10</sup> Markku Suksi, 'Sub-State Governance through Territorial Autonomy: On the Relationship between Autonomy and Federalism' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 64.

<sup>11</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 149.

<sup>12</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 182; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 80.

To ensure the proper execution of these statutes, the constituent entities shall also hold administrative powers.<sup>13</sup> The balance between the extent of the legislative and administrative powers held by the constituent entities may vary significantly depending on the structure of state constitutional frameworks. It is at best hypothetical to assert that a constituent entity with lacking legislative powers ineluctably lacks normative autonomy and is thus powerless to self-rule. For instance, while federated entities commonly hold both types of powers, those held by the German landers are mostly administrative, even though that hardly jeopardises their characterisation as federated entities.<sup>14</sup> In fact, the value of a federal framework shall be assessed pragmatically, considering the actual capacity of the constituent entities to hold the powers, regardless of their precise nature, that they deem necessary to control their collective life.<sup>15</sup>

Furthermore, so that the constitutional provisions dividing powers can be meaningful and functional, federal and federated entities shall hold the material (especially financial) resources that are instrumental<sup>16</sup> to the exercise of their powers.<sup>17</sup> A self-ruling entity

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<sup>13</sup> Markku Suksi, 'Autonomous Areas as a Constitutional Feature in the People's Republic of China and Finland' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 218.

<sup>14</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 62.

<sup>15</sup> Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 161; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 33.

<sup>16</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 107; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 70.

<sup>17</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 93; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 125-26; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 203; Michel Seymour and Alain-G

shall raise, borrow, and spend money without the supervision of other entities.<sup>18</sup> Certainly, fiscal equalisation is opportune to foster solidarity between the constituent entities and, more importantly, to ensure that they all have the means to self-rule.<sup>19</sup> Nonetheless, the operation of redistributive mechanisms shall not trivialise and legitimise normative encroachments from an entity (federal, in most cases) into another's jurisdiction. That would likely empower this entity to do effectively what the constitutional division of powers expressly forbids it to achieve. Indeed, extensive federal spending powers and fiscal misbalances are significant threats to federated self-rule since they unduly and unilaterally limit the powers of substate entities by the valuation of centralisation under the guise of increasing managerial efficiency.<sup>20</sup>

In practice, overcentralisation constitutes a significant threat to the fair ability of the constituent entities to self-rule. Still, there are three

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Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 4.

<sup>18</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 24 and 100; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 129; Henry Teune, 'The Future of Federalism: Federalism and Political Integration' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 222-23; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 181; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 235; Michael Pagano, 'In the Eye of the Beholder: The Dynamics of Federalism in National and Supranational Political Systems' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 5; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 72-73.

<sup>19</sup> Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 15; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 244.

<sup>20</sup> JC Banks, *Federal Britain?* (Harrap 1971) 168; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 201.

significant reservations on this matter. First, as a federal state shall safeguard its unity, normative centralisation is, to a certain degree, necessary to actualise the federal spirit. Second, the degree of functional centralisation is not indicative alone of the federal nature of a state. The balance between the aggregative and disaggregative components that shape state governance reflects of a dynamic of power that is peculiar to a polity and cannot be struck uniformly.<sup>21</sup> In this regard, the federal character of devolutionary states cannot be contested on the sole basis that their central entities hold, and resolutely protect, particularly extensive powers.<sup>22</sup> Third, that is not because some critical and strategic aspects of governance are centralised that a state is ineluctably centralised and non-federal.<sup>23</sup> For example, the fact that a federal entity holds the exclusive power to conduct foreign relations (which is very common) highlights less the domineering and centralising character of this entity than a will to uphold the power and the unity of the state.<sup>24</sup> What centralisation never legitimises within a federal state is the establishment of a strict normative hierarchy on top of which a federal entity might overrule any decision made by federated entities.<sup>25</sup>

Nonetheless, a federal constitution shall divide powers in a manner that hierarchises the constituent entities in one specific aspect. It identifies which type of entity holds powers of last resort when a

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<sup>21</sup> Constitution Unit, *An Assembly for Wales* (1996) 59.

<sup>22</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 237.

<sup>23</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 125.

<sup>24</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 163 and 169; Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 58; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 187.

<sup>25</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 50.

jurisdictional conflict occurs or when a new power must be allocated (in this case, such a power is characterised as residuary).<sup>26</sup> Looking for the holder of those powers helps to determine if the federal dynamic within a state is centralising or decentralising.<sup>27</sup> Lenaerts and Agnew yet relativise this criterion of analysis arguing that federal supremacy in this context simply fosters normative coherence, especially when it is deemed opportune to implement uniform policies.<sup>28</sup> However, Suksi notes that when a federal entity has the 'last word' or gains new powers, it shapes the state in conformity with its centralising interests and, potentially, compromises federal fairness due to its effectively dominant position.<sup>29</sup> That reasoning indicates how powers of last resort can transform the actualisation of self-rule over time. In any case, the exercise of those powers shall never engender the systemic domination of some entities, which is intrinsically opposed to the core of federalism.

Ultimately, the federal division of powers optimises the complementary role of the constituent entities within a state instead of accentuating the differences between them and engendering bitter conflicts. In line with the principle of subsidiarity, a federal entity shall not address issues that can be handled autonomously by federated entities, which shall hold sufficient

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<sup>26</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 145; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 90.

<sup>27</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 145; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 90.

<sup>28</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 263; John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 297.

<sup>29</sup> Markku Suksi, 'Sub-State Governance through Territorial Autonomy: On the Relationship between Autonomy and Federalism' in Alain-G Gagnon and Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 65.

constitutional powers and material resources to do so.<sup>30</sup> The purposes underlying the exercise of federal powers shall then be the upholding of state unity and the pursuit of common interests. For their part, substate entities shall be empowered to enact norms and to implement policies that dovetail their specific realities, which entails that policy differentiation shall be accepted and valued in a federal state.<sup>31</sup> Although it can reasonably be feared that such a differentiation makes governance haphazard and inefficient,<sup>32</sup> this concern does not necessarily justify furthered centralisation to counter this outcome and does not even represent, as such, a flaw of self-rule.<sup>33</sup> In fact, differentiation strengthens federalism, instead of weakening it, because a differentiated exercise of self-rule can

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<sup>30</sup> John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 297; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 195; Richard Simeon, 'Federalism and Social Justice: Thinking through the Tangle' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 40; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 158.

<sup>31</sup> Charlie Jeffery, 'Devolution and Social Citizenship: Which Society, Whose Citizenship?' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 90; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 23.

<sup>32</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 151; R Randall Kelso, 'A Post-Conference Reflection on Federalism, Toleration, and Human Rights' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 271; Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 26; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 15; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 8.

<sup>33</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 54.

be key to articulating substate diversity, which is a fundamental federal principle, by normative means.<sup>34</sup>

It can be sensible to argue that the division of powers shall no longer be watertight. That permits to conciliate the virtues of policy differentiation with the need to foster a policy coordination benefitting entities and citizens on certain matters. According to several authors, a dualistic understanding of the division of sovereignty is obsolete<sup>35</sup> because it is overly reminiscent of the modern and non-federal idea of exclusive sovereignty. Especially from a heterarchical perspective, some powers can be held jointly by the constituent entities, regardless of constitutional provisions.<sup>36</sup> Federalism shall then be cooperative rather than essentially competitive to acknowledge the natural character of policy overlaps and the contemporary virtues of interdependence, so that state unity can be consolidated when needed.<sup>37</sup> In practice, without surrendering their constitutional powers, the constituent entities can consent to cooperate jurisdictionally beyond a zero-sum logic and be encouraged to pool some of their resources to

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<sup>34</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 157.

<sup>35</sup> Susan E Clarke, "'Thinking Federally" from a Governance Perspective' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 56; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 515; Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 87.

<sup>36</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 151 and 219; Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press 2009) 354-55.

<sup>37</sup> Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 240; Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 203.

reach greater common goods.<sup>38</sup> Cooperative federalism, whose characteristics are studied more thoroughly in the next chapter on shared rule, can certainly be valuable. It enables us to apprehend the division of powers beyond strict formalism, with a pragmatism that fosters dialogue and concord. Nonetheless, if it is inappropriately institutionalised, it threatens self-rule, and thus federal principles, for three reasons.

First, especially if federal entities hold last-resort and residuary powers,<sup>39</sup> cooperative federalism might justify policy encroachments for strictly utilitarian reasons and hierarchise normative power effectively.<sup>40</sup> Concurrent jurisdictions might become federal Trojan horses that would clash with, and lead to the demise of exclusive federated jurisdictions.<sup>41</sup> Second, the pragmatism of cooperative federalism weakens the protection of constitutional jurisdictions from power struggles. Federal entities may take advantage of their considerable strengths to assert their values and their interests domineeringly, regardless of the

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<sup>38</sup> Richard Simeon and Daniel-Patrick Conway, 'Federalism and the Management of Conflict in Multinational Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 361; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 100; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 7.

<sup>39</sup> Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinis (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 200.

<sup>40</sup> Eugenie Brouillet, *La negation de la nation: L'identite culturelle quebecoise et le federalisme canadien* (Editions du Septentrion 2005) 98; *ibid* 202.

<sup>41</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 75; Roland Sturm, 'The Adventure of Divergence: An Inquiry into the Preconditions for Institutional Diversity and Political Innovation after Political Decentralization' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 144; Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 88-89.

substance of the federal pact.<sup>42</sup> In such cases, power misbalances would be emboldened in the name of cooperation, which would be intendedly founded upon good faith. Third, as highlighted by Watts, seeking the end of any federal competition is fundamentally vain because removing conflicts from social life by the work of institutions is effectively naïve and utopistic.<sup>43</sup>

To ensure the compatibility of cooperative federalism with self-rule, the constitutional division of powers shall remain the guiding star of federalism. Since any fruitful and fair cooperation relies on mutual trust and on the absence of subordination,<sup>44</sup> each constituent entity shall be confident in its ability to self-rule in keeping with the characteristics of its unique legal personality. A division of powers shall yet be apprehended flexibly in accordance with the principle of subsidiarity, which shall be clearly constitutionalised. That is particularly crucial in multinational federal states so that the substate nations can control decisive levers of their collective lives.<sup>45</sup> Therefore, beyond purely

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<sup>42</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 242; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinat (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 200; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 63.

<sup>43</sup> Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 212.

<sup>44</sup> Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 402 and 408; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinat (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 202; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 95.

<sup>45</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 129; Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 60; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 101; R Randall Kelso, 'A Post-Conference Reflection on Federalism,

normative and managerial considerations, self-rule is vital in securing the constitutional recognition of the constituent entities in a multinational polity.

### 5.1.2. The Recognition of Substate National Autonomy

If the devolution arrangements have implemented federal principles into British constitutionalism, that would have primarily been motivated by the intent to recognise and institutionalise the multinational character of the United Kingdom. They would embody legally the long-standing desires of the constituent nations, especially Scotland, to dissociate unionism from any idea of societal uniformity.<sup>46</sup> In that vein, Schutze highlights the transformative effect of devolution, which has limited, beyond what formal law provides, the scope of central powers and reinforced the sense that substate national identities are distinct.<sup>47</sup> Consequently, apprehending British self-rule can hardly be done while glossing over national considerations.

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Toleration, and Human Rights' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 270; Malcolm Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 247; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 277 and 286; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 443; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 8; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 149; Keith Basting and Nicola McEwen, 'Inequality, Redistribution and Decentralization in Canada and the United Kingdom' in Michael Keating and Guy Laforest (eds), *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan 2018) 105.

<sup>46</sup> Reginald Coupland, *Welsh and Scottish Nationalism: A Study* (Collins 1954) 413; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 298 and 301.

<sup>47</sup> Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 22.

The increased fluidity and multiplicity of contemporary identities have highlighted the importance of recognising tangibly substate national identities.<sup>48</sup> As observed previously, the lack of a British Jacobinism entails that multinationalism has never been deemed constitutionally heretical in the United Kingdom. This reality had yet taken time to make sense institutionally. For instance, determining whether matters such as education and culture contribute in priority to the edification of Britishness or the assertion of substate nationalism has been the object of intricate debates.<sup>49</sup> Still, as in the past, central (essentially English) institutions did not want to devise a homogeneous understanding of Britishness, primarily through assimilation, by the operation of a centralised education system.<sup>50</sup> Furthermore, few English citizens have seen devolution as a direct threat to state unity.<sup>51</sup> So, while it has consistently been marginal, the idea of a single British nation and culture has clearly been characterised as unrealistic in contemporary times.<sup>52</sup>

However, for decades, the British substate nations have been somewhat voiceless and invisible institutionally and, especially,

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<sup>48</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 316.

<sup>49</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 9.3.1.

<sup>50</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 71.

<sup>51</sup> Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 262.

<sup>52</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 248; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 98; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 36.

normatively.<sup>53</sup> The ideas underlying Gladstonian Home Rule were quite fanciful concretely, at least until devolution.<sup>54</sup> Institutionally, the recognition of the constituent nations has been affected by the evolution of long-standing conventional rules that had guided for centuries how the relationships between British nations and institutions were conducted.<sup>55</sup> Certainly, even before this process was initiated, Scotland, among others, retained substantial autonomy regarding religious, educational, legal, and cultural matters to uphold its national distinctiveness.<sup>56</sup> Still, substate nationalism was more a 'state of mind', to use Ichijo's phrase, than a tool empowering entities to self-rule without being constrained by domineering central institutions.<sup>57</sup>

In fact, the most transformative impact of devolution has been the establishment of genuine norm-making institutions so that the affirmation of substate nationalism would no longer emanate only from civil society.<sup>58</sup> The devolution arrangements were devised at an epoch shaped by constitutional transformations such as the continuous decline of central parliamentary power,<sup>59</sup> which is no

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<sup>53</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 60; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 19; Michael Keating and Nicola McEwen, 'The Scottish Independence Debate' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 5.

<sup>54</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 119.

<sup>55</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 168.

<sup>56</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 15.

<sup>57</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 121; Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 22; Michael Keating and Nicola McEwen, 'The Scottish Independence Debate' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 6.

<sup>58</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 1; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 175.

<sup>59</sup> Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 *Law Quarterly Review* 218, 235.

longer hegemonic in an orthodox sense. The corollary increase of executive powers has also made it crucial that substate self-rule is not only legislative or regulatory but also executive and administrative.<sup>60</sup> Concretely, devolved legislative and executive powers have become indissociable.<sup>61</sup> For example, executive substate institutions, despite their inability, with few statutory exceptions, to reform the role and the status of the Crown and of its ministers,<sup>62</sup> have exercised the prerogatives and duties of the Crown in a pretty similar way as the central institutions.<sup>63</sup> Additionally, the coexistence of state and national civil services reflects the multi-level essence of contemporary British governance, which cannot only be operationalised exclusively through pure norm-making processes.<sup>64</sup> For substate self-rule to become a reality, it had to be thought and institutionalised in a tailor-made fashion that could dovetail distinctive national characteristics and realities beyond formal considerations.

Consequently, it can be asserted that the constitutional recognition of the British constituent nations since devolution is far from having merely been rhetorical. Accordingly, it is reasonable to contend that devising an extensive framework of constitutional governance

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<sup>60</sup> Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 78.

<sup>61</sup> Scotland Act 1998 (c 46) s 52-53; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 283

<sup>62</sup> Northern Ireland Act 1998 (c 47) s 23; Scotland Act 1998 (c 46) s 55(1) and 56; Government of Wales Act 2006 (c 32) Schedule 5, Part 2, General restrictions, s 1 and Schedule 5, Part 3, Exceptions from general restrictions in Part 2, s 7; *Somerville v Scottish Ministers* (HM Advocate General for Scotland intervening) [2007] UKHL 44 [96].

<sup>63</sup> Scotland Act 1998 (c 46) s 45; Government of Wales Act 2006 (c 32) s 58A and 157(2); Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 51; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 17.

<sup>64</sup> Constitution Unit, *An Assembly for Wales* (1996) 86; Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 3.16.

in which the substate nations can enact primary legislation, and thus self-rule, has led to the crumble of unitarism in British constitutionalism.<sup>65</sup> While Tierney criticises the overly hierarchic structure of devolution that would contradict federal principles, he notes that multiple distinct self-ruling entities coexist nowadays within a British state whose constitutive diversity has become a normative reality since 1998.<sup>66</sup> Whether or not that was deliberate, a multinational British settlement limiting the importance of its institutional centre substantially would have emerged at the turn of the 21<sup>st</sup> century.<sup>67</sup> The constituent nations could then feel confident in their existence and interact together within a common state framework in which their recognition would not be challengeable.<sup>68</sup>

### 5.1.3. The Division of Powers

Devolution would be effectless if the constituent nations were not endowed with some normative powers that were previously exercised exclusively by central institutions. In the United Kingdom, it has been considered that a fair and functional division of powers, which is vital to make the devolution arrangements work well, should have three characteristics. First, its constitutional value shall be assessed qualitatively (the ability to institutionalise

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<sup>65</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 3; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 207; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 471; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 514; Jo Murkens, 'The UK's Reluctant Relationship with the EU: Integration, Equivocation, or Disintegration?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 167.

<sup>66</sup> Stephen Tierney, 'Federalism in a Unitary State: A Paradox too Far?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 51.

<sup>67</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 274; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 196 and 260.

<sup>68</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 119.

self-rule within particular constitutional settings) rather than quantitatively (the extensiveness of the powers held by some entities).<sup>69</sup> Second, since such a division articulates multi-level self-rule, it shall be posited as precisely as possible and interpreted holistically and coherently.<sup>70</sup> Third, when substantive ambiguities or jurisdictional conflicts arise, a mechanism shall be used to determine clearly and impartially the extent of the powers allocated to each entity.<sup>71</sup>

Concretely, far from being mere nominal or even administrative subdivisions,<sup>72</sup> substate entities have become fully-fledged polities that can enact and implement norms autonomously.<sup>73</sup> In practice, a division of powers has allowed these nations to take control of the matters that characterise their legal and political distinctiveness.<sup>74</sup> Since devolution, substate institutions, rather than only the Westminster Parliament, can enact acts, primary legislation, within their jurisdictions<sup>75</sup> and corollary subordinate legislation<sup>76</sup>. Moreover, the existence of Scottish and Welsh

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<sup>69</sup> Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 199.

<sup>70</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 [14].

<sup>71</sup> *ibid* [15].

<sup>72</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 197.

<sup>73</sup> Mark Goodwin, Martin Jones and Rhys Jones, 'Devolution, Constitutional Change and Economic Development: Explaining and Understanding the New Institutional Geographies of the British State' (2005) 39(4) *Regional Studies* 421, 425; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 326; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 97.

<sup>74</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 2.8; *Martin v Most* [2010] UKSC 10 [35]; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 17.

<sup>75</sup> European Union (Withdrawal) Act 2018 (c 16) s 20(1).

<sup>76</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 66; Scotland Act 1998 (c 46) s 104(1) and 105; The National Assembly for Wales (Transfer of Functions) Order 1999 (no 672) s 2 and 5; *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 [84]; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*

governments that are normatively equal to the British one has been recognised statutorily.<sup>77</sup> In fact, these nations can self-rule because they hold some definite powers exclusively, in a somewhat federal manner.

In practice, the division of powers shall not only confer powers to substate entities but also to the central entity, which shall also hold some structuring powers to self-rule.<sup>78</sup> Some powers, especially on economic and safety matters, have been retained by the British central entity to safeguard state integrity, to mitigate the impacts of external shocks, and to act, in compliance with the principle of subsidiarity, on matters that cannot be dealt with efficiently by substate institutions.<sup>79</sup> Moreover, increasing national autonomy through devolution was not meant to increase socio-economic inequalities within the state due to an uncontrolled heterogenization of the social safety net.<sup>80</sup> Among others, fiscal

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(2014) paras 4.7.2 and 4.7.3; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 16.

<sup>77</sup> Scotland Act 2012 (c 11) s 12(1); Wales Act 2014 (c 29) s 4(1); HL Deb 24 February 2016, vol 769, col 272 (Lord Dunlop).

<sup>78</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 57.

<sup>79</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 65; Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 29; Government of Wales Act 2006 (c 32) Schedule 5, Part 1, Field 4; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 153; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 4.8.2; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 95(8); House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 56.

<sup>80</sup> Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right: The Blueprint for Scotland* (Campaign for a Scottish Parliament 1995) 3; Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 9; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 153; Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 5.5; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 35 and 37; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 247.

equalisation, the limitation of fiscal autonomy, and the central allocation of grants to substate institutions have been implemented to avoid this outcome.<sup>81</sup>

Furthermore, central institutions long financed substate national institutions, such as the English regional ones,<sup>82</sup> through block grants,<sup>83</sup> which were calculated following the 'Barnett Formula',<sup>84</sup> and controlled their access to financial resources. Indeed, substate entities long held no independent borrowing power.<sup>85</sup> Still, despite claims that central institutions should scrutinise how the constituent nations use the sums granted to them,<sup>86</sup> it has been increasingly accepted that once these sums have been allocated, they can be spent autonomously and unconditionally.<sup>87</sup> In fact, central powers were essentially intended to be used to avoid undue spillovers and to optimise the efficiency of state

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<sup>81</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 277; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 92; *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [15].

<sup>82</sup> Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 409.

<sup>83</sup> Northern Ireland Act 1998 (c 47) s 58; Scotland Act 1998 (c 46) s 64 (2); Government of Wales Act 1998 (c 38) s 157 (1) and (4); Government of Wales Act 2006 (c 32) s 118

<sup>84</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 64; Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 221; Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 233.

<sup>85</sup> Scotland Act 1998 (c 46) s 67 (1); Government of Wales Act 2006 (c 32) s 121(1); Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 415.

<sup>86</sup> HL Deb 10 April 2000, vol 612, col 6 (Lord Monro of Langholm).

<sup>87</sup> Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 84.

governance.<sup>88</sup> They were not intended to quash self-rule, but rather to optimise its exercise.

However, the collapse of a system dividing powers is ineluctable if an entity, which is often the central one, considers itself entitled to deprive another entity of its powers. Since a federal division of powers should be entrenched to be authoritative and durable,<sup>89</sup> the flexibility of British constitutionalism could provide central institutions the opportunity to act domineeringly and disregard statutory provisions on the division of powers.<sup>90</sup> Indeed, and that is studied more exhaustively later, the permanence of a British division of powers is uncertain because the Westminster Parliament can still amend it and would have never formally relinquished its power to act on devolved matters.<sup>91</sup> The ensuing shaky legal essence of substate self-rule explains why Bogdanor hesitates to characterise it as federal.<sup>92</sup> The only way to overcome this issue would be to embrace the pragmatic and evolutive nature of British constitutionalism and to entrench the division of powers

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<sup>88</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) paras 4.6 and 5.28; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 170; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 32 and 71; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 35 and 37.

<sup>89</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 209.

<sup>90</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 303.

<sup>91</sup> Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 553; HL Deb 21 March 2016, vol 769, col 2071 (Lord Keen of Elie); *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [52]; Simon Parsons, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*, 18; Jo Hunt, 'Subsidiarity, Competence and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 23.

<sup>92</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 185.

by political means.<sup>93</sup> As highlighted by Peters, that is only how a steady, workable, and substantively federal system dividing powers among diverse nations can be established in the United Kingdom.<sup>94</sup> As it is crucial to bear in mind these considerations, they are discussed more precisely in the chapter on the safeguard of the devolution arrangements. Still, I cannot examine whether the British division of powers that was established amidst devolution is federal on the sole basis of formal considerations.

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<sup>93</sup> Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 26.

<sup>94</sup> Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 81.

## **5.2. The Importance of Asymmetry and Constitutional Evolution**

Particularly in the United Kingdom, the institutionalisation of self-rule is done by considering the importance of dividing powers to meet the needs of the constituent entities with flexibility and responsiveness. That fits well with the pragmatism with which federal principles shall be implemented and which characterises British constitutionalism. In practice, asymmetry and versatility are vital to ensure that the arrangements making devolved self-rule possible are and remain fair, functional, and legitimate.

