

Is the United Kingdom Becoming a Federal State?

Volume 2

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7. The Constitutional Safeguards of Devolution

Establishing that self-rule, though not necessarily shared rule, can be institutionalised and constitutionalised in accordance with federal principles is certainly opportune to determine whether the United Kingdom is a federal state. Still, establishing a multi-level, federal, framework of governance is barren if its existence only relies on mere political will. To be implemented genuinely, federal principles cannot only be asserted declaratorily and shall be complied with in practice. There shall also exist guarantees that these principles cannot be disregarded or repealed without the consent of the constituent nations. At first sight, the British constitution can hardly provide these guarantees due to its primarily intangible character. However, the nature of constitutionalism is epistemologically plural, especially in the United Kingdom. Accordingly, I contend there are unorthodox ways to entrench and safeguard the devolution arrangements in a manner that induces the federalisation of the British state.

In this chapter, I study the mechanisms through which British constitutional norms can be enforced, despite the non-existence of a canonical supralegislative text, and I evaluate their efficiency. First, I seek to balance the need for federal constitutions to be supreme and the political will to preserve British parliamentary sovereignty. Then, I analyse the unique role of constitutional conventions as binding devices from a practical perspective. Ultimately, I argue that the Sewel Convention is substantively federal since it can constrain central interventionism within devolved jurisdictions although its limited functional character cannot be overlooked.

7.1.The Need to Limit the Supremacy of the British Parliament

As highlighted previously, parliamentary sovereignty has been the backbone of the British constitution for centuries. Despite the undertaking of transformative reforms such as devolution, it still stands, at least normatively. Nonetheless, the sovereign character of Parliament within the British constitutional order, instead of the supremacy of a formal constitution, has never meant that this institution could do as it pleased. Several mechanisms and devices have consistently narrowed the scope of its powers and obligated it to serve as the guardian of the constitutive elements of the British polity. Accordingly, I shall assess whether Parliament can make the British constitution normatively supreme concretely, as a federal constitution shall be.

7.1.1. The Supreme Status of Federal Constitutions

In federal states, constitutionalism is viewed as a corollary of contractualism, which characterises the processes through which these composite polities were established. When they come together, constituent entities do not surrender their distinct legal personalities and remain integral parts of the pact whose ratification is the founding act of a federal state. This pact shall be sufficiently clear and enforceable to rely on more than the assertion of value claims. Although values like cooperation and good faith shall undeniably be upheld beyond what formal norms express, the latter must be more than guidelines that can be disregarded inconsequentially.¹ As noted by Jeffery, a federal

¹ Preston King, *Federalism and Federation* (Croom Helm 1982) 14; Francis Delperee and Marc Verdussen, 'L'egalite: mesure du federalisme' in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le federalisme dans*

covenant is valuable when the entities that contracted it feel bound by its provisions and abide by the duties it sets out.² The constitutionalisation of federal principles is crucial to avoid this outcome. Indeed, the consent that the constituent entities give when they become parties to a federal pact logically entails that they must stand by their commitments.

For long, it was considered that the existence of a constitutional document was an unavoidable staple of any federal constitutional framework so that it could firmly entrench federal principles.³ That is why, according to Dicey, '[federalism], lastly, means legalism-the predominance of the judiciary in the constitution-the prevalence of a spirit of legality among the people'.⁴ From his perspective, which is centred on the legal sense of constitutionalism, a federal constitution had to be the fundamental source of any federal or federated power.⁵ It should be the core embodiment of a federal pact and ensure that its stipulations are enforced in compliance with the rule of law.⁶ Upholding the division of sovereignty between fully-fledged entities, which is a vital federal principle, can hardly be achieved without upholding the normative primacy of the state constitution.⁷

tous ses états: gouvernance, identité et méthodologie (Editions Yvon Blais 2005) 207; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 91.

² 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) 83.

³ 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, 75; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 321.

⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 100.

⁵ *ibid* 77.

⁶ *ibid*; Malcolm Cameron and Tulia Falletti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 271.

⁷ William Riker, *Federalism: Origin, Operation, Significance* (Little & Brown 1964) 11; Michael Burgess, 'Federalism and Federation: A Reappraisal' in

Ensuring that the division of federal sovereignty is constitutionalised is far from being a pernicky legalistic consideration. It is cardinal that the duties set by (and intrinsic to) a federal pact are complied with and enforced in case of inexecution. Certainly, posited constitutional norms can never be entirely devoid of ambiguities and are not a panacea to secure the authoritativeness of a federal pact. Nonetheless, since they expressly lay down the terms of a federal pact, posited constitutional norms can optimise their intelligibility and their clarity and prevent them from being interpreted biasedly.⁸ These norms also provide in definite terms how the constituent entities can be empowered to exercise self-rule and shared rule autonomously and completely.⁹ Accordingly, federal principles could be implemented following precise and objective guidelines that would not be shaped by opportunistic considerations.¹⁰

Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) 5; Paul Chen, 'Federalism and Rights: A Neglected Relationship' in Neil Colman McCabe (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002) 301; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 4.

⁸ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 34-36; *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 852; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 157; Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 401; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 83; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 43.

⁹ Preston King, *Federalism and Federation* (Croom Helm 1982) 77; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 98; 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) 124.

¹⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 79; WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 13; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 335;

In this regard, a formal constitution is precious in preventing domineering entities from grabbing powers unilaterally through power struggles while blatantly overlooking the distinct constituent powers that each constituent entity shall hold.¹¹ It shall serve as an iron-clad box in which defining federal principles and features can be inserted and safeguarded from being altered at the drop of a hat.¹² In fact, a federal constitution shall ensure in priority that the norms entrenching the substantively federal character of a state cannot be altered effortlessly and without the unambiguous consent of a popular majority.

Still, setting the constitutional importance of federal principles does not entail that their sense must be frozen. Since a federal constitution shall be tailor-made to a particular polity, especially if it is multinational,¹³ this constitution shall evolve at the same pace

Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 275; John McGarry and Brendan O'Leary, 'Federation and Managing Nations' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 180.

¹¹ Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 22.

¹² AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 99; WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 11-12; id, *Exploring Federalism* (University of Alabama Press 1987) 173; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 248; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 1 and 3; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 26.

¹³ David Miller, 'Colonialism and Academic Representations of the Troubles' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 13; 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; David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 153; A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 6; Jaime Lluich, 'Introduction: The Multiple Dimensions of the Politics of Accommodation in Multinational Democracies' in Jaime Lluich (ed), *Constitutionalism and the*

as this polity.¹⁴ It shall be flexible enough to be adapted, both regarding its substance and its implementation, to realities that might make it obsolete.¹⁵ Otherwise, posited norms would become inadequate as they could no longer structure the functioning of a federal state in keeping with its societal peculiarities.¹⁶ Indeed, since federal norms shall be ‘effectively communicated and universally accepted’ within a polity, they cannot be apprehended too fixedly and rigidly.¹⁷ Consequently, the capacity to amend federal constitutions displays less their apparent vulnerability as legal instruments than their responsiveness to federal and federated claims and needs.¹⁸ In practice, each constituent entity shall have a say, and a decisive opportunity, to consent to the enactment of constitutional amendments, and entrenching this

Politics of Accommodation in Multinational Democracies (Palgrave Macmillan 2014) 4.

¹⁴ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 4; 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) 110; Eugénie Brouillet, *La négation de la nation: L’identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 105; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 145; Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 863; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 214; 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) 124.

¹⁵ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 4.

¹⁶ Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 208 and 213; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 101.

¹⁷ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 38; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 158.

¹⁸ Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 56.

principle in the constitution permits to do so.¹⁹ Otherwise, the existence of the constituent entities would be easily jeopardised by the effects of unitarizing dynamics that could lead, in extreme cases, to the unilateral negation, in law or in fact, of their distinct existence.²⁰

In that vein, a prerequisite of the legitimacy of a federal constitution is its ability to provide recognition and, if needed, accommodation to each constituent entity. That is particularly important for minority groups²¹ and federated nations since the legal steadiness of their normative and constituent powers would be very shaky if they were not safeguarded by constraining means.²² Minority nations shall be recognised as *demos* by and for themselves who cannot simply be tolerated.²³ That is a sensible reason why it can be argued that breaches of a federal pact could be avoided if their powers were formally entrenched. Accordingly, the upholding of federal

¹⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 79-80.

²⁰ Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 404; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 161.

²¹ Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 27; 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) 16.

²² 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) 118.

²³ Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 27; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 280; Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 73; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 12; 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.

principles would not depend strictly on political will, whose nature is intrinsically variable and not necessarily reliable.

In practice, a trap to avoid while seeking to implement and entrench federal principles is to apprehend a federal constitution from a strictly legalistic perspective, which is insufficiently pragmatic and holistic. In practice, the authoritativeness of federal principles relies on both their inclusion within the set of norms structuring state governance and on effective guarantees that citizens act in conformity with them.²⁴ A federal constitution shall be normatively supreme, but the means by which its supremacy can be upheld are rather subsidiary to achieving this aim. A supreme federal constitution shall be ranked above all other norms, amended through complex mechanisms, and dictate the conduct of every actor and institution.²⁵ Operationally, this constitution shall place federal principles at the centre of the state institutional framework of governance so that they could not be breached with impunity effectively.²⁶

If a posited and canonical constitution is almost always supreme, a supreme constitution does not necessarily have to meet these formal conditions to be characterised as such.²⁷ Certainly, as

²⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 82; Vincent Ostrom, 'Federal Principles of Organization and Ethnic Communities' in Daniel Elazar (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 78-79; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctional Theory of Governance*, vol 1 (Oxford University Press 2016) 96.

²⁵ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 53 and 209; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 83.

²⁶ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 10-11; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Éditions du Septentrion 2005) 160.

²⁷ Preston King, *Federalism and Federation* (Croom Helm 1982) 145; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 46; Ronald L

noted by Wheare, the formalisation of federal principles, which has the merit of setting in definite terms how they should be implemented, is opportune to guarantee their supreme constitutional character.²⁸ Nonetheless, that is not because a supreme constitution shall top the normative hierarchy of a federal state that nothing besides posited norms can set authoritative standards of behaviour. Unwritten usages and conventions are crucial to make sense of a constitution, which is far from simply being a mechanical codification of duties and principles.²⁹ Constitutional practice also compensates for formalistic lacunas that might hamper the proper implementation of federal values and principles.³⁰ Therefore, any constitution that is exclusively interpreted based upon what the content of its formal provisions would be no more than a paper tiger.

Legitimate doubts have yet been raised that federal principles can be constitutionalised in a state like the United Kingdom in which its Parliament, rather than its constitution, is sovereign.³¹ Still, such

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.

²⁸ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 54-55.

²⁹ 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; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 20 and 70.

³⁰ Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 208; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 101.

³¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 81; 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) 107; *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 806; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 19; DV Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) *Publius: The Journal of Federalism* 81, 83 and

analyses overlook what constitutional supremacy is substantively about. Federal principles do not imperatively have to be enshrined within a constitutional document for them to make sense concretely. That fits well with how British constitutionalism functions. Nevertheless, asserting that the constitution of the United Kingdom can hold a supreme status while its Parliament remains sovereign appears quite uncertain.

7.1.2. The Statutory Restrictions on Parliamentary Supremacy

No legal norm circumscribes the powers of British parliamentarians in a wholly formal and enforceable manner. At least in principle, the bindingness of ordinary statutes cannot be explained by their inherent authoritativeness or because independent institutions like courts might review them to ensure that they comply with some structuring principles.³² This functional reality characterises the peculiar British constitution. I shall then evaluate whether British constitutionalism can be supreme if no norm could be apprehended in an overarching sense over time. In fact, the supremacy of the sovereign British Parliament does not entail that its powers are unlimited and unchecked. Although Parliament can 'legally enact legislation dealing with any subject-matter' and 'legislate for all persons and all places',³³ Jennings highlights that its supremacy, when applied in absolute terms, is a legal fiction detached from political realities.³⁴ Since, as argued by

93; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 34.

³² AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 4; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 328.

³³ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 170.

³⁴ *ibid.*

Barber, 'a legal rule is entrenched when it is rendered legally more difficult to change than other rules generated from the legal rules',³⁵ the enactment of a formal constitution is not an absolute prerequisite to safeguard some principles and features from being amended unconsciously. In fact, devices such as usages and conventions or electoral processes, which are not legal as such, can ensure that MPs fulfil their duties, even though they are not necessarily compelled to do so formally.³⁶

Accordingly, parliamentary sovereignty is limited internally by the binding strength of politically constitutional instruments and externally by the need to guarantee that the norms enacted by Parliament are legitimate and that citizens consent to abide by them.³⁷ According to the principle of legality, statutes are presumed to serve as 'expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts'.³⁸ For instance, for undertaking significant societal reforms challenging substantively constitutional postulates with legitimacy, they shall first be discussed and approved during general elections.³⁹ Therefore, statutes serve as the reflections of how citizens want to be governed and guarantee that their rulers do not unduly jeopardise their rights.⁴⁰

³⁵ Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 63.

³⁶ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 9.

³⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 30 and 32; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 2.

³⁸ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 166.

³⁹ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 176.

⁴⁰ JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 15.

In practice, mechanisms controlling the exercise of parliamentary initiatives beyond what a formal constitution, which does not exist in the United Kingdom, provides shall be devised to hold parliamentarians accountable to the people. In this regard, manner and form requirements have been decisive in upholding core constitutional principles without leading to the crumble of orthodox parliamentary sovereignty. Parliamentarians are then required to assert unambiguously their intent to change the substance of a material norm of the British constitution when they amend a statute that entrenches, in their opinion, one of its fundamental components.⁴¹ Those requirements serve essentially as self-denying ordinances and make up for the absence of a formally supreme constitution to secure the terms of a potential British federal pact and to avoid its unilateral amendment by central institutions.⁴²

However, in keeping with the orthodox definition of parliamentary sovereignty, manner and form requirements can hardly be legally and substantively obligatory.⁴³ Parliament, since it remains the official sovereign of the British polity, cannot be tightly bound by the statutory decisions it previously made when its members contend that they no longer embody the will of the people.⁴⁴

⁴¹ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 91.

⁴² Preston King, *Federalism and Federation* (Croom Helm 1982) 143; Constitution Unit, *An Assembly for Wales* (1996) 134; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 188.

⁴³ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 265; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 181; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 69.

⁴⁴ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 75; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 542; *R (Jackson) v Attorney General* [2005] UKHL 56 [9]; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 201.

Indeed, several provisions of statutes that were intended to be substantively constitutional, such as the Bill of Rights and the Magna Carta, were amended or repealed without formality.⁴⁵ Accordingly, manner and form requirements set guidelines, though no absolute norms that are akin to a formal amending formula. Nonetheless, parliamentarians can signal to their successors that a statute contains substantively constitutional provisions and that the opportunity and the consequences of amending or repealing them shall be weighed seriously.⁴⁶ Consequently, although manner and form requirements do not narrow the scope of legislative initiative in constraining legal terms, they specify, especially from a procedural perspective, how it can be exercised to trigger extensive changes.⁴⁷

Operationally, the implementation of these requirements is pragmatic and versatile. For long, it was considered that, in compliance with the traditional doctrine of implied repeal, a legislature enacting a statute contradicting another one impliedly repealed the latter as long as the most recent statute was in force.⁴⁸ Still, courts can indicate that a statute whose provisions signal a legislative intent to make it substantively constitutional

⁴⁵ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 46; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 165; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 56.

⁴⁶ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 74-75; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 477; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 34.

⁴⁷ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 97.

⁴⁸ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 75; *Thoburn v Sunderland CC* [2003] QB 151 [37]; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 66.

shall not be repealed unless parliamentarians explicitly asserted their intent to alter the existent constitutional order.⁴⁹ Certainly, since Parliament remains sovereign, courts could not strike down a statute that was enacted in breach of manner and form requirements or that implicitly repealed a substantively constitutional statute.⁵⁰ Nevertheless, a statute, despite its lack of inherent normative binding strength and enforceability, can be so structuring that it gives rise to conventional duties that could even be enforceable judicially.⁵¹ For example, when a statute is unambiguously about ‘fundamental rights or the relation between citizen and State’,⁵² beyond mere implication,⁵³ it can only be repealed or fundamentally amended if Parliament clearly expressed its intent to do so.⁵⁴ How clear this expression shall concretely be yet remains obscure, at least formally.