### **5.2.1. The Factual Fairness between the Constituent Entities**

In a federal state, legal norms and institutional devices are instrumental in the capacity of the constituent entities to self-rule and foster fairness through a shared constructive engagement.<sup>95</sup> However, fiscal and relational factors, rather than purely formal ones, also shape the exercise of an intrinsically multi-faceted divided sovereignty.<sup>96</sup> When they are not devised considering socio-political factors, legal norms and institutions reproduce, and potentially exacerbate, the power struggles that they shall mitigate.<sup>97</sup> Consequently, the institutionalisation of self-rule cannot

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<sup>95</sup> Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 19 and 156.

<sup>96</sup> Ferran Requejo, 'Political Liberalism in Multinational States: The Legitimacy of Plural and Asymmetrical Federalism' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 113; Michael Pagano, 'In the Eye of the Beholder: The Dynamics of Federalism in National and Supranational Political Systems' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 9-10.

<sup>97</sup> Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 18; Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 243; David Armitage,

be based exclusively on formalistic considerations, which are often apprehended inflexibly and disjointed from societal realities.

The constitution of a federal state shall be devised considering the social forces that, despite their rather intangible character, help to conciliate unity and diversity within this state.<sup>98</sup> Studying the impacts of these forces enables us to determine whether, concretely, the constituent entities hold extensive self-rule or are dependent on an overly proactive federal entity.<sup>99</sup> This assessment can only be done on a practical, case-based, basis. Indeed, the nature and the effects of these forces affecting the division of sovereignty are essentially peculiar to states and vary substantially.<sup>100</sup> Looking for a universal way to divide sovereignty constitutionally without any variation is both abortive and

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'Conclusion: We Have Always Been Federal' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 283.

<sup>98</sup> Jaime Lluich, 'Introduction: The Multiple Dimensions of the Politics of Accommodation in Multinational Democracies' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 8.

<sup>99</sup> Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 259.

<sup>100</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 174; Preston King, *Federalism and Federation* (Croom Helm 1982) 54 and 71; Michael Burgess, 'Federalism as Political Ideology: Interests, Benefits and Beneficiaries in Federalism and Federation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 112; John Agnew, 'Postscript: Federalism in the Post-Cold War Era' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 299; Vicki Jackson, 'Comparative Constitutional Federalism: Its Strengths and Limits' in Jean-François Gaudreault-Desbiens and Fabien Gelinis (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 150; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 238; Michael Pagano, 'In the Eye of the Beholder: The Dynamics of Federalism in National and Supranational Political Systems' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 6; Alain-G Gagnon and Guy Laforest, 'The Moral Foundations of Asymmetrical Federalism: Normative Considerations' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 98.

hazardous,<sup>101</sup> as implementing a uniform template would lead to inefficient and illegitimate outcomes. Accordingly, federal normative and institutional frameworks cannot be expected to engender similar outcomes systematically and shall not be transplanted without having first been adapted to a given polity.<sup>102</sup> That is particularly important in multinational states, whose federated entities shall be accommodated diligently and flexibly since their distinct needs are neither uniform nor immutable.<sup>103</sup> Certainly, the differences between federal constitutional systems

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<sup>101</sup> Eugenie Brouillet, *La negation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 77; Jedna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 3.

<sup>102</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 302; William Livingston, 'Canada, Australia and the United States: Variations on a Theme' in Valerie Earle (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968) 95-96; Preston King, *Federalism and Federation* (Croom Helm 1982) 19; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 165; Ralph JK Chapman, 'Structure, Process and the Federal Factor: Complexity and Entanglement in Federations' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 86; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 1.5; Richard Simeon and Daniel-Patrick Conway, 'Federalism and the Management of Conflict in Multinational Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 341; Eugenie Brouillet, *La negation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 98; Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 3; Vicki Jackson, 'Comparative Constitutional Federalism: Its Strengths and Limits' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 148; Michael Pagano, 'In the Eye of the Beholder: The Dynamics of Federalism in National and Supranational Political Systems' in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 16-17; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 450; Richard Simeon, 'Is Federalism like Snow, and Is It Exportable? Some Cautionary Notes on the Study of Federalism' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 117.

<sup>103</sup> John McGarry and Brendan O'Leary, 'Territorial Pluralism: Its Forms, Flaws, and Virtues' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 20.

do not entail that federalism is a substantively weak concept. What truly matters is that a federal system ensures that the constituent entities hold the powers they need concretely to be recognised constitutionally and to self-rule. That can only be done if the constituent entities are treated fairly, which is a prerequisite for institutionalising federal principles, especially these related to self-rule.

In that vein, it should be considered how self-rule can be entrenched and exercised asymmetrically. According to Hooghe and Marks, a constitutional arrangement is asymmetrical 'when a region acquires special legislative, executive or fiscal competences'.<sup>104</sup> However, some authors characterise asymmetrical federalism as an oxymoron because, in their view, federalism, contrary to autonomism, cannot be embodied by piecemeal arrangements and because federal fairness cannot be actualised through a formally unequal allocation of powers and resources.<sup>105</sup> Since federal sovereignty shall be divided into shares that are as fair as possible for the benefit of the constituent entities so that they can enjoy similar opportunities, it is reasonable to argue that this division shall follow a somewhat consistent pattern. It can also be feared that granting more constitutional powers or distinctive statuses to some constituent entities (frequently, though not limitatively, because their national

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<sup>104</sup> Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 104.

<sup>105</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 14; Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 155; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 139; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 159-62, 172 and 178.

character) would make some of these entities substantively more equal than the others. Privileged entities would be deemed, from a comparative perspective, to have more opportunities to self-rule in conformity with their interests and could ultimately make 'ordinary' entities feel disadvantaged, fearful of becoming subordinated to the other entities, and even alienated.<sup>106</sup> Asymmetry would then be an institutional flaw since an asymmetrical federal pact would be devised bilaterally and apprehended without a comprehensive approach, which would make any balance between unity and diversity very unstable.<sup>107</sup>

Nonetheless, it is vital to remember that fairness, which is a key federal principle, shall not be conflated with equality, whose sense is overly abstract and formal. Federal fairness is not safeguarded automatically when a symmetrical constitutional arrangement endows all constituent entities with the exact same jurisdictions and statuses.<sup>108</sup> Federal asymmetries cannot be discarded on a matter of principle since they might be necessary in some contexts to guarantee that each constituent entity can self-rule and be appropriately recognised constitutionally.<sup>109</sup> In a state whose

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<sup>106</sup> Graham Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 9; Peter H Russell, 'The Future of Europe in an Era of Federalism' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 18; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 112.

<sup>107</sup> Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 81; Ferran Requejo, 'Decentralisation and Federal and Regional Asymmetries in Comparative Politics' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 2.

<sup>108</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 69.

<sup>109</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 5; John McGarry and Brendan O'Leary, 'Territorial Pluralism: Its Forms, Flaws, and Virtues' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*

constituent entities are fundamentally dissimilar and do not seek to have the exact same extent of powers and recognition, its constitution shall acknowledge this reality instead of negating it. Otherwise, the valuation of formal and legal equality can create significant factual discrepancies between the constituent entities, engender actual unfairness, and lead to the demise of federal pacts.

Accordingly, it shall be accepted that some entities require more means than others to overcome structural disadvantages that jeopardise substantive fairness.<sup>110</sup> As noted by Barber, '[on] occasion, political equality requires legal inequalities', so that the diverse members of a polity can be treated fairly.<sup>111</sup> Since, conceptually, federalism is neither intrinsically symmetrical, nor asymmetrical, implementing asymmetrical frameworks shall be envisioned to guarantee federal fairness between the constituent

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(Routledge 2012) 24; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 26.

<sup>110</sup> Alain-G Gagnon, 'The Moral Foundations of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 329; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 283; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 188; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinat (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 204; Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 267; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 280; Alain-G Gagnon and Guy Laforest, 'The Moral Foundations of Asymmetrical Federalism: Normative Considerations' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 91, 94 and 102.

<sup>111</sup> Nick Barber, *The Constitutional State* (Oxford University Press 2010) 53.

entities beyond abstract and formalistic considerations.<sup>112</sup> Especially when there is no symmetry in the societal composition of a federal state and when consequential differences between its constituent entities exist, its institutional arrangements can definitely not be symmetrical.<sup>113</sup> In a state like this one, upholding federal fairness can only be done genuinely when the extent and

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<sup>112</sup> Thomas D Lancaster, 'Complex Self-Identification and Compounded Representation in Federal Systems' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 78; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinas (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 196 and 204; Ferran Requejo, 'Decentralisation and Federal and Regional Asymmetries in Comparative Politics' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 8; Miquel Caminal and Ferran Requejo, 'Democracy and Federalism in Plurinational Societies' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 7; Alain-G Gagnon and Guy Laforest, 'The Moral Foundations of Asymmetrical Federalism: Normative Considerations' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 96; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 171 and 205.

<sup>113</sup> Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinas (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 196; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 278-79; Ferran Requejo, 'Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain, and the European Union' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 311-12; Peter H Russell, 'The Future of Europe in an Era of Federalism' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 17; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 236; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 445; Alain-G Gagnon and Guy Laforest, 'The Moral Foundations of Asymmetrical Federalism: Normative Considerations' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 102; Ferran Requejo, 'The Lack of National Pluralism in Federal Theory and Federations: Plurinational Federalism in a Comparative and Value Pluralist Approach' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 120.

the substance at which the constituent entities can self-rule is differentiated, even when formal constitutional norms do not expressly provide so.

Operationally, the existence of factual discrepancies, which may be characterised as unequal formally, between, among others, constituent entities can be recognised and entrenched pragmatically when federalism is apprehended asymmetrically. Asymmetries, especially regarding the ways by which self-rule is exercised, can then empower nations to preserve their identity characteristics, primarily the cultural and linguistic ones.<sup>114</sup> In sum, symmetry does not ineluctably threaten federalism. It could instead secure the fair and efficient actualisation of its core principles within a composite state. That has been the case in the United Kingdom, whose devolution arrangements are asymmetrical.

### **5.2.2. Asymmetry as an Advantage for Devolution**

The asymmetrical structuring character of devolution does not reflect a constructivist, or even accidental, policy initiative as much as a legislative response to the socio-politically plural essence of

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<sup>114</sup> KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 87; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 10; Ferran Requejo, 'Political Liberalism in Multinational States: The Legitimacy of Plural and Asymmetrical Federalism' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 125; Ferran Requejo, 'Decentralisation and Federal and Regional Asymmetries in Comparative Politics' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 5-6; Jaime Lluch, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 144; Alain-G Gagnon and Guy Laforest, 'The Moral Foundations of Asymmetrical Federalism: Normative Considerations' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 89; Jaime Lluch, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 170-71.

the British polity.<sup>115</sup> Despite the existence of some common formal features, the Devolution Acts have been tailor-made to the constituent nations of which they are the objects. Although they were enacted at a similar time, their making has been ‘piecemeal and incremental’, as British constitutional reforms have traditionally been, according to Keating.<sup>116</sup> The devolution arrangements were the outcomes of a responsive, ‘bottom-up’,<sup>117</sup> policy approach that could meet ‘very different sets of constitutional demands’ from the constituent nations.<sup>118</sup>

In that vein, Elliott and Thomas observe that ‘[devolution] occurred because it was desired and to the extent that it was desired’.<sup>119</sup> The intent to devolve powers was not uniform and did not have the same sense throughout the United Kingdom, which explains why the extent of normative autonomy held by the constituent nations had to be differentiated.<sup>120</sup> As noted by Stepan, devolution has been a ‘*demos-enabling*’ process rather than a ‘*demos-constraining* one’, which means that it is centred on the recognition of national singularities upon which constitutional asymmetries are

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<sup>115</sup> HC Deb 21 October 1999, vol 336, col 671 (Dr John Reid); HL Deb 10 April 2000, vol 612, col 6 (Baroness Ramsay of Cardvale); House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 48.

<sup>116</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 134.

<sup>117</sup> Aileen McHarg, ‘Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention’ in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 13.36.

<sup>118</sup> Stephen Tierney, ‘Federalism in a Unitary State: A Paradox too Far?’ in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 47.

<sup>119</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 300; Tom Mullen, ‘Brexit and the Territorial Governance of the United Kingdom’ (2019) 14(2) *Contemporary Social Science* 276, 280.

<sup>120</sup> Klaus-Jurgen Nagel and Ferran Requejo, ‘Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments’ in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 250.

based.<sup>121</sup> It is normal and even necessary that devolution institutionalises the diversity that characterises the identity traits and the wills to self-rule of the British constituent nations. Bearing in mind that the Scottish nation very much desired devolution, that the Welsh and Northern Irish nations wanted devolution rather lukewarmly, and that the English nation hardly wanted to hold distinct powers at the turn of the millennium, devolution had to be devised asymmetrically to be relevant.<sup>122</sup> The constituent nations could not self-rule, and even self-determine, properly in accordance with the wills and needs of their citizens if the devolution arrangements were strictly symmetrical and uniform.<sup>123</sup> Although doubts have been raised that devolution could disunite the United Kingdom,<sup>124</sup> they were mitigated thanks to its versatility. The devolution arrangements could work and last over the last decades because they have reflected what the constituent nations needed and wanted,<sup>125</sup> even when their citizens changed their minds.

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<sup>121</sup> Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 267.

<sup>122</sup> Iain McLean, 'The National Question' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 492; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 34; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 138; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 17.

<sup>123</sup> Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 254.

<sup>124</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 50.

<sup>125</sup> Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 104; Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 268.

The asymmetrical nature of the devolution arrangements is coherent with a British constitutional tradition that has never actively fostered a centralising homogenisation.<sup>126</sup> McGarry is right when he asserts that, although devolution breaks from a somewhat centralised past normatively speaking, it continues a British constitutional history that has long been shaped by asymmetry.<sup>127</sup> Despite the legal unitary sovereignty of the Westminster Parliament, British governance has consistently been territorially differentiated and asymmetrical.<sup>128</sup> Moreover, the relationships between British central institutions and the constituent nations have mainly been apprehended pragmatically

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<sup>126</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 8; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 16; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 168; Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 258; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 164.

<sup>127</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales'* (Cm 6348, 1975) 65; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 131.

<sup>128</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 26; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 95; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 103 and 129; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 14 and 182; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 190; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 129; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 168; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 9; Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 272.

and bilaterally.<sup>129</sup> As glimpsed previously, that was the case while endowing Scotland with unique exclusive normative powers on some matters like private law.<sup>130</sup> Accordingly, as noted by Loughlin, the most significant change induced by devolution was the addition of a political side to long-standing societal, cultural, and administrative asymmetries.<sup>131</sup>

In practice, British devolution is asymmetrical in two aspects: institutionally and substantively. From an institutional perspective, it is striking how each initial devolution framework was devised with the clear intent of dovetailing the distinctive characteristics of each nation.<sup>132</sup> When the Devolution Acts were enacted, they set: 'a reserved powers model in Scotland, a consociational arrangement in Northern Ireland, and a shared powers model in Wales'.<sup>133</sup> Although, as seen later, the extent of institutional asymmetry has progressively declined, it has been a staple of British devolution in its initial stages so that it could be responsive to substate peculiarities. Furthermore, while some constituent nations held the same institutional tools, they did not necessarily use them to

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<sup>129</sup> Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 272.

<sup>130</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 50-53; Preston King, *Federalism and Federation* (Croom Helm 1982) 123; *Martin v Most* [2010] UKSC 10 [69].

<sup>131</sup> John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 57.

<sup>132</sup> Jonathan Bradbury, 'The Blair Government's White Papers on British Devolution: A Review of Scotland Parliament and a Voice for Wales' (1997) 7(3) *Regional and Federal Studies* 115, 131; John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 114; *ibid* 51; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 137.

<sup>133</sup> Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 113.

achieve the same substantive outcomes. The nature and the scope of devolved powers can be highly different. For example, Welsh institutions cannot enact norms on criminal law while the Scottish ones can.<sup>134</sup> The discrepancies related to the extensiveness of devolved jurisdictions have even led Keating to consider that Scotland, at the opposite of Wales, could self-rule in a federal manner since the inception of devolution.<sup>135</sup>

Asymmetrical devolution has empowered the constituent nations to self-rule by various and diverse means and contributed to the implementation of the principle of subsidiarity through the embrace of policy differentiation.<sup>136</sup> In that vein, determining to which extent the constituent nations could act on linguistic matters confirms the relevance of asymmetrical devolution because of the existence of significant normative variations. While English is the dominant language throughout the United Kingdom, there exist substate linguistic nationalisms.<sup>137</sup>

For instance, Welsh linguistic nationalism has consistently been fierce despite the long-standing weakness of Welsh political and normative nationalisms and although few Welsh citizens master Gaelic nowadays. Even before the enactment of the Welsh Devolution Acts, Welsh Gaelic has been the object of several statutory provisions guaranteeing a right to use it in daily life and

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<sup>134</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 251.

<sup>135</sup> Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 229.

<sup>136</sup> Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 9.

<sup>137</sup> Liam Connell, 'Scottish Nationalism and the Colonial Vision of Scotland' (2004) 6(2) *Interventions* 252, 255; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 448.

securing its place in the media.<sup>138</sup> Since devolution, although Welsh and English are not officially and absolutely on an equal footing,<sup>139</sup> language matters have mostly been devolved, and British central institutions have been committed to ensuring that public services can be delivered in Welsh Gaelic.<sup>140</sup> Still, Welsh linguistic nationalism, on which Welsh identity has been rooted for centuries,<sup>141</sup> is significantly less crucial nowadays compared to a more demanding Welsh political nationalism.<sup>142</sup> This evolution has made Brooks worry that civic nationalism, which the Welsh devolution arrangements would institutionalise and secure, would threaten the Welsh unique identity due to the effectively impactful hegemony of the English language.<sup>143</sup> But despite the powerful effect of uniformising socio-political dynamics,<sup>144</sup> there is a shared and visceral commitment to preserve what has characterised Welsh nationalism and made it thrive over centuries.<sup>145</sup> Furthermore, as the Northern Irish devolution arrangements were intended to build bridges between nationalists and unionists, securing their linguistic identity traits has been a priority to foster reconciliation.<sup>146</sup> The Northern Irish executive institutions have

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<sup>138</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 85; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 41.

<sup>139</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 12.2.2.

<sup>140</sup> Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 42.

<sup>141</sup> Linda Colley, *Britons: Forging the Nation 1707-1837* (3<sup>rd</sup> edn, Yale University Press 2009) 13.

<sup>142</sup> Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 107, 110-11 and 127.

<sup>143</sup> *ibid* 130, 133 and 138.

<sup>144</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 43.

<sup>145</sup> Richard Rawlings, 'Law Making in a Virtual Parliament: The Welsh Experience' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 101; HC Deb 16 June 2015, vol 597, col 222 (Mr Hywel Williams).

<sup>146</sup> Cathal McCall, 'From "Long War" to "War of the Lillies": "Post-Conflict" Territorial Compromise and the Return of Cultural Politics' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good*

then been statutorily obliged since devolution to implement a targeted strategy to protect Irish and Ulster Scots languages.<sup>147</sup>

Still, while going back to the heart of the matter, substate national quests for enhanced autonomy and recognition through devolution have not necessarily been motivated by language issues.<sup>148</sup> The long-standing dichotomy between the strong will of Scots to obtain and retain extensive political and normative powers and their 'disinterest in the development of a distinctive language' is noticeable.<sup>149</sup> The evolution of Scottish nationalism has proved that the desires of political and linguistic emancipation cannot automatically be conflated in a British context.<sup>150</sup> Ultimately, the diversity of the normative arrangements seeking, or not, to safeguard British substate linguistic nationalisms shows the potentiality of asymmetrical devolution to accommodate the constituent nations and to entrench their distinctiveness.

However, some important and legitimate concerns about the asymmetrical essence of devolution have been voiced. For instance, Bogdanor, echoing several British federalists, points out that asymmetries that are based upon nationalist claims overly focus on what distinguishes constituent entities from the others, which may foster undue inequalities and unfairness between

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Friday Agreement (2<sup>nd</sup> edn, Palgrave 2006) 310 and 313; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 567.

<sup>147</sup> Northern Ireland Act 1998 (c 47) s 28D.

<sup>148</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 325; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 238.

<sup>149</sup> Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 89.

<sup>150</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 71; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 10.

them.<sup>151</sup> Asymmetrical devolution has also raised doubts on the ability of central British institutions, whose powers have become less important than ever before, to preserve the cohesive character of British constitutionalism.<sup>152</sup> It has then been argued that the lack of a common template for the devolution arrangements has made British multi-level governance more haphazard or lop-sided than truly asymmetrical.<sup>153</sup>

Nonetheless, these concerns are at best exaggerated in practice. Asymmetry, which is neither antagonistic to federalism nor foreign to the constitutional essence of the United Kingdom, fosters fairness among the constituent nations instead of threatening it. Asymmetrical devolution prevents the recognition of national diversity from being systematically opposed to the upholding of state unity on uniform bases that are disjointed from reality. Since the contemporary British framework of governance is fundamentally multi-layered as the contemporary British polity,<sup>154</sup> normative and institutional differentiation is rather unavoidable. In that vein, the claim that devolution is devoid of a coherent essence, and would be more haphazard than asymmetrical, can be busted by considering what the devolution arrangements, regardless of what distinguishes them, have in common. For instance, as noted

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<sup>151</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 187.

<sup>152</sup> John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 41; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 119.

<sup>153</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 91; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 174-75; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 168.

<sup>154</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 331.

by Chaney, they all include 'a 5-year election cycle, and primary law-making and tax-raising powers' on mostly social and cultural matters.<sup>155</sup> The balance between shared and differentiated traits and features within the British territorial constitution is even what, especially from a federal perspective,<sup>156</sup> empowers diverse self-ruling entities to coexist orderly. Still, such coexistence is fragile, requiring asymmetrical devolution arrangements to be interpreted and implemented pragmatically, according to their fundamental nature. It is then crucial to appreciate the flexible character of devolution, whose embodiments have often been adapted to meet evolving national needs and claims.

### 5.2.3. The Evolution of Devolution

To evaluate the federal character of asymmetrical substate self-rule in the United Kingdom, investigating how the devolution arrangements have evolved since their establishment is essential. As noted by Burrows, 'devolution is a process not an event',<sup>157</sup> which explains why amending these arrangements regularly is both expected and advisable. That is coherent with the versatility of British constitutionalism, which has made the undertaking of ambitious reforms possible without requiring to rethink the architecture of the whole institutional framework after each reform.<sup>158</sup> Certainly, the peculiar normative simplicity by which the

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<sup>155</sup> Paul Chaney, "'Governance Transitions' and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 284.

<sup>156</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 48.

<sup>157</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 2.

<sup>158</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 15 and 127; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 159 and 172; Michael

British constitution can be transformed has raised acute concerns about the certainty and the authoritativeness of constitutional changes.<sup>159</sup> Nonetheless, especially given the importance of guiding unwritten principles in a multinational British polity, a constitution cannot stand and last simply because it has been set in stone and enshrined by formal devices.<sup>160</sup> I shall then assess how devolution can evolve without the undertaking of revolution bearing in mind the peculiar multi-faceted nature of British constitutionalism and the diversity of its sources.

Certainly, devolution has been implemented through mechanisms that are not constraining by themselves. For instance, although holding referendums can undeniably increase the legitimacy of consequential reforms, the British government has never surrendered its discretionary powers to hold them and to act in fulfilment of their verdicts.<sup>161</sup> In fact, constitutional referendums were held only when they could serve the interests of the Government,<sup>162</sup> such as when New Labour wanted to obtain a

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Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 119.

<sup>159</sup> Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 22 and 26; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 30; Aileen McHarg, 'Navigating without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16(3) *International Journal of Constitutional Law* 952, 953.

<sup>160</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 256.

<sup>161</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 61; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 49.

<sup>162</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 14.5.3; *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43 [28]; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 172; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 49; Eoin Daly, 'Populism and Popular Sovereignty in the UK and Irish Constitutional Orders' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge

popular mandate to overcome the Conservatives' initial rejection of devolution.<sup>163</sup> Additionally, the Scottish division of powers can be amended flexibly by Order in Council, usually to expend the scope of devolved powers, when both Houses in Westminster and the Scottish Parliament pass motions expressing their consent to do so.<sup>164</sup> The Northern Ireland Assembly also holds, in a similar manner, the power to enact, continuously or punctually, bills on matters that the Northern Ireland Act yet reserves to central institutions.<sup>165</sup> Such consensual and pragmatic procedures markedly contrast with several complex federal constitutional amendment formulas. Reshaping, even substantially, the British constitution is far from requiring the consent of a qualified majority of Britons or the amendment of formal supralegisative norms affecting them all. Even if material devices could not necessarily safeguard devolution from being entirely rolled back, they are helpful in empowering the constituent nations to address rising issues diligently. The versatility intrinsic to the operation of these devices helps to provide autonomy at the exact, tailor-made, extent that these nations want. This adaptable and informal approach to the evolution of devolution has permitted to reflect what each constituent entity wanted at a specific time and, when needed, to institutionalise asymmetry. As highlighted by Tierney,

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University Press 2021) 181; Stephen Tierney, 'Parliament and the Brexit Process: The Battle for Constitutional Supremacy in the United Kingdom' (2022) 12(1) *Notre Dame Journal of International and Comparative Law*, Article 3, 4.

<sup>163</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 61.

<sup>164</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 297; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 19.

<sup>165</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Democratic Institutions in Northern Ireland, s 27; Northern Ireland Act 1998 (c 47) s 4(2) and 8.

the accommodation of diverse and conflicting national wills over time would have hardly been possible otherwise.<sup>166</sup>

In practice, the frequent amendments to the Devolution Acts have displayed how effortlessly, from a legal perspective, substate institutions have progressively gained more tools, such as fiscal autonomy, to self-rule. Initially, as noted previously, the constituent nations could only exercise their powers using the financial resources granted by central institutions. They could not fix and collect autonomously the sums they needed to implement their distinct policies, although Scotland could, albeit very limitatively, 'vary the basic rate of income tax by up to 3p'.<sup>167</sup> However, devolution has progressively triggered a decentralising dynamic that made the constituent nations keen on obtaining more exclusive normative powers and the means to exercise them efficiently. More precisely, Scotland has increasingly wanted to assert its societal uniqueness,<sup>168</sup> and even considered leaving the United Kingdom to do so. Amidst the 2014 Referendum, granting this nation more fiscal powers appeared as a sound and appropriate option to accommodate its nationalist claims. Scotland then became the first constituent nation to hold extensive powers to borrow money and to raise income and sales taxes without central supervision.<sup>169</sup> Although several fiscal powers are still held

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<sup>166</sup> Stephen Tierney, 'The Constitution of an Independent Scotland: Popular Empowerment or Judicial Supremacy?' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 148.

<sup>167</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 56.

<sup>168</sup> Iain McLean, 'The National Question' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 505; Paul Chaney, '"Governance Transitions" and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 287.

<sup>169</sup> Scotland Act 1998 (c 46) s 64A, 80B (1) and 80C (1); Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) paras 4.10, 4.15 and 4.26; Scotland Act 2012 (c

by central institutions,<sup>170</sup> Scotland has become empowered to finance itself sufficiently to self-rule with very few risks of central interferences,<sup>171</sup> thanks to the natural complementarity of normative and fiscal autonomies.<sup>172</sup> Consequently, Bogdanor notes that, following these jurisdictional changes, 'Scotland enjoys more fiscal autonomy than most federal states both with regard to its formal and effective powers'.<sup>173</sup> This significant evolution displays how devolution can evolve considerably without making overarching and formal constitutional amendments.

On a more general basis, it is striking how the evolution of devolution has made it less asymmetrical, especially institutionally. Such an evolution has been made possible by flexible devices like popular consultations, formally 'ordinary' amendments to Devolution Acts, and legislative consent motions (which institutionalise a dialogue between central and substate legislative institutions).<sup>174</sup> For instance, 63% of the Welsh voted, during a

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11) s 23(2); Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 18; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) paras 54, 76 and 94 and 95(5); Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 25, 39 and 45; Scotland Act 2016 (c 11) s 16; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 410-411.

<sup>170</sup> Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) paras 75 and 77; Nicola McEwen and Michael Keating, 'Beyond the Referendum' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 199.

<sup>171</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 63.

<sup>172</sup> Nicola McEwen and Michael Keating, 'Beyond the Referendum' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 198; Paul Chaney, "'Governance Transitions" and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 300.

<sup>173</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 181.

<sup>174</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 61; *R (Miller) v Secretary of State for Exiting the European*

referendum held in 2011, for granting their institutions primary legislative powers,<sup>175</sup> as in Scotland and in Northern Ireland. It was even asserted afterwards that any Welsh jurisdictional asymmetry shall be 'objectively justified'.<sup>176</sup> Such transformative changes have signalled the growing desire of the constituent nations to increase the extent of their normative autonomy and to base it upon a Scottish model, which was initially the most far-reaching.<sup>177</sup> While Wales had long been closely integrated to England,<sup>178</sup> particularly legally and judicially,<sup>179</sup> its citizens have increasingly sought to rule themselves autonomously, as Scots could already do since the turn of the millennium. Consequently, this evolution of devolution has made possible and guaranteed the constant

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*Union* [2017] UKSC 5 [140]; Richard Rawlings, 'The Welsh Way / Y Ffordd Gymreig' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 302.

<sup>175</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 1.2.3; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 409.

<sup>176</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.3.10.

<sup>177</sup> John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 53; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 250; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 4; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 113 and 115.

<sup>178</sup> David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 185; Richard Rawlings, 'Law making in a Virtual Parliament: The Welsh Experience' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 110; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 16.8.9; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 15.

<sup>179</sup> JC Banks, *Federal Britain?* (Harrap 1971) 245; Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 21; Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 13 and 26; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 114.

deepening of its normative substance and the consolidation of its constitutional foundations.

Therefore, by considering that its existence and its relevance have become relatively unchallenged politically nowadays, devolution has become, mainly through informal means, a staple of contemporary British constitutionalism.<sup>180</sup> The ability to reform the devolution arrangements pragmatically before crises, such as that of the Irish Home Rule, is key in explaining the successful implementation of multi-level governance in the United Kingdom.<sup>181</sup> Hence, as I agree with Peters that broadening the scope of devolution has made it somewhat akin to federalism,<sup>182</sup> I shall investigate whether, and the case being how, the constituent nations can self-rule in a federal manner.

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<sup>180</sup> Dennis Kavanagh, 'The Blair Premiership' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 14; Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 262; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 12; Matt Finn and Anthony Seldon, 'Constitutional Reform Since 1997: The Historians' Perspective' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 33.

<sup>181</sup> John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 130; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The Scotland Act 1998' (2011) 30(1) *Parliamentary History* 85, 99; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 95(6); Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 332; Alvin Jackson, 'The Failure of British and Irish Federalism, circa 1800-1950' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 29; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019); 182. Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 280.

<sup>182</sup> Guy Peters, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 80.

### **5.3. The Exercise of Self-Rule by the British Constituent Nations**

I have shown that self-rule is a crucial component of both federal and devolution arrangements, and that asymmetries and constitutional evolutions are decisive in making it genuine. Despite its increasing standardisation, British self-rule has remained institutionalised in a mostly tailor-made fashion. Accordingly, the Devolution Acts provide that the British constituent nations hold exclusive normative powers to address societal issues autonomously in accordance with their peculiarities. For this reason, I must study how self-rule is implemented in British constitutional law and determine whether federal principles shape its nature and its exercise on an individualised and national basis.

#### **5.3.1. The Exercise of Self-Rule by Scottish and Welsh Institutions**

Examining concurrently how Scotland and Wales self-rule enables us to compare more accurately how diversely two constituent nations have actualised deep senses of belonging that have long been substantively different. But instead of enshrining and consolidating the long-standing divergent autonomist wills of these nations constitutionally, devolution has attenuated the differences between them, especially from an institutionalist perspective. Nonetheless, before drawing definitive conclusions on the nature of Scottish and Welsh self-rule, I shall study the substance of the statutory devolution arrangements of these nations in their initial and subsequently amended forms. I can then evaluate whether they can be characterised as federal.

The primary purpose of Scottish devolution was to endow the Scottish nation with the powers and the institutions through which it could shape its own public sphere in accordance with its interests and with responsiveness to its distinct characteristics.<sup>183</sup> Devolution could also prevent central British institutions from patronising this nation or from jeopardising its identity.<sup>184</sup> Devolution could then contribute to reignite the multinational spirit of the Act of Union, according to which Scotland is a fully-fledged member of the British Union.<sup>185</sup> That is consequent with Bogdanor's finding that 'the basic premise of devolution, after all, is that there is a separate political will in Scotland'.<sup>186</sup> Accordingly, devolution permits to recognise that there is such thing as a unique Scottish nation<sup>187</sup> that insists on its differences more sharply than other constituent nations, though without inexorably seeking to become an independent state.<sup>188</sup> As exemplified by the Europhilia of most nationalists, contemporary Scottish nationalism is not antagonistic to the recognition of multiple identities and to the upholding of political unions.<sup>189</sup> So, as it is not a vital threat to British unity, Scottish nationalism, which has always been more

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<sup>183</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 13; AXA General Insurance Company Ltd v Lord Advocate [2011] UKSC 56 [145].

<sup>184</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 288; Michael Keating, 'The End of Union? Scottish Nationalism and the UK State' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 108 and 114.

<sup>185</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 58; Scotland Act 1998 (c 46) s 37; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 118.

<sup>186</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 288.

<sup>187</sup> David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 37 and 179.

<sup>188</sup> Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 22; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 141-42.

<sup>189</sup> Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 91; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 92.

substantive than an abstract British one, can be accommodated and recognised rather well.<sup>190</sup> In practice, what actually matters for most Scots is the optimisation of their ability to self-rule on matters that they consider crucial to their collective life, whether or not they remain citizens of the United Kingdom<sup>191</sup>. Substate institutions have embodied the deep-rooted ideal of popular sovereignty, which has remained well-alive within the Union,<sup>192</sup> more legitimately than distant central institutions like the British Parliament.<sup>193</sup>

Normatively speaking, I contend that the Scottish devolution arrangements reveal the division of British sovereignty. Contrary to the 1970s Devolution Bills, the Scotland Act 1998 provides that Scottish institutions hold all powers except those that are expressly reserved to central institutions.<sup>194</sup> This Act, which is interpreted teleologically and flexibly,<sup>195</sup> has empowered Scottish national institutions to enact, without supervision, norms upholding peculiar

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<sup>190</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 76 and 338.

<sup>191</sup> Ben Jackson, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50, 55.

<sup>192</sup> Harold John Hanham, *Scottish Nationalism* (Faber 1969) 27.

<sup>193</sup> HL Deb 21 July 1998, vol 592, col 793-94 (Lord Steel of Aikwood); Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 186; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 540, 558 and 560; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 22 and 89; AXA General Insurance Company Ltd v Lord Advocate [2011] UKSC 56 [49]; Sionaidh Douglas-Scott, 'Britain and the European Union: Federalism and Differentiation' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 189.

<sup>194</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 63; Scotland Act 1998 (c 46) s 29 and Schedule 1, Part 1, s 2(1).

<sup>195</sup> Scotland Act 1998 (c 46) s 29 (4) and Schedule 1, Part 1, s 2(1); *Martin v Most* [2010] UKSC 10 [19]; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 303.

elements of Scots private and criminal law.<sup>196</sup> It was particularly ground-breaking as it set reserved powers instead of enumerating devolved powers, which has made the fact that Scotland self-rules the norm, subject only to few exceptions.<sup>197</sup> At least statutorily and politically, central, rather than substate, powers are constrained in order to safeguard the existence of exclusive national jurisdictions in conformity with the principle of subsidiarity. Reserved central powers only concern matters that are intrinsic to the preservation of state unity and cohesion, such as foreign affairs, defence, and the supremacy of the Crown.<sup>198</sup> For instance, while Scottish institutions hold executive and administrative powers and prerogatives akin to those of the British Crown,<sup>199</sup> they can only exercise them to deal with strictly Scottish matters. Otherwise, within its jurisdiction,<sup>200</sup> Scotland holds primary legislative powers that are on an equal footing with these of the Westminster Parliament, although the latter has not wholly relinquished (formally) its power to legislate for Scotland.<sup>201</sup>

For their part, the initial Welsh devolution arrangements were significantly less extensive than the Scottish ones considering the rather non-demanding nature of Welsh political nationalism.<sup>202</sup> At first, the substate Assembly self-ruled by executive means akin to

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<sup>196</sup> *Montgomery v HM Advocate* [2001] SLT 37; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 252.

<sup>197</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 37; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 179; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 4.3.3.

<sup>198</sup> Scotland Act 1998 (c 46) Schedule 5, Part 1.

<sup>199</sup> *Ibid* Schedule 5, Part 1, s 2(1).

<sup>200</sup> *ibid* s 29; *Martin v Most* [2010] UKSC 10 [2].

<sup>201</sup> Scotland Act 1998 (c 46) s 28.

<sup>202</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 81.

these previously held by the Welsh Secretary of State as it only held secondary, regulatory, normative powers.<sup>203</sup> When its members wanted to take tailor-made legislative initiatives, this Assembly had to request, through Legislative Competence Orders, the British Parliament to enact laws implementing its will.<sup>204</sup> Wales, due to the inability of its institutions to enact primary norms, was then more akin to local English entities<sup>205</sup> than to, for example, Scotland.<sup>206</sup> Ensuing normative stalemates confirmed concerns that the Welsh devolution arrangements were dysfunctional and insufficient,<sup>207</sup> particularly as Welsh citizens increasingly wanted their nation to self-rule more autonomously.<sup>208</sup>

Accordingly, the Government of Wales Act, which was enacted in 2006, has divided the legislative and executive components of the Welsh Assembly, so that it could be more similar to the Scottish one, and endowed it with statutory powers.<sup>209</sup> McGarry notes that

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<sup>203</sup> Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 7-8 and 27; Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 302; Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 6.

<sup>204</sup> Keith Patchett, 'Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 132; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 133.

<sup>205</sup> Constitution Unit, *An Assembly for Wales* (1996) 68; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 14.3.6.

<sup>206</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 83.

<sup>207</sup> Constitution Unit, *An Assembly for Wales* (1996) 50; *ibid* 186; Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 6-7 and 12; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 181; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) paras 3.2.3, 13.2.1 and 16.9.2.

<sup>208</sup> Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 6; Richard Rawlings, 'Law Making in a Virtual Parliament: The Welsh Experience' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 71.

<sup>209</sup> Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 9 and 20; Government of Wales Act 2006 (c 32) s 94; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 171-72;

this constitutional reform has empowered the Welsh Assembly to enact statutes, although they were not akin to primary legislation, and, thus, to self-rule.<sup>210</sup> As for Scotland, the Westminster Parliament has since refrained itself from legislating on devolved Welsh matters, though without surrendering its power to do so.<sup>211</sup> Still, this Welsh Assembly only held enumerated powers; the powers that were granted to it statutorily.<sup>212</sup> In practice, powers were divided so that Wales could rule on essentially local matters such as agriculture, health, housing, and education.<sup>213</sup> Linguistic matters have also been devolved to the Welsh Assembly, except when they intersect with (reserved) judicial or broadcasting matters.<sup>214</sup> This Assembly can enact norms ensuring that Welsh and English were considered equally as official languages not only within statutes and substate institutions,<sup>215</sup> but also in daily life.<sup>216</sup>

However, despite the contemporary Welsh ability to self-rule,<sup>217</sup> the Welsh and English legal systems have remained integrated with few substantive differences between them.<sup>218</sup> Moreover, since only an enumerated and limited set of matters were devolved, Welsh (partial) sovereignty would not be inherent. Certainly, it was

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Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 2.2.10.

<sup>210</sup> John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 134.

<sup>211</sup> Government of Wales Act 2006 (c 32) s 107.

<sup>212</sup> *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43 [29] and [67].

<sup>213</sup> Government of Wales Act 2006 (c 32) Schedule 5, Part 1.

<sup>214</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 12.2.1.

<sup>215</sup> Government of Wales Act 2006 (c 32) s 156(1); European Union Referendum Act 2015 (c 36) s 1(6).

<sup>216</sup> Government of Wales Act 2006 (c 32) s 35(1).

<sup>217</sup> *ibid* s A2; Wales Act 2017 (c 4) s 60(1).

<sup>218</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 172; Richard Rawlings, 'The Welsh Way / Y Ffordd Gymreig' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 318.

more convenient initially to enumerate devolved rather than central powers, since the first were quite limited.<sup>219</sup> But after the 2006 reform, Welsh self-rule remained substantively lacking and the Welsh devolution arrangements, especially when compared to the Scottish ones, hardly displayed that British sovereignty could be divided.

Afterwards, Welsh nationalists increasingly claimed additional powers and institutional autonomy.<sup>220</sup> Moreover, the initial popular reluctance towards devolution, especially among the English speaking-majority of Wales, declined, and proposals to deepen devolution became more popular and, ultimately, legitimate.<sup>221</sup> Indeed, as stated previously, 63% of Welsh consented in 2011 to endow their National Assembly with primary legislative powers that are normatively equal to these held by the Westminster Parliament and by the Scottish Assembly.<sup>222</sup> Wales could self-rule more autonomously and genuinely than ever since it became a British constituent nation, although the nature of the Welsh devolved powers was still a matter of tense debates after that.<sup>223</sup>

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<sup>219</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) paras 4.3.2 and 4.3.4.

<sup>220</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 201; Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 27; *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43 [42].

<sup>221</sup> John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 134.

<sup>222</sup> *ibid*; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 34; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 47; Mike Varney, '"Brexit" and Welsh Devolution: The Likely Impact' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 79.

<sup>223</sup> Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 13.

In that vein, the Cameron Conservative Government established the Silk Commission to improve Welsh devolution substantively, which led in 2014 to the devolution of some, albeit limited, taxation and borrowing powers.<sup>224</sup> Subject to the holding of a subsequent referendum, the Welsh Assembly has been empowered to pass rate resolutions setting basic, higher, and additional tax rates.<sup>225</sup> Moreover, after years of complex discussions,<sup>226</sup> an extensive reform of Welsh constitutional governance was completed in 2017 so that a reserved powers model similar to the Scottish one could be established.<sup>227</sup> Consequently, Wales now has a ‘fully-fledged legislature’<sup>228</sup> that can make, within its jurisdiction, its own normative choices and even amend long-enacted British Acts affecting devolved matters<sup>229</sup>. It can even be asserted that federal principles are institutionalised and that British sovereignty can be divided through the operation of contemporary Welsh self-rule.

Nevertheless, the evolution of the Welsh devolution arrangements towards a ‘Scottish model’ does not mean that the Scottish devolution arrangements have remained static. As in Wales, several commissions have been established since the 2000s to propose some ways to enhance the Scottish ability to self-rule.<sup>230</sup>

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<sup>224</sup> *ibid* 6 and 46.

<sup>225</sup> Government of Wales Act 2006 (c 32) s 116D(1); Wales Act 2014 (c 29) s 6 and 12(1).

<sup>226</sup> HC Deb 23 January 2006, vol 441, col 1248 (Mr Nick Ainger); Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 4.5.7; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 12 and 14.

<sup>227</sup> Government of Wales Act 2006 (c 32) Schedule 7A, Part 1, General Reservations and Part 2, Specific Reservations; Wales Act 2017 (c 4) Schedule 1; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 183.

<sup>228</sup> Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 18-20.

<sup>229</sup> *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [89] (diss).

<sup>230</sup> Scotland Office, *Scotland’s Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) paras 1.10.

Ensuing proposals mitigated many Scots' feeling that their devolution arrangements, all extensive they might be from British standards, could not endow them with enough powers.<sup>231</sup> As argued previously, gaining more fiscal independence from British central institutions has considerably empowered Scottish substate institutions and made them more accountable for their actions.<sup>232</sup> Although Scotland still receives, though at the expense of a perfect institutional coherence,<sup>233</sup> blocks grants that are set according to the Barnett Formula,<sup>234</sup> unilateral central interventions can be prevented more efficiently than before.<sup>235</sup> Additionally, despite a long-standing reluctance of central institutions, for the sake of state unity, to do so,<sup>236</sup> powers on abundant and lucrative Scottish oil and gas resources were devolved in 2016.<sup>237</sup> This decision was deemed essential to quash a growing feeling of economic alienation<sup>238</sup> based upon the belief that Scotland could not have its fair share within the United Kingdom.

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<sup>231</sup> John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 125.

<sup>232</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) paras 2.11, 4.8, 4.17, 4.20 and 4.24; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 31.

<sup>233</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 34.

<sup>234</sup> Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 95(1).

<sup>235</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 33.

<sup>236</sup> Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales* (Cm 6348, 1975) 26; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 151; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 71.

<sup>237</sup> Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 69; Scotland Act 2016 (c 11) s 47(2); Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 181.

<sup>238</sup> HL Deb 24 November 2015, vol 767, col 601 (Earl of Kinnoull); HL Deb 24 February 2016, vol 769, col 271 (Lord Dunlop).

These evolutions have signalled a common unionist desire to accommodate Scottish nationalism, as the latter almost became irremediably independentist amidst the 2014 referendum.<sup>239</sup> Instead of having set the constitutional status of Scotland once and for all, the referendum has rather accentuated the importance of reforming it to expand the scope of Scottish devolution.<sup>240</sup> Despite the divisions engendered by this democratic exercise, most Scots support 'devo-plus' or 'devo-max':<sup>241</sup> a furthered Scottish autonomy within the British Union.<sup>242</sup> However, the imprecisions of unionist reform proposals and the persistence of a fierce independentist will have hindered the implementation of the favourite Scottish constitutional option.<sup>243</sup> Dividing parcels of British sovereignty by establishing exclusive substate jurisdictions, even beyond the assessment of the Scottish case, has been harder to achieve concretely than providing 'symbolic recognition

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<sup>239</sup> HL Deb 24 November 2015, vol 767, col 602 (Lord Lang of Monkton); HL Deb 24 February 2016, vol 769, col 263 (Lord Dunlop).

<sup>240</sup> Scottish Government, *Supplementary Legislative Consent Memorandum - Scotland Bill* (LCM (S4) 37.2, 2016) para 38; Stephen Tierney, 'The Constitution of an Independent Scotland: Popular Empowerment or Judicial Supremacy?' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 135.

<sup>241</sup> Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) paras 1 and 95(2); House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 5; Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 5, 27 and 81.

<sup>242</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 252.

<sup>243</sup> House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 33; Michael Keating and Malcolm Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2<sup>nd</sup> edn, Luath 2015) 141; HL Deb 24 November 2015, vol 767, col 603 (Lord Lang of Monkton); Scottish Government, *Supplementary Legislative Consent Memorandum - Scotland Bill* (LCM (S4) 37.2, 2016) paras 3, 4 and 40; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 7; Nicola McEwen and Michael Keating, 'Beyond the Referendum' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 198-99.

and administrative differentiation'.<sup>244</sup> Still, while constitutional turmoil has complexified the progress of the British substate nations towards autonomy, it did not halt it. Although that is not formally acknowledged, Scotland, and even Wales, self-rule nowadays in a substantively federal manner. I shall then determine whether another constituent nation with unique characteristics and issues, Northern Ireland, can also do so.