To prevent the requirement of express repeal from being too imprecise procedurally, McLean argues that a statute shall be declared by parliamentarians to be substantively constitutional and that only a qualified majority of them can amend or repeal it.⁵⁵ This procedure already exists in Scotland and Wales, since at least two-

⁴⁹ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 166; John Gardner, ‘Can There Be a Written Constitution?’ (2009) *Oxford Legal Studies Research Paper* 2009, 6.

⁵⁰ HWR Wade, ‘The Basis of Legal Sovereignty’ (1955) *Cambridge Law Journal* 172, 190; Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) *Oxford Journal of Legal Studies* 461, 477; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 234.

⁵¹ John Gardner, ‘Can There Be a Written Constitution?’ (2009) *Oxford Legal Studies Research Paper* 2009, 5.

⁵² *Thoburn v Sunderland CC* [2003] QB 151 [63]; David Jenkins, ‘Common Law Declarations of Unconstitutionality’ (2009) 7 *International Journal of Constitutional Law* 183, 203.

⁵³ 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 15.61.

⁵⁴ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 166; *Thoburn v Sunderland CC* [2003] QB 151 [63].

⁵⁵ Iain McLean, *What’s Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 330.

thirds of the members of national assemblies can enact norms related to, for instance, the determination of the electorate and the structure of the electoral system.⁵⁶ While this procedure can be implemented efficiently in a parliamentary system, it can be particularly propitious in the United Kingdom because it provides an informal constitutional amendment mechanism. Requirements on qualified majorities could thwart a simple, likely English, majority from rolling back devolution, especially if substate entities obtained a constitutional veto, as in federal states like the United States or Australia.⁵⁷ However, such requirements, especially those related to the granting of veto powers for minority interests, clash with staples of orthodox British parliamentary sovereignty such as the supremacy of the will of a simple majority and the corollary equality between MPs.⁵⁸ Moreover, these requirements create two sets of matters, the ordinary and the constitutional ones, that would be dealt with differently by parliamentarians.⁵⁹ This constitutional evolution of the functioning of British parliamentary institutions would be far from trivial. Implementing these requirements would be opportune as that might allow the recognition of the dual nature of the Westminster Parliament as a constituent and constituted institution without subjecting its authority to a supreme text working externally from it.⁶⁰

⁵⁶ Scotland Act 1998 (c 46) s 31 and 31(A); Government of Wales Act 2006 (c 32) s 111A; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 27; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 32; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 21; Scotland Act 2016 (c 11) s 11; Wales Act 2017 (c 4) s 9.

⁵⁷ Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 13.

⁵⁸ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 335.

⁵⁹ *ibid* 334.

⁶⁰ Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 168; Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern

Furthermore, it has been increasingly considered since the turn of the millennium that constituent powers, especially those related to substate and devolution issues, shall be held directly by the people rather than by its representatives within central institutions. Although the Blairite proposal that ‘any proposed legislation “of first-class constitutional significance”’ should be enacted conditional on its approval by referendum was never implemented,⁶¹ it sheds light on a momentous change of mindset. While referendums were long deemed foreign to British constitutionalism, it is nowadays accepted that citizens shall have a decisive say, and potentially a veto, on matters of great constitutional importance, despite the complexity of identifying them unambiguously.⁶² Certainly, to avoid compromising the essence of parliamentary sovereignty, referendums are still consultative and their results are not legally binding, although they would effectively be so politically.⁶³ Moreover, it would be expected, and even ineluctable, that the verdicts of referendums cannot be interpreted univocally.⁶⁴ Accordingly, referendums, which can only be organised at the will of Parliament that sets out statutorily why and how they should be held,⁶⁵ would have a weak

Defence of Parliamentary Sovereignty’ (2012) 32(1) *Oxford Journal of Legal Studies* 179, 190.

⁶¹ Philip Norton, ‘The Constitution’ in Anthony Seldon (ed), *Blair’s Britain: 1997-2007* (Cambridge University Press 2007) 114.

⁶² Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 547; Vernon Bogdanor, ‘Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty’ (2012) 32(1) *Oxford Journal of Legal Studies* 179, 188; 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, 9.

⁶³ Constitution Unit, *An Assembly for Wales* (1996) 135; Thomas Benedikter, *The World’s Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 95.

⁶⁴ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 80.

⁶⁵ Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 57; *R (Miller) v Secretary of State for Exiting the European*

legal value.⁶⁶ However, particularly since the enactment of the Devolution Acts following referendums, the monopoly of Parliament over the exercise of substantively constituent powers has clearly been circumscribed in contemporary times.⁶⁷ This evolution has been confirmed by the recognition by British legal and political actors that Parliament was politically obliged to respect the choice that Britons made by referendum to leave the European Union and to act accordingly.⁶⁸ In contemporary times, referendums can settle constitutional issues in fulfilment of the popular will, which legitimises their verdicts, more accurately than elections or parliamentary votes, primarily since electoral mandates are seldom based upon a single issue.⁶⁹

It can be argued that the increased recourse to constitutional referendums might federalise the functioning of British constitutionalism. As noted by Burgess, that sheds light on the crumble of British parliamentary sovereignty, mainly due to the

Union [2017] UKSC 5 [118] and [119]; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 141; 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) 176 and 181.

⁶⁶ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1024.

⁶⁷ Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 57; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 3; Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179, 190.

⁶⁸ Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179, 190; Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1021; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 98; 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, 9.

⁶⁹ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 544.

more sustained implementation of federal principles.⁷⁰ Indeed, holding referendums can help to meet the requirement for constituent powers to be exercised with the consent of the people, which is a core principle underlying federal contractualism. In practice, it is widely accepted nowadays that a referendum should be held before initiating extensive constitutional changes, such as the repeal of the devolution arrangements.⁷¹ As contended by Jennings in a remarkably prescient manner,⁷² the most efficient way to legitimise constitutional changes to the status of some British constituent nations would be the organisation of referendums within them (and not throughout the United Kingdom).⁷³ Accordingly, the citizens of the constituent nations shall be empowered through referendum processes to make consequential choices directly and autonomously, which has made the division of constituent powers a reality. A long-standing British political duty to consult the citizens of the substate nations before making decisions affecting them specifically, which Livingston characterises as a substantive staple of federal governance,⁷⁴ could then be institutionalised, while it was essentially informal before devolution. Still, I can hardly determine whether the United Kingdom can safeguard the supreme character of its core

⁷⁰ 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) 191.

⁷¹ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 329.

⁷² Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 178-79; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 96.

⁷³ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 287; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 95; Alisa Henderson and Stephen Tierney, 'Can Referendums Foster Citizen Deliberation? The Experience of 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.

⁷⁴ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 271.

constitutional features and become a federal state without investigating the constitutional role of the common law.

7.1.3. The Binding Strength of Common Law

For centuries, Parliament theoretically held unlimited normative powers, but it was accepted that it could not disregard ‘the essential principles of the common law’.⁷⁵ Despite the constitutive importance of statutes, devices, and processes that are not set in express, posited, terms have been decisive in implementing these principles and in actualising the rule of law.⁷⁶ Political mechanisms have ensured that parliamentarians and members of the Cabinet fulfil their constitutional duties whose respect shall not be facultative.⁷⁷ Accordingly, it is crucial to find out what are the core common law principles and how, by their implementation, they can constitute the British polity as formal constitutional norms do in states that have a formal constitution.

While, according to Blackstone, ‘the authority of these maxims rests entirely upon general reception and usage’,⁷⁸ common law customs and rules have been structuring and authoritative constitutional sources.⁷⁹ They would not only set ‘the universal rule of the whole kingdom’, which has granted them a *de facto*

⁷⁵ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 328.

⁷⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 277-78; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 68; Jack Beatson, ‘Reforming an Unwritten Constitution’ (2010) 126 *Law Quarterly Review* 48, 48-49.

⁷⁷ Aileen Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’ (2019) 30(1) *King’s Law Journal* 43, 57, 64 and 70.

⁷⁸ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 63.

⁷⁹ *ibid*; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 12.

overarching normative worth, but also customs and laws that are only applicable to some areas or jurisdictions⁸⁰. Since there is no comprehensive and codified set of legal norms in the United Kingdom, statutes and case law primarily serve as remedies that are suitable in specific circumstances, and common law principles are paramount to them.⁸¹ The common law is immanent and completed substantively, rather than constructed, by other institutions, such as courts that can shape, though never create, it by interpretative means when they adjudicate a particular case.⁸² The common law would then set fundamental normative standards that could cross ages thanks to their flexible implementation.

In that vein, the Supreme Court, in the *HS2 Action Alliance Ltd.* ruling, stated that ‘the common law itself also recognises certain principles as fundamental to the rule of law’ and that their abrogation would alter the essence of British constitutionalism.⁸³ For example, parliamentary sovereignty is one of these principles, which has been characterised as both ‘the general principle of [the British] constitution’ and as ‘a construct of the common law’.⁸⁴ A non-exhaustive list of other constitutional principles and staples include the sovereignties of the Crown and Parliament; the rule of law serving as a bulwark against threats to individual rights; the upholding of unionism; the representativeness of government; and

⁸⁰ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 62.

⁸¹ Andreas Rahmatian, ‘Brexit and Scotland: Centralism, Federalism or Independence?’ (2018) 26(4) *European Review* 616, 626-27.

⁸² Haig Patapan, ‘Australian Federalism: An Innovation in Constitutionalism’ in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 487-88.

⁸³ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207].

⁸⁴ *R (Jackson) v Attorney General* [2005] UKHL 56 [102].

the belonging to supranational organisations like the Commonwealth.⁸⁵

In accordance with the dual nature of British constitutionalism, legal principles, such as the rule of law and parliamentary sovereignty, and the processes through which they are implemented have been critical in making sense of this constitution.⁸⁶ Constitutional statutes can even posit and entrench, substantively, common law principles that shall be highly regarded despite their lacking formally supreme character.⁸⁷ The ensuing alliance between common law principles and constitutional statutes ensures that Parliament restrains itself from disregarding these fundamental principles without losing its sovereign status formally.⁸⁸

Moreover, courts have consistently played a proactive role in holding the Crown, and the government following the Glorious Revolution, accountable regarding the respect of their common law obligations, which could also be enshrined in statutes.⁸⁹ Certainly, the existence of a judicial power to safeguard fundamental common law principles from being altered by

⁸⁵ House of Lords Select Committee on the Constitution, *Constitution – First Report* (2001) para 21; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 266.

⁸⁶ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 115.

⁸⁷ Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 21; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 277.

⁸⁸ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 201; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 86; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 128.

⁸⁹ Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 65.

parliamentary initiatives remains highly doubtful because courts can hardly review and strike down statutes systematically.⁹⁰ Nevertheless, especially since the turn of the millennium, courts have used common law principles to circumscribe the power of British rulers, and more precisely that of parliamentarians since they have considered that statutes shall be devised in compliance with these principles.⁹¹ Although Rahmatian considers that the common law is a 'mystical idea', he also states that it is 'the ultimate source of law, including for the courts'.⁹² Accordingly, the common law has a less indefinite substance than its intangible nature suggests, which has been decisive in making it authoritative and binding.

Still, the role of courts has been subsidiary to the valuation of a political culture shaped by harmonious relationships between political actors.⁹³ Indeed, the political implementation of the principles intrinsic to the common law and, more precisely, the interest of complying with it have structured British

⁹⁰ *R (Jackson) v Attorney General* [2005] UKHL 56 [102]; *ibid* 136.

⁹¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 259; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 117; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 47; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [40]; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 47.

⁹² Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 626.

⁹³ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 40; Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.3; 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) 342; Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 287-88; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 141; *ibid* 52-53.

constitutionalism mostly informally. For instance, the fear of seeing controversial and unpopular policy proposals being rolled back once they lose power has made governing political parties conscious of the need to find common grounds and to play by constitutional rules.⁹⁴ In other words, the short-term benefits of disregarding what citizens want (and acting without their consent) or of behaving tyrannically are outweighed by the risk of a far-reaching long-term exclusion from power circles. Since, as noted by Gordon, democracy is conceptually 'more than just majoritarian political decision-making',⁹⁵ it can only thrive if citizens and politicians share a commitment to respect its structuring rules, regardless of their form (or lack thereof).⁹⁶ Otherwise, these norms would be devoid of a genuine societal effect and could not fulfil the purpose for which they were instituted. Certainly, doubts can be raised that citizens or other political actors will sanction those who disregard conventional constitutional norms, which cannot systematically be enforced by an independent third party like a court. Nonetheless, the risk of being severely sanctioned through the operation of political processes is acute and highlights the importance of essentially material principles, such as the need for parliamentary sovereignty to be exercised by and for the people.⁹⁷

However, since common law principles, and their embodiments, could hardly be set in stone in an absolutely definite manner, legitimate concerns about their clarity and their steadiness have

⁹⁴ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 95; 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) 57; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 89.

⁹⁵ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 46.

⁹⁶ *ibid* 46 and 49.

⁹⁷ *Ibid* 49.

remained persistent.⁹⁸ Indeed, it is very difficult, if not simply impossible, to assert unambiguously what are the duties that are the fundamental corollaries of principles like the rule of law, and how they can be fulfilled in any context.⁹⁹ Consequently, arguing that the common law shall be the unquestionable cornerstone of the British constitution would make the latter deeply imprecise and somewhat vulnerable to arbitrariness.¹⁰⁰ It is yet essential to bear in mind Bogdanor's brilliant argument that 'a constitutional crisis cannot be avoided or resolved simply by laying down constitutional principles'.¹⁰¹ Moreover, common law principles shall be implemented pragmatically, in a manner that dovetails specific circumstances.¹⁰² Although constitutional statutes can codify common law principles at least to some extent,¹⁰³ they cannot restrain their scope and their authoritativeness as much as safeguarding their guiding constitutional role, especially politically.¹⁰⁴ Accordingly, common law principles, and more precisely the rule of law and the sovereignty of Parliament, are characterised as constitutional pillars not because they were intended to be so, but because of their effects.¹⁰⁵ These principles shall guide the interpretation and the implementation of statutory law, rather than the opposite.

⁹⁸ *ibid* 143.

⁹⁹ Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 101; *ibid* 146.

¹⁰⁰ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 137, 142 and 148.

¹⁰¹ Vernon Bogdanor, *The Monarchy and the Constitution* (2nd edn, Oxford University Press 1995) 180.

¹⁰² TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 93.

¹⁰³ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 127.

¹⁰⁴ *ibid* 311.

¹⁰⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 119 and 314; Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 119; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 174.

Consequently, it can be argued that the common law, more than any statute endowed with a supreme status, is an authoritative source of British constitutional law because its content can be intimated particularly well concretely. Despite its rather unenforceable character, which might limit its pure normative power, its organic essence increases its legitimacy. The latter both emanates from societal realities and provides the means to devise norms that are responsive to them. The common law can then value and safeguard the constitutive elements of the United Kingdom. Hence, I contend that implementing federal principles within this polity could be achieved if they became essential common law principles. I shall assess the actuality of this proposal in the following sections of this chapter to determine whether the United Kingdom is becoming a federal state.

7.2. The Crucial Role Played by Constitutional Conventions

In practice, the scope of the sovereignty of the British Parliament has been increasingly narrowed over time so that common law principles could be operationally binding because of their societal value. These principles and the institutional mechanisms through which they are implemented shall be safeguarded from being changed or disregarded without a careful consideration for their impacts on the British polity. Although they are not legally or formally supreme, the devices that constrain the exercise of parliamentary powers have established constitutional supremacy by essentially political means. That is coherent with the intrinsically two-sided, legal and political, nature of the British constitution. To evaluate how it can function properly and, potentially, uphold federal principles, studying the practical role of constitutional conventions is decisive, as well as determining whether conventions have a supreme character.

7.2.1. British Constitutional Morality

Common law principles, such as the rule of law, convey a constitutional morality that does not need to be entrenched to be authoritative.¹⁰⁶ As noted by Bellamy, this morality serves as the ‘glue’ that unites the disparate components of British constitutionalism in a substantive, albeit mostly intangible,

¹⁰⁶ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 4, 79, 130, 135 and 154; Jeffrey Jowell, ‘The Rule of Law’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 17; Mark Elliott, ‘Parliamentary Sovereignty in a Changing Constitutional Landscape’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 46.

manner.¹⁰⁷ This morality shapes common law constitutionalism, according to which parliamentary sovereignty shall be exercised while observing constitutional common law principles. This institution shall never have the authority to enact norms that blatantly breach these principles.¹⁰⁸ Even Dicey, whose orthodox views are very well-known, acknowledges that Parliament could not enact norms that would be, among other attributes,¹⁰⁹ ‘unwise or tyrannical’¹¹⁰. This stance markedly contrasts with the conceptual assumption that parliamentary sovereignty shall fundamentally be absolute, regardless of how it is exercised. It cannot be overlooked that Parliament is sovereign because of common law principles, rather than despite them, and shall not have the power to act in contravention of its substance.

A radical and somewhat controversial claim underlying the existence of a constitutional morality rooted in common law principles is that a statute that violates ‘the fundamental tenets of our political morality – which must include our commitment to basic civil rights and democratic government’¹¹¹ shall be worthless.¹¹² For example, statutes that amend the status of national churches without consulting the citizens of the affected nations,¹¹³ shake the bases of ‘a system of a government by opinion’,¹¹⁴ engender

¹⁰⁷ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 6.

¹⁰⁸ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 4, 10 and 284.

¹⁰⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 19.

¹¹⁰ *ibid* 26.

¹¹¹ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 130.

¹¹² *ibid* 130 and 282.

¹¹³ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 80-81; AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 372.

¹¹⁴ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 256.

inequality before the law,¹¹⁵ or be 'opposed to the principles of morality or to the doctrines of international law'¹¹⁶ would fundamentally run counter to the essence of British constitutionalism. Furthermore, Jennings and Allan argue that a statute shall not infringe common law rights unless, in compliance with a manner and form requirement, it contains an express provision asserting that Parliament intended to breach these rights.¹¹⁷ Accordingly, a principled understanding of the rule of law shall be privileged even within a state whose Parliament remains legally sovereign.¹¹⁸

As noted previously, common law constitutionalism might empower courts to quash the majoritarian excesses of a legislature that overlooks common law principles, which has raised doubts about its democratic character.¹¹⁹ Still, an orthodox understanding of the normative supremacy of Parliament entails that the statutes enacted by this institution could not be struck down judicially.¹²⁰ To

¹¹⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 114; *ibid* 311; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 192.

¹¹⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 19.

¹¹⁷ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 290; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 189.

¹¹⁸ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 17 and 290; Jeffrey Jowell, 'The Rule of Law' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 4.

¹¹⁹ Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 314; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 135, 137, 288 and 330; 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) 326.

¹²⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 372; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 72.

mitigate this clash, it is crucial to distinguish what common law constitutionalism can do from what it cannot concretely achieve, especially politically. Making simplistic, slippery slope, arguments can then be avoided. In practice, courts shall be empowered to ensure the conformity of statutes with common law principles, though without necessarily depriving unprincipled statutes of their normative strength. On a pragmatic basis, courts shall be able to declare that these statutes are unconstitutional and antagonistic to long-standing and structuring principles, which is extremely meaningful politically.¹²¹ Ultimately, this reasoning entails that if Parliament altered or repealed unilaterally devolution arrangements, which are key parts of the British constitution, it would have to face severe consequences, especially politically.

There were fierce debates between, among others, Dicey and Jennings on the potentiality of securing constitutional morality by conventional means; without establishing overarching institutional structures to uphold it.¹²² Nowadays, a more balanced stance has become dominant. While British constitutionalism has been increasingly formalised, the Diceyan faith in the ability of politically constitutional devices to make the rulers stand by their commitments has not wavered yet. However, an exclusive recourse to these devices to uphold the core principles of a British constitutional morality is realistically vain for four main reasons. First, it provides overly broad latitude to political actors, who might

¹²¹ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 316; TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 317; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 870; 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, 395.

¹²² Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 31; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 302.

use it ill-advisedly and against the public interest.¹²³ Second, unposited duties are vulnerable to being apprehended ambiguously and potentially arbitrarily, which lessens their authoritativeness.¹²⁴ Third, as highlighted by Bogdanor, fundamental rights and principles could hardly be safeguarded if a majority of citizens decided otherwise since the British constitution is mainly the reflection of the popular will asserted in Parliament.¹²⁵ Fourth, bearing in mind the common apathy and cynicism of citizens about public affairs, it is not certain that political actors who behave incorrectly or lack political judgement could be effectively held accountable and sanctioned by electoral means.¹²⁶ Therefore, the sustainability of a principled understanding of the common law looks pretty tenuous if its implementation relies primarily on political will. While the pragmatic nature of the British constitution has eased its adaptation to changing times, it could hardly secure any substantive constitutional core without strong institutional safeguards and a major popular support to uphold it.

Nevertheless, the virtues of a British parliamentary system that fosters a continuous dialogue between diverse segments of the British people, whose interests often diverge, cannot be underestimated.¹²⁷ This system of governance, whose functioning institutionalises societal pluralism, incentivises the research of

¹²³ Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 289.

¹²⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 304.

¹²⁵ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 19.

¹²⁶ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 296; John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 6; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 25.

¹²⁷ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 45; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 302.

common grounds¹²⁸ in compliance with common law principles. In that vein, the existence of shared ethical and moral norms, which serve as constitutive standards of behaviour, shall be a prerequisite for the forging of a fruitful and harmonious political cooperation within institutions.¹²⁹ As noted previously, these norms, which cannot be enforced solely by formal legal means in the United Kingdom, can only be authoritative if abiding by them is imperative to be part of political processes.¹³⁰ In practice, their authoritativeness shall rely on a shared engagement by political actors to uphold constitutional principles and to consent to comply with material obligations.

So, despite the substantial risks engendered by citizen apathy, the dual nature of the British constitution can ensure that theoretically unrestrained parliamentary powers are exercised with moderation and wisdom for their outcomes to be legitimate.¹³¹ While legal devices are primarily social constructs,¹³² political mechanisms, which reflect or embody societal realities, optimise the efficiency of institutional systems, and contribute to the pragmatic implementation of common law principles. The British constitution, which is composed of 'both formal and informal settlements governing the relations between institutions',¹³³ can then uphold a

¹²⁸ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 205.

¹²⁹ Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 121; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 9.

¹³⁰ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 2; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 51.

¹³¹ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 4; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 57.

¹³² Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 155.

¹³³ *ibid* 168.

constitutional morality, which might be shaped by federal principles. Operationally, the crucial union between the legal and political sides of British constitutionalism stands because of complex albeit fundamental devices: constitutional conventions.

7.2.2. The Principles of British Conventional Constitutional Law

Regardless of the existence of a canonical legal constitutional text within a polity, constitutional conventions are crucial to making an institutional system work well. As noted by Morton, they 'regulate some of the innermost workings of the state; they govern and influence relations within, and between, institutional structures [...]'.¹³⁴ Since the binding strength of norms emanates from the synergy between legal, social, and moral rules and powers,¹³⁵ constitutional conventions are suitable tools to make this synergy possible. Conventions, as other soft law devices, can adapt norms to social realities and further legal change, particularly on sensitive matters, without amending statutory law or even necessarily complying with formal requirements.¹³⁶ Conventions articulate pragmatically how core constitutional principles, such as government accountability, shall be implemented, even though their substance might not dovetail the content of formal legal

¹³⁴ *ibid* 117.

¹³⁵ Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 773-74.

¹³⁶ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 857; TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 315; Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 137; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 333; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 868; David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 112.

provisions that might no longer be relevant.¹³⁷ Without these flexible devices, the proper functioning of state institutions would be overly legalistic. It could ultimately fail the test of reality.

However, due to their unposited character, the sense of conventional duties can easily become imprecise, which might jeopardise their ability to constrain political actors to act, and more precisely to restrain their powers, in a specific and definite manner.¹³⁸ When too few people know accurately what they are obligated to do, the nature of obligations becomes meaningless, and their authority becomes severely compromised.¹³⁹ That is particularly concerning regarding conventional norms, since their substance is built and shaped neither by parliamentarians, nor by courts, but rather amidst political developments that do not naturally follow a linear path.¹⁴⁰ Consequently, especially from a Kelsenian perspective, conventions cannot be normatively supreme, and even constitutional, because they could not embody a settled constituent will steadily.¹⁴¹

Still, as conventional norms are devised contractually on an essentially circumstantial and pragmatic basis,¹⁴² they are akin to several federal constitutional norms whose sense cannot be

¹³⁷ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 880; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 18.

¹³⁸ Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1152.

¹³⁹ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 211.

¹⁴⁰ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 133; *ibid* 216; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 18 and 225; David Kenny, 'Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness' (2015) 38(2) *Dublin University Law Journal* 432, 435.

¹⁴¹ William Maley, 'Laws and Conventions Revisited' (1985) 48(2) *Modern Law Review* 121, 129 and 131.

¹⁴² *ibid*.

grasped from a strictly formalistic perspective. Furthermore, in all cases, implementing norms, whether conventional or not, requires flexibility and formal pluralism so that their letter (or what resembles it) does not overshadow their spirit, especially regarding sensitive political matters.¹⁴³ Despite the usefulness of legal normative systems, they cannot alone guarantee the respect of constitutional duties, and their judicial enforcement is far from being an end in itself.¹⁴⁴ Although putting conventions on a statutory footing might clarify their content and optimise their authoritativeness by mostly declaratory means,¹⁴⁵ it is inaccurate to assert that conventions are devoid of normativity.¹⁴⁶ Indeed, they would be as worthy as statutes to assert what are the norms of conduct in a polity.¹⁴⁷ In practice, constitutional conventions can be placed 'on a continuum with other non-legal techniques for regulating government behaviour'¹⁴⁸ without their powers being only declaratory.¹⁴⁹ Concretely, constitutional conventions can

¹⁴³ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 227.

¹⁴⁴ Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 *Law Quarterly Review* 218, 221; Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 165.

¹⁴⁵ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 880; Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 130.

¹⁴⁶ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 136; Thomas May, *Parliamentary Practice* (25th edn, LexisNexis Butterworths 2019) para 11.7.

¹⁴⁷ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 883; Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 131 and 177; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 785.

¹⁴⁸ Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 863.

¹⁴⁹ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 72; Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 151; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 89; David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 97.

embody diverse normative elements such as ‘principles, doctrines, practices, habits and the likes’.¹⁵⁰

However, any intangible common practice cannot necessarily be typified as a convention. A convention is only established when three stringent conditions, which compose what is labelled as the Jennings’ test, are met.¹⁵¹ A convention shall further a definite purpose that serves as its mainspring (even when it is effectively weak¹⁵²), ensure that political actors and citizens feel bound by it, and embody the existence of precedents regarding its implementation.¹⁵³ Accordingly, what distinguishes customs from conventions is the imperative need for the latter to engender deliberate effects setting a general norm of conduct within a polity.¹⁵⁴ Although Feldman contends that ‘conventions are ways of handling disagreement rather than encapsulating

¹⁵⁰ Peter Morton, ‘Conventions of the British Constitution’ (1991) 15(2) *Holdsworth Law Review* 114, 144.

¹⁵¹ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 8; William Maley, ‘Laws and Conventions Revisited’ (1985) 48(2) *Modern Law Review* 121, 126; Joseph Jaconelli, ‘Continuity and Change in Constitutional Conventions’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 122; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 768.

¹⁵² Nick Barber, ‘Laws and Constitutional Conventions’ (2009) 125 *Law Quarterly Review* 294, 296.

¹⁵³ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 8; William Maley, ‘Laws and Conventions Revisited’ (1985) 48(2) *Modern Law Review* 121, 126; Joseph Jaconelli, ‘Continuity and Change in Constitutional Conventions’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 122; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 768.

¹⁵⁴ KC Wheare, *The Constitutional Structure of the Commonwealth* (Clarendon Press 1960) 19; Colin Munro, ‘Laws and Conventions Distinguished’ (1975) 91 *Law Quarterly Review* 218, 233; Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 859; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 85; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 772.

agreement',¹⁵⁵ they set the common rules by which the members of plural groups shall comply so that they can coexist within a state. More precisely, Jaconelli notes that the essence of constitutional conventions 'is found to subsist in a stream of concordant actions and expectations deriving from such actions',¹⁵⁶ from which they draw their authoritativeness.¹⁵⁷ Since conventions can only be authoritative if there is a broad societal consent to abide by the standards that they establish,¹⁵⁸ they can efficiently embody the intrinsic principles of political constitutionalism.

Certainly, since no constitution can be entirely legal and devoid of conventions ensuring its operability,¹⁵⁹ the substantial importance of constitutional conventions is not a British peculiarity. Still, as the uncoded and non-hierarchical nature of the British constitution easily blurs its substance, conventions are particularly useful to fill any ensuing normative gap.¹⁶⁰ A watertight separation of law and convention cannot exist in a state like the United Kingdom whose (parliamentary) sovereignty is shaped by both legal norms and

¹⁵⁵ David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 105.

¹⁵⁶ Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 170.

¹⁵⁷ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 21.

¹⁵⁸ Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 144.

¹⁵⁹ David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 93; Richard Albert and David Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Practice' (2018) 16(3) *International Journal of Constitutional Law* 880, 881 and 883; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 3.

¹⁶⁰ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 231; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 16; Richard Albert and David Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Practice' (2018) 16(3) *International Journal of Constitutional Law* 880, 881.

political, moral, principles that are upheld conventionally.¹⁶¹ Although Jaconelli doubts that conventions can be integral parts of a comprehensive normative system because of their somewhat piecemeal nature,¹⁶² they have brought coherence and sense to British constitutionalism.¹⁶³ In that vein, Gordon observes that '[the] systemic character of the political constitution shows that it is not simply a set of facts that have to be accepted, but a complex framework which can be cultivated, reorganised and reinvigorated, to further enhance its democratic character and its effective operation'.¹⁶⁴ Accordingly, as noted by Perry and Tucker, the British constitution has indeed been shaped by 'interlocking convention structures (which are themselves a simple system) which reinforce each other, leading to reciprocal (and hence systematic) resilience'.¹⁶⁵ Furthermore, since the British constitution has lasted longer than all continental formal constitutions, the assumption that the formalisation of norms is a prerequisite for their steadiness can easily be debunked.¹⁶⁶

In practice, as constitutional conventions can either impose duties or confer entitlements,¹⁶⁷ they have structured, beyond theory,

¹⁶¹ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 283; Nick Barber, 'Laws and Constitutional Conventions' (2009) 125 *Law Quarterly Review* 294, 294; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 103.

¹⁶² Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 165.

¹⁶³ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 68; David Kenny, 'Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness' (2015) 38(2) *Dublin University Law Journal* 432, 435; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 784.

¹⁶⁴ Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 145-46.

¹⁶⁵ Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 787.

¹⁶⁶ Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 71.

¹⁶⁷ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 8.

how the United Kingdom is governed.¹⁶⁸ For instance, they play a central role in regulating legal and political processes, enforcing standards of good behaviour, regardless of their form, by non-judicial means, and ensuring that legally omnipotent institutions like Parliament do not abuse their powers.¹⁶⁹ In fact, constitutional conventions set genuine counterweights to legally unconstrained institutions in guaranteeing the upholding of fundamental British constitutional principles.¹⁷⁰ Conventions have prevented the monarch from acting against the advice of the Cabinet, the Lords from blocking the implementation of the manifesto on which the governing party was elected and potentially, as discussed in the next section, Parliament from amending unilaterally statutes like the Devolution Acts.¹⁷¹ This last element can be particularly decisive to determine whether federal principles are constitutionalised and normatively supreme in the United Kingdom.