### **5.3.2. The Exercise of Self-Rule by Northern Irish Institutions**

The core purpose underlying the implementation of the Northern Irish devolution arrangements was not to provide recognition or autonomy as in Scotland or Wales. Since most unionists still see themselves as Britons with few distinctive identity traits and most nationalists have preferred to be citizens of the Irish Republic,<sup>245</sup> there is hardly such thing as a fully-fledged and stand-alone Northern Irish nation. Unionists mostly make autonomist claims when British central institutions intend to deprive them of what they consider to be their Britishness or to compromise with nationalists.<sup>246</sup> Several unionists are devolutionists, and even federalists, because they want Northern Ireland to self-rule in a

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<sup>244</sup> Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 54-55.

<sup>245</sup> Michael Gallagher, 'How Many Nations Are There in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715, 724; Paul Bew, 'Myths of Consociationalism: From Good Friday to Political Impasse' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 67.

<sup>246</sup> Andrew White, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118, 127; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 104; FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 477; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 250.

manner that counters Irish nationalism, even if the Troubles could resume because of that.<sup>247</sup> Even before 1998, devolution was intended to provide 'a resolution for a long-running historical conflict',<sup>248</sup> to end armed struggles, and to foster concord between the unionist and nationalist communities.<sup>249</sup> Seeking to reach these aims has then shaped the Northern Irish devolution arrangements in a peculiar manner. The Northern Ireland Act 1998 has entrenched the content of the GFA statutorily and set the institutions through which nationalists and unionists could rule jointly over a constituent nation that yet does not perceive itself as such.<sup>250</sup> The source of this statute is neither a common national sense of belonging, nor even political necessity, but an agreement between communities and states (the United Kingdom and Ireland) to devise a constitutional framework based upon co-sovereignty.<sup>251</sup>

However, the jurisdiction of the Northern Irish Assembly and Executive looks quite similar formally to that of Scottish substate

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<sup>247</sup> Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 299; Caroline Kennedy-Pipe, 'From War to Uneasy Peace in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 54.

<sup>248</sup> Gordon Anthony and John Morison, 'Here, There, and (Maybe) Here Again: The Story of Law Making for Post-1998 Northern Ireland' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 155.

<sup>249</sup> Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) para 18; Jonathan Tonge, *Northern Ireland* (Polity 2006) 2 and 205; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 213.

<sup>250</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Democratic Institutions in Northern Ireland, s 3; Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 15.

<sup>251</sup> John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 49; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 135.

institutions. The Northern Irish Assembly has always held primary legislative powers on any matter except those that are expressly excepted and reserved to central institutions.<sup>252</sup> However, these institutions can hold Northern Irish institutions accountable for their autonomous decisions, which they have often done,<sup>253</sup> to ensure that they abide by the provisions of the GFA.<sup>254</sup> Accordingly, the Secretary of State for Northern Ireland controls the exercise of devolved powers more stringently than her Scottish and Welsh counterparts.<sup>255</sup> To prevent the devolution arrangements from engendering and legitimising systemic discrimination and power abuses, she retains the right to suspend their implementation unilaterally, even without seeking the consent of Northern Irish citizens and rulers.<sup>256</sup>

Indeed, the core concern about Northern Irish self-rule is that it cannot be exercised domineeringly because that would likely tear apart an intrinsically divided polity. A socio-cultural group shall never conflate its interests with these of the Northern Irish polity and institutionalise its effective supremacy, as unionists tended to do during the Stormont regime.<sup>257</sup> Considering the necessity of preventing any breach of human rights based upon unionist majoritarianism, central interventionism is made essential by

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<sup>252</sup> Northern Ireland Act 1998 (c 47) s 4 and 6 and Schedule 2; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 31.42.

<sup>253</sup> Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 446.

<sup>254</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Democratic Institutions in Northern Ireland, s 33.

<sup>255</sup> *ibid* s 32; Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 188.

<sup>256</sup> Aileen McHarg, 'Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 13.39.

<sup>257</sup> James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 285.

circumstances.<sup>258</sup> Moreover, since the demographic growth of the nationalist population increases the likeliness of Irish reunification, unionists may feel insecure about their identity and want to assert their interests domineeringly, even at the expense of social cohesion.<sup>259</sup> Therefore, looking back into historical precedents, concerns justifying unilateral and temporary suspensions of the operation of substate institutions are far from being speculative nowadays.

To avoid these grim outcomes, devolved institutions were devised so that the exercise of Northern Irish self-rule could be constrained with due consideration to the socio-political diversity of Northern Ireland. They are consociational, which means that some consequential decisions are made by cross-community majorities to prevent any majority from ruling hegemonically.<sup>260</sup> For instance,

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<sup>258</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 75; *Re Northern Ireland Human Rights Commission* [2002] HRIR 35 [12]; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 253.

<sup>259</sup> Liam O'Dowd, 'New Unionism', *British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland* in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 87; Andrew White, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118, 129; FC McGrath, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463, 478.

<sup>260</sup> Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) para 19; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2<sup>nd</sup> edn, Athlone Press 1996) 301; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 66-67; Shane O'Neill, 'Mutual Recognition and the Accommodation of National Diversity: Constitutional Justice in Northern Ireland' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 232; John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 48; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 193; Oran Doyle, David Kenny and Christopher McCrudden, 'The Constitutional Politics of a United Ireland' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 136.

there is no Official Opposition in the legislature, some norms must be enacted with the majority support of both communities, and all instances of government have to be composed equally of unionists and nationalists.<sup>261</sup> For a few time, after the ratification of the GFA, nationalists and unionists shared power, and the Northern Irish could self-rule somewhat peacefully and functionally.<sup>262</sup>

However, this promising situation did not last peacefully for two reasons. First, the root causes of the discriminations fuelling community tensions were too deeply ingrained and systematised to be tackled efficiently by institutions whose unionist members continuously feared to lose their effectively majority status.<sup>263</sup> The will of several unionist leaders to redefine unionism in more inclusive terms, in accordance with a parity of esteem with nationalists, has been at best doubtful.<sup>264</sup> Second, instead of transcending communitarian belongings and fostering a shared

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<sup>261</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Democratic Institutions in Northern Ireland, s 26 (b); Frank Millar, 'Ireland: The Peace Process' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 517; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 211; Oran Doyle, David Kenny and Christopher McCrudden, 'The Constitutional Politics of a United Ireland' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 136.

<sup>262</sup> Jonathan Tonge, *Northern Ireland* (Polity 2006) 4.

<sup>263</sup> David Miller, 'Colonialism and Academic Representations of the Troubles' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 14; Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 24.

<sup>264</sup> Liam O'Dowd, "New Unionism", British Nationalism and the Prospects for a Negotiated Settlement in Northern Ireland' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 83; Cathal McCall, 'From "Long War" to "War of the Lillies": "Post-Conflict" Territorial Compromise and the Return of Cultural Politics' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 305-306; Andrew White, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118, 129; Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 141.

identity, consociational arrangements have institutionalised and consolidated identity cleavages, which increased long-standing social tensions.<sup>265</sup> Radicals from both communities staunchly loathed consociationalism because they could not renounce their irredentist, and antagonistic, self-determination claims.<sup>266</sup> As unionist and nationalist electorates increasingly supported less moderate parties such as the DUP or Sinn Féin, power-sharing institutions quickly became paralysed and frequent political stalemates occurred.<sup>267</sup> Consequently, the Secretary of State for Northern Ireland often had to serve as a dealbreaker, albeit with little success.<sup>268</sup> The inability to find durable common grounds led to several periodic suspensions of the dysfunctional work of the Assembly or the Executive.<sup>269</sup> Several authors and citizens, especially within the nationalist community, then voiced concerns that these suspensions, which were unilaterally decided by a

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<sup>265</sup> Gordon Gillespie, 'Noises Off: Loyalists after the Agreement' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 150; Jonathan Tonge, *Northern Ireland* (Polity 2006) 28-29; Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 474; David Mitchell, 'Political Parties in Northern Ireland and the Post-Brexit Constitutional Debate' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 87; Oran Doyle, David Kenny and Christopher McCrudden, 'The Constitutional Politics of a United Ireland' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 135.

<sup>266</sup> John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 45.

<sup>267</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 572 and 577-78; David Mitchell, 'Political Parties in Northern Ireland and the Post-Brexit Constitutional Debate' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 96.

<sup>268</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [15].

<sup>269</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 183.

member of the British cabinet, reflected the tenuousness of the GFA and, in turn, that of devolution.<sup>270</sup>

In 2006, these concerns were addressed by the St Andrews Agreement, 'which devolved policing and criminal justice powers to the Assembly'<sup>271</sup> and repealed the decried power of unilateral suspension.<sup>272</sup> It also tightened the norms regulating the functioning of power-sharing institutions and securing cross-community cooperation so that abiding by them would become a clear prerequisite to hold Northern Irish self-rule.<sup>273</sup> The formation of a functional power-sharing Executive in 2007 prefigured a success.<sup>274</sup> But after years of relative harmony, tensions resumed after the 2016 Brexit referendum, which jeopardised several staples of the GFA.<sup>275</sup> The incapacity to devise a common Northern Irish approach to address increasingly concerning constitutional issues hampered the functioning of substate

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<sup>270</sup> Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 446; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 27.

<sup>271</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 183.

<sup>272</sup> Thomas Bartlett, *Ireland: A History* (Cambridge University Press 2010) 577; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 216; John McGarry and Brendan O'Leary, 'Territorial Autonomy: Taxonomizing its Forms, Virtues and Flaws' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 27.

<sup>273</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 214 and 216.

<sup>274</sup> Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 113.

<sup>275</sup> Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 24; Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 261.

institutions and led to their effective collapse in January 2017.<sup>276</sup> Until 2020, since no stable and functional power-sharing executive could be formed, British central institutions had no choice but to appoint caretakers who would rule Northern Ireland.<sup>277</sup>

So, while the devolution arrangements have granted extensive normative autonomy to a deeply divided nation, its rulers could not systematically use it cohesively. Although this opportunity to self-rule was entrenched statutorily in 1998, it could not be fulfilled over time due to peculiar contextual circumstances. Certainly, the statutes on Northern Irish devolution include several federal features and characteristics, like the establishment of exclusive jurisdictions, and implement federal principles, such as the fostering of concord and fairness. However, amidst troubled times, pragmatic measures, regardless of their inherent federal character, had to be taken to preserve social peace.

### **5.3.3. The Exercise of Self-Rule by English Institutions**

The non-existence of English devolution arrangements cannot be overlooked when determining whether England can self-rule, especially from a federal perspective. While Scottish and Welsh institutions have become increasingly functional and autonomous, and while Northern Irish institutions have held the statutory power, though not always the effective ability, to self-rule, England is still ruled directly by central institutions.<sup>278</sup> It can then be sensible to

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<sup>276</sup> Eamon Phoenix, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17, 25; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 183 and 238.

<sup>277</sup> Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (c 28) s 3(1) and 7.

<sup>278</sup> Mark Goodwin, Martin Jones and Rhys Jones, 'Devolution, Constitutional Change and Economic Development: Explaining and Understanding the New Institutional Geographies of the British State' (2005) 39(4) *Regional Studies*

argue that England cannot be a self-ruling nation and that the United Kingdom could not be a federal state.

Still, despite the apparent pertinence of this argument, it glosses over several characteristics of British unionism and constitutionalism. First, as explained later, it was hardly possible to establish English devolution arrangements akin to these of the other constituent nations due to the unique societal character of England. Second, the reluctance of an entity to self-rule autonomously is not ineluctably antagonistic to federalism, especially when it is conceptualised asymmetrically. Third, the failure to implement English devolution is the outcome of the reluctance of English citizens to consider themselves as members of a nation that should have its own governance framework.<sup>279</sup> In fact, British central institutions, especially during the Blair era, devised proposals to devolve powers to England,<sup>280</sup> but they mustered limited popular support. Accordingly, the fact that English citizens refused to self-rule displays the importance for devolution to embody national self-determination claims, whose variety can be explained by the enormous disparities between the constituent nations. This decision would even be coherent with the

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421, 429; Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 263; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 129; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 8.

<sup>279</sup> David Miller, 'Nationality in Divided Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 314; Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 237.

<sup>280</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 22.

federal principles underlying self-rule and prove that they would have been implemented in England, albeit intangibly.

To grasp the intricacies that have shaped the debates on an English devolution process that never was, it is essential to ascertain the dominant position of England within the British Union. England is politically, economically, and demographically considerably mightier than, even when they are combined, Wales, Scotland, and Northern Ireland; and can use its dominant position to assert its interests.<sup>281</sup> It is neither opportune nor realistically possible to argue that endowing England with the same legal means given to its fellow constituent nations would lead to fair outcomes.<sup>282</sup> Establishing properly distinct English institutions is thus ill-advised.<sup>283</sup>

Accordingly, many scholars have contended that English devolution should be regionalised, especially since English citizens hardly share a common substantive identity.<sup>284</sup> Although local government has long been a staple of English governance,<sup>285</sup> regions, despite their millenary histories, had long been powerless,

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<sup>281</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 94.

<sup>282</sup> John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 133.

<sup>283</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 94.

<sup>284</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 192; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 191; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 167.

<sup>285</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 5.

voiceless, and somewhat unable to uphold their peculiar traits.<sup>286</sup> Implementing regionalised English devolution arrangements could fix that. They could benefit smaller and more tight-knitted entities that would be on a more equal footing with the other constituent nations, which could also ease the pragmatic implementation of the principle of subsidiarity.<sup>287</sup>

The Blair Government proposed to establish such arrangements, but since, as in Wales, public support for extensive constitutional reforms was lukewarm in the English regions, it chose to proceed incrementally after having obtained clear, popular, mandates.<sup>288</sup> During its first term, it established regional development agencies and regional government offices to, respectively, transfer decisional economic powers to regional institutions and decentralise the delivery of public services that yet remained managed by central institutions.<sup>289</sup> Still, the members of these institutions were neither elected, nor empowered, to make decisions within exclusive English jurisdictions.<sup>290</sup> Nonetheless,

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<sup>286</sup> Id, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 31; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 100.

<sup>287</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 95.

<sup>288</sup> Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 84.

<sup>289</sup> Regional Development Agencies Act 1998 (c 45) Preamble; Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 174; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 170; Michael Keating, 'From Functional to Political Regionalism: England in Comparative Perspective' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 153; Mark Sanford, 'Facts on the Ground: The Growth of Institutional Answers to the English Question in the Regions' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 176; Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 115.

<sup>290</sup> Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 303; John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question*

during this term, the powerful and normatively autonomous Greater London Authority was established in a manner that was more akin to devolution than to traditional local governance.<sup>291</sup> This reform, more than devolution to the other constituent nations, served as a catalyser of regionalist claims.<sup>292</sup>

During Blair's second term, devolution arrangements appeared ripe to be approved by the citizens of increasingly demanding English regions in referendums.<sup>293</sup> Still, there was no precise and uniform English will to devise a unique English devolution framework.<sup>294</sup> Devolution arrangements would be tailor-made to regional realities and rely on the consent of the concerned citizens to abide by them, which could make them piecemeal.<sup>295</sup> Each region would decide if it wanted to self-rule within its own democratic institutions.<sup>296</sup> Demands for devolution were based upon a functional desire to self-rule on definite social and economic matters than on identity claims.<sup>297</sup> Even when the latter were made, they mostly fulfilled the purpose of arguing that domineering Westminster and London ruling elites could not

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(Manchester University Press 2006) 119; Tony Travers, 'Local Government' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 63.

<sup>291</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 173.

<sup>292</sup> John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 135.

<sup>293</sup> Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 172.

<sup>294</sup> John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 134.

<sup>295</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 273; *ibid* 11.

<sup>296</sup> Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 22 and 49.

<sup>297</sup> Guy Lodge and James Mitchell, 'Whitehall and the Government of England' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 117; Mark Sanford, 'Facts on the Ground: The Growth of Institutional Answers to the English Question in the Regions' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 192.

address issues responsively.<sup>298</sup> Any English devolution arrangement would then further functional and instrumental purposes.

Operationally, the Blair Government wanted to establish a new, regional, tier of government in England that would give back some powers and a voice to citizens who long felt ignored by distant British central institutions.<sup>299</sup> A referendum would be held in a specific region if the British government reckoned that its citizens would likely consent to initiate a devolution process.<sup>300</sup> A simple majority was needed to do so, and a rejection prevented the organisation of another regional referendum for seven years.<sup>301</sup> Ultimately, although that was not its intended outcome expressly, the implementation of English devolution arrangements would have likely turned the United Kingdom into at least a quasi-federal state.<sup>302</sup> Indeed, when each entity of a state can self-rule, state sovereignty could hardly be held and exercised unitarily.

However, in the first referendum, which was held in 2004, 78% of citizens from the North East region, although they mainly considered themselves different from other English or Britons, did not think that devolution was worth the cost.<sup>303</sup> This massive

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<sup>298</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 191; Michael Keating, 'From Functional to Political Regionalism: England in Comparative Perspective' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 156; Andrew Mycock, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388, 392.

<sup>299</sup> Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 11, 22, 33 and 59.

<sup>300</sup> Regional Assemblies (Preparations) Act 2003 (c 10) s 1.

<sup>301</sup> *ibid* s 6.

<sup>302</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 276; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 251.

<sup>303</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 43.

rejection of English regional devolution has led British rulers to relegate this constitutional project to oblivion.<sup>304</sup> The empowerment of the English regions would then continue to be done through local or administrative decentralisation, which were widely deemed both efficient and legitimate.<sup>305</sup> Accordingly, the powers of English local governments have been considerably extended thereafter.<sup>306</sup> Still, even decentralisation seems uncertain, as regional development agencies were scrapped due to their lacking operational character.<sup>307</sup> Consequently, as at the turn of the millennium,<sup>308</sup> the English regions remain the only ones in Europe that cannot self-rule autonomously within a distinct framework of democratic regional governance.

It is debatable whether the failure of English devolution characterises the final state of British devolution or reflects its incompleteness.<sup>309</sup> Certainly, British governance is complexified by the dual nature of, among others, the Westminster Parliament, which is simultaneously the sole norm-making institution within

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<sup>304</sup> Tony Travers, 'Local Government' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 73; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 198; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 42; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 96.

<sup>305</sup> Mark Sanford, 'Facts on the Ground: The Growth of Institutional Answers to the English Question in the Regions' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 189.

<sup>306</sup> Cities and Local Government Devolution Act 2016 (c 1) s 1(1) and 24; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 53.

<sup>307</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 36.

<sup>308</sup> Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 10.

<sup>309</sup> Robert Hazell, 'Introduction: What Is the English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 1.

which English representatives can devise statutory norms<sup>310</sup> and a British central institution.<sup>311</sup> It shall yet be kept in mind that devolution and federal arrangements are worthless if citizens do no consent to their implementation and are endowed with powers, such as these to self-rule, that they do not want to hold.<sup>312</sup> That is why Hazell is right to argue that the lack of citizen support for English devolution does not signal fundamental issues with the process of devolution, even from a federal perspective.<sup>313</sup>

Accordingly, a contractualistic and asymmetrical understanding of federalism based upon the right to internal self-determination means that a constituent entity, like England, can choose if and how it wants to self-rule. In accordance with the multinational essence of the United Kingdom, its constituent nations have had the opportunity to self-rule by various institutional means.<sup>314</sup> England has simply renounced deliberately to take advantage of it. Since these nations are able, if they want so, to enact norms embodying their societal choices, contemporary British sovereignty would be divided and, thus, federal. Still, only upholding substate self-rule is insufficient to characterise a state

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<sup>310</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 22.

<sup>311</sup> LJ Sharpe, 'British Regionalism and the Link with Regional Planning – A Perspective on England' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 132-33.

<sup>312</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 274; Stephen Tierney, 'Federalism in a Unitary State: A Paradox too Far?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 52-53.

<sup>313</sup> Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 239.

<sup>314</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 187; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 15; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 6.

as federal. The unity and the cohesion of the constituent nations shall also be fostered and safeguarded institutionally. Therefore, especially while considering how the diversity of the devolution arrangements can make devolution look piecemeal,<sup>315</sup> investigating the existence and the substance of a British federal shared rule becomes crucial.

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<sup>315</sup> House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 34.

## **6. Shared Rule within a Federal British State?**

In the previous chapter, I contended that the British constituent nations have been endowed with the power to self-rule in a substantively federal sense. However, while they shall be able to exercise their normative share of a divided state sovereignty, they shall also pursue common goals and interests to coexist within a composite and cohesive state. They shall cooperate for the benefit of the whole state, whether that be within intergovernmental frameworks or common central institutions. Hence, federal shared rule can guarantee the unity of a state without threatening its constitutive societal diversity.

In this chapter, I evaluate whether shared rule is institutionalised in accordance with federal principles in the United Kingdom. I first study the concept of shared rule and explain why federal and devolved systems of governance shall actualise it. I then shed light on the lacking multinational character of British central institutions and display how it compromises shared rule. Ultimately, I contend that since the operation of British intergovernmental mechanisms is relatively inefficient concretely, they can hardly live up concretely to their potential to actualise shared rule in a federal sense.

## **6.1. The Importance of Shared Rule**

Before investigating how it can be implemented and institutionalised to make the United Kingdom a federal state, grasping the substance of shared rule is primordial. In practice, self-rule and shared rule are fundamentally complementary. The constituent nations shall be empowered to have a decisive say on matters that affect a federal state, which shall be governed jointly with a cooperative mindset. I contend that such an ambition has shaped devolution arrangements, which were devised to prevent power relationships from being domineering and hierarchical both in law and in fact.

### **6.1.1. Shared Rule in a Federal State**

Sound constitutional governance requires balancing diverse and often contradictory interests. Conciliatory and efficient compromises, which are intrinsically contextual and tenuous, shall be the outcomes of vigorous, albeit respectful, deliberations, whose holding shall be institutionalised to foster societal concord through dialogue.<sup>1</sup> Still, while Jennings notes that a constitution is ‘an instrument of national co-operation’, he also remarks that the sole enforcement of its provisions does not permit to reach this aim.<sup>2</sup> The virtues of informal devices and intangible mechanisms cannot be underestimated so that citizens and entities can coexist harmoniously.<sup>3</sup> Valuing cooperation and dialogue is how, beyond the making of mere aspirational claims and the enactment of

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<sup>1</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 207.

<sup>2</sup> Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 82.

<sup>3</sup> *ibid*; KC Wheare, *Modern Constitutions* (2<sup>nd</sup> edn, Oxford University Press 1966) 136.

formal norms, a diverse polity survives and thrives. That is particularly crucial in a federal state, whose unity relies on the shared consent of its constituent entities to be part of it and, despite the frequent divergences between them, to rule it together. Indeed, as noted by Tomkins, shared rule guarantees mutual respect and recognition, which is a crucial federal principle, by upholding a shared sense of belonging and by bringing the constituent entities together.<sup>4</sup>

Four reasons justify why shared rule is a pillar of federal constitutional governance. First, citizens shall share a common plural identity to prevent some of them from feeling excluded by an exclusive and homogenising state constitutional narrative.<sup>5</sup> Shared identity traits, and common values, are essential to give life to a federal loyalty towards both the federal state and a substate entity.<sup>6</sup> Otherwise, some constituent entities might become alienated and seek to secede.<sup>7</sup> Second, the appreciation and the

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<sup>4</sup> Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 99.

<sup>5</sup> Jaime Lluçh, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 154; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 3.

<sup>6</sup> William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 108.

<sup>7</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 24; Daniel Weinstock, 'The Moral Psychology of Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 225; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 162; Ephraim Nimni, 'Nationalism, Ethnicity, and Self-Determination: A Paradigm Shift' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 26; Jan Erk and Lawrence M Anderson, 'The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 2; Jaime Lluçh, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 135; Michael Burgess, *In Search of the Federal Spirit: New*

constitutional recognition of dual allegiances, which cannot be seen as antagonistic as long as they are not imposed on citizens or on nations, is a key federal principle.<sup>8</sup> Third, the constituent entities shall share interests so that they can be incentivised to reach common goals by participating actively within central or intergovernmental institutional frameworks.<sup>9</sup> Fourth, federated entities shall have the capacity to express their wills and their concerns within these frameworks, which shall empower them to rule the state as alike associates without there being any domineering and centralising federal hegemony.<sup>10</sup>

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*Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 9.