In this regard, it is noteworthy that conventions can be both the triggers and the outcomes of momentous societal changes, as the federalisation of British constitutionalism would be. Understanding the distinction between bottom-up and top-down conventions is then highly relevant.¹⁷² Bottom-up conventions arise organically,

¹⁶⁸ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 237.

¹⁶⁹ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 9; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 195; Richard Albert and David Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Practice' (2018) 16(3) *International Journal of Constitutional Law* 880, 885.

¹⁷⁰ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 201.

¹⁷¹ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 136.

¹⁷² Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 766.

like footpaths,¹⁷³ when the normative elements underlying well-established customs have become the foundations of social rules; while top-down conventions are deliberately constructed by rulers so that some practices become politically binding norms.¹⁷⁴ If facts precede law regarding the making of bottom-up conventions, the authoritativeness of top-down conventions relies on an unequivocal will, sometimes made possible by bottom-up power-conferring and power-shifting conventions,¹⁷⁵ to set behavioural standards.¹⁷⁶

However, McHarg casts doubts on the ability to establish a top-down convention out of the blue, during parliamentary debates or following political statements, even if a particular practice is unprecedented.¹⁷⁷ She contends that ‘the obligatory quality of a convention cannot be established by mere declaration, but rather is constituted through the practice of constitutional actors’.¹⁷⁸ Nonetheless, she acknowledges that top-down conventions can embody the exercise of constituent powers, which would be meant to have normative effects over time rather than immediately.¹⁷⁹ The establishment and the authority of these conventions then rely primarily on the rulers’ influence on the evolution of the British

¹⁷³ Peter Morton, ‘Conventions of the British Constitution’ (1991) 15(2) *Holdsworth Law Review* 114, 126.

¹⁷⁴ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 183; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 767, 780 and 783-84.

¹⁷⁵ Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 774, 779 and 788.

¹⁷⁶ *ibid* 779, 782 and 784.

¹⁷⁷ Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 858 and 861.

¹⁷⁸ *id*, ‘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 13.21.

¹⁷⁹ *id*, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71(6) *Modern Law Review* 853, 862.

constitutional system.¹⁸⁰ Accordingly, top-down conventions indicate how this system can implement principles that are deemed fundamental,¹⁸¹ even with very few precedents,¹⁸² in a responsive, pragmatic, and coherent manner.¹⁸³

In practice, constitutional conventions, especially those that are top-down, serve as crucial devices in conciliating functionally both sides of British constitutionalism. Conventional and formally legal norms complete and mutually reinforce themselves.¹⁸⁴ For instance, although statutes endow the Crown with significant powers, they are conventionally held by the Cabinet, which reduces the disparities between legal and societal realities without reshaping exhaustively and formally the British constitution.¹⁸⁵ The creation, the implementation, and even the abrogation of conventional norms are mostly achieved following what shall be done politically in a given context rather than what was provided

¹⁸⁰ Joseph Jaconelli, 'Continuity and Change in Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 124; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 771.

¹⁸¹ Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 127.

¹⁸² Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 12; Jane Munro, 'Thoughts on the "Sewel Convention"' (2003) 23 *Scots Law Times* 194, 194; David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 100.

¹⁸³ Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 787.

¹⁸⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 293; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 74 and 340; Nick Barber, 'Laws and Constitutional Conventions' (2009) 125 *Law Quarterly Review* 294, 295.

¹⁸⁵ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 130 and 132; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 51.

statutorily, regardless of its actual contemporary relevance.¹⁸⁶ Indeed, conventions are developed in keeping with the core British constitutional principle that ordered and continuous evolutions are preferable to formal revolutions which would likely engender chaos. Conventional norms have a sedimentary nature akin to that of British constitutionalism, whose legitimacy, and ultimately its normative authority, is rooted in 'tradition, acceptance and practice', which are also the core sources of conventional duties.¹⁸⁷ Hence, I shall evaluate whether these duties can be operationalised and executed so that constitutional conventions can be normatively supreme.

7.2.3. Observing Constitutional Obligations

Although it can be tempting to assert that conventional constitutional duties are not binding, they are concretely enforceable, albeit not by purely legal means. They are not different from any norm, whose authoritativeness shall rely on the guarantee that it can be implemented beyond declaratory means.¹⁸⁸ In fact, Morton notes that conventions do not only describe relations of power as they are but also shape them normatively as they set standards with a binding prescriptive force.¹⁸⁹ The peculiarity of conventions is that they provide do so, while avoiding societal disregard, in mostly informal ways.

¹⁸⁶ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 775; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 217.

¹⁸⁷ David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 334.

¹⁸⁸ Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 767.

¹⁸⁹ Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 142.

A major issue regarding the authoritativeness of constitutional conventions has yet been their lack of justiciability. The ability of institutional third parties, especially of courts, to enforce conventional norms, particularly since they cannot be distinguished unmistakably from legal norms like statutes,¹⁹⁰ seems at best doubtful.¹⁹¹ At least legally,¹⁹² British courts are not empowered to coerce a person or an institution, and not even the ruler of the state, to comply with a convention unless she consents to be bound by it.¹⁹³ At the opposite of the common law, which is shaped judicially, conventions are based upon principles that arise and grow out of political realities, and courts have been reluctant to adjudicate on matters coming under the political constitution.¹⁹⁴

Nonetheless, courts have developed, without having been formally authorised to do so,¹⁹⁵ mechanisms empowering them to recognise the existence of conventions and to clarify their structuring substance,¹⁹⁶ particularly when it is disputed¹⁹⁷. As

¹⁹⁰ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 127.

¹⁹¹ David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 112.

¹⁹² *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 853.

¹⁹³ *ibid*; Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 160; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [146].

¹⁹⁴ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 880; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 872; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1150 and 1154.

¹⁹⁵ Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1155.

¹⁹⁶ TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 316; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 244; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 186; *ibid* 1148, 1151 and 1157.

¹⁹⁷ David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 343.

when they interpret statutory provisions to clarify their sense,¹⁹⁸ courts, although the extent of their powers remains controversial, can decipher the meaning of conventions, and ensure their actualisation.¹⁹⁹ Instead of systematically safeguarding conventions actively or refraining themselves from intervening in any case, courts shall facilitate the execution of conventional constitutional duties when that is effectively necessary and, foremost, wanted by political actors.²⁰⁰

Concretely, courts can act as the executors of constitutional conventions by various means. For instance, they can declare that some conventions uphold fundamental constitutional principles and that breaching them is an offense that shall be sanctioned politically, albeit not legally and forcefully.²⁰¹ The more these principles are put on a statutory footing, the more courts can authoritatively require the abidance by their corollary conventional duties, but always with great deference to the judgement of

¹⁹⁸ William Maley, 'Laws and Conventions Revisited' (1985) 48(2) *Modern Law Review* 121, 126.

¹⁹⁹ 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 13.58.

²⁰⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [146]; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 276; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1149.

²⁰¹ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 214; TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 313 and 315; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 195; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 94; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 30; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1148.

political actors.²⁰² Moreover, courts can uphold the standards of morality that are intrinsic to common law constitutionalism by enforcing power-shifting conventions,²⁰³ so that the behavioural expectations set by the British political constitution can be met.²⁰⁴ Consequently, there exist some grounds, as tenuous as they might be concretely, for the judicial safeguard of conventional norms and principles, especially if they are not strictly conventional.

In contemporary times, the link between statutory and conventional norms has become increasingly narrower, which is why it is considered that conventional norms may draw their binding strength from statutory ones rather than despite them.²⁰⁵ The source of the judicial power to enforce statutes can justify the existence of a power to enforce constitutional conventions. For instance, while conventional devices were initially decisive in safeguarding the autonomy of substate institutions, statutory norms can reinforce, or even supersede, long-standing conventional guarantees. Still, traditionally, it was considered that initially conventional duties would no longer be normatively conventional if they were posited statutorily or recognised judicially.²⁰⁶ However, Elliott and Thomas contend that conventions whose substance has been integrated into statutes would not be 'converted into laws', but would instead be

²⁰² Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1148 and 1155.

²⁰³ TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 313; *ibid* 1156-59.

²⁰⁴ Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1156-59.

²⁰⁵ Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853, 853.

²⁰⁶ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 135.

entrenched, 'recorded', within statutes and, ultimately, codified.²⁰⁷ So, as the binding strength of conventions, which is actual though intangible and effectively imperfect, has been increasingly recognised and secured, even by statutory means, that might yet be at the expense of their distinct constitutional role and status.

In that vein, it can be found that the frontiers between the legal and political sides of British constitutionalism are not delineated exclusively and squarely,²⁰⁸ especially regarding their ability to set constraining duties. As noted by Turpin and Tomkins, '[the] difference [between breaches of legal or conventional duties] lies in the nature of the enforcement and of the sanction', but not in the existence of a sanction.²⁰⁹ A political actor who breaches constitutional duties can be held liable to socio-political consequences that are far from being inconsequential²¹⁰ and that might even be more dissuasive effectively than purely legal sanctions.²¹¹ Certainly, conventions only have the worth and the authoritative character that citizens consent to grant them, whether because they sincerely agree with the moral principles they uphold or because they simply want to comply with social norms.²¹² Still,

²⁰⁷ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 50.

²⁰⁸ James Alt, 'The Constitutional Revolution of Tony Blair' in Terrence Casey (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009) 229; Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273, 292.

²⁰⁹ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 182.

²¹⁰ Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 153.

²¹¹ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 339.

²¹² AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 295; *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 857; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 6; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 51; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 24.

citizens obey judicial rulings and orders because they have consented to be bound by the decisions of institutions, rather than because these rulings and orders are inherently obligatory.²¹³ Therefore, Allan contends that the legal sense of accountability shall not be hierarchically superior to the political one and that the normative value of conventions shall be fully recognised, even by courts.²¹⁴

However, the execution of conventional constitutional duties, and the determination of the consequences of their potential inexecution, shall remain done mainly through political means.²¹⁵ It is both naïve and faulty to argue that judicial intervention is fundamentally required to enforce any obligation within a polity.²¹⁶ Elliott and Thomas highlight that an essential virtue of conventional norms is their ability to value the shared responsibility of political actors and institutions to abide by constitutional norms without being subject to judicial coercion.²¹⁷ In fact, breaches of conventional duties shall be fixed by remedies and sanctions that are deemed dissuasive in a particular societal context.²¹⁸ Certainly, the terms of the execution of a conventional duty and the consequences of failing to execute it shall be as straightforward as possible. Still, their operational flexibility can

²¹³ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 131; Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179, 194.

²¹⁴ TRS Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305, 312 and 320; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 244.

²¹⁵ *Re: Resolution to Amend the Constitution*, [1981] 1 RCS 753, 853.

²¹⁶ Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 163.

²¹⁷ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 60.

²¹⁸ David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 101.

optimise their responsiveness to the needs of a polity, their versatility to meet these needs, and, ultimately, their authority.²¹⁹

For better and for worse, the court of public opinion is the one that ultimately determines the best whether and how conventional and, more broadly, political duties are and should be enforced. The British constitutional system would likely collapse if citizens disregarded constitutional conventions and were indifferent to their breaches, especially those affecting the organisation of the state or the safeguard of individual rights.²²⁰ Despite contemporary debates on the merits of formalising the entrenchment of constitutional principles and empowering judges to enforce them in priority through judicial review,²²¹ these transformative ideas have not entirely legalised British constitutionalism.²²² As parliamentary sovereignty still stands even though its foundations were shaken, conventional duties are still enforced by the work of the people and of its elected representatives. Accordingly, conventions, despite the risk of their authoritativeness crumbling amidst popular indifference, remain staples of a resilient British political constitution. In this regard, the evolution of the protection of the devolution arrangements from being rolled back or repealed can shed light on the virtues and the potential downfalls of conventional norms, which are far from immanent. I shall then investigate whether, and the case being how, the principles

²¹⁹ Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1164.

²²⁰ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 317; Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 *Law Quarterly Review* 218, 235.

²²¹ Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 298-99.

²²² Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 140.

intrinsic to devolved and multi-level governance can be entrenched and, thus, supreme by formal or conventional means.

7.3. The Imperfect Entrenchment of Devolution within the British Constitutional Order

When devolution arrangements were enacted at the turn of the millennium, a constitutional convention was devised to guarantee the implementation of these arrangements beyond what the Devolution Acts expressly provided. While a sovereign British Parliament could not relinquish its powers formally on devolved matters, it had to be thwarted from overstepping the substate jurisdictions it had established. Otherwise, the status and the authority of substate institutions would have been in constant jeopardy, and British constitutionalism could not be characterised as substantively federal. To address these issues, constitutional norms shall guarantee the existence of devolved jurisdictions, especially conventionally, without eroding the normative supremacy of Parliament. Formulating and executing them has turned out to be both innovative and challenging.

7.3.1. Conciliating Devolution with Parliamentary Sovereignty

Devolution has considerably transformed a traditional British constitution that had long been shaped legally by statutes and politically by conventions. Devolution has not only led to the establishment of frameworks of multi-level governance for the benefit of the constituent nations but also advanced the decentralisation of the exercise of normative powers in the United Kingdom.²²³ Still, as highlighted in the previous chapter, the

²²³ *Whaley v Watson* [2000] SC 340, 360; 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) 104.

functioning of Parliament has remained predominantly unitary since devolution.²²⁴ Moreover, in the 1990s, British constitutionalism was not rethought exhaustively so that a canonical constitution, rather than Parliament, could hold a leading position and be endowed with a supreme status within the British constitutional order.²²⁵ Burgess' apprehension that devolution arrangements would be very vulnerable if their existence solely relied on a unilateral parliamentary will, which he raised a few years before their implementation,²²⁶ has not been completely debunked. In that vein, the Constitution Unit expressed concerns that political statements on the respect of substate jurisdictions would be vain if parliamentarians did not entrench the latter statutorily and were not required to declare expressly when they would make encroachments.²²⁷ So, although that does not necessarily have to be done by formalistic means, entrenching the devolution arrangements is vital to guarantee that the constituent nations can be normatively autonomous.²²⁸

²²⁴ Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 76; Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 63; Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 18

²²⁵ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 267; Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 267-68; 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; *Somerville v Scottish Ministers* (HM Advocate General for Scotland intervening) [2007] UKHL 44 [13]; 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) 43; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 2 and 116; 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.

²²⁶ Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 187-88.

²²⁷ Constitution Unit, *An Assembly for Wales* (1996) 135; Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 49.

²²⁸ *id.*, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 12.

Formalising the norms regulating the relations between central and substate entities is the simplest, and arguably the most secure, way to prevent and solve ambiguities and conflicts.²²⁹ That mitigates Jennings' worry that the political actors who are responsible for executing and enforcing conventional duties can disregard them blatantly and get away with it, which is a serious flaw of conventional norms.²³⁰ This concern is sensible bearing in mind that the relationships between central and substate entities have historically been plagued by power struggles, especially regarding (sensitive) financial matters²³¹. The enactment of statutes positing how the devolution arrangements shall be implemented has signalled the increasingly formal and legal character of British constitutionalism.²³² According to Winetrobe, the Devolution Acts are akin to written constitutions for the constituent nations.²³³ Devolved legislation can even be reviewed judicially,²³⁴ based upon, quite controversially though, unwritten constitutional principles.²³⁵ However, devolution is also very much shaped and ruled conventionally.²³⁶ Accordingly, the reality that 'the assessment of the substantive validity of statutes has been out of

²²⁹ Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 277.

²³⁰ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 344.

²³¹ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 233.

²³² AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 6; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 289; John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 414.

²³³ Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 93.

²³⁴ *ibid.*

²³⁵ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 335.

²³⁶ Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 62 and 71.

the judicial sphere for so long²³⁷ is accurate despite the enactment of the Devolution Acts, which enshrine fundamental principles. Moreover, courts would only be empowered to issue declarations of incompatibility regarding statutes contradicting these acts,²³⁸ which would yet come short of fully-fledged judicial review.