<sup>8</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 76; KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 49; Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 60; Christian Tuschhoff, 'The Compounding Effect: The Impact of Federalism on the Concept of Representation' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 18; Thomas D Lancaster, 'Complex Self-Identification and Compounded Representation in Federal Systems' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 65-66; David Miller, 'Nationality in Divided Societies' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 304; Roderick Macdonald, 'Kaleidoscopic Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 278; Dimitrios Karmis and Wayne Norman, 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 9; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 269; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 15.

<sup>9</sup> Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 1 and 139.

<sup>10</sup> WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 310; Preston King, *Federalism and Federation* (Croom Helm 1982) 19 and 121; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 154; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 13; Kyle Scott, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011) 39; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 3; Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 342.

Consequently, shared rule shall simultaneously strengthen the position of the constituent entities within a federal constitutional framework and ensure that their autonomist claims are not construed egoistically and opportunistically.<sup>11</sup> Federal and federated powers shall be constrained by ‘vertical check and balances’ to ensure that the constituent entities do not abuse of their powers and work together with fairness.<sup>12</sup> Indeed, the rejection of power relationships based upon subordination is a common defining attribute of self-rule and shared rule.<sup>13</sup> The alliance between these concepts entails that the constituent entities can exercise important powers beyond their strict formal jurisdictions and prevents a federal state from being a haphazard set of autonomous entities that have nothing in common.<sup>14</sup> Shared rule shall then endow citizens with representation at both federal and federated levels by guaranteeing that federated entities can

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<sup>11</sup> Stephen Tierney, ‘Flexible Accommodation: Another Case of British Exceptionalism’ in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 161.

<sup>12</sup> Cheryl Saunders, ‘Challenges of Multilevel Constitutionalism’ in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 345.

<sup>13</sup> Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 88.

<sup>14</sup> Vincent Ostrom, ‘Federal Principles of Organization and Ethnic Communities’ in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 86; Richard Simeon and Daniel-Patrick Conway, ‘Federalism and the Management of Conflict in Multinational Societies’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 339; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 126; Peter H Russell, ‘The Future of Europe in an Era of Federalism’ in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 5; Susan E Clarke, ‘Thinking Federally’ from a Governance Perspective’ in Michael Pagano and Robert Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007) 57; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 160.

participate in federal norm-making with due respect for shared, state, interests.<sup>15</sup>

From a more theoretical perspective, federalism is meaningless without shared rule. As noted by Elazar, this mode of governance shall be shaped by fair and dialectical relationships between citizens, constituent entities, and both.<sup>16</sup> Devising mechanisms through which deliberation and conciliation can be achieved continuously is crucial to consolidating these relationships and, as a result, to actualising the federal spirit.<sup>17</sup> Accordingly, the constituent entities shall be discouraged to uphold fixed loyalties and identities, which hamper intergroup communication and state cohesion.<sup>18</sup> Moreover, both systematically and substantively, dialogue between the constituent entities prevents structuring decisions affecting the whole state from being made unilaterally, without consideration for substate interests and needs.<sup>19</sup> Although federal policymaking can easily be stalemated if consensus are

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<sup>15</sup> Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 25; Christian Tuschhoff, 'The Compounding Effect: The Impact of Federalism on the Concept of Representation' in Joanne Brzinski, Thomas D Lancaster and Christian Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999) 21; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 8; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 3-4.

<sup>16</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 103.

<sup>17</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 47; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 48 and 50; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 1-2; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 202; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 323.

<sup>18</sup> Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 39.

<sup>19</sup> Ralph JK Chapman, 'Structure, Process and the Federal Factor: Complexity and Entanglement in Federations' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 71.

unreachable, abiding by ethical standards rooted in dialogue, constructive engagement, and unifying traits and values can mitigate this concern.<sup>20</sup>

Shared rule can simply not exist without being institutionalised to some extent. Beyond the functional character of the institutions through which the constituent entities can exercise shared rule, their operation shall be deemed legitimate by them.<sup>21</sup> The authority of these institutions cannot rely primarily on coercion but rather on a valuation of self-restraint and of consensus-making.<sup>22</sup> That is how federal loyalty (*Bundestreue*), which is crucial to place cooperation at the heart of federalism, can be generated and safeguarded.<sup>23</sup> Implementing this principle helps to make the constituent entities trustful that negotiated compromises can further shared interests without opportunism while preserving as much as possible their vital peculiar identity traits.<sup>24</sup>

In a more operational sense, the central institutions of a state that is ruled jointly by its constituent entities shall embody its composite

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<sup>20</sup> Sergio Ortino, 'Functional Federalism between Geopolitics and Geo-economics' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 280; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 201.

<sup>21</sup> Sergio Ortino, 'Functional Federalism between Geopolitics and Geo-economics' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 280.

<sup>22</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 181 and 191.

<sup>23</sup> Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 181.

<sup>24</sup> id, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 154; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 19-20; Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 352.

character and ensure that these entities are integral parts of the processes through which this state is governed.<sup>25</sup> As much as possible, the powers of a federal entity shall be exercised collegially by representatives of all constituent entities on a continuous and constitutionalised basis.<sup>26</sup> For instance, making central institutions responsive to the claims of the constituent entities, for instance through their representation within a legislative second chamber,<sup>27</sup> shall prevent them from acting unilaterally and domineeringly.<sup>28</sup>

However, central federal institutions are not the only institutions that can foster 'flexible relationships capable of facilitating interstate relations, intrastate linkages and intercommunity relations'.<sup>29</sup> Indeed, shared rule can be exercised both through federated representation within federal legislative institutions (legislative) and intergovernmental (or, more rarely,

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<sup>25</sup> Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 142.

<sup>26</sup> Preston King, *Federalism and Federation* (Croom Helm 1982) 77; Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007) 202.

<sup>27</sup> Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 342.

<sup>28</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 166; DV Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) *Publius: The Journal of Federalism* 81, 94; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 281; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 49, 51 and 208; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 241; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 77; Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 276.

<sup>29</sup> A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 111-12.

interparliamentary) frameworks of negotiation.<sup>30</sup> More precisely, intergovernmental institutions are vertical (federal/federated) and horizontal (between federated entities)<sup>31</sup> forums within which representatives of all constituent entities interact directly on an equal footing.<sup>32</sup> Certainly, the authority of intergovernmental arrangements can be weak if they lack steady constitutional bases and if their members do not act in conformity with the will of the citizens they represent.<sup>33</sup> But as long as these concerns are mitigated pragmatically, the flexibility of these arrangements helps them to make, beyond hierarchical patterns, sound and authoritative decisions that both build and embody societal consensuses.<sup>34</sup> Intergovernmental institutions can complement the crucial work of central institutions with a less formal approach that can ease cooperation even if their existence, which primarily relies on political (good) will, cannot be taken for granted.

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<sup>30</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 116; Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 451; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 26.

<sup>31</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 116; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 96.

<sup>32</sup> Guy Peters, 'The United Kingdom Becomes the United Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71, 75; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 91.

<sup>33</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 281; Johanne Poirier, 'Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 445, 454 and 459; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 216.

<sup>34</sup> KC Wheare, *Federal Government* (4<sup>th</sup> edn, Oxford University Press 1963) 226; Johanne Poirier, 'Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 446 and 449; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 217.

In all cases, the institutionalisation of shared rule shall chiefly empower the parties to a federal pact to be permanent and, as much as possible, equal partners in state policymaking processes.<sup>35</sup> Despite their differences, federal and intergovernmental institutions share the development of a constructive engagement in the making of a functional composite polity and the valuation of open bargaining through dialogue as core purposes.<sup>36</sup> That is how federal and federated wills can be conciliated instead of being systematically opposed.<sup>37</sup> Federal shared rule can then be exercised harmoniously by the entities coexisting within a plural federal state. Hence, it can be probed whether, considering Tomkins' findings on the prerequisites for the harmonious coexistence of diverse constituent nations,<sup>38</sup> the United Kingdom has institutionalised shared rule to enhance the constitutional worth of devolution.

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<sup>35</sup> Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 184-85; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 218; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 87 and 90.

<sup>36</sup> Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2<sup>nd</sup> edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 30; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 154; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 36 and 77; Thomas Fleiner, 'The Challenge of Ethnic Diversity to Federalism' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 184.

<sup>37</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 6.17; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 183-84; Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 276.

<sup>38</sup> Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 99.

### 6.1.2. The Role of Shared Rule in Making Devolution Work

Although devolution has long been conceptualised as being primarily about self-rule,<sup>39</sup> this perspective has proved to be incomplete and inaccurate. Devolution shall be apprehended beyond purely substate considerations to ensure that the British constituent nations enjoy the full benefits of their normative autonomy. Shared rule is essential to make the devolution arrangements function well because jurisdictional spillovers and encroachments are normal elements of any framework of multi-level governance, especially since the delineation between reserved and devolved matters is quite imprecise.<sup>40</sup> In practice, central institutions can optimise the efficiency of devolved constitutional governance. Neither the centre nor the periphery carries the exclusive burdens of upholding state unity and ensuring that all constituent entities feel included within the state. The creation and the preservation of mutually supportive connections between the constituent nations are essential to keep them united as parts of a composite British state. Since, in a federal state, federal and federated entities shall share a constructive engagement to work together without egoism or opportunism; this spirit has also shaped devolution. It is then crucial to investigate whether and how cooperation and mutual respect, which shall be fostered in any multinational state,<sup>41</sup> have been fostered and institutionalised in the United Kingdom.

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<sup>39</sup> Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 515.

<sup>40</sup> *Martin v Most* [2010] UKSC 10 [90] and [156]; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) paras 89 and 99.

<sup>41</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 3.4.

I shall first highlight that the Devolution Acts do not provide exhaustively and comprehensively how intergovernmental frameworks, whose legal bases are primarily conventional or covenantal, are structured and can be functional.<sup>42</sup> Certainly, substate ministers are empowered by these statutes to conduct intergovernmental relationships and to enter into agreements on behalf of the citizens of their nation.<sup>43</sup> Moreover, these statutes establish mechanisms through which jurisdictional conflicts can be solved, even though their uncomprehensive and informal character may engender and legitimise clashes with the statutory division of powers.<sup>44</sup> However, mainly due to the complex fabric of British constitutionalism and to the disparities between the constituent nations, the relationships between the latter can hardly be based upon a uniform and definite pattern devised statutorily.<sup>45</sup> Consequently, if there exists such thing as British shared rule in a federal sense, its substance shall be multi-faceted and can only be sought, as that of British constitutionalism, beyond what formal norms provide.

Concretely, regarding the relationships between entities and institutions, the pragmatic essence of devolution is best embodied in what Rawlings characterises as bilateral concordats.<sup>46</sup> Devising bilateral, tailor-made, intergovernmental institutional frameworks is

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<sup>42</sup> Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 119.

<sup>43</sup> Government of Wales Act 2006 (c 32) s 60 and 62.

<sup>44</sup> Constitution Unit, *An Assembly for Wales* (1996) 64; Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 298.

<sup>45</sup> Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 16.

<sup>46</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 280.

opportune. For instance, the proper implementation of the GFA, which is the backbone of the Northern Irish devolution framework, requires representatives from the Republic of Ireland to be members of intergovernmental institutions and joint functional authorities like the British-Irish Council.<sup>47</sup> Although the functioning of such concordats is not always set exhaustively and might effectively be erratic,<sup>48</sup> their flexibility and their responsiveness make them more efficient than more overarching and constitutionalised intergovernmental arrangements can.<sup>49</sup> They help to find, through dialogue, common grounds and common sense solutions beyond a logic centred on zero-sum games.

Nevertheless, the importance of informal intergovernmental arrangements does not entail that British central institutions cannot play a decisive role in actualising shared rule. British multi-level governance cannot work for the benefit of all constituent nations if reserved powers are exercised without due consideration for their realities and their interests.<sup>50</sup> In that vein, the Scotland Office notes that 'where institutions or areas of policy are reserved to the UK Parliament, they must nonetheless continue to meet the needs of Scotland as well as other parts of the UK'.<sup>51</sup>

It is also noteworthy that, before devolution, the constituent nations, especially Scotland and Wales, considered that taking their place at the centre of the British institutional system, literally

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<sup>47</sup> Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 410; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 185.

<sup>48</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 279.

<sup>49</sup> *Ibid* 280.

<sup>50</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 53.

<sup>51</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 5.40.

and figuratively, could secure their influence and the respect of their uniqueness.<sup>52</sup> That was within, for instance, the Houses of Parliament and the Cabinet that these nations could seek to have an institutional voice, even though they could not self-rule within distinct institutions. For example, the Speaker of the House of Commons could certify that a public bill whose territorial extent was limited to Scotland and require it to be reviewed by a separate standing committee composed mainly of Scottish MPs, which could guarantee that this bill met peculiar national needs.<sup>53</sup> Although all MPs have formally the same rights and duties,<sup>54</sup> Scottish MPs dealt with exclusive Scottish matters in priority from the 1880s to accommodate normatively Scottish nationalism. Since special Welsh parliamentary committees were not established until the 1960s,<sup>55</sup> the multinational character of British parliamentarism was, to say the least, very asymmetrical, though as substate nationalist wills were back then. Nonetheless, beyond the operation of these committees that merely held consultative powers, the British Parliament hardly operationalised a multi-level framework from comprehensive and institutional perspectives before the 1990s. As devolution became a reality, decisive changes were due in this regard.

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<sup>52</sup> Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 8; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 171 and 178; Michael Keating, 'The End of Union? Scottish Nationalism and the UK State' in Keith Breen and Shane O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010) 105.

<sup>53</sup> Scotland Office, *Scotland in the Union. A Partnership for Good* (Cm 2225, 1993) 11; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 10; Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 773; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) paras 27.2, 38.1 and 39.1.

<sup>54</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 10.

<sup>55</sup> Jonathan Bradbury, 'Introduction' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 10-11.

The first term of the Blair Government was not only characterised by the establishment of substate institutions, but also by other constitutional reforms that sought to diffuse state power and to increase the participation of citizens in political processes.<sup>56</sup> Devolution could have served as a catalyst for reshaping British constitutionalism in a manner that would make the operation of multi-level governance simpler and more coherent.<sup>57</sup> For example, the opportunity to transform the House of Lords into a federal legislative chamber within which representatives of the constituent nations could participate directly in the state legislative process was examined to diversify the exercise of sovereignty.<sup>58</sup>

However, as noted later, the pillars of a mostly informal British constitution and the staples of its parliamentary system have mostly remained unchanged structurally following devolution.<sup>59</sup> The Blair Government hardly sought to constitutionalise the needs for seeking the consent of the members of substate institutions before undertaking constitutional changes and continuously

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<sup>56</sup> Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 6; James Alt, 'The Constitutional Revolution of Tony Blair' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 220; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 57.

<sup>57</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 76; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 56; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 53.

<sup>58</sup> Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 241.

<sup>59</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 6 and 456; David Butler, 'The Changing Constitution in Context' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 12 and 16.

dialoguing with them afterwards.<sup>60</sup> Moreover, the rising power of Cabinet over that of Parliament, although it proved decisive in pushing ambitious reforms such as devolution,<sup>61</sup> was not necessarily exercised with responsiveness to substate realities concretely.<sup>62</sup> Consequently, important federal principles characterising shared rule could not necessarily be entrenched in British constitutional law.

Nevertheless, despite the relative incompleteness of formal institutional reforms, the recent evolution of British constitutionalism displays how it can effectively accommodate substate national claims within central institutions.<sup>63</sup> The functioning of these institutions, especially politically, can no longer be apprehended in a strictly unitary sense. In keeping with the British constitutional tradition, political solutions could overcome, due to their pragmatic and legitimate nature,<sup>64</sup> a certain reluctance to rethink from the cellar to the attic the structure of the British central institutions.<sup>65</sup> While the Westminster parliamentary system intrinsically favours majoritarianism due to its 'winner-take-all' approach towards governance, mechanisms and institutions

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<sup>60</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 217.

<sup>61</sup> Mark Stuart, 'The Role of Parliament under Blair' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 179.

<sup>62</sup> Philip Cowley, 'Parliament' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 33; Paul Fawcett and RAW Rhodes, 'Central Government' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 79.

<sup>63</sup> Ben Jackson, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50, 52.

<sup>64</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 44.

<sup>65</sup> Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 183.

ensuring that the wills of a constituent nation are not systematically ignored or disregarded have become essential operationally.<sup>66</sup>

For instance, the constituent nations can contribute to the governance of the United Kingdom through the consolidation of direct relationships between state and substate executive institutions.<sup>67</sup> A dialogue between them can both increase central responsiveness and ensure that substate executives can adequately exercise their powers, which are provided by Devolution Acts.<sup>68</sup> A Cabinet Minister (the Prime Minister herself concretely) shall then have the duty to uphold unionism by ensuring the coordination of harmonious and fruitful relations between central and substate institutions.<sup>69</sup> She shall neither overshadow the substate First Ministers, nor the territorial Secretaries of State, but continually make sure that no part of the United Kingdom is, or feels, alienated. Even in England, the appointment in June 2007 of dedicated Ministers for the nine regions was motivated by the desire to prevent this outcome.<sup>70</sup> These evolutions have signalled a particular acknowledgement

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<sup>66</sup> John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 198; Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 348.

<sup>67</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 6.12; George Anderson and Jim Gallagher, 'Intergovernmental Relations in Canada and the United Kingdom' in Michael Keating and Guy Laforest (eds), *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan 2018) 19.

<sup>68</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 310.

<sup>69</sup> Constitution Unit, *An Assembly for Wales* (1996) 82; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 76; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 38.

<sup>70</sup> Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 116.

that British shared rule exists or could exist, and that (parts of) England would exercise it.

These relational arrangements can yet be criticised very legitimately. Making intergovernmental relationships rely on the (discretionary) initiative of executive officials might weaken the decisional legislative powers of assemblies, which would become effectively subordinated to these officials, and compromise the democratic character of devolution.<sup>71</sup> Even since devolution, although their core contemporary duty is to ‘articulate [distinct national] concerns’ within central institutions,<sup>72</sup> territorial Secretaries of State have been more interested effectively in the protection of central interests within the constituent nations.<sup>73</sup> However, it is impossible to get away from an important political fact on these crucial matters. Since central and substate executive officials draw their powers and their legitimacy from the trust of legislative assemblies and thus, indirectly, from that of the people, they can only act authoritatively if they fulfil its will. As central and devolved executive powers are normatively similar,<sup>74</sup> this equality of status would be based upon their common source, which is the reliance on popular and electoral mandates. Therefore, executive cooperation can be vital in making shared rule a reality.

In practice, institutions and entities can work together, even though the constitutional structure of the United Kingdom has hardly

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<sup>71</sup> *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43 [3] and [39].

<sup>72</sup> Michael Keating, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988) 87.

<sup>73</sup> Richard Rawlings, ‘Concordats of the Constitution’ (2000) 116(1) *Law Quarterly Review* 273; Alan Trench, ‘Whitehall and the Process of Legislation after Devolution’ in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 223; Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 19.

<sup>74</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 97.

evolved formally and comprehensively, because of the rise of a cooperative political culture.<sup>75</sup> Gavin Little points out that there has been 'a broad cultural shift towards a more fluid and pluralistic conception of how law and politics ought to operate' regarding devolution and, more widely, the governance of the British polity.<sup>76</sup> Although it is not necessarily recent,<sup>77</sup> the considerably active role played, within both central and substate institutions, by parties advocating substate nationalism indicates how significantly this option has shaped contemporary British constitutional governance.<sup>78</sup> A similar finding can be made regarding the acceptance by all the main unionist parties, especially the Conservative Party (despite its initial reluctance),<sup>79</sup> that elected substate institutions are normatively autonomous and politically independent from central institutions.<sup>80</sup> Since the very existence of devolution would no longer be a matter of political debates, the principles and the values underlying it would not only have been operationalised, but also intimated by political actors. Both nationalist and unionist parties have understood that, if they adapted themselves to an evolving reality, abiding by the

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<sup>75</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 298; Dawn Oliver, 'The Politics-Free Dimension to the UK Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 91.

<sup>76</sup> Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 559.

<sup>77</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 188; David Adamson, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991) 128.

<sup>78</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 46; Paul Chaney, "'Governance Transitions" and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 288.

<sup>79</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 265; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 108.

<sup>80</sup> Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 196.

structuring rules of devolution could allow them to make electoral and programmatic gains.<sup>81</sup>

Certainly, the control of the Labour Party over the British, Scottish, and Welsh executive offices, from 1999 to 2007, contributed to the harmonious conduct of intergovernmental relationships.<sup>82</sup> Their steadiness was actually tested when governments from different parties, and even from a nationalist party in Scotland, had to work together.<sup>83</sup> In fact, to make intergovernmental relations work durably, the holders of central and substate powers shall share a desire to work together beyond particular, and favourable, circumstances.<sup>84</sup> Although there initially lacked institutional devices<sup>85</sup> permitting to deal conveniently with increasing ideological divergences and conflicts that could strain

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<sup>81</sup> Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 137; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2<sup>nd</sup> edn, Routledge 2001) 124; Jonathan Tonge, *Northern Ireland* (Polity 2006) 8; Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 249; Andrew Mycock, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388, 392; Paul Chaney, '"Governance Transitions" and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 284; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 309.

<sup>82</sup> Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 133; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 108.

<sup>83</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 103; Ronald L Watts, 'Origins of Cooperative and Competitive Federalism' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 221.

<sup>84</sup> Keith Patchett, 'Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 151.

<sup>85</sup> Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 117; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 200.

intergovernmental relationships,<sup>86</sup> the relationships between governments from different parties have been quite cordial and fruitful concretely.<sup>87</sup> Still, multi-level arrangements can only function well in the long run if actualising mutual understanding and cooperation is more than a virtuous intent.<sup>88</sup> That is why a balance between the implementation, and the continuous operation, of carefully devised institutional frameworks and the assertion of the values that characterise a pluralistic political culture shall be struck.

### 6.1.3. The Value of Heterarchical Cooperation

Although the United Kingdom has an informal constitution and pragmatic (but potentially haphazard) institutional arrangements, its constitutional practice relies on firm definite principles. They set authoritative behavioural standards by which legal and political officials shall abide, even though they can hardly be enforceable judicially.<sup>89</sup> In practice, Halberstam's concept of heterarchy is instrumental in apprehending the substance of devolution in a manner that prevents the constituent entities from acting domineeringly. It can help making interjurisdictional cooperation

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<sup>86</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 9; Máire Braniff and Sophie Whiting, 'Deep Impact: The Fiction of a Smooth Brexit for Northern Ireland' (2017) 23(4) *Juncture* 249, 250; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 4.

<sup>87</sup> Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 297.

<sup>88</sup> Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 117; Máire Braniff and Sophie Whiting, 'Deep Impact: The Fiction of a Smooth Brexit for Northern Ireland' (2017) 23(4) *Juncture* 249, 250; Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 352-53.

<sup>89</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 46.

between these entities a reality. Understanding the institutional and practical importance of this concept in the United Kingdom is crucial to evaluating the federal nature of shared rule.

A decisive element of the synergy that should characterise intergovernmental relationships is the existence of a duty to consult and inform. Decision-making shall be done jointly and collegially when its outcomes affect multiple entities or when it is based upon information that an entity cannot obtain by itself.<sup>90</sup> For instance, bearing in mind the cherished distinctiveness of the Scottish legal and judicial systems, the Prime Minister can only recommend 'the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk'<sup>91</sup> if the Scottish First Minister has expressed the will to nominate her.<sup>92</sup> Still, substate officials, who shall be consulted before the making of consequential decisions, are not entitled to veto systematically any measure from central institutions. The existence of a duty to consult rather seeks to involve all the constituent nations in decision-making processes and prevent necessary policy coordination from being hampered by unilateral decisions.