In practice, the persistence of parliamentary sovereignty, which was a key reason why Wheare considered that the constituent nations could not be federated entities,²³⁹ still hampers their constitutional recognition, even though they hold distinct normative powers nowadays. While the *Thoburn* ruling inferred that some substantively supreme norms on devolution are normatively supreme, the *Miller* ruling has reiterated the relatively unaltered sovereign status of Parliament.²⁴⁰ In fact, the establishment of new autonomous tiers of government was not intended to undermine parliamentary sovereignty, as they were instead meant to coexist.²⁴¹ British rulers, whether driven by institutional conservatism or by sincere conviction, have been reluctant to put an end to parliamentary sovereignty so that they could deliberately establish a plurinational federal state on its ruins.²⁴² Even the

²³⁷ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 46 and 106.

²³⁸ 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* (25th edn, LexisNexis Butterworths 2019) para 11.8.

²³⁹ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 11.

²⁴⁰ 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 16.32.

²⁴¹ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 1.

²⁴² Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 167; Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 281; David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 180; Michael Keating, 'Territorial Autonomy in Nationally Divided Societies: The Experience of the United Kingdom, Spain, and Bosnia and

ambitious and decentralist reforms undertaken by Tony Blair, which have acquired considerable authoritativeness over time since they have not been rolled back by his successors, did not undermine the long-standing constitutional conventions upholding parliamentary sovereignty.²⁴³ When the Devolution Acts were devised, several thinkers and politicians, like Redwood, feared that dividing state sovereignty, and even devolving powers to substate entities, would inexorably value national egoisms, foster disunion, and jeopardise individual freedoms.²⁴⁴ The will to avoid these grim outcomes has cooled transformative desires to avoid constitutional crises. Seeking to conciliate the unitary principles characterising parliamentary sovereignty with the federal principles that might shape the devolution arrangements would be aimed but also highly complex.²⁴⁵

The avoidance of potentially polarising debates that could have settled whether devolution shall strictly provide substate autonomy or lead to the federalisation of the United Kingdom has tangled the essence of British constitutionalism.²⁴⁶ Since constitutional reformists, such as Tony Blair, wanted to have their (new) cake and eat it, the process through which devolution could become a staple of contemporary British constitutionalism has been, at best,

Herzegovina' in John McGarry, Richard Simeon and Karlo Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015) 139.

²⁴³ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 279.

²⁴⁴ John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 135, 141-142 and 189.

²⁴⁵ Walter Bagehot, *The English Constitution* (2nd edn, first published 1872, D. Appleton & Company 1904) 296; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 162; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 17.

²⁴⁶ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 267.

half-baked.²⁴⁷ As dreaded by King, the moderation characterising the 'constitutional unsettlement' devised by the Blair Government has worsened constitutional issues instead of mitigating them.²⁴⁸ The non-occurrence of a cathartic constitutional moment that could start a new, more pluralistic, era, and the primarily peripheral nature of the contemporary reforms on multi-level governance have hampered the rise of devolution as a constitutional staple.²⁴⁹ While the pragmatic and asymmetrical nature of devolution is not intrinsically problematic, the devolution arrangements are insufficiently precise, principled, and coherent, which would make them haphazard and prevent them from being supreme.²⁵⁰ Moreover, the mechanisms ensuring that the fundamental institutional components of devolution can work together cohesively are lacking.²⁵¹ The dissemination of the structuring

²⁴⁷ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 38.

²⁴⁸ Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 91.

²⁴⁹ Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 277.

²⁵⁰ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 4 and 27; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 158 and 165; 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) 195; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 105; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 5; 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) 167; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 28; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 55; 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) 102 and 104.

²⁵¹ Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 234; Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 266; Philip Norton, 'The Constitution' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007) 115 and 119; Stephen Tierney, 'Flexible Accommodation: Another Case of British Exceptionalism' in Jaime

norms on devolution into various and varied sources would '[inhibit] a holistic interpretation of that material'²⁵² and make constitutional duties substantively ambiguous and hardly enforceable concretely.²⁵³

In fact, there would simply be no point in enacting supreme, and likely formal, constitutional norms, which intrinsically constrain political powers, in a state whose Parliament remains sovereign.²⁵⁴ The endless difficulty for this institution to bind itself, at least formally, and to self-impose restrictive thresholds to amend the Devolution Acts has highlighted how difficult setting in stone the devolution arrangements would be.²⁵⁵ Legally speaking, MPs can effortlessly revoke these arrangements (by the enactment of an ordinary statute) and, thus, renege on their promises to the Welsh, Scots, and Northern Irish to endow them with recognition and normative autonomy. Besides, as noted previously, they cannot even deprive themselves of the power of doing so, at least in keeping with an orthodox understanding of parliamentary sovereignty. So, according to Rahmatian, establishing a British federal state could hardly be done if the unitary characteristics of parliamentary sovereignty still prevailed and were not undermined, particularly by conventional means.²⁵⁶

Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 159; 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) 53; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 332.

²⁵² Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 480.

²⁵³ Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 95.

²⁵⁴ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 14.

²⁵⁵ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 49.

²⁵⁶ Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 629.

However, Keating argues that the supremacy of the principles underlying devolution might be entrenched and asserted, by referendum or special legislative amending procedures, without compromising the essence of parliamentary sovereignty.²⁵⁷ Despite his doubts that the British constitution, as a whole, could become federal, he contends that, concretely, 'Westminster could no longer change [constitutional arrangements on devolution] unilaterally and by ordinary law', and that the permanence of devolution is thus guaranteed.²⁵⁸ Operationally, the execution of conventional duties would be vital in achieving this objective and in upholding the principles underlying devolution. In that vein, Burrows notes that 'the adoption of non-legally binding mechanisms and procedures and new constitutional conventions' has stimulated coordinated policy-making and interinstitutional dialogue.²⁵⁹ The formal supremacy of parliamentary norms might not be constrained by these means, but that could be done politically, which is not insignificant considering the dual nature of British constitutionalism.²⁶⁰ Accordingly, multi-level governance can be made functional despite the non-existence of a formal and comprehensive legal framework in the United Kingdom.

Certainly, concerns can be raised that the substance of devolution could not be made sufficiently steady by conventions, whose authoritativeness would be at the whim of swinging popular and parliamentary moods. Moreover, conventions have historically

²⁵⁷ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 162.

²⁵⁸ *ibid* 135.

²⁵⁹ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 4.

²⁶⁰ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 116.

engendered chiefly incremental and somewhat mild changes,²⁶¹ mainly due to their valuation of tradition that has permitted to conserve principles like parliamentary sovereignty.²⁶² Nonetheless, a convention that prevents Parliament from overstepping the devolved jurisdictions of Wales, Scotland, and Northern Ireland without their consent (as that was already the case regarding the jurisdictions of the Channel Islands and of the Isle of Man) has arisen in the last decades.²⁶³ Hence, I shall decipher the substance of this transformative device to understand its impact on British constitutionalism properly.

7.3.2. The Transformative Impact of the Sewel Convention

Proposed by Lord Sewel amidst the parliamentary debates on the bills that became the Devolution Acts, the eponymous top-down convention was intended to entrench devolved autonomy without undermining parliamentary sovereignty.²⁶⁴ This aim was already

²⁶¹ Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 220.

²⁶² Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 46 and 188; id., *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 164-65; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 29; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 6; 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; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 171 and 260.

²⁶³ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 95.

²⁶⁴ HL Deb 21 July 1998, vol 592, col 791 (Lord Sewel); Andrew Tickell, 'Does Westminster Need Holyrood's Consent to Repeal the *Human Rights Act 1998*?' (2015) 33 *Scots Law Times* 160, 161; David Feldman, 'Constitutional Conventions' in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 100; HL Deb 24 February 2016, vol 769, col 305 (Lord Keen of Elie); Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 56; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765, 785 and 787.

pursued conventionally for the benefit of dominions following the enactment of the Statute of Westminster and of Northern Ireland during the Stormont era.²⁶⁵ Certainly, the central Parliament, which remains sovereign, can still repeal or amend unilaterally these acts and intervene on devolved matters, which can even be sought by the members of substate institutions.²⁶⁶ However, the Sewel Convention helps to avoid abuses since, contrary to its remote conventional ancestors, it has transformed the core structure of British governance, which would no longer be purely unitary.

Operationally, the Sewel Convention safeguards the jurisdictions of the substate nations, which shall not be overstepped or changed, (following consequential evolutions²⁶⁷) without the proper consultation of their institutions.²⁶⁸ Since, as noted

²⁶⁵ Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edn, Athlone Press 1996) 119; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 78; Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 175; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1156.

²⁶⁶ Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149, 174; 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) 149; HL Deb 8 December 2015, vol 767, col 1501 (Lord Keen of Elie); 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) 141.

²⁶⁷ Andrew Tickell, 'Does Westminster Need Holyrood's Consent to Repeal the Human Rights Act 1998?' (2015) 33 *Scots Law Times* 160, 161; 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) 149.

²⁶⁸ Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 129; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 19; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 415; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 3.

previously, the distinction between reserved and devolved matters shall not be watertight, central institutions shall also seek the consent of their substate counterparts before taking initiatives on joint matters.²⁶⁹ More precisely, this convention shifts the exercise of normative powers from Parliament, which retains them *de jure*, to substate institutions, which hold them *de facto* as part of a politically binding agreement that can hardly be overlooked judicially.²⁷⁰ This convention would then be instrumental in empowering the constituent nations to self-rule without interference from central institutions.²⁷¹ Indeed, by the effect of this conventional device, these institutions have chosen to self-limit their legal power to overpass the jurisdictions set by the acts that they enacted.²⁷²

Furthermore, the Sewel Convention is not only crucial to secure the autonomous exercise of substate self-rule, but also to foster shared rule, as it sets duties to dialogue and cooperate.²⁷³ This convention then serves as a tool enabling political actors to develop ‘mutual respect for each other’s constitutional authorities’ without judicial interventions being ineluctable to settle conflicts

²⁶⁹ 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) paras 13.18 and 13.36.

²⁷⁰ Farrah Ahmed, Richard Albert and Adam Perry, ‘Judging Constitutional Conventions’ (2019) 17(4) *International Journal of Constitutional Law* 1146, 1156.

²⁷¹ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 145.

²⁷² 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) 202.

²⁷³ HL Deb 21 July 1998, vol 592, col 791 (Lord Sewel); *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] UKSC 5 [136-37]; *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [19]; 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.

between them.²⁷⁴ Additionally, the Sewel Convention requires the acts enacted by substate institutions to be interpreted in a manner that maximises the extent of their normative powers, and that complies with other constitutional norms.²⁷⁵ In sum, this conventional instrument shields devolved powers from centralisation and unilateralism and upholds a somewhat federal division of the British sovereignty, as a formal constitution would.

Another significant impact of the Sewel Convention has been its ability to entrench the principles and the arrangements by which devolution is actualised without using formal means. It sets a 'manner and form' requirement²⁷⁶ that shall be complied with before substantially reviewing the substance of the devolution arrangements. In that vein, the need to respect the withholding of consent by a devolved assembly to adopt a legislative consent motion approving central interferences has become an integral part of British constitutional morality.²⁷⁷ Accordingly, it is somewhat politically unrealistic nowadays that Parliament can overlook what the substate nations want (or do not want) and then alter the devolution arrangements unilaterally and with impunity.²⁷⁸

²⁷⁴ Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 277.

²⁷⁵ Scotland Act 1998 (c 46) s 27(8); HL Deb 21 July 1998, vol 592, col 791 (Lord Sewel).

²⁷⁶ House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 21.

²⁷⁷ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 14.

²⁷⁸ 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) 174-75; Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 15; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 1-2; *ibid* 6 and 37.

Certainly, as this convention was initially devised by British political actors in a top-down manner,²⁷⁹ doubts can be raised on the strength of its roots within the British polity and on its legitimacy. Indeed, it is completely devoid of precedents from which it can draw its authoritativeness. Nonetheless, the Sewel Convention has been authoritative concretely because it relies on strong guiding principles that have been popularly accepted as binding on executive and legislative power holders.²⁸⁰ This convention, which has hardly needed to be enforced through external coercive mechanisms so far,²⁸¹ has been widely obeyed because citizens and officials alike have consented to be bound by the duties it set.²⁸² So, while central institutions could only roll back devolution if they secured a massive popular mandate to do so, that appears quite unlikely considering the structuring role of this convention.²⁸³

Furthermore, recent amendments to the Welsh and Scottish Devolution Acts have expressly recognised that substate institutions are ‘permanent [parts] of the United Kingdom’s constitutional arrangements’²⁸⁴ that can only be abolished by

²⁷⁹ Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 9.

²⁸⁰ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 56; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 788.

²⁸¹ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 6.

²⁸² McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 145.

²⁸³ JC Banks, *Federal Britain?* (Harrap 1971) 230; Vernon Bogdanor, ‘Devolution: Decentralisation or Disintegration?’ (1999) 70(2) *The Political Quarterly* 185, 187; 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) 234; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 324.

²⁸⁴ Scotland Act 1998 (c 46) s 63A; Government of Wales Act 2006 (c 32) s A1; Scotland Act 2016 (c 11) s 1 and 2; Wales Act 2017 (c 4) s 1 and 2.

referendum.²⁸⁵ These provisions have not only codified the essence of the Sewel Convention but would also have created a corollary formal constitutional duty. By the effect of a power-shifting convention, the constituent powers related to devolution shall then be exercised effectively by the citizens of the constituent nations rather than by Parliament. The multiple referendums held before the enactment, or the amendment, of the Devolution Acts serve as binding precedents of this conventional norm.²⁸⁶ Although the British constitution could not be altered automatically by a referendum held in a substate entity,²⁸⁷ as it remains consultative, it could trigger a centrifugal reformist dynamic that could not be overlooked. Nevertheless, what could guarantee that primarily conventional devices, which are based upon a shifting popular will, can reliably safeguard the permanent and supreme status of devolution?

7.3.3. The Limits of the Sewel Convention

Burrows noted in 2000 that, for devolution to thrive over time, ‘what is missing is a constitutional principle to bind the devolution settlement together and to provide a legal guarantee of devolved autonomy’.²⁸⁸ In fact, it was contended that the constitutional effect of a Sewel Convention would be doomed to get ‘dogged by controversy and misunderstanding’²⁸⁹ if it only came under mere

²⁸⁵ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 324; 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) 110.

²⁸⁶ HL Deb 25 June 1999, vol 602, col 1199 (The Lord Chancellor).

²⁸⁷ Thomas May, *Parliamentary Practice* (25th edn, LexisNexis Butterworths 2019) para 28.71.

²⁸⁸ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 120.

²⁸⁹ Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 4.

political will.²⁹⁰ Two decades later, asserting that the Sewel Convention can concretely fill these voids is rather controversial, both legally and politically. Certainly, the entrenchment of ‘the Vow’ made by Scottish unionists that Scottish substate institutions (and later the Welsh, but not the Northern Irish,²⁹¹ ones) shall never be abolished was meant to put an essentially political claim on posited, and thus steadier, grounds.²⁹² By putting this conventional norm on a statutory footing after the 2014 Scottish Referendum, the Cameron Government intended to address this issue without codifying the British constitution more exhaustively.²⁹³ The manner and form requirement of express repeal has concretely limited the ability of Parliament to breach the Sewel Convention, particularly since it is societally expected that Parliament abides by its commitments.

However, the entrenchment, at least from British standards, of the Sewel Convention, which was meant to make devolution a supreme element of British constitutionalism, would have been a sword cutting through water.²⁹⁴ Indeed, manner and form

²⁹⁰ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 15; Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81(5) *Modern Law Review* 765, 786.

²⁹¹ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 5-6.

²⁹² House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 11; HL Deb 24 February 2016, vol 769, col 306 (Lord Keen of Elie); *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [149]; 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) 109.

²⁹³ Cabinet Office, *The Implications of Devolution for England* (Cm 8969, 2014) 24; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 24.

²⁹⁴ Scottish Government, *Supplementary Legislative Consent Memorandum - Scotland Bill* (LCM (S4) 37.2, 2016) para 32; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [148]; Mark Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76(2) *Cambridge Law Journal* 257, 278-79; Mark Elliott and Robert Thomas, *Public*

requirements would not be applicable to conventions whose substance had only been posited without engendering fully-fledged and stand-alone statutory duties.²⁹⁵ In practice, the entrenchment of the substance of the Sewel Convention in statutes can only last as long as they are not amended or repealed. Central institutions do not only retain, in accordance with parliamentary sovereignty, the ability to intervene unilaterally on devolved matters, but also that of reshaping unilaterally the scope of devolved jurisdictions.²⁹⁶ Moreover, the provision that Parliament shall ‘normally’ comply with the Sewel Convention is a loophole that could empower, and even entitle, this institution to overlook the importance of legislative consent motions (or the lack thereof).²⁹⁷ Furthermore, as British officials intended the Sewel Convention to remain normatively conventional even after its codification, courts shall not intervene actively to uphold its core substance, and more precisely the principle of subsidiarity underlying it.²⁹⁸ The Supreme Court confirmed this stance in the

Law (3rd edn, Oxford University Press 2017) 328; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 5-6; 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) paras 13.83-13.84; Alison Young, ‘The Relationship between Parliament, the Executive and the Judiciary’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 338.

²⁹⁵ House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government’s Draft Scotland Clauses* (HC 1022, 2015) 13.

²⁹⁶ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 7; 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) 141.

²⁹⁷ HL Deb 8 December 2015, vol 767, col 1502 (Lord Keen of Elie); HL Deb 21 March 2016, vol 769, col 2070 (Lord Keen of Elie); Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79(6) *Modern Law Review* 1019, 1039; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 15.

²⁹⁸ *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53 [79]; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government’s Draft Scotland Clauses* (HC

Miller ruling when it both refused to grant a legal status to this yet crucial convention and to make it evolve beyond what the members from central and substate institutions intended.²⁹⁹ Since the entrenchment of the Sewel Convention in Devolution Acts did not make it a formal, statutory norm, political actors still have the opportunity to implement it with deference, for better and for worse.

Even despite their esteem for the constitutional role of the Sewel Convention, at least officially, it is quite uncertain whether British rulers can walk their talk.³⁰⁰ Although the evolution of devolution signals that this device has consistently been normatively steadied and substantively improved,³⁰¹ it has not been tightly secured from counter institutional initiatives and unambiguously made constitutionally supreme. Accordingly, current conventional commitments might not necessarily hold over time,³⁰² particularly if antagonistic socio-political pressures arise. As noted by Peters, ‘a decentralising political movement must identify ways of

1022, 2015) 13; HL Deb 8 December 2015, vol 767, col 1502 (Lord Keen of Elie); HL Deb 24 February 2016, vol 769, col 307 (Lord Keen of Elie); HL Deb 21 March 2016, vol 769, col 2070 (Lord Keen of Elie).

²⁹⁹ Aileen McHarg and James Mitchell, ‘Brexit and Scotland’ (2017) 19(3) *The British Journal of Politics and International Relations* 512, 524; 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 13.76; Alison Young, ‘The Relationship between Parliament, the Executive and the Judiciary’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 338.

³⁰⁰ 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) 300.

³⁰¹ Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) paras 21-22; Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015) 15; Wales Office, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015) 19; HL Deb 24 November 2015, vol 767, col 604 (Lord Lang of Monkton).

³⁰² Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 144.

mobilising political powers if it is to be successful'.³⁰³ Since centralisation has been an enduringly structuring trend of British constitutionalism, guaranteeing substate autonomy by mostly conventional means can hardly be done in absence of a continuous political will. Still, the long-standing valuation of what Jackson describes as the British 'social union' would have generated a certain apathy among the citizens about the need for them to defend the recognition of substate diversity.³⁰⁴ In that vein, doubts have been cast that the citizens of the constituent nations have meaningfully intimated that British sovereignty shall be divided to improve constitutional governance.³⁰⁵ Indeed, societal patterns, like the appreciation by some citizens of the benevolence of overarching central institutions, tend to die hard. Consequently, the authority of the Sewel Convention is far from being immanent, and the execution of its corollary duties is not automatic.

It can yet be contended, certainly not without reason, that seeking to entrench the core components of devolution efficiently and durably has shaken the foundations of the British constitution.³⁰⁶ For instance, it has been societally accepted that Parliament no longer retains effectively the concrete powers that were devolved

³⁰³ 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, 82.

³⁰⁴ Ben Jackson, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50, 55.

³⁰⁵ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 283.

³⁰⁶ Richard Rawlings, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 262; 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) 137; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 278; HL Deb 21 March 2016, vol 769, col 2075 (Lord Hope of Craighead).

to the constituent nations.³⁰⁷ Furthermore, the binding strength and the normative worth of the Sewel Convention can only be assessed when its constraining effect is tested by adverse circumstances that have not occurred yet.³⁰⁸ Consequently, no definitive statement regarding its authority can be made so far. However, I must note that both the persistence of legal parliamentary sovereignty and a potential popular will (especially in emergencies) for central omnipotence might empower Parliament to quash the Sewel Convention and disregard the duties it sets. This is a possibility that cannot be taken lightly.

I recognise that the Sewel Convention was intended to entrench the core principles and elements of the devolution arrangements into a British constitution that is not entirely tangible. Sound intents have shaped its establishment and its implementation. That has had the effect, in fact but not necessarily in law, of endowing devolution with a supreme constitutional status that can hardly be challenged concretely. However, the Sewel Convention cannot be unambiguously characterised as constitutionally supreme as long as doubts surrounding its binding strength and its authoritativeness persist. Even in its entrenched form, this conventional device cannot guarantee the permanence of devolution as suitably as a formal constitutional norm due to its intrinsically political and effectively fragile nature.³⁰⁹ Accordingly, while the devolution arrangements can be upheld in a supreme manner politically and conventionally even amidst fast-changing and challenging circumstances, devolution could not be supreme

³⁰⁷ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 109.

³⁰⁸ Jane Munro, 'Thoughts on the "Sewel Convention"' (2003) 23 *Scots Law Times* 194, 195.

³⁰⁹ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 8.

in a legal sense. Especially formally, federal principles rest on shaky grounds, even though they shape the substance of contemporary British polity and constitutionalism.

Part 3: Moving towards Federalism?

8. Devolution amidst British Constitutional Change and Continuity

After having examined the substance of the devolution arrangements from a federal perspective in the second part, I can draw three conclusions. First, the establishment of substate norm-making institutions has endowed the British constituent nations with extensive powers to self-rule. Second, despite a clear will to foster dialogue and cooperation between central and substate entities, the lack of coherent and functional heterarchical interinstitutional structures has hampered the exercise of shared rule in a federal sense. Third, the non-existence of a canonical supreme British constitution complexifies the entrenchment of the principles underlying devolution, whose substance would yet be federal. From a legal perspective, a conventional device like the Sewel Convention cannot not necessarily guarantee the supreme character of devolution in an authoritative manner that does not solely rely, at least to some extent, on political will.

However, determining whether the United Kingdom is becoming a federal state cannot be done in isolation. Federalism is not actualised when its formal embodiments meet some abstract conditions but when its core principles shape the functioning of a composite plural polity. Accordingly, I evaluate whether some significant developments in British constitutionalism that are not related directly to devolution have highlighted its contemporary federal character. I first analyse the diverse reasons for the decline of orthodox parliamentary sovereignty. I then investigate how devolution has reignited complex debates on substate national identity instead of settling them. Finally, I study the links between devolution and another transformative process: Brexit.

8.1. The Retreat of British Parliamentary Sovereignty

Although devolution was not meant to erode the sovereignty of Parliament or to lead to the enactment of a codified constitution, parliamentary sovereignty can no longer be apprehended in a strictly orthodox sense. Parliamentary powers have been increasingly limited due to the impacts of processes that were not necessarily related to devolution. In keeping with the British constitutional tradition, consequential evolutions can occur without there being ground-breaking and overarching revolutions. There would even be signals that, in practice, devices like constitutional statutes and mechanisms like judicial review are no longer deemed intrinsically foreign to British constitutionalism. I shall then contemplate the ways by which they can be operated to assess their genuine character.

8.1.1. Increased Constraints on British Parliamentarism

Traditionally, British parliamentary sovereignty was grasped in an orthodox sense so that its exercise could not be constrained by any legal act, which explains why it was deemed supreme.¹ Contrary to national sovereignty, which could deliberately be sacrificed partially, parliamentary sovereignty is not a 'tradable asset'.² It should be unaltered or should simply not be. However, differences between the theoretical and ideal form of this concept and a practical one have always existed.³ For instance, the

¹ HWR Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172, 196.

² Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 28.

³ *Blackburn v AG* [1971] 1 WLR 1037 [7]; Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 167; Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political*

Westminster Parliament relinquished its sovereignty over former colonies and dominions without that being seen as a sign that it ceased to be the British sovereign.⁴ Even in 1977, Birch considered that the sovereignty of Parliament, which could not be limitless politically and effectively, could not fundamentally justify alone the rejection of proposals on devolution.⁵ In contemporary times, it is even more essential to apprehend the functioning of parliamentary institutions beyond overly abstract absolutes.

In fact, although it remains a sovereign British institution that is not superseded normatively by a formal supreme constitution, Parliament has effectively renounced to exercise some of its powers without necessarily seeking to retain them legally.⁶ Despite the legal, though very theoretical, possibility for Parliament to legislate on devolved matters, it no longer has the legitimacy, and thus the authority, to act as an omnipotent institution.⁷ Furthermore, Parliament has not only transferred over time some of its powers to the institutions of the constituent nations, but also to European institutions and to British courts.⁸ While the

Accountability (Oxford University Press 1984) 209; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 270; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 237; 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.

⁴ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984) 172, 201 and 205; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 136; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th 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.

⁵ Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 168.

⁶ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 283.

⁷ *ibid* 284; Thomas May, *Parliamentary Practice* (25th edn, LexisNexis Butterworths 2019) para 11.9.

⁸ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 283; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 134; Sionaidh Douglas-

Devolution Acts, the European Communities Act (ECA) 1972 and the Human Rights Act (HRA) 1998 may not have, as such, an unquestionable supreme normative value, they have structured, in a binding manner, British constitutional governance.⁹ Accordingly, their substantive worth is exceptionally high within the British constitutional order.

The enactment of those statutes during the second half of the twentieth century has signalled a critical evolution of the concept of parliamentary sovereignty, which was even acknowledged by a traditionalist constitutionalist like Wade.¹⁰ As parliamentarians could enact norms providing that their powers shall be narrowed, even though they could always renege such self-limiting commitments, that spells the end of the supreme status of parliamentary institutions.¹¹ Although this outcome has not occurred yet, there have been eloquent indications of the contemporary retreat of parliamentary sovereignty. Even without considering the implementation of the devolution arrangements, British constitutionalism has changed considerably over the last decades. Some long-standing assumptions on its nature have indeed been challenged.¹²

For centuries, it was considered that the compliance by British citizens and rulers with constitutional conventional duties based

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) 175.

⁹ *Blackburn v AG* [1971] 1 WLR 1037 [8] and [10]; *R (Jackson) v Attorney General* [2005] UKHL 56 [159].

¹⁰ HWR Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568, 573.

¹¹ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 68 and 79.

¹² 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) 15.

upon the common law could efficiently curb the majoritarian excesses of Parliament and, more particularly, safeguard individual rights.¹³ However, these devices of the British political constitution can no longer fulfil these duties all by themselves.¹⁴ The enactment, of the European Convention of Human Rights (ECHR), to which the United Kingdom is a party, after WW2 has been the trigger for a paradigm shift.¹⁵ When British rulers consented to be bound by this continental instrument, they recognised that human rights shall be constitutionalised formally and safeguarded through the operation of both legal and political mechanisms.¹⁶ In practice, courts have been empowered to declare that fundamental constitutional duties and requirements are breached when a statute infringes a right entrenched in the ECHR. Although courts cannot invalidate such a statute,¹⁷ the fact that the exercise of the normative powers of Parliament could be reviewed to ensure that it complies with the standards set by the ECHR was a constitutional breakthrough. Consequently, there exists, at the very least, an enforceable political duty for

¹³ Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 168; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 62; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 324.

¹⁴ Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 69; Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 254; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 323.

¹⁵ Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 168; John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 183.

¹⁶ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 183; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 15.

¹⁷ 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) 226.

parliamentarians, and more broadly for political actors, to legislate and to act with due respect for some substantive higher norms.¹⁸

Additionally, in 1972, the British Parliament enacted the ECA, by which the United Kingdom became a member of the European Economic Community, which ultimately evolved into the EU. That showed that Parliament could narrow statutorily the actual scope of its sovereignty and, potentially, bind its successors.¹⁹ In the *Blackburn* ruling, which confirmed the legality of European integration, the Lords characterised this process as ‘irreversible’ since ‘the sovereignty of these islands will thenceforward be limited’ and could not be retained by the Westminster Parliament.²⁰ By enacting the ECA, which provided that European law shall be transposed into British law and engender direct normative effects, Parliament endowed European norms with a direct and fundamentally British source of authority.²¹ Furthermore, since the first British constitutional referendum was held in 1975 to confirm the enactment of the ECA, debates on European integration would have marked the beginning of a decisive shift towards popular sovereignty.²² When the devolution arrangements were

¹⁸ Nick Barber, *The Constitutional State* (Oxford University Press 2010) 80.

¹⁹ HWR Wade, ‘Sovereignty: Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568, 572-73; John Redwood, *The Death of Britain?: The UK’s Constitutional Crisis* (Palgrave Macmillan 1999) 21.

²⁰ *Blackburn v AG* [1971] 1 WLR 1037 [2].

²¹ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 105; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [77]; Jo Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80(4) *Modern Law Review* 685, 686; Paul Craig, ‘Brexit in the UK Constitution’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 103.

²² Ben Wellings and Helen Baxendale, ‘Euroscepticism and the Anglosphere: Traditions and Dilemmas in Contemporary English Nationalism’ (2015) 53(1) *Journal of Common Market Studies* 123, 128; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [23]; Kevin O’Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 74 and 77; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 2.

implemented, it was contended that the cohesive work of three levels of governance (European; state; substate/national) holding legislative powers would spell the end of the last remnants of British constitutional unitarism.²³

In that vein, although that was somewhat unclear and misunderstood originally,²⁴ the most disruptive effect of European integration was the establishment of a normative hierarchy that parliamentary statutes would not top.²⁵ European norms would not be enforced alongside those statutes and would even be superior to them since they were integral parts of internal British law due to the principle of direct effect.²⁶ Contrary to the long-standing British

²³ Constitution Unit, *An Assembly for Wales* (1996) 103; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 518.

²⁴ 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) 162; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 78; 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) 324.

²⁵ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 545; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 345; 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; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 80; 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, 399; 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) 80; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 266; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 54; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 43.

²⁶ John Bell and George Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995) 105; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 54; 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) 15; Robert

constitutional tradition in this regard, courts became empowered, but initially with limited effects,²⁷ to invalidate acts and statutes that contradicted European norms.²⁸ That was recognised in the second *Factortame* ruling, when the Lords ‘granted an injunction to forbid a minister from obeying [an invalid] statute’²⁹, and confirmed that they could disapply a parliamentary statute, which they could not do otherwise, if it breached European norms.³⁰ Consequently, the transplant of the mostly continental concept of Kelsenian legal supremacy was attempted in the United Kingdom, even though that could jeopardise the sovereignty of Parliament.³¹

Still, the increased legalisation of British constitutionalism did not lead to the complete crumble of parliamentary sovereignty.³² In

Schutze, ‘Introduction: British “Federalism”?’ in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 15; Paul Craig, ‘Brexit in the UK Constitution’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 104.

²⁷ *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, 612 and 632.

²⁸ *ibid* 628 and 659; Peter Oliver, ‘Abdicating and Limiting Parliament’s Sovereignty – Reply to Goldsworthy’ (2006) 17(2) *King’s Law Journal* 281, 284; 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) 13; 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) 142; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 71.

²⁹ HWR Wade, ‘Sovereignty: Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568, 568.

³⁰ *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, 623; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 37.

³¹ 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) 37.

³² Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 280-81, 298 and 302; Patrick Birkinshaw and Mike Varney, ‘Britain Alone Constitutionally: Brexit and *Restitutio in Integrum*’ in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The*

fact, parliamentary and European supremacies hardly clashed in an irreconcilable manner that would have required courts to enforce EU norms that Parliament deliberately disregarded.³³ Whether a fully-fledged judicial review could arise as a corollary of European integration could never be proved undoubtedly, and the British Supreme Court even judged this outcome quite unlikely.³⁴ Moreover, although parliamentary statutes were subordinate to European treaties and law, the supremacy of the European normative order was hardly intimated by British political actors since an important number of them deemed that it lacked legitimacy.³⁵ It can then be argued that the ECHR and EU norms, which were supranational instruments, could not reshape how British institutions had worked internally for centuries.³⁶

Nonetheless, in 1998, when Parliament enacted the HRA and incorporated the substance of the ECHR into a fully-fledged British statute, it further constrained its freedom to legislate. The resulting constraints were ground-breaking because they were set directly by parliamentarians, by those who are entrusted to convey the

Implications and Consequences and UK Exit from the EU (Wolters/Kluwer 2016) 35.

³³ *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, 659; Jeffrey Goldsworthy, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010) 298; Paul Craig, 'Brexit in the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 104.

³⁴ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [105] and [206].

³⁵ *ibid* [105]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [80]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [61] and [67]; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 20.

³⁶ 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) 2 and 15; David Bailey and Leslie Budd, 'Brexit and Beyond: a Pandora's Box?' (2019) 14(2) *Contemporary Social Science* 157, 160; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 1-2.

Britons' will, instead of having been imposed by a supranational institution.³⁷ Being portrayed by Bogdanor as the 'cornerstone of the new British Constitution',³⁸ the HRA paved the way for the rise of a peculiar British process of judicial review.³⁹ This outcome seemed likely to happen as, concomitantly, courts were empowered to quash substate decisions or to strike down devolved norms as continental courts do to uphold constitutional provisions. Still, since parliamentary statutes infringing the HRA could only be declared unconstitutional without being invalidated, this Act would not lead to the establishment of a British constitutional sovereignty overshadowing that of Parliament.⁴⁰ However, as noted by Tierney, the implementation of the HRA displayed how fundamental values or principles could be entrenched through a judicialisation of British constitutionalism that would not compromise the preservation of parliamentary sovereignty.⁴¹ I shall then evaluate whether the principles structuring the devolution arrangements can be entrenched by non-conventional means maximising the certainty of their substance and of their existence.

³⁷ *R v Her Majesty's Advocate & Anor* [2002] UKPC D3 [140].

³⁸ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 116.

³⁹ *Anderson, Reid and Doherty v The Scottish Ministers* [2002] SC 63 [1]; *R v Her Majesty's Advocate & Anor* [2002] UKPC D3 [1], [18] and [100]; Richard Cornes, 'Cartographers of the New Constitutional Settlement: The United Kingdom's Top Courts and Devolution' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 440; *BH and H v Lord Advocate* [2012] UKSC 24 [31].

⁴⁰ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 184; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 117.

⁴¹ 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) 142.

8.1.2. Constitutional Statutes and Devolution

As noted previously, the place of devolution within an evolving albeit persistently conservative British constitutional order remains relatively unsecured from a legal perspective. As for the constitutionalisation of human rights and the implementation of European normative hierarchies, the recognition of the multi-level character of contemporary British governance can hardly be conciliated effortlessly with the preservation of parliamentary sovereignty. Nevertheless, the British constitution has become increasingly diffused and composite due to the joint and simultaneous effects of these developments that have decentralised its operation in a disruptive manner.⁴² In fact, European integration has provided insights on the optimal institutionalisation of devolution, and consequently on the recognition of the substate nations. Burrows even contends that 'devolution is like a mirror image of [European integration]'.⁴³ However, numerous members of British central institutions who invoked the principle of subsidiarity (which is a fundamental principle of EU law) to secure British autonomy within the European institutions were somewhat reluctant to implement this principle in the United Kingdom.⁴⁴ According to Marquand, these passionate defenders of subsidiarity at the European scale should have overtly advocated the division of British state sovereignty on

⁴² John Morison, 'Constitutionalism, Civil Society and Democratic Renewal in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2nd edn, Palgrave 2006) 238; 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) 41.

⁴³ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 189.

⁴⁴ David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 182; 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) 41.

substantively federal lines, which yet did not happen concretely, to be coherent.⁴⁵ They would have rather apprehended multi-level governance with opportunism, since they would have mostly sought to maximise the scope of their powers.

Meanwhile, despite their initial reluctance to support European integration,⁴⁶ substate nationalists have become some of its staunchest supporters. They understood how it could help them to gain autonomy without constantly having to seek the permission of central British institutions.⁴⁷ Accordingly, the constituent nations established increasingly direct relationships with European institutions, that were shaped by the principle of subsidiarity, and became empowered, normatively and financially, to act on some 'community' matters, without central institutions serving as intermediaries.⁴⁸ Although they did not necessarily embrace

⁴⁵ David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 182.

⁴⁶ Michael Keating, 'The European Question' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 103; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 513.

⁴⁷ Atsuko Ichijo, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004) 50, 76 and 149; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 299; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 92; 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, 296-97; 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) 20; Michael Keating, 'The European Question' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 103; 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) 156; Alan Greer, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134, 135.

⁴⁸ Charlotte Davies, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989) 98; Constitution Unit, *An Assembly for Wales* (1996) 36; Michael Goldsmith, 'British Local Government in the European Union' in Jonathan Bradbury and John Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European*

federalism overtly, nationalists, especially in Scotland, grasped that small nations shall implement the federal principle according to which sovereignty is divisible both within and beyond state borders in contemporary times.⁴⁹ Devolution, in conjunction with European integration, has then highlighted the multinational character of the British polity and the need for its governance frameworks to reflect it. Despite the concerns of some of their members on the loss of some of their powers, central institutions, could not reverse this evolution without triggering a constitutional crisis. This reality shall not only be recognised, but also safeguarded, constitutionally.

However, it was concluded in the last chapter that the Sewel Convention could hardly guarantee the entrenchment of the devolution arrangements by itself as long as Parliament remained the sovereign of the United Kingdom. Nonetheless, the non-existence of a canonical and codified British constitution does not inexorably prevent the use of legal mechanisms to shape and constrain the exercise of powers regarding the devolution

Integration (Routledge 1997) 216; John Redwood, *The Death of Britain? : The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 118 and 125; Michael Keating, 'From Functional to Political Regionalism: England in Comparative Perspective' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 157; Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 34; Alan Greer, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134, 135.

⁴⁹ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 99; Ben Jackson, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50, 54; Michael Keating and Malcolm Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2nd edn, Luath 2015) 136; 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) 3; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 57; 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) 177.

arrangements.⁵⁰ Due to the influence of the continental legal thought on British constitutionalism since the United Kingdom became a member of the EU, it can be argued that all statutes are not normatively equal.⁵¹ The role of constitutional statutes, whose binding strength is based upon the common law because of their structuring, and constituent, role within the British constitutional order, shall be fully appreciated.⁵² Consequently, despite the non-existence of a formal supreme hierarchy of statutes, Parliament shall be required to assert expressly its intent to amend or repeal a core provision of those statutes, which are deemed substantively fundamental in contemporary times.⁵³

As highlighted previously, the existence of constitutional statutes was acknowledged even before the turn of the millennium. Even several orthodox thinkers, though not all of them,⁵⁴ considered that statutes like the Acts of Union 1707 and 1800, the ECA and the Parliament Acts 1911 and 1949 were constitutionally superior, at least substantively, to other 'ordinary' statutes.⁵⁵ More precisely, in the *MacCormick* ruling, the Lords asserted that Parliament was not empowered to alter the Act of Union in 1707 as it pleased and to refuse to comply with its provisions.⁵⁶ In this landmark ruling, it was

⁵⁰ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207].

⁵¹ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 157.

⁵² *Thoburn v Sunderland CC* [2003] QB 151 [62]; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 464.

⁵³ *Thoburn v Sunderland CC* [2003] QB 151 [60]; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 15; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 3.

⁵⁴ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 10.

⁵⁵ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 177.

⁵⁶ *MacCormick v Lord Advocate* [1953] SC 396 [2].

found that Parliament could not only be restrained politically, but also judicially, from repealing the guarantees on the upholding of Scottish autonomy due to their substantive constitutional worth.⁵⁷ In that vein, Smith argued in 1961 that, despite the non-existence of precedents on this matter, Scottish courts could prevent British central institutions from altering domineeringly the provisions of what is fundamentally a constituent treaty between England and Scotland.⁵⁸ Still, this audacious, and somewhat counter-cultural, argument has had slight legal or doctrinal echo, at least until it has been made clear since devolution that Scotland is and should be an autonomous constituent nation.

However, it is difficult, if not impossible, to define unambiguously what characterises a constitutional statute both substantively and formally.⁵⁹ Since there could hardly be a definite, exhaustive, and immutable list of constitutional statutes, their structuring role within the British constitutional order appears pretty limited.⁶⁰ Still, the criteria set in the *Thoburn* ruling (the impacts of statutes on the 'legal relationship between citizen and State' and on fundamental rights⁶¹) and by Ahmed and Perry (the structuring role of statutes

⁵⁷ TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 213; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 543 and 550; *R (Jackson) v Attorney General* [2005] UKHL 56 [106]; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 246; Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008) 247.

⁵⁸ TB Smith, *British Justice: The Scottish Contribution* (Stevens 1961) 212.

⁵⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [122]; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 286 and 288.

⁶⁰ Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) paras 5.8 and 5.9; 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) 157; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 465 and 468.

⁶¹ *Thoburn v Sunderland CC* [2003] QB 151 [62].

in the societal and constitutional making of the United Kingdom⁶²) provide useful, albeit not absolute, guidelines. Law-applying officials, like judges, shall use them to identify constitutional statutes.⁶³ They shall primarily consider whether these norms are substantively constitutive of the contemporary United Kingdom. It has also been discussed that the Speaker of Parliament could ‘certify’, as she already does for money bills, that some bills are the outcomes of the exercise of constituent powers because of their fundamental importance for the British polity.⁶⁴ This proposal is operationally sound and coherent with the British constitutional practice.

Therefore, based upon the aforementioned criteria, the Devolution Acts shall be characterised as constitutional statutes.⁶⁵ This conclusion fits well with the Supreme Court’s assertion that the repeal of the Scotland Act could only be provided by an express statutory provision ‘because of the fundamental constitutional nature of the settlement that was achieved by [it]’.⁶⁶ Bearing in mind that Parliament, as a sovereign institution, holds the duty to uphold the compact uniting the British constituent nations, constitutional statutes like Devolution Acts serve as binding self-

⁶² Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) *Oxford Journal of Legal Studies* 461, 466-67, 469-70 and 473.

⁶³ John Gardner, ‘Can There Be a Written Constitution?’ (2009) *Oxford Legal Studies Research Paper* 2009, 11.

⁶⁴ Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.11.

⁶⁵ Vernon Bogdanor, ‘Devolution: Decentralisation or Disintegration?’ (1999) 70(2) *The Political Quarterly* 185, 187-88; *Thoburn v Sunderland CC* [2003] QB 151 [62]; Iain McLean, *What’s Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 327; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 2.2.22; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207]; Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37(2) *Oxford Journal of Legal Studies* 461, 465.

⁶⁶ *BH and H v Lord Advocate* [2012] UKSC 24 [30].

denying ordinances.⁶⁷ Still, despite the increasing recognition of the authoritativeness of constitutional statutes, asserting that enforcing them secures their core substance and, in a certain way, their permanence remains uncertain.

8.1.3. Judicial Guardians of the British Constitution

In a system in which the will of most MPs becomes the law of the state, there is a risk that majoritarian impulses cannot be countered simply by statutory or conventional self-restraint.⁶⁸ Since the MPs representing the constituent nations constitute a structural minority against English MPs, what these nations want, and even what the devolution arrangements provide, could be disregarded without breaching any legal norm. Parliamentarians can amend the Devolution Acts if they consider that their implementation is too cumbersome and overly circumscribes their powers. Despite the importance of democratic institutions in ensuring that the British political constitution sets authoritative standards,⁶⁹ systemic misbalances in their functioning can prevent them from upholding the constitutive elements of British multinationalism. Consequently, courts serve as, in Bellamy's words, a 'counter-majoritarian check'⁷⁰ to extensive parliamentary powers because these institutions are outside the political sphere and can make fair decisions regardless of public opinion.⁷¹ Since remedies are crucial to uphold the rule of law when it is

⁶⁷ Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 139.

⁶⁸ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 28.

⁶⁹ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 301.

⁷⁰ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 28.

⁷¹ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 178; *ibid* 193; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 39.

disregarded, courts can also provide them by serving as dispassionate and objective adjudicators.⁷² Orthodox constitutional claims regarding the role of courts have then been challenged directly, particularly to secure the multinational character of British polity, even without a supreme federal court.

In practice, the need for securing the constitutional status, and even the existence, of the Devolution Acts has required adjustments to the balance between political and judicial institutions. The intents to deconcentrate the exercise of state power and to safeguard individual rights, which constitutional statutes have furthered, have legitimised active judicial interventions to settle conflicts and misunderstandings.⁷³ The last decades have been characterised by a growing societal awareness of the need to protect some rights and interests, whether they be individual, collective or, more precisely, national. As in continental states, judges have become entrusted as the fully-fledged guardians of the British constitution. Still, it remains challenging to conciliate the judicial upholding of some constitutional principles with the preservation of parliamentary sovereignty, even if it is not conceptualised in an orthodox sense.

Arguing that Parliament can do wrong challenges long-standing assumptions on British democracy and claiming that unelected judges shall provide remedies to its wrongs raises important issues

⁷² AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 118; KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 100; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 136; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 97.

⁷³ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 188; Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179, 193; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [203].

regarding their legitimacy.⁷⁴ Indeed, it can be feared that empowering judges to make consequential decisions on sensitive societal issues would ultimately empower them to govern in place of electorally accountable MPs and Cabinet ministers.⁷⁵ Moreover, as long as Parliament remains sovereign, it is doubtful that courts hold an inherent power to give authoritative effects to constitutional statutes in a precise, predictable, and truly mandatory manner.⁷⁶ However, the institutional role of courts within the British constitutional system cannot be underestimated even if they do not have the exclusive duties to guard and enforce a canonical constitution.⁷⁷ While they cannot review systematically and strike down substantively unconstitutional parliamentary statutes, courts can hold citizens and political actors accountable for having breached their constitutional duties.⁷⁸ In fact, the common law, which is made incrementally in compliance with the doctrine of *stare decisis* according to which judicial precedents are binding, could simply not exist if courts were powerless to adjudicate

⁷⁴ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 3; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 202; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 282; John Baker, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4, 19; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 141.

⁷⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 28; KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 105; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 62; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 142.

⁷⁶ Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.10; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 25.

⁷⁷ John Gardner, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 8.

⁷⁸ Peter Morton, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114, 170; Anthony King, *Does the United Kingdom Still Have a Constitution?* (Sweet and Maxwell 2001) 96; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 102; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 165.

constitutional issues.⁷⁹ The exclusive power of courts to interpret statutes, and thus to shape them when their substance is vague or indeterminate,⁸⁰ also highlights the active role they can have in making constitutional law.⁸¹

In that vein, the Supreme Court asserted in the *Miller* ruling that it has ‘the responsibility of upholding the values and principles of [the] constitution and making them effective’, particularly to set and enforce ‘the legal limits conferred on each branch of government’.⁸² As found previously, courts can require political actors, although without coercing them effectively, to abide by uncodified standards of constitutional morality as they can ‘note, rely upon, and accommodate’ constitutional conventions.⁸³ Baker even argues that these institutions can unilaterally narrow the scope of a parliamentary sovereignty that he characterises as conventional.⁸⁴ Still, the political risk of engendering a constitutional crisis shall refrain them from doing that. Accordingly, courts can decisively shape the contemporary frameworks of

⁷⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 18; Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 77; 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) 20; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 47; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 16.

⁸⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 269; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [166].

⁸¹ *R (Jackson) v Attorney General* [2005] UKHL 56 [51]; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 17.

⁸² *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [39].