While the Blair Government wanted the territorial Secretaries of State to 'manage relations between central government and the devolved institutions' after devolution,<sup>93</sup> they have become the partners, rather than the superiors, of substate institutions.<sup>94</sup> They shall only exercise their power to refuse to submit for royal assent

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<sup>90</sup> Scotland Act 1998 (c 46) s 88(2) and 90C (1); Government of Wales Act 2006 (c 32) s 66 and 148A (1).

<sup>91</sup> Scotland Act 1998 (c 46) s 95 (1).

<sup>92</sup> *ibid* s 95 (1) and (2).

<sup>93</sup> Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 195.

<sup>94</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 103.

bills adopted by substate assemblies under very narrow conditions, which shall be set statutorily and conventionally.<sup>95</sup> In fact, British central institutions, despite the preservation of their formal powers to act on devolved matters, have restrained themselves politically, through the institutional valuation of dialogue, from centralising governance domineeringly.<sup>96</sup> While they shall make sure that devolution arrangements and British policies on reserved matters are correctly implemented within the substate nations, they shall not do micro-management.<sup>97</sup>

Certainly, especially in a federal state, the constituent entities of a state, like the United Kingdom, whose governance is multi-level shall respect exclusive jurisdictions, which have been delineated statutorily, to avoid unsettling an often-precarious balance of power.<sup>98</sup> However, as noted previously, dividing the exercise of state sovereignty into watertight compartments is quite hazardous because spillovers and blurred jurisdictions are concretely unavoidable in composite polities.<sup>99</sup> Normative or effective crossovers might even be necessary to implement policies wisely and to fulfil the purpose of some statutes.<sup>100</sup> Accordingly, it is recognised, even statutorily, that some powers shall be shared

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<sup>95</sup> Northern Ireland Act 1998 (c 47) s 14 and 80; Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 75; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 63.

<sup>96</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 10.

<sup>97</sup> Welsh Office, *A Voice for Wales* (Cm 3718, 1997) 9; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) paras 14.2.5 and 16.4.1; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 36.

<sup>98</sup> *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [35].

<sup>99</sup> Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 152.

<sup>100</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) paras 81 and 88.

between the constituent nations due to the impossibility to exercise them properly in accordance with a strict dualist perspective.<sup>101</sup> Furthermore, it shall not be deemed heretical that the constituent entities can adjust, on a circumstantial, negotiated, and, especially, consensual basis, the scope of their powers.<sup>102</sup> Cooperative policymaking on matters of joint concern like taxation, infrastructure, and trade has proved key in operationalising and upholding the principles underlying shared rule.<sup>103</sup>

Another way to achieve these aims is the devolution (or the joint exercise) of executive powers on formally reserved matters.<sup>104</sup> This practice helps to establish flexible, evolutive, and functional concordats between central and substate executive institutions.<sup>105</sup> That also eases the implementation of the principle of subsidiarity. Indeed, the constituent nations shall develop mutual trust and accept that the entity that can exercise the most efficiently a power

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<sup>101</sup> Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 76; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 294.

<sup>102</sup> Constitution Unit, *An Assembly for Wales* (1996) 64.

<sup>103</sup> Id, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 79; Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 7864, 2010) 58; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 93; Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 21; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 34; Wales Act 2017 (c 4) s 50.

<sup>104</sup> The National Assembly for Wales (Transfer of Functions) Order 1999 (no 672) s 2 and 5; Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 152; *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 [84]; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 22; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) paras 4.7.2 and 4.7.3; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 16.

<sup>105</sup> Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 60.

in given circumstances should do so, regardless of what Devolution Acts expressly provide. Therefore, since both central and substate institutions hold normative powers and political legitimacy to take initiatives, their status shall be neither hierarchised nor systematically antagonised.<sup>106</sup>

Still, some powers are effectively concurrent not because they are meant to be shared but because several constituent entities feel entitled to wield them on their own.<sup>107</sup> In the United Kingdom, that was particularly acute regarding the implementation of European norms, which often overlapped with substate ones.<sup>108</sup> Substate institutions sought to assert their jurisdictions beyond their territorial borders, though without compromising the unitary British prominence over foreign affairs<sup>109</sup> (especially amidst complex debates on Brexit<sup>110</sup>). This situation exemplifies why some issues

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<sup>106</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [38]; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 7.

<sup>107</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [39] and [57].

<sup>108</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 272.

<sup>109</sup> Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 62 and 70; John Redwood, *The Death of Britain? : The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 122; Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 8, 17, 19, 21, 23, 54 and 56; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 11; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 31; Gordon Anthony, "' Britain Alone": A View from Northern Ireland' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 61; Mike Varney, "' Brexit" and Welsh Devolution: The Likely Impact' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 84.

<sup>110</sup> House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 23.

related to reserved or devolved matters can only be addressed when multiple levels of government coordinate their actions.<sup>111</sup>

Nonetheless, I reiterate the claim that cooperation shall never justify systematic and unconsented jurisdictional breaches and overlaps. Constituent entities (especially the central one) shall never take the upper side of power struggles and feel entitled to overstep constitutional jurisdictions. Political actors, like the speakers of legislative assemblies (as in Scotland<sup>112</sup>), or judges, which shall not be biased towards central or devolved interests,<sup>113</sup> shall ensure that the devolution arrangements are implemented fairly. Although they are members of central institutions, and despite the subsequent potential appearance of conflicts of interests, these officials shall uphold, in priority, devolution arrangements and statutes rather than central interests. Consequently, the need to prevent and solve jurisdictional conflicts fairly and efficiently sheds light on the requirement to grasp devolution beyond power hierarchies, which is essential to make multi-level governance work.

Certainly, the implementation of heterarchical frameworks cannot avert the existence of power struggles and the conflicts between divergent entities and interests.<sup>114</sup> However, heterarchical

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<sup>111</sup> *Martin v Most* [2010] UKSC 10 [71] and [85]; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 4.

<sup>112</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 105; Scotland Act 1998 (c 46) s 32.

<sup>113</sup> Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 14; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 172; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) paras 13.3.9, 13.3.13 and 13.3.14; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 19.

<sup>114</sup> Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman

principles shall be at the heart of a 'spontaneous, decentralised, and immanent' constitutional system relying on fair cooperation.<sup>115</sup> In fact, as noted by Kavanagh, 'self-restraint and inter-institutional support therefore reinforce the mutuality and reciprocity of the inter-institutional relations', even though fostering constructive engagement requires considerable efforts.<sup>116</sup> Ensuring the coexistence of the diverse British constituent nations can then be done through 'spontaneous, mutual accommodation'.<sup>117</sup> That shall be a prerequisite for both the existence of shared rule and for that of any functional federal state.

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(eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press 2009) 354.

<sup>115</sup> *ibid.*

<sup>116</sup> Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 67.

<sup>117</sup> Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press 2009) 355.

## **6.2. The Flawed Multinational Character of the Central Institutions**

The establishment of the devolution arrangements has signalled an intent to institutionalise shared rule in a manner that can actualise heterarchical and federal principles. Still, in law, the thought alone does not count. The intent underlying the enactment of a norm is vain if citizens and institutions do not abide by its content. I shall then investigate whether the practices of British central institutions, especially Parliament and courts, have evolved to become increasingly multinational and potentially federal since devolution. While this evolution occurred, I yet argue that its efficient and systematic character is doubtful.

### **6.2.1. The Multinational Evolution of the House of Commons**

British devolution was devised at a time when several long-standing constitutional postulates were challenged. At the turn of the millennium, it was increasingly contended that the powers of the Westminster Parliament shall be deconcentrated, institutionally and normatively, to improve the constitutional recognition of the multiple and diverse components of the British polity.<sup>118</sup> Indeed, like the British Cabinet as it established substate national offices,<sup>119</sup> Parliament no longer holds power on substate matters

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<sup>118</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 284 and 287; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 204; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 40; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 97; Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 162.

<sup>119</sup> Guy Lodge and James Mitchell, 'Whitehall and the Government of England' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006)

besides these 'in which the United Kingdom as a whole has an interest'.<sup>120</sup> Concretely, Bogdanor argues that it is nowadays 'a parliament for England [and] a federal parliament for Scotland[, Wales,] and Northern Ireland'<sup>121</sup> and that, in sum, it would even be a 'quasi-federal parliament'.<sup>122</sup> This evolution has empowered the constituent nations to play an increasingly essential and autonomous role in central decision-making processes. Shared rule, in a substantively federal sense, could then become a reality over time.<sup>123</sup>

However, doubts can be raised on the genuine multinational character of British parliamentary institutions since, as glimpsed previously, their structure has mostly remained the same since the advent of devolution. In practice, no reform was undertaken to increase the representation of the substate nations directly or to provide them normative vetoes. Instead, a rare change in this regard was the end of a compensatory overrepresentation of Scotland, as thirteen Scottish constituencies were abolished when this nation was endowed with its own institutions.<sup>124</sup> Nonetheless, it is inaccurate to conclude straight away that the House of Commons, which is one of the few institutions that has a great

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97; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 129.

<sup>120</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61 [29].

<sup>121</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 114.

<sup>122</sup> *ibid.*

<sup>123</sup> Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 119.

<sup>124</sup> LJ Sharpe, 'British Regionalism and the Link with Regional Planning – A Perspective on England' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 132-33; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 279.

dignified and unifying value within the United Kingdom,<sup>125</sup> is not a place where the representatives of the constituent nations can uphold their interests. Even since the establishment of substate norm-making institutions in Wales, Scotland, and Northern Ireland, these nations are not voiceless and ignored in the central Parliament.

As before devolution, there still exist special committees within which Scottish, Welsh, and Northern Irish MPs can review British bills that specifically affect their nations.<sup>126</sup> When the Speaker certifies (or when, regarding Northern Irish issues, a parliamentary motion recognises<sup>127</sup>) that a bill on a reserved matter only affects a particular nation effectively, the MPs representing it study this bill in priority before all MPs vote on it.<sup>128</sup> The ability of Welsh MPs to address the Welsh Committee in Welsh Gaelic or in English also displays an increased awareness of the constitutive socio-cultural diversity of the British polity.<sup>129</sup> Such proceedings and accommodative norms highlight that British parliamentarism can provide forums to the constituent nations within which they can make national claims. Still, because of the continuous expansion of devolved jurisdictions, national committees have mostly fell into disuse since they increasingly became purposeless.<sup>130</sup> They no

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<sup>125</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 3.7.

<sup>126</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 6; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 84 and 413; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) paras 39.44 and 39.53.

<sup>127</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) paras 27.3 and 39.56.

<sup>128</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.2.14; *ibid* paras 27.3, 31.23, 39.48, 39.52, 39.57 and 39.60.

<sup>129</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 39.51.

<sup>130</sup> Robert Hazell, 'Westminster as a "Three-In-One" Legislature for the UK and its Devolved Territories' in Robert Hazell and Richard Rawlings (eds),

longer optimise the participation of the MPs from the constituent nations in British processes of governance. Indeed, since these committees are no longer relevant to empower these nations to self-rule indirectly, the same finding can be made regarding shared rule nowadays. Therefore, the multinational character of these parliamentary committees is essentially dignified nowadays and does not 'federalise' the functioning of the House of Commons.

However, evaluating properly the multinational and the potential federal character of the British Parliament cannot be done without assessing the national status of England within it. Since this nation does not have control over distinct institutions within which it could self-rule autonomously, Parliament is the only place where its representatives can champion its distinct claims and interests normatively.<sup>131</sup> The Westminster Parliament is both a state and national institution for England, which is unique in contemporary times. The accommodation of English nationalism could not be done without conciliating the multiple statuses of central Parliament, which has been quite complex concretely.

This complex situation has deep historical roots that have impeded even more the finding of a sensible solution to issues related to substate representativity. In modern times, English and British interests were conflated since British governments almost always relied on strong English majorities, which tended to marginalise the citizens of the other nations.<sup>132</sup> The fact that a great majority of the

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*Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 240.

<sup>131</sup> id, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 302.

<sup>132</sup> Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 217; Meg Russell and Guy Lodge, 'The Government of England by Westminster' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 83 and 88; McKay Commission, *Report of the*

members of the House of Commons were English also consolidated both the non-existence of a distinct English institutional identity and an enduring popular reluctance to have one.<sup>133</sup> However, the general apathy characterising English political nationalism ceased in 1977 during the first parliamentary debates on devolution. The MP from West Lothian, Tam Dalyell, asked if only English MPs should vote on strictly English matters to prevent MPs from nations that would be endowed with substate institutions from interfering in what is akin to the exercise of English self-rule.<sup>134</sup> The 'West Lothian question' highlighted a concern, which was also raised during the debates on Irish Home Rule and contributed to doom it,<sup>135</sup> that substate autonomy could be unfair and disempowering to England.<sup>136</sup>

Two decades later, when devolution became reality, the equality of powers between MPs unambiguously ceased to exist as a matter of fact.<sup>137</sup> As many English officials then viewed themselves

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*Commission on the Consequences of Devolution for the House of Commons* (2013) para 33; Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 766 and 774.

<sup>133</sup> Meg Russell and Guy Lodge, 'The Government of England by Westminster' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 82; John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 53.

<sup>134</sup> HC Deb 14 November 1977, vol 939, col 123 (Tam Dalyell).

<sup>135</sup> Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 762.

<sup>136</sup> HC Deb 14 November 1977, vol 939, col 123 (Tam Dalyell); John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 139; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 32.

<sup>137</sup> John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 126; Meg Russell and Guy Lodge, 'The Government of England by Westminster' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 87; Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question*

as second-class legislators,<sup>138</sup> an increased awareness of English distinctiveness, though not fundamentally a rejection of devolution, aroused.<sup>139</sup> The establishment of a Regional Affairs Committee, following the template of distinct national committees for English regions, could not provide satisfactory answers to the West Lothian question because English citizens and MPs found this Committee operationally irrelevant.<sup>140</sup> Institutionally, considering the unwillingness to establish English legislature(s),<sup>141</sup> implementing an 'in and out' principle, entailing that only English MPs could vote on English matters, appeared as a more sensible, pragmatic, and fair solution.<sup>142</sup> However, the ensuing potential inability of a 'bifurcated'<sup>143</sup> government to rely only on the trust of English MPs, which could destabilise British governance since parliamentary majorities would be weakened, was perceived by some as an irredeemable flaw.<sup>144</sup> It was also deemed complex to identify unambiguously whether a bill would strictly be on English matters due to the lack of a definite English devolved

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(Manchester University Press 2006) 225; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 18; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 27.7.

<sup>138</sup> HL Deb 25 June 1999, vol 602, col 1201 (The Lord Chancellor); McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 152.

<sup>139</sup> John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 141; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 65.

<sup>140</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 39.61.

<sup>141</sup> Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 165; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 90.

<sup>142</sup> Robert Hazell, 'Introduction: What Is the English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 7; John McGarry, 'The United Kingdom's Experiment in Asymmetric Autonomy and the Lessons Learned' in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 142.

<sup>143</sup> Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 162.

<sup>144</sup> Iain McLean, 'The National Question' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 503.

jurisdiction.<sup>145</sup> Furthermore, although several English citizens overlooked this reality, MPs representing the constituent nations still wanted to vote on English bills, because the resulting policy choices could affect the amount of the block grant that their nations would receive.<sup>146</sup> Due to these difficulties, the status quo prevailed at the turn of the millennium. Parliamentary procedures for enacting norms on reserved, and English, matters remained indistinct, and all MPs could vote on these norms.<sup>147</sup> The fairness of devolution then seemed doubtful since England felt increasingly voiceless institutionally while the constituent nations only had a weak special status in Westminster.<sup>148</sup> Seeking to provide simultaneously what each constituent nation wanted looked like an intractable zero-sum game.<sup>149</sup>

Nevertheless, the return to power of the Conservatives, whose supporters were mostly English, in 2010 was seen as a new opportunity to answer the West Lothian question.<sup>150</sup> The

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<sup>145</sup> Meg Russell and Guy Lodge, 'The Government of England by Westminster' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 85; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 20; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.3.27.

<sup>146</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 189; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 164.

<sup>147</sup> Meg Russell and Guy Lodge, 'The Government of England by Westminster' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 65.

<sup>148</sup> Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 190; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 105.

<sup>149</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 108; Jonathan Bradbury and John Mawson, 'Conclusion – The Changing Politics and Governance of British Regionalism' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997) 303; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) paras 67 and 73.

<sup>150</sup> Klaus-Jürgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and

Government led by David Cameron advocated granting England more powers within the traditional Westminster framework and without rolling back devolution.<sup>151</sup> In fact, it sought to increase the responsiveness of government initiatives and bills to English realities.<sup>152</sup> It then established the McKay Commission to assess the merits of a proposal requiring 'English votes for English laws' (EVEL).<sup>153</sup> EVEL was meant to recognise that the House of Commons is the multinational institution within which English citizens somewhat self-rules and Britons exercise shared rule.<sup>154</sup> However, no statute or standing order in that sense was enacted by the end of Cameron's first term in office.<sup>155</sup> When his party formed a majority government in 2015, it implemented EVEL through the enactment of standing orders (which are more flexible, though less securely entrenched, than statutes).<sup>156</sup> These Standing Orders, which are unusually exhaustive, provide that only English MPs could vote during the study, in distinct legislative grand committees, of bills that are certified by the Speaker to affect England exclusively<sup>157</sup> and hold decisive votes to enact secondary legislation on English matters.<sup>158</sup> Since all MPs still vote on the final

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Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 266; Michael Kenny, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8, 9.

<sup>151</sup> Klaus-Jurgen Nagel and Ferran Requejo, 'Conclusions: Asymmetries and Decentralisation Processes – Comparative Comments' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 266.

<sup>152</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 128.

<sup>153</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 19.

<sup>154</sup> *ibid* 23; Andrew Mycock, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388, 397.

<sup>155</sup> Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 174.

<sup>156</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 27.7.

<sup>157</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 19; *ibid* paras 27.8 and 27.14.

<sup>158</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 93; Daniel Gover and Michael Kenny, 'Answering the

enactment of English laws,<sup>159</sup> EVEL was not implemented literally to mitigate criticisms on the potential instability of governments, to preserve the power of the other nations to check eventual spillover, and to maintain, overall, British parliamentary sovereignty.<sup>160</sup> Still, grand committees now serve as English national forums,<sup>161</sup> as they did for the constituent nations before devolution. In fact, granting a veto to the members of these grand committees, and thus establishing a double-majority system,<sup>162</sup> has been groundbreaking.<sup>163</sup>

Ultimately, despite its imperfect nature, its infrequent use,<sup>164</sup> and the significant institutional advantages provided to England<sup>165</sup>,

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West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 778; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) paras 27.7, 27.8 and 27.18.

<sup>159</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 147; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 19; Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 174.

<sup>160</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 150; HL Deb 24 November 2015, vol 767, col 604 (Lord Lang of Monkton); HL Deb 8 December 2015, vol 767, col 1501 (Lord Keen of Elie); John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 405.

<sup>161</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 276.

<sup>162</sup> Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 27.25.

<sup>163</sup> Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 20; HL Deb 8 December 2015, vol 767, col 1501 (Lord Keen of Elie); House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 93; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 200; Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 760-61, 769 and 773; *ibid* para 27.18.

<sup>164</sup> Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 174.

<sup>165</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 41.

EVEL has provided a sensible response to the West Lothian Question.<sup>166</sup> As noted by Gover and Kenny, EVEL, as it stands, embodies a reasonable compromise between conflicting national wills that dovetails the asymmetrical nature of devolution.<sup>167</sup> Moreover, although Standing Orders could hardly entrench it steadily,<sup>168</sup> their informal character has made EVEL substantively versatile, which is helpful in securing national accommodation over time. It shall indeed be actualised by a shared commitment of parliamentarians to refrain from interfering in exclusive national jurisdictions.<sup>169</sup> Therefore, despite its flaws,<sup>170</sup> EVEL reflects the evolution of British parliamentarism, which has been achieved without undertaking a revolution, that has become operationally multinational in line with several federal principles. Still, EVEL has mostly been about the institutionalisation of English self-rule within a central institution rather than through devolution processes.

### **6.2.2. The Absence of a Genuinely Federal Second Chamber**

Although devolution led to changes to the functioning of the House of Commons through the recognition of its contemporary plural nature, they were not meant to institutionalise shared rule as such. That is coherent with the fact that, in many federal systems, a lower legislative chamber rarely provides direct representation to federated entities. Usually, this chamber provides a voice to all citizens, regardless of where they are from within the state. In

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<sup>166</sup> Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 775 and 778.

<sup>167</sup> *ibid* 777-78.

<sup>168</sup> *ibid* 774.

<sup>169</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 217.

<sup>170</sup> HL Deb 24 November 2015, vol 767, col 604 (Lord Lang of Monkton).

practice, the most adequate way to evaluate if British central legislative institutions make shared rule possible is to investigate whether federal principles shape the functioning of an upper chamber, a senate. In the United Kingdom, there is indeed another legislative chamber: the House of Lords. Despite its lack of efficient normative powers nowadays, it has remained a pillar of British constitutionalism because of its dignified nature. Examining whether this House is the forum within which the constituent nations do or can exercise shared rule in a federal sense is then very opportune to evaluate the existence of the latter.

Beforehand, I must insist upon the long-standing bicameral character of British parliamentarism. The House of Lords was set as an “elite” chamber’ whose members were noblemen and religious officials nominated by the monarch to advise him and to check and balance the popular will expressed in the House of Commons.<sup>171</sup> However, as the latter institution gained exclusive powers on financial matters during the 17<sup>th</sup> century and continuously represented an increased number of eligible electors, the efficient Lords’ powers crumbled.<sup>172</sup> That can be explained by their unelected status, which limited their ability to oppose the legislative programme of the government legitimately.<sup>173</sup> Since the enactment of the Parliament Acts 1911 and 1949, they cannot veto

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<sup>171</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 15.1; Meg Russell, ‘Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms’ (2018) 10(2) *Perspectives on Federalism* 268, 273; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 12.2.

<sup>172</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 168; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 2.1; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 31.

<sup>173</sup> *R (Jackson) v Attorney General* [2005] UKHL 56 [52].

public bills emanating from the House of Commons.<sup>174</sup> Moreover, they have the duty, which is set by the Salisbury Convention, to let the governing party act in accordance with its manifesto, which the people has consented to implement by its vote.<sup>175</sup> So, in contemporary times, the Lords' genuine powers are the careful and (somewhat) independent and detached scrutiny of bills, the proposal of statutory amendments, and their persistent influence.<sup>176</sup> Still, in all cases, Lords shall not use their powers to enter into direct power struggles against elected officials.

Nevertheless, the House of Lords has found a contemporary purpose in serving as a forum within which minority groups can assert their claims and as a bulwark against the potential majoritarian excesses of the House of Commons or the government.<sup>177</sup> British bicameralism can ensure that the division of powers between the constituent nations and the protection of minority interests are apprehended beyond what any majority thinks or wants. Lords could then draw a renewed and enhanced legitimacy from their expertise and representing minority interests.<sup>178</sup> However, persistent concerns about their unelected

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<sup>174</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 4.3; *ibid* [53]; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 29.77.

<sup>175</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 4.21; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 208.

<sup>176</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 2.10 and 3.5; Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 138; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 184 and 204; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 11.4; Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 179.

<sup>177</sup> John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 23.

<sup>178</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 10.6 and 10.31.

status have still prevented the Lords from maximising the scope of their new role.

The House of Lords did not fit in the constitutional vision advocated by New Labour, which aimed to democratise the functioning of British institutions and of which devolution was a component.<sup>179</sup> As several Labourites thought that this second chamber was inherently inefficient and undemocratic, they wanted to reform it radically or to abolish it plainly and simply.<sup>180</sup> Hence, a Royal Commission was established at the turn of the millennium to settle which role the House of Lords should play within the British constitutional framework. Its findings were, as noted by Russell, quite paradoxical substantively.<sup>181</sup> It was simultaneously contended that the House of Commons should remain normatively prominent because its members were elected and that the House of Lords should hold more powers to complement the legislative work of the House of Commons and to scrutinise government action more independently.<sup>182</sup> A rejuvenated House of Lords should then serve as a counterpower to its elected counterpart, beyond what conventional norms provide, even though parliamentary sovereignty was meant to be preserved.<sup>183</sup> In practice, while reforms were undertaken to end hereditary peerages and to restrain the discretionary power of the Crown to

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<sup>179</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 3.17 and 6.8.

<sup>180</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 68; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 339.

<sup>181</sup> Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 293.

<sup>182</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 1.1, 3.10, 3.13, 4.7, 8.7, 10.4 and 11.6.

<sup>183</sup> *ibid* para 5.4.

nominate Lords, they came short from establishing a second elected central legislative institution.<sup>184</sup>

Still, some proposals to increase and secure the representation of minority interests that would be, especially at territorial and national scales, overlooked within the House of Commons were assessed seriously.<sup>185</sup> There was a will to find a way by which the House of Lords could be more responsive to substate national realities, though without reshaping the nature of parliamentary institutions completely. Accordingly, the idea of guaranteeing that the membership of the House of Lords reflects more accurately the multinational character of the United Kingdom, since England, and especially its Southeast area, had long been overrepresented within it, was discussed.<sup>186</sup> Historically, although the need to nominate peers from all the constituent nations was consistently made clear,<sup>187</sup> the effective dominance of English interests within this House has concretely hampered the equal normative status of Lords.<sup>188</sup> As devolution recognised institutionally the distinct legal personalities of the constituent nations, the institutionalisation of shared rule within the House of Lords could both remediate this long-standing problem and complete a multinational transformation of British constitutionalism. The democratic deficit that had long characterised the British upper chamber could also

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<sup>184</sup> *ibid* para 13.2; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 1.14.

<sup>185</sup> Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 275 and 280.

<sup>186</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 13.30; Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 191.

<sup>187</sup> Union with England Act 1707 (c 7) s 23; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.2.15; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 1.16.

<sup>188</sup> AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 238 and 245.

be fixed as it would become the parliamentary forum of the constituent nations.<sup>189</sup> The representatives of these nations could be elected directly,<sup>190</sup> or indirectly if they were members of local or devolved assemblies who would be nominated by their colleagues.<sup>191</sup> The House of Lords could then become concretely a substantively federal second chamber,<sup>192</sup> within which its members could scrutinise the exercise of reserved powers and veto constitutional changes that would contradict substate national interests.<sup>193</sup> Hence, the constituent nations would not only self-rule, but also rule jointly the United Kingdom.

Certainly, as noted by Bagehot, establishing a mostly dignified institution that would be ruled collectively by all constituent entities can be opportune in a federal state.<sup>194</sup> However, successfully undertaking an ambitious reform of the House of Lords for it to represent in priority substate national interests, as federal second chambers should do, has been extremely difficult for several reasons. First, determining whether all nations should have the exact same number of representatives or a number that reflects the socio-demographical composition of the United Kingdom raised serious concerns related to the true sense of fairness.<sup>195</sup>

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<sup>189</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 285.

<sup>190</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 19.5.

<sup>191</sup> Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 139.

<sup>192</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 39-40.

<sup>193</sup> Constitution Unit, *An Assembly for Wales* (1996) 137; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 6.6 and 6.11; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 215; *ibid* 39-40.

<sup>194</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> edn, first published 1872, D. Appleton & Company 1904) 179.

<sup>195</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 12.23; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 164; Iain McLean, *What's Wrong with the British Constitution?* (2<sup>nd</sup> edn, Oxford University Press 2012) 248; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers*

Second, the significant disparities between the constituent nations, and the asymmetry characterising their devolution arrangements, complexified the choice of a selection mechanism ensuring that the Lords would be legitimate representatives of their nations.<sup>196</sup> For instance, the proposal of appointing members of substate assemblies to serve in the House of Lords was brushed aside by the Royal Commission because being elected in a constituency would not provide the legitimacy to act on behalf of a whole nation.<sup>197</sup> However, the rejection of this idea contradicted the will to improve interinstitutional dialogue through devolution,<sup>198</sup> and was a missed opportunity to foster constructive engagement.<sup>199</sup> More precisely, it relied on the doubtful idea that devolution is intrinsically about self-rule.<sup>200</sup> I can then note a worrying disinclination to consider devolved legislative institutions as equal partners, which hampers the will to implement federal principles.

Third, there lacked leadership, especially from the Blair Government, to empower the constituent nations to exercise shared rule within central institutions in a comprehensive

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to *Strengthen Wales* (2014) para 13.3.22; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 116.

<sup>196</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 15.22; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 186.

<sup>197</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 6.7, 6.20, 6.22 and 11.16; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 160.

<sup>198</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 6.21.

<sup>199</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 302.

<sup>200</sup> Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 294.

manner.<sup>201</sup> Since the Lords considered that they could assert their views more legitimately and forcefully following the membership reforms of the 1990s, the government became increasingly reluctant to strengthen bicameralism, as that limited its prominent control over the legislative agenda.<sup>202</sup> It also realised that proposals endowing the Lords with decisive law-making powers would open a Pandora's box shaking the foundations of British constitutionalism. As noted by the Royal Commission, 'such proposals raise more problems than they solve' since they raised several decisive constitutional issues that could not be addressed through half measures and bring about consensuses.<sup>203</sup> The pragmatism characterising Blair's approach towards constitutional issues then showed its limits to undertake substantially transformative reforms. The incapacity of those who opposed the status quo, which still had many supporters, to find common ground on any reform proposal entailed that devolution could not lead to a ground-breaking evolution of the House of Lords.<sup>204</sup> So, the Lords remain unelected, unable to make authoritative normative decisions autonomously, and unrepresentative of the multinational essence of the United Kingdom.<sup>205</sup>

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<sup>201</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 314; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 115; Jonathan Bradbury, 'The Blair Government, Devolution and Regionalism in the United Kingdom' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 200.

<sup>202</sup> Mark Stuart, 'The Role of Parliament under Blair' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 183.

<sup>203</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 6.10.

<sup>204</sup> Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 289 and 293.

<sup>205</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 69; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 214; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 413.

Therefore, Keating and Tierney are right to argue that the aim of conciliating the establishment of substate shared rule through devolution with the preservation of a relatively unchanged parliamentary sovereignty could not be achieved.<sup>206</sup> After devolution, British parliamentarism could not be reformed to provide a forum over which the constituent nations would have a relative control.<sup>207</sup> If there was a political intent to end the hegemony of the centre within the British framework of governance, it has only been actualised rhetorically and symbolically.<sup>208</sup> Central institutions can hardly embody the plural will of the British people.<sup>209</sup> That chimes with the fact that the

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<sup>206</sup> Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 133; Stephen Tierney, 'Federalism in a Unitary State: A Paradox too Far?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 59; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 190; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 173.

<sup>207</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 109; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 212 and 331; Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 139; Stephen Tierney, 'Federalism in a Unitary State: A Paradox too Far?' in Jan Erk and Lawrence M Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions* (Routledge 2010) 58; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7<sup>th</sup> edn, Cambridge University Press 2011) 36; Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 168.

<sup>208</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 156; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 338; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluich (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 169 and 171; Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 18; Daniel Gover and Michael Kenny, 'Answering the West Lothian Question? A Critical Assessment of "English Votes for English Laws" in the UK Parliament' (2018) 71(4) *Parliamentary Affairs* 760, 764.

<sup>209</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 297.

foundations of British parliamentarism, which are ‘based upon the principles of confidence in a government and, corollary, on majoritarianism’,<sup>210</sup> clash with the principles that are intrinsic to multinational and federal shared rule.<sup>211</sup> Further institutional reforms are then needed, despite a relative lack of will to undertake them, to foster heterarchical relationships between nations and institutions within the British parliamentary framework.<sup>212</sup>

Still, the persistent non-existence of a central institution whose core duty is the implementation of federal principles does not inexorably entail that shared rule within a British federal polity cannot exist. That rather entails that the latter cannot be normative. The United Kingdom, as other multinational states such as Spain and even the Canadian federal state, simply has a ‘weak second legislative chamber’<sup>213</sup> within which shared rule and substate national accommodation are not upheld normatively.<sup>214</sup> As noted in the next section, a partnership between central and substate legislative institutions, which would not have been the outcome of British central initiatives, might have been developed concretely.<sup>215</sup> It must yet be acknowledged that the opportunity to

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<sup>210</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 107.

<sup>211</sup> Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 27; *ibid*; John McGarry, ‘The United Kingdom’s Experiment in Asymmetric Autonomy and the Lessons Learned’ in Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 142; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 20.

<sup>212</sup> Robert Hazell, ‘Devolution as a Legislative Partnership’ in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 312; Aileen McHarg, ‘Devolution in Scotland’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 279.

<sup>213</sup> Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 246.

<sup>214</sup> *ibid*; Ronald L Watts, ‘Multinational Federations in Comparative Perspective’ in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 241.

<sup>215</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 251.

institutionalise shared rule through the work of British parliamentary institutions, which are common to all constituent nations, has been missed.<sup>216</sup> I shall then examine whether British central institutions can uphold substate national interests otherwise, beyond norm-making processes.

### **6.2.3. The Powerlessness of the British Supreme Court to Act as Federal Arbiter**

In a state whose governance is multi-level or shaped by federal principles, both the rule of law and social cohesion cannot exist without the institutionalisation of mechanisms remedying disagreements between people or groups orderly and impartially. There shall be a neutral arbiter to adjudicate the issues on which constituent entities have divergences.<sup>217</sup> The central institution acting in this capacity shall treat each entity, whether it be federal or federated, fairly and unbiasedly.

In the United Kingdom, the hegemony of England within the British constitutional order and parliamentary sovereignty have prevented the establishment of such an independent institution.<sup>218</sup> Law Lords and Privy Councillors, who held substantively judicial powers, adjudicated constitutional matters more authoritatively than ordinary courts, which was coherent with the essence of

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<sup>216</sup> Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 171; Meg Russell, 'Attempts to Change the British House of Lords into a Second Chamber of the Nations and Regions: Explaining a History of Failed Reforms' (2018) 10(2) *Perspectives on Federalism* 268, 277.

<sup>217</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 259.

<sup>218</sup> Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 93.

parliamentary sovereignty.<sup>219</sup> Still, it has been commonly accepted in contemporary times that courts shall arbitrate the conflicts that ineluctably occur in a multinational polity.<sup>220</sup> The diffusion of British sovereignty that was carried out during the Blair Government has led to the judicialisation of the relationships between the multiple levels of British governance.<sup>221</sup> In practice, issues related to devolution, and more precisely 'disputes over legislative competence', shall be addressed by members of the judicial order.<sup>222</sup> They are the best-suited officials to achieve this crucial task as their core duty is to make decisions that are not flawed by effective power misbalances and by majoritarian impulses.<sup>223</sup> The interests of each constituent nation could then be considered and secured beyond power struggles.

However, there have long been legitimate concerns that courts, which are central institutions, would inexorably be biased against substate national interests.<sup>224</sup> Their composition and their functioning norms are indeed determined from the institutional centre. Nevertheless, judges must overlook this reality when they

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<sup>219</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, first published 1915, Liberty Fund 1982) 260; Constitution Unit, *An Assembly for Wales* (1996) 142; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 9.5; Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 54; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 330.

<sup>220</sup> Mark Elliott and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, Oxford University Press 2017) 485.

<sup>221</sup> Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 93; *ibid* 484.

<sup>222</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Democratic Institutions in Northern Ireland, s 28; Northern Ireland Act 1998 (c 47) s 79; Giovanni Poggeschi, 'The United Kingdom and France: A Stronger Decentralization of just an Institutional "Maquillage"?' in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 232; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 255.

<sup>223</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 28.

<sup>224</sup> TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 84.

fulfil their duties, as they do when they adjudicate cases opposing the state to moral or physical persons. Impartiality is a corollary of judicial independence, which is in turn a pillar of the rule of law. Accordingly, the legitimacy and, ultimately, the authority of British courts to adjudicate multinational conflicts rely on their impartiality both in appearance and in fact. Consequently, the establishment of a fully-fledged state constitutional court seemed highly opportune as the devolution arrangements were implemented. It could serve as an independent institution setting British binding normative standards, ensuring that the constituent nations abide by the provisions of the Devolution Acts, and settling potential conflicts related to their implementation.

Although the Blair Government did not initially intend to reform the judicial system comprehensively,<sup>225</sup> establishing the British Supreme Court is one of the most prominent elements of its constitutional legacy. That has strengthened the separation of powers, since the long-standing confusion between the joint exercise of legislative and judicial duties within the House of Lords could then cease.<sup>226</sup> In 2005, the Constitutional Reform Act provided that the United Kingdom shall have ‘a unified court of final appeal’<sup>227</sup> composed of twelve Justices who shall be independent

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<sup>225</sup> Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 48; James Alt, ‘The Constitutional Revolution of Tony Blair’ in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 226.

<sup>226</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 9.5; *ibid*; Graham Gee, ‘Devolution and the Courts’ in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 284-85; Jack Beatson, ‘Reforming an Unwritten Constitution’ (2010) 126 *Law Quarterly Review* 48, 54; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 330; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 11.7.

<sup>227</sup> James Alt, ‘The Constitutional Revolution of Tony Blair’ in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 227.

of other state institutions<sup>228</sup> and responsive to the multinational character of the British polity.<sup>229</sup> The composition and the functioning of this institution shall not be homogeneous (and overly English), as it shall not deliberately foster centralisation. Since the British constituent nations have distinct legal orders and systems, the Supreme Court shall make decisions that consider their peculiar characteristics.<sup>230</sup>

Operationally, Cameron and Falletti note that the Supreme Court can prevent 'the encroachment on subnational government by the centre' by upholding the division of powers structuring devolution.<sup>231</sup> Although any bill emanating from substate assemblies must be certified to be within devolved legislative competence,<sup>232</sup> that cannot be taken for granted effectively. As highlighted previously, no division of powers can be perfectly unequivocal and watertight and apprehended formalistically and rigidly.<sup>233</sup> In practice, when they address so-called devolution issues, courts, and in last recourse the Supreme Court, resolve the ambiguities of the statutory division of powers (and the directly underlying legal questions<sup>234</sup>) that become apparent when it is

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<sup>228</sup> AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 100.

<sup>229</sup> Constitutional Reform Act 2005 (c 4) s 23 and 40; James Alt, 'The Constitutional Revolution of Tony Blair' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 227; Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 53-54.

<sup>230</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 285.

<sup>231</sup> Maxwell Cameron and Tulia Falletti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 255.

<sup>232</sup> Northern Ireland Act 1998 (c 47) s 9; Scotland Act 1998 (c 46) s 31 (1) and (2).

<sup>233</sup> *Martin v Most* [2010] UKSC 10 [11].

<sup>234</sup> *Whaley v Watson* [2000] SC 340, 368; *Hoekstra v HM Advocate No 4* [2001] 1 AC 216 [1]; *Mills v HM Advocate* [2002] 3 WLR 1597 [34].

argued that jurisdictions were overstepped.<sup>235</sup> Certainly, due to their valuation of deference, courts have been reluctant to settle issues on the implementation of the principle of subsidiarity with assertiveness.<sup>236</sup> Nonetheless, through appeals from lower courts or, potentially, pre-legislative references,<sup>237</sup> the British Supreme Court has the last word to delineate the extent of the jurisdictions held by substate institutions,<sup>238</sup> even beyond how they exercise their normative powers<sup>239</sup>.

Furthermore, although the Blair Government was reluctant to empower courts to review statutes since that would jeopardise parliamentary sovereignty, it has empowered these institutions to issue declarations of incompatibility, which marked a decisive constitutional shift.<sup>240</sup> It is studied more extensively and holistically later. In practice, without striking it down, courts, like the Supreme

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<sup>235</sup> Northern Ireland Act 1998 (c 47) Schedule 10, s 1; Scotland Act 1998 (c 46) Schedule 6, Part 1, s 1; Government of Wales Act 2006 (c 32) Schedule 9, Part 1, s 1(1).

<sup>236</sup> *Martin v Most* [2010] UKSC 10 [5]; *Imperial Tobacco Ltd. v Lord Advocate* [2012] UKSC 53 [12]; Jo Hunt, 'Subsidiarity, Competence and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 31.

<sup>237</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 164; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 291; Elisenda Casanas Adam, 'Brexit and the Mechanisms for the Resolution of Conflicts in the Context of Devolution: Do We Need a New Model?' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 62.

<sup>238</sup> Northern Ireland Act 1998 (c 47) s 11; Scotland Act 1998 (c 46) s 32A(1) and 33(1); Government of Wales Act 2006 (c 32) s 99(1); Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 7864, 2010) 12; *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 [71].

<sup>239</sup> *Martin v Most* [2010] UKSC 10 [5]; *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [79]; *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [86].

<sup>240</sup> Matt Qvortrup, '"Let Me Take You to a Foreign Land": The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 67.

Court, can declare that a provision infringes the substantively constitutional provisions of, for example, the Devolution Acts, and legislators would have a politically constitutional duty to fix ensuing breaches.<sup>241</sup> Substate institutions, even when they are endowed with autonomous normative powers, are seen as public bodies whose acts can be reviewed judicially based upon administrative law principles.<sup>242</sup> Consequently, judges can require the holders of legislative and executive powers to abide by their constitutional duties as in (federal) states that have a formal constitution.<sup>243</sup>

Although the consolidation of a British judicial order set by central institutions might set courts against national institutions and compromise interinstitutional dialogue,<sup>244</sup> these potential clashes are lesser evils to avoid bitterer clashes between the constituent nations. The adjudication of devolution issues helps to initiate a judicial dialogue between central and substate institutions. That can even contribute actualising shared rule in accordance with

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<sup>241</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 298-99; Matt Qvortrup, "'Let Me Take You to a Foreign Land': The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 67.

<sup>242</sup> Alan Trench, 'Whitehall and the Process of Legislation after Devolution' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 204; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 256 and 279; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 586.

<sup>243</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 40; *Martin v Most* [2010] UKSC 10 [11]; Matt Qvortrup, "'Let Me Take You to a Foreign Land': The Political and the Legal Constitution' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 61 and 67; Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 80; Roger Masterman, 'Federal Dynamics of the UK/Strasbourg Relationship' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 207.

<sup>244</sup> Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 84.

substantively federal principles. In fact, as in federal systems, judges enforce the provisions on the division of powers so that it can have a constitutionally binding strength, which is crucial to make federalism work; as I argue in the next chapter.<sup>245</sup> Judges can bring devolution to life when they uphold its substantive core and shape its sense when it is unclear.<sup>246</sup> More precisely, they shall interpret and review the statutes enacted by substate assemblies purposedly,<sup>247</sup> in a manner that fits their jurisdiction.<sup>248</sup> even though their deference towards these institutions can be questioned.<sup>249</sup>

To ensure that judges perform their duties related to devolution efficiently and legitimately, they shall be appointed with due consideration for the increased recognition of multinationalism and the accentuated separation of powers in the United Kingdom. Accordingly, the discretionary power of the Queen to appoint judges, on the advice of the Prime Minister, has been constrained as she follows the advice of an independent Judicial Appointments

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<sup>245</sup> id, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 188; id, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 294; id, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 189.

<sup>246</sup> Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 79.

<sup>247</sup> Government of Wales Act 2006 (c 32) s 108A; *Martin v Most* [2010] UKSC 10 [18].

<sup>248</sup> Northern Ireland Act 1998 (c 47) s 83; Scotland Act 1998 (c 46) s 54(1); Government of Wales Act 2006 (c 32) s 154(2).

<sup>249</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 281; Jo Hunt, 'Subsidiarity, Competence and the UK Territorial Constitution' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 37; Elisenda Casanas Adam, 'Brexit and the Mechanisms for the Resolution of Conflicts in the Context of Devolution: Do We Need a New Model?' in Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021) 51.

Committee.<sup>250</sup> The depoliticisation of judicial appointments reinforces the guarantee that judges shall not be biased towards central interests. Still, since the members of this committee are appointed by the British government, which retains the ultimate power of appointment, courts, at least regarding their composition, remain shaped by central institutions.<sup>251</sup> Moreover, there is no firm duty to consult the members of substate institutions before appointing a judge, whose responsiveness and impartiality regarding devolution issues are never formally evaluated. These elements severely compromise the ability of courts to officiate as fair constitutional arbiters.

In that vein, and that is particularly concerning, it is substantively challenging to guarantee that the Supreme Court issues rulings that consider the multinational and multi-level characters of the contemporary British polity and governance. For instance, Scotland and Northern Ireland are only endowed with one representative on the bench (no such guarantee exists for Wales since it shares a legal system with England<sup>252</sup>).<sup>253</sup> Hence, an overwhelming majority of the twelve Justices of the Supreme Court could be English.<sup>254</sup> Moreover, justices are not even required to have a deep knowledge of the diverse British legal traditions.<sup>255</sup> Consequently, it is uncertain whether the members of the Supreme Court can genuinely appreciate the diverse perspectives on British

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<sup>250</sup> Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 54; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17<sup>th</sup> edn, Pearson 2018) 330.

<sup>251</sup> John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 11.

<sup>252</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 10.3.38.

<sup>253</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 282-83.

<sup>254</sup> *ibid.*

<sup>255</sup> *ibid.*

constitutionalism and, functionally, grasp the importance of substate autonomy.<sup>256</sup> Moreover, the intangible character of the principles structuring the devolution arrangements, even beyond their federal character, complicates the ability of the Supreme Court, which is effectively doubtful,<sup>257</sup> to uphold these arrangements in keeping with parliamentary sovereignty.<sup>258</sup> Furthermore, the judicial inability to review statutes enacted by the Westminster Parliament,<sup>259</sup> while it can review the acts emanating from substate institutions, blatantly overlooks the requirement for (federal) fairness.<sup>260</sup> In sum, from an institutional perspective, the British Supreme Court can hardly serve as an impartial and legitimate arbiter. As such, it can hardly be substantively federal and make shared rule possible in a federal sense when it adjudicates and settles multinational issues.

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<sup>256</sup> David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 348; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 294-95.

<sup>257</sup> Aileen McHarg, 'Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 13.86.

<sup>258</sup> Johanne Poirier, 'Les ententes intergouvernementales et la gouvernance federale: aux confins du droit et du non-droit' in Jean-François Gaudreault-Desbiens and Fabien Gelinis (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 465; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 189.

<sup>259</sup> *Whaley v Watson* [2000] SC 340, 356; Alan Page, 'A Parliament that is Different? Law making in the Scottish Parliament' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 25; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 257; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 115.

<sup>260</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 188; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 293; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 11.8.

### **6.3. The Imperfect Character of British Intergovernmental Institutions**

In a federal state, shared rule does not have to be implemented strictly within the walls of central institutions, which might not, as in the United Kingdom, always be responsive to what substate entities want. The latter can and even should devise frameworks and mechanisms through which they can work together and build fruitful relationships with the federal entity by mostly informal means. In practice, the functional exercise of shared rule is not possible without intergovernmental institutions. I shall then probe whether the devolution arrangements empower, in accordance with federal principles, the British constituent nations to do more than self-ruling.

#### **6.3.1. British Intergovernmental Institutions**

As found previously, the British constituent nations can hardly exercise shared rule meaningfully through the work of central institutions due to the inability to reform them comprehensively in a multinational and substantively federal manner. To overcome their ensuing state of powerlessness, these nations have had to act and developed institutional frameworks within which they can cooperate with fairness. Instead of waiting for an overarching constitutional revolution that would undermine parliamentary sovereignty and quash strong centralising dynamics, they have taken advantage of their peculiar institutions to connect them into functional networks. Intergovernmental and interparliamentary institutions and mechanisms were then established to operationalise shared rule flexibly.

As highlighted by Poirier, intergovernmental arrangements are staples of sound federal governance even if their often-informal character might weaken their legal bases.<sup>261</sup> In fact, they are also staples of multi-level governance frameworks. In the contemporary United Kingdom, Rawlings notes that these arrangements have complemented the work of legislative and executive substate institutions and could make up for the non-exhaustiveness of posited arrangements.<sup>262</sup> These arrangements, which can be characterised as soft-law due to the conventional nature of their normative components,<sup>263</sup> fit very well within a British constitutional framework whose rules of recognition are also mostly informal. Indeed, intergovernmental arrangements or concordats can transform a constitutional order comprehensively despite the lack of a state political will to reform it, which permits to achieve effectively what could hardly be done formally.<sup>264</sup> Concretely, they fulfil numerous duties such as ‘substantive policy co-ordination, procedural co-operation, para-constitutional engineering, “regulation by contract” and “quasi-legislation” (or soft law)’.<sup>265</sup> They can then fill the ‘vast constitutional space’ engendered by the lack of statutorily established institutions by empowering substate

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<sup>261</sup> Johanne Poirier, ‘The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* 134, 138.

<sup>262</sup> Richard Rawlings, ‘Concordats of the Constitution’ (2000) 116(1) *Law Quarterly Review* 258.

<sup>263</sup> Johanne Poirier, ‘The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* 134, 146.

<sup>264</sup> Richard Rawlings, ‘Concordats of the Constitution’ (2000) 116(1) *Law Quarterly Review* 258; *ibid* 142; Jack Beatson, ‘Reforming an Unwritten Constitution’ (2010) 126 *Law Quarterly Review* 48, 62-63; Richard Gordon, ‘Constitutional Change and Parliamentary Sovereignty – The Impossible Dialectic’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 163.

<sup>265</sup> Johanne Poirier, ‘The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* 134, 138.

entities to exercise shared rule.<sup>266</sup> That is how multi-level governance can be improved after the enactment of the Devolution Acts, which contained few provisions institutionalising cooperation among the constituent nations.<sup>267</sup> Although their efficiency and their legitimacy could be better optimised if they were formally entrenched,<sup>268</sup> they have been crucial in making devolution a reality with versatility and pragmatism.

While the institutions led by executive officials have displayed the most initiative to make multilateral governance work, the role and the relevance of interparliamentary institutions cannot be overlooked. As the citizens of the constituent nations elect representatives in both state and national assemblies, they shall work together to pursue shared interests and address common issues with respect for the jurisdictions of the assemblies in which they respectively sit.<sup>269</sup> In this regard, the work of the British-Irish Inter-Parliamentary Assembly, which gathers members of the British, Irish and, since 2001, devolved legislatures, has proved that legislative coordination can foster interjurisdictional cooperation with limited spillover.<sup>270</sup> Instead of competing with

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<sup>266</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 258-59.

<sup>267</sup> Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 147.

<sup>268</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 285; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 217; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 5.3.2; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 28; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 21.

<sup>269</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.2.17.

<sup>270</sup> Paul Gillepsie, 'From Anglo-Irish to British-Irish Relations' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 330; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 10.11.

literally intergovernmental, executive, institutions, such as the British-Irish Council (BIC),<sup>271</sup> these assemblies have complemented their work through the joint exercise of varied normative powers. However, beside the action of this mostly subsidiary inter-parliamentary assembly, highly valuable interinstitutional links between legislative assemblies mostly exist because of several legislators' initiatives, particularly since they have not been exhaustively formalised and entrenched.<sup>272</sup> They are upheld innovatively in a manner that furthers their core purpose: empowering the constituent nations to rule the British state together through, for instance, the valuation of dialogue.

In that vein, a brilliant example of how dialogue can be established between central and substate institutions, both at the executive and legislative levels, to make shared rule possible is the adoption by a substate assembly of legislative consent motions.<sup>273</sup> Its members can consent to empower the British Parliament to legislate within its exclusive jurisdiction after the holding of painstaking negotiations between central and substate governments.<sup>274</sup> In practice, these motions, which are governed by

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<sup>271</sup> Scottish Government, *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (SP 313, 2018) para 65; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 10.11.

<sup>272</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 6.19 and 6.24.

<sup>273</sup> Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 156; Barry Winetrobe, 'A Partnership of Parliaments? Scottish Law-Making under the Sewel Convention at Westminster and Holyrood' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 59.

<sup>274</sup> Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 156; Barry Winetrobe, 'A Partnership of Parliaments? Scottish Law-Making under the Sewel Convention at Westminster and Holyrood' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 49; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 85; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para

normatively flexible Standing Orders,<sup>275</sup> have set a binding conventional duty for elected officials to negotiate with a cooperative mindset before overstepping devolved jurisdictions.<sup>276</sup> As other devices like Orders in Council, which have for their part been used to expend considerably the scope of devolved jurisdictions,<sup>277</sup> these motions have highlighted that devolution can evolve structurally and harmoniously without undertaking formal comprehensive reforms.<sup>278</sup>

Hence, the principle of subsidiarity, which can legitimise centralisation if that is deemed essential to improve the efficiency of state governance meaningfully, can be implemented, though imperatively on a consensual basis. Nonetheless, it is an occupational hazard of cooperative multi-level governance, regardless of its federal character, that operational efficiency can be set against the respect of substate autonomy and then induce, even collaterally, centralisation.<sup>279</sup> Indeed, legislative consent motions can legitimise centralising encroachments,<sup>280</sup> especially

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13.2.16; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 18.

<sup>275</sup> Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 12.

<sup>276</sup> Barry Winetrobe, 'A Partnership of Parliaments? Scottish Law-Making under the Sewel Convention at Westminster and Holyrood' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 50; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 175; *ibid* 6.

<sup>277</sup> Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 24.

<sup>278</sup> *ibid* 18 and 22; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 287.

<sup>279</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 21.

<sup>280</sup> Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 2; Barry Winetrobe, 'A Partnership of Parliaments? Scottish Law-Making under the Sewel Convention at Westminster and Holyrood' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 39; Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The Scotland Act 1998' (2011) 30(1) *Parliamentary History* 85, 96.

as they can only be adopted by substate legislators.<sup>281</sup> Moreover, central and substate institutions, which shall cooperate through the making and the adoption of these motions, are not effectively on an equal footing, which limits the legitimacy and their authoritativeness of these motions. Bearing that in mind, there is room for a much-needed improvement to secure fairness within British intergovernmental frameworks. Therefrom, I shall study more thoroughly the role of the non-normative devices and institutions through which this federal principle, which is intrinsic to shared rule, can be implemented and safeguarded. That is key to avoid abuses justified by the principle of subsidiarity.

### **6.3.2. The Operation of Intergovernmental Arrangements**

In the long run, cooperation and, even more precisely, shared rule can be durable and fruitful only if the constituent entities abide by the rules to which they have consented for them to break fair deals. Accordingly, the core source of intergovernmental arrangements shall be a common engagement of the constituent entities to work together, which echoes the contractualistic ideal underlying federalism. In that vein, Poirier notes that intergovernmental arrangements, which can institutionalise shared rule by the implementation of binding soft-law, are akin to ‘pseudo-contracts’ between these entities.<sup>282</sup> Consequently, politicians and citizens, rather than exclusively judicial officials, have the shared

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<sup>281</sup> Giovanni Poggeschi, ‘The United Kingdom and France: A Stronger Decentralization of just an Institutional “Maquillage”?’ in Sergio Ortino, Mitja Zagar and Vojtech Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005) 231.

<sup>282</sup> Johanne Poirier, ‘The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* 134, 158.

responsibility to ensure that intergovernmentalism functions well.<sup>283</sup> That is coherent with the effective impossibility to coerce people to comply with federal values and principles like cooperation and fairness which, although they can be asserted by posited norms, are hardly enforceable by themselves.

In practice, especially considering the nature of British constitutionalism, devices like a Memorandum of Understanding are vital in ensuring the proper implementation of the devolution arrangements beyond the enactment of constraining formal norms.<sup>284</sup> This Memorandum serves as a guide for the proper and fair conduct of intergovernmental relationships.<sup>285</sup> Although this document is a 'statement of political intent [...] binding in honour only',<sup>286</sup> it provides clear guidelines whose authoritativeness is principally political, for better and for worse.<sup>287</sup> It embodies a shared engagement to communicate, negotiate, cooperate, coordinate policymaking, and exchange information in an equanimous and dialectical spirit.<sup>288</sup> Concretely, Perry and Tucker ascertain that it has been instrumental in setting the behavioural standards by which the representatives of the British constituent nations shall abide when they work together.<sup>289</sup> The informal

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<sup>283</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 284.

<sup>284</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 8; Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 304; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 778; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 280.

<sup>285</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 10.

<sup>286</sup> *ibid* 5.

<sup>287</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 5.2.9.

<sup>288</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 5; *ibid* para 4.8.2.

<sup>289</sup> Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 778.

nature of this document would not be its weakness as much as what optimises its adaptability and, in the long run, its authority.

Furthermore, the Memorandum has set the bases of another unposited intergovernmental arrangement whose nature is mainly contractualistic: the Joint Ministerial Committee (JMC).<sup>290</sup> This committee, whose members are also members of central and substate governments, holds plenary and functional private meetings to coordinate the long-term pursuit of common interests beyond the fulfilment of immediate normative needs.<sup>291</sup> It can also help to mitigate disagreements without necessarily resorting to judicial recourses,<sup>292</sup> which may fuel confrontation instead of easing the reach of common grounds. The JMC then operationalises intergovernmentalism in a manner that institutionalises shared rule since it values interdependence through dialogue over the exercise of divided powers in isolation.<sup>293</sup> Certainly, some concerns have been raised about the few constraints set by the JMC on the ability of the British government to exercise its reserved and residual powers extensively and domineeringly.<sup>294</sup> Moreover, the fact that its Secretariat is institutionally linked to the British Cabinet Office<sup>295</sup>

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<sup>290</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 5; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 21.

<sup>291</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 12; Stephen Tierney, 'The United Kingdom as a Plurinational State' in Ferran Requejo and Miquel Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012) 203.

<sup>292</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 7864, 2010) 15.

<sup>293</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 284.

<sup>294</sup> Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 1; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 67.

<sup>295</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 15.

might engender conflicts of interests jeopardising the fairness of its structure and of its functioning. However, the JMC, especially since it cannot be held accountable to this Office,<sup>296</sup> can act impartially without triggering centralising dynamics concretely. Since its existence relies on bilateral arrangements between the constituent nations that recognise statutory asymmetry and multinational diversity,<sup>297</sup> this committee can fulfil its duties with responsiveness to substate interests and operationally transcend hierarchical patterns.

In that vein, it is noteworthy that the JMC has close ties with a crucial intergovernmental network that was evoked previously: the BIC.<sup>298</sup> The latter complements the role of North/South Ministerial Council, which makes possible the shared rule of the Irish island.<sup>299</sup> While the BIC was established initially to forge harmonious and fair relationships between the British and Irish governments in line with the third strand of the GFA,<sup>300</sup> it has evolved substantially beyond what this Agreement strictly provides.<sup>301</sup> It has become a multinational institution that no longer acts solely upon Northern Irish issues.<sup>302</sup> While British substate

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<sup>296</sup> *ibid.*

<sup>297</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 259.

<sup>298</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 5 and 15; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 414.

<sup>299</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) North/South Ministerial Council, s 1.

<sup>300</sup> *id.*, Declaration of Support, s 1 and 5; Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era' in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 58; *Re McCord's Application* [2016] NIQB 85 [39].

<sup>301</sup> Philip Lynch and Stephen Hopkins, 'The Totality of Relationships? The British-Irish Council' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 192; *Re McCord's Application* [2016] NIQB 85 [37].

<sup>302</sup> Paul Bew, 'Myths of Consociationalism: From Good Friday to Political Impasse' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 63;

governments have always been represented on this Council,<sup>303</sup> it is recognised nowadays that their representatives hold the same powers as state institutions to devise initiatives on matters that affect the British and Irish polities taken as composite wholes.<sup>304</sup> The existence of a Common Travel Area,<sup>305</sup> for example, signals a will to deepen interjurisdictional cooperation without engendering unitarisation. Although the decisions taken by the BIC do not have the force of formal law,<sup>306</sup> they have great legitimacy because they are made by consensus rather than by majority (which mitigates the risks of national divisions compromising the worth of substate consent).<sup>307</sup> As noted by Meehan, the involvement of all constituent nations within the BIC ‘introduces a novel development in sovereignty by permitting a non-sovereign sub-state government in the UK to interact with the government of another sovereign state on matters of bilateral interest’.<sup>308</sup> Therefore, within the Council, the constituent nations are somewhat empowered to rule the United Kingdom jointly, beyond mere declarations.

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Philip Lynch and Stephen Hopkins, ‘The Totality of Relationships? The British-Irish Council’ in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 187;

<sup>303</sup> Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) British Irish Council, s 2; *Re McCord’s Application* [2016] NIQB 85 [37].

<sup>304</sup> Philip Lynch and Stephen Hopkins, ‘The Totality of Relationships? The British-Irish Council’ in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 195-96; Thomas May, *Parliamentary Practice* (25<sup>th</sup> edn, LexisNexis Butterworths 2019) para 10.11.

<sup>305</sup> Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 57.

<sup>306</sup> Philip Lynch and Stephen Hopkins, ‘The Totality of Relationships? The British-Irish Council’ in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 191-92.

<sup>307</sup> *Re McCord’s Application* [2016] NIQB 85 [38].

<sup>308</sup> Elizabeth Meehan, ‘Europe and the Europeanisation of the Irish Question’ in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2<sup>nd</sup> edn, Palgrave 2006) 342.

### 6.3.3. The Flaws of British Intergovernmental Shared Rule

British intergovernmental devices and mechanisms have displayed great potential by both their structure and their outcomes to institutionalise the exercise of shared rule. However, they have significant flaws that have complicated the systematic achievement of this aim, particularly from a federal perspective. Rawlings observes that, especially amidst tough times requiring decisive and cohesive action, these arrangements have insufficiently fostered interinstitutional dialogue due to the difficulty of conciliating multilateral decision-making with the asymmetrical character of devolution.<sup>309</sup> In fact, intergovernmental arrangements relying predominantly on the consent of the constituent entities to be part of them cannot transform the substance of a dialogue between them into common authoritative legal norms.

Certainly, as Gee astutely noted, 'structural checks are not absolute safeguards'<sup>310</sup> of substate jurisdictions. Accordingly, depriving intergovernmental British frameworks of the flexibility that characterises them is a false siren. However, particularly in two cases, the constituent nations would gain that these frameworks stand on firmer and clearer legal grounds. First, the implementation of the British multi-level framework of governance, and more precisely that of the Memorandum of Understanding,

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<sup>309</sup> Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 36.

<sup>310</sup> Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 256.

has overly relied on the leadership of central institutions.<sup>311</sup> This reality shows that the divide between central and substate entities and institutions has not been transcended as much as the exercise of shared rule requires. Consequently, the mechanisms by which the principles at the heart of this Memorandum are implemented shall not be strictly conventional and apprehended piecemeal to prevent them from crumbling if the political will to uphold them became lacking.<sup>312</sup> Second, the JMC is rather powerless concretely to solve conflicts between several constituent nations.<sup>313</sup> Its consensual mode of functioning and the inability of its Secretariat to arbitrate litigations likely engender stalemates when severe disagreements occur.<sup>314</sup> Institutionalising a more sustainable method of settling disputes then appears highly opportune. These findings highlight that even when the constituent nations want to cooperate through flexible mechanisms, reality might catch them and produce different outcomes than those they expected.

The pragmatism that has characterised British devolution and intergovernmentalism becomes deeply problematic if it cannot be set in stone and avoid undue spillover and inefficiencies that their

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<sup>311</sup> Alan Trench, 'Whitehall and the Process of Legislation after Devolution' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 199; Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 295; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 170.

<sup>312</sup> Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 15.

<sup>313</sup> Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 10 and 19.

<sup>314</sup> *ibid*; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 19.

operational flexibility would engender.<sup>315</sup> Moreover, since intergovernmental arrangements have been characterised as being essentially political rather than legal, courts can hardly level the playing field efficiently. Certainly, apprehending the multinational character of the United Kingdom from primarily judicial and legal perspectives would not be more appropriate. Nonetheless, studying the relationships between the British constituent nations from an essentially political perspective overshadows to which extent they might be shaped by power struggles engendering factually unfair treatments.<sup>316</sup> The trivialisation of this reality likely leads to a systematic accentuation of inequalities, instead of reducing them, which could, in turn, make the substate nations doubt of the legitimacy of British intergovernmental frameworks.

Indeed, the primarily unposited nature of the British intergovernmental arrangements<sup>317</sup> has made them tenuous and substantively imprecise, which has effectively empowered the central entity to act domineeringly.<sup>318</sup> That has occurred in the United Kingdom as the valuation of interjurisdictional cooperation has blurred the division of powers,<sup>319</sup> primarily for the benefit of

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<sup>315</sup> Constitution Unit, *An Assembly for Wales* (1996) 60; Guy Lodge and James Mitchell, 'Whitehall and the Government of England' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 104.

<sup>316</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 309.

<sup>317</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 284.

<sup>318</sup> Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 285; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 22; Stephen Tierney, 'The Three Hundred and Seven Year Itch': Scotland and the 2014 Independence Referendum' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 151-52; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 517.

<sup>319</sup> *Martin v Most* [2010] UKSC 10 [156].

central institutions. They have the upper hand to assert unitary interests and policy choices because they control most of the economic, fiscal, and spending powers that affect how and by which means substate powers can be exercised.<sup>320</sup> The fact that British central institutions also act in the name of England in intergovernmental processes creates a substantial conflict of interest that engenders even more centralisation.<sup>321</sup> Moreover, the primarily bilateral nature of the devolution arrangements has prevented substate entities from coming together as a cohesive whole to push against this concerning trend and to claim more normative autonomy.<sup>322</sup> So, since substate institutions can hardly drive the evolution of devolution substantially in the sense of their interests, they are too often left in the backseat and treated as subordinate entities.<sup>323</sup>

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<sup>320</sup> Constitution Unit, *An Assembly for Wales* (1996) 114; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 64; Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 253; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 234; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 169; Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 25; Paul Chaney, "'Governance Transitions" and Minority Nationalist Parties' Pressure for Welfare State Change: Evidence from Welsh and Scottish Elections--And the UK's "Brexit" Referendum' (2017) 17(3) *Global Social Policy* 279, 286; Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 84.

<sup>321</sup> Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 190; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9<sup>th</sup> edn, Oxford University Press 2019) 292-93.

<sup>322</sup> Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 309.

<sup>323</sup> Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 142; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [145]; Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 118; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 12.

Furthermore, the emphasis on the virtues of negotiation to foster concord and settle disagreements<sup>324</sup> becomes a double-edged sword if the citizens of the constituent nations do not know what decisions are made on their behalf and why. Since British intergovernmental relationships have been predominantly elite-led and shaped by opportunistic bargains struck behind closed doors, intergovernmentalism lacks transparency and, potentially, legitimacy.<sup>325</sup> The relative non-existence of a public interjurisdictional dialogue might occasion burden shifting,<sup>326</sup> and accentuate antagonisms that were ironically meant not to be publicised. Ultimately, when clashes between the divergent national interests shaping the British state are insufficiently mediated through democratic processes, the legitimacy of those who seek to uphold these interests or to settle disagreements is severely compromised.

However, despite their mostly undisclosed character, debates on British intergovernmentalism and shared rule have displayed the considerable gaps between the centralised and decentralised perspectives on a multinational British polity. As this polity is intended to synthesise powerful centripetal and centrifugal forces<sup>327</sup> that are continuously evolving,<sup>328</sup> it is expected that conflicts might arise organically. While the implementation of the devolution arrangements indicates a broad commitment to secure

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<sup>324</sup> Constitution Unit, *An Assembly for Wales* (1996) 58.

<sup>325</sup> Vernon Bogdanor, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Oxford University Press 2001) 285; Robert Hazell, 'Devolution as a Legislative Partnership' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 310; HL Deb 24 November 2015, vol 767, col 603 (Lord Lang of Monkton).

<sup>326</sup> David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 59.

<sup>327</sup> Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 182.

<sup>328</sup> Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 19.

substate autonomy, it has also given an opportunity to hear again long-standing claims that legal uniformity makes governance more efficient and that intergovernmentalism intrinsically compromises that.<sup>329</sup> In that vein, Bogdanor argues with lucidity that endowing all substate entities with formalised equal statuses and veto powers might make the central entity normatively impotent and lead to critical stalemates.<sup>330</sup> Echoing these concerns, many Britons fear that policy differentiation would increase inequalities among them and threaten societal cohesion.<sup>331</sup> While devolution arrangements were devised in a moderate fashion to mitigate such concerns, they could not open new constitutional horizons because of their incompleteness.<sup>332</sup> Institutionalising shared rule appropriately within the British constitutional order then seems to be overly ambitious, at least as it stands and as it is apprehended by several Britons.

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<sup>329</sup> Alan Butt Philip, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975) 321; *ibid* 51; Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 265; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 255; John Loughlin, 'Political and Administrative Asymmetries in a Devolving United Kingdom' in Ferran Requejo and Klaus-Jurgen Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011) 55.

<sup>330</sup> Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 217.

<sup>331</sup> JC Banks, *Federal Britain?* (Harrap 1971) 41; Charlie Jeffery, 'Devolution and Social Citizenship: Which Society, Whose Citizenship?' in Scott Greer (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005) 70; Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 239; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 171; Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 4; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 38 and 68; Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 94; *ibid* 245.

<sup>332</sup> Graham Walker, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235, 250.

Nevertheless, beyond mere declarations, improving British intergovernmentalism to institutionalise shared rule in a substantively federal sense is far from being a lost cause. Some insightful reform proposals have been made in this regard. For instance, the functioning of the JMC could be rethought to meet the ‘need for a cooperative and constructive relationship underpinned by the principle of parity of esteem’,<sup>333</sup> which is a key component of shared rule in a composite state. Accordingly, the JMC shall be empowered to make authoritative decisions, potentially by non-consensual means, to prevent shared rule from being synonymous with meaningless and inconsequential discussions.<sup>334</sup> Establishing an independent Secretariat that would be managed jointly by central and substate institutions might help on this matter so that the JMC could be a genuinely multinational institution.<sup>335</sup> Furthermore, the functioning norms of this institution, as well as the mechanisms guiding the adoption of legislative consent motions,<sup>336</sup> shall be set on more robust formal bases to guarantee that their implementation does not strictly rely on circumstantial political wills.<sup>337</sup> A balance between the preservation of operational flexibility and the safeguard of the interests of each constituent entity shall then be struck to uphold federal principles like fairness and cooperation.

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<sup>333</sup> House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 10.

<sup>334</sup> House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 74.

<sup>335</sup> House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 20 and 22.

<sup>336</sup> McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 267.

<sup>337</sup> Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 3.3; House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019) 11 and 14.

In fact, devolution has triggered a centrifugal constitutional dynamic that could, as noted by Burgess, 'accentuate the spirit of federalism' through the crumbling of a constitutional hierarchy between central and substate entities.<sup>338</sup> Poirier even contends that British intergovernmental arrangements are substantively akin to these empowering the constituent entities of federal states to exercise shared rule.<sup>339</sup> However, that it is not because one has the tools to build something that she knows how to use them. That is what has happened so far regarding the institutionalisation of intergovernmental British shared rule, which has been done haphazardly and overly relied on the dominant leadership of central institutions.<sup>340</sup> Therefore, especially since the constituent nations remain unrepresented, as such, within these institutions,<sup>341</sup> they cannot, in practice, exercise British sovereignty together as partners even though they have the potential to do that.

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<sup>338</sup> Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 182.

<sup>339</sup> Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 159.

<sup>340</sup> Russell Deacon, *Devolution in the United Kingdom* (2<sup>nd</sup> edn, Edinburgh University Press 2012) 248.

<sup>341</sup> Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 105.