⁸³ John Gardner, ‘Can There Be a Written Constitution?’ (2009) *Oxford Legal Studies Research Paper 2009*, 10.

⁸⁴ John Baker, ‘The Unwritten Constitution of the United Kingdom’ (2013) 15 *Ecclesiastic Law Journal* 4, 19.

British constitutional governance by setting guiding standards and making sense of intangible norms and principles.

Furthermore, the principle of legality, according to which courts safeguard common law rights and principles from being overlooked when there is no express parliamentary intent to do so, might be the foundation of a comprehensive British process of judicial review.⁸⁵ Although Blackstone staunchly opposed the judicial review of primary legislation, which would be undemocratic and illegitimate, he acknowledged that all statutes shall be reasonable and produce effects in accordance with the common law.⁸⁶ So, while British courts have never been endowed with the extensive powers of their continental counterparts to review statutory provisions, they shall not be completely helpless to perform this duty in contemporary times. For instance, the limitation of parliamentary sovereignty instigated by the ECA became legally binding because the compliance of British norms to EU law was characterised as a core common law principle.⁸⁷

Concretely, courts can and even should ensure that Parliament legislates in conformity with what constitutional statutes, which shall have an interpretative prominence, provide and with the constitutional staples that they have established.⁸⁸ Courts shall then prevent Parliament from exercising its constituent and

⁸⁵ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 187 and 209; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 286; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 13; Alison Young, 'The Relationship between Parliament, the Executive and the Judiciary' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 329 and 335.

⁸⁶ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 76.

⁸⁷ *Thoburn v Sunderland CC* [2003] QB 151 [59].

⁸⁸ *ibid* [64]; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 168.

constituted powers in a contradictory manner, especially as this distinction has become quite apparent over the last decades. Certainly, courts hardly exercised their powers to review statutes in practice,⁸⁹ and Ahmed and Perry doubt that they could efficiently guarantee the implementation of the substance of the Sewel Convention by this way.⁹⁰ Still, the existence of a judicial power to review statutes that clash with constitutional statutes and common law norms and principles would be far from being plainly and simply non-existent in the contemporary United Kingdom.⁹¹

In that vein, Elliott contends that statutory judicial review shall be apprehended as a continuum, which debunks absolute reasonings according to which some institutions are intrinsically better than others.⁹² That is coherent with the need for courts to show deference towards the choices of parliamentarians.⁹³ Indeed, the retreat of parliamentary sovereignty, at least from its original and orthodox sense, shall not pit Parliament against courts, but rather give place to a constructive institutional dialogue. Gee argues that courts do not have to review statutes with a restrictive and literal approach to be up to the task of guarding a British constitution whose foundations have considerably evolved.⁹⁴ Courts shall

⁸⁹ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 249.

⁹⁰ Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1160.

⁹¹ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 249.

⁹² Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 54.

⁹³ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 165; 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, 409.

⁹⁴ Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 279.

rather grasp the constitutional implications of statutes from a teleological perspective, mainly to focus judicial review on the assessment of blatant and substantive breaches of constitutional principles.⁹⁵ Concretely, it shall be expected that, as advocated by Allan, ‘the warmth of [constitutional statutes]’ judicial reception may legitimately vary with the gravity of their assault, if such it be, on settled rights and expectations’.⁹⁶ That is how a reasonable compromise can ultimately be found between the preservation of orthodox parliamentary sovereignty and the rise of a completely formal constitutional sovereignty.

In practice, courts do not inexorably have to choose between upholding or striking down unconstitutional primary legislation. Judicial institutions shall have varied options to enforce constitutional principles, statutes, and common law efficiently and legitimately. Courts can use two main tools to control the constitutionality of statutory, and even conventional, norms: nullification and declaration.⁹⁷ The first tool, which is peculiar to judicial review even in common law systems such as the Canadian, American, and Indian ones, is rather straightforward. Nullification prevents a norm breaching ‘legally entrenched constitutional norms’ from having normative effects as it is struck down.⁹⁸ Elliott argues that, in the United Kingdom, the nullification of statutes could only be legitimate if these statutes infringed fundamental and substantive norms entrenched in constitutional

⁹⁵ David Jenkins, ‘Common Law Declarations of Unconstitutionality’ (2009) 7 *International Journal of Constitutional Law* 183, 208 and 214.

⁹⁶ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 269.

⁹⁷ Farrah Ahmed, Richard Albert and Adam Perry, ‘Judging Constitutional Conventions’ (2019) 17(4) *International Journal of Constitutional Law* 1146, 1149.

⁹⁸ *ibid.*

statutes or furthering common law principles.⁹⁹ If courts did not use their powers of review parsimoniously, they could be tempted to overshadow the norm-making role of parliamentarians, which would likely lead to a serious constitutional crisis.

To avoid this grim outcome, courts have mostly used the second tool, which is the declaration that a statute is unconstitutional without depriving it of its legal effects. This tool constitutes the principal mean by which a process of judicial review based upon the common law and conventions has been operated.¹⁰⁰ Indeed, declarations do not challenge the sovereignty of Parliament since they only signal the unconstitutionality of statutes and maintain the power of Parliament, which is based upon its popular legitimacy, to have the ultimate opportunity to settle thorny constitutional issues.¹⁰¹ However, since their constraining strength relies exclusively on mostly voluntary commitments rather than on externally enforceable legal constraints, declarations are normatively lacking. As noted by Dicey and Rait a century ago, declarations could only be authoritative and set binding obligatory standards if the people and its rulers upheld the principles structuring the political constitution.¹⁰² Declarations can only be efficient if political actors consent to only enact, and comply with, valid constitutional norms, recognise the judicial authority to review these norms, and are actually held accountable by citizens to abide by the constitution.¹⁰³ Courts undeniably have a role to play

⁹⁹ Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 54.

¹⁰⁰ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 186 and 209.

¹⁰¹ *ibid* 193.

¹⁰² AV Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920) 253-54.

¹⁰³ David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 186 and 203; Farrah Ahmed,

to safeguard constitutional principles, but in any case, they cannot act alone without risking that their powers of upholding these principles become merely theoretical.

The relatively weak worth of judicial declarations raises essential questions about the ability to uphold British constitutional principles by non-legally enforceable means. They can then easily be criticised for entitling Parliament to do anything it deems appropriate to implement judicial rulings on constitutional matters, even disregarding them. Despite the general compliance of British legal and political actors with declarations, the role of courts as counterweights holding an inherent authority seems far from being impregnable and even existent. Nonetheless, since the implementation of the content of judicial declarations can only be done through a dialogue between diverse political institutions, that sheds light on the necessity of apprehending British constitutionalism from a plural perspective. Indeed, its foundations can only be steadied if a balance between pure power and legitimacy is struck.¹⁰⁴ Only then could the peculiar constitutional role of British courts be grasped accurately.

In that vein, other mechanisms can be used to make the judicial review of primary legislation less intrusive and more legitimate. Judges shall not be seen as usurpers of parliamentary normative powers when they uphold constitutional principles. For instance, the powers of courts to provide constitutional advice to legislators in pre-enactment references might be key in initiating and valuing a fruitful interinstitutional dialogue permitting to identify and

Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1149.

¹⁰⁴ 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, 409.

decipher the substance of constitutional duties.¹⁰⁵ Systematising this ground-breaking procedure in British law could split the difference between the widespread apprehension that legislative power would be grabbed by courts and the need for entrenching constitutional norms and principles beyond words.

Furthermore, Hueglin and Fenna contend that, legally, there is 'no obstacle to judicial review' regarding the devolution arrangements.¹⁰⁶ Despite their structural flaws, which were identified previously, British courts have progressively become the arbiters between central and substate institutions, quite like federal courts serving as the guardians of a federal pact. In practice, they have settled jurisdictional conflicts and, while doing so, could nullify substate, and potentially central, statutes that are inconsistent with the devolution arrangements.¹⁰⁷ British courts can then act as counterweights to a hegemonic sovereign Parliament and then uphold what would be a division of the exercise of British sovereignty based upon federal principles. However, while judges have the potential to serve as both the guardians of the British constitution and of a federal pact, the constraints they set on the exercise of central powers cannot be genuinely authoritative unless political actors and citizens genuinely want this. The implementation and the safeguard of the devolution arrangements is a shared responsibility, which shall yet not prevent British courts from taking their share by asserting and upholding core constitutional principles.

¹⁰⁵ Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 265.

¹⁰⁶ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 293.

¹⁰⁷ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 161.

8.2. The Impact of National Self-Determination Claims on the British Constitutional Order

While considering other events or processes that have radically transformed British constitutionalism, I note that devolution has been not only an outcome but also the trigger of considerable changes. A constitutional Pandora's box was opened. Since the turn of the millennium, the fervour of substate national identity and political claims has been reignited, which has had transformative impacts that could not always be totally grasped and mastered. In practice, they have often clashed with the assertion of an overarching British identity. As a result, since its constituent nations have appeared increasingly disunited, the integrity of the United Kingdom even seems in jeopardy nowadays.

8.2.1. The Divisibility of the United Kingdom

A core virtue of unionism has been to accommodate substate nationalism so that the constituent nations of the United Kingdom do not have to consider that secession is the only way by which they could self-determine.¹⁰⁸ There have always been several, multinational, ways to be British.¹⁰⁹ However, primordial unionists, who were influential during modern times shaped by the ideal of the nation-state, thought that conciliating state unity with national diversity would inexorably lead to the break-up of a disunited

¹⁰⁸ Anthony Birch, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977) 98 and 170; 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) 118.

¹⁰⁹ 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) 169; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 56.

United Kingdom.¹¹⁰ Nonetheless, they could never impose their views decisively on the implementation of the British societal covenant, which was ratified by diverse constituent entities for mostly instrumental purposes.¹¹¹ Especially in contemporary times, Britishness is primarily a civic and political concept rather than a sociocultural one that is exclusive and unalterable. This explains both its compatibility with multinationalism and its resilience.¹¹² More globally, determining what are the unnegotiable characteristics of a common British identity is highly complex, especially if it is fostered through the shared rule of the state and without institutional homogeneity.¹¹³

When the British Empire crumbled, substate identities, especially in Scotland, were no longer deemed ‘subsumed or complementary to an overarching sense of Britishness’,¹¹⁴ and citizens then sought to affirm their distinctiveness more firmly.¹¹⁵ Although, when they answer the Moreno question on the existence of multiple identities, most British citizens still view themselves as members of both their nation and the British state, their senses of belonging are not necessarily equal.¹¹⁶ Accordingly, especially since devolution, the

¹¹⁰ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 298; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 10.

¹¹¹ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 249.

¹¹² Vernon Bogdanor, ‘The West Lothian Question’ (2010) 63(1) *Parliamentary Affairs* 156, 166; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 88.

¹¹³ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 295.

¹¹⁴ David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 52.

¹¹⁵ *ibid*; Krishan Kumar, ‘Empire and English Nationalism’ (2006) 12(1) *Nations & Nationalism* 1, 10; Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 374; Oran Doyle, Aileen McHarg and Jo Murkens, ‘The Constitutional Tensions of Brexit’ 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) 9.

¹¹⁶ David Miller, ‘Nationality in Divided Societies’ in Alain-G Gagnon and James Tully (dir), *Multinational Democracies* (Cambridge University Press 2001) 313;

members of the Welsh, Scots, and Northern Irish nations have increasingly identified themselves as such rather than as Britons, at the opposite of English citizens.¹¹⁷ As highlighted by Loughlin, since 'England occupies the dominant position and tends to confuse "England" with "Britain", while Scotland and Wales are highly conscious of their national identities', ¹¹⁸ the sense of British identity is essentially plural and asymmetrical. The enhanced institutionalisation and constitutional recognition of substate nationalism that have been made possible through devolution then appear as both the causes and the outcomes of the substantial evolution of a composite British identity.

Despite the lack of tangible evidence that devolution has directly caused disunity¹¹⁹ and the rise of exclusive identities,¹²⁰ this process has highlighted what distinguishes the constituent nations from the rest of the United Kingdom.¹²¹ Schutze notes that, due to the crumble of the unitary character of British sovereignty following

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, 76; 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) 43.

¹¹⁷ Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 6; 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) 110.

¹¹⁸ 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) 43.

¹¹⁹ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 71.

¹²⁰ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 83; 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) 3.

¹²¹ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 22.

devolution, '[the] political loyalty of British citizens, who are subject to two legislatures, may thus gradually be divided'.¹²² Ultimately, devolution might become the stepping stone towards the dislocation of the British Union if its multinational essence is not intimated. Enduring conflicts on the optimal constitutional status of the substate nations could jeopardise the essence, and even the existence, of British constitutionalism.¹²³ Hence, investigating properly the impacts of devolution, as well as its federal nature, can hardly be done without evaluating whether the United Kingdom is divisible, both in law and in fact.

For centuries, several unionists contended that 'the Acts of 1707 and 1800 had prescribed Union "for all time"'¹²⁴ to protect it from being dismantled by the initiative or the influence of irredentist nationalists.¹²⁵ The covenant among the British nations had to be as unbreakable and irreducible as the American pact, whose federal character has always been unambiguous, was.¹²⁶ Since British substate nationalisms were essentially cultural rather than political following the enactment of these Acts,¹²⁷ the secession of some constituent nations seemed highly unlikely. However,

¹²² Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 23.

¹²³ Barry Winetrobe, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85, 98; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 277 and 279.

¹²⁴ Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 30.

¹²⁵ Act of Union (Ireland) 1800 (c 38) s 1; Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 30; Douglas Kanter, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009) 15 and 319-20.

¹²⁶ Iain McLean and Alistair McMillan, 'England and the Union since 1707' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 30.

¹²⁷ Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 25.

Blackstone stated that the United Kingdom could be dismantled if its constituent nations mutually consented to achieve this outcome or if one of them infringed one of the ‘fundamental and essential conditions of the union’.¹²⁸ Accordingly, one of these entities could cease to be a party to the British covenant if it could no longer consent to abide by its terms.¹²⁹ The authority of this pact would neither be inherent nor eternal. This finding is coherent with Melding’s argument that the British Union can only be a fully-fledged partnership, which it was intended to be, if its members could renew or dissolve it over time.¹³⁰ The secession of a constituent nation would be the (potential and undesirable) corollary of the contractual nature of the British constitution. Consequently, since the secessionist will of the citizens of a substate nation could supersede a Union Act, this multinational understanding of unionism would substantially undermine parliamentary sovereignty.¹³¹ Bearing that in mind, Bogdanor contends that the devolution arrangements could implement the federal principle of consent more efficiently than the Constitution of a formally federal state like the USA, whose indivisibility has even been constitutionalised.¹³²

Nevertheless, contemporary substate nationalism cannot be conflated with independentism. Several nationalists, who are the heirs of home rulers, simultaneously challenge the supremacy of Westminster, seek furthered decentralisation, and consider

¹²⁸ William Blackstone, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011) 80-81.

¹²⁹ Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 247-48.

¹³⁰ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 84-85 and 93.

¹³¹ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 249; *ibid* 13; Andrew Gamble, ‘The Conservatives and the Union: The “New English Toryism” and the Origins of Anglo-Britishness’ (2016) 14(3) *Political Studies Review* 359, 365.

¹³² Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 116.

themselves as British unionists.¹³³ For instance, numerous Scottish secessionists want to redefine the British Union as a pact between sovereign states instead of establishing an integrally independent Scottish nation-state.¹³⁴ Furthermore, in Wales, whose institutions have mostly sought the broadening of its distinct jurisdiction in a somewhat federal manner, devolution has not fuelled a popular will for independence¹³⁵ or even for a very extensive cultural revival.¹³⁶ However, while Bogdanor deems that asserting that devolution ineluctably leads to secession is an inaccurate 'slippery-slope argument', he acknowledges that, 'by providing legitimacy for [...] national claims, [devolution stimulates] the demand for independence'.¹³⁷ Establishing multiple tiers of government, as in federal states, may provide a 'base for separatist mobilisation',¹³⁸ especially from an institutionalist perspective.¹³⁹ Consequently, although secession is neither the sole way by which the constituent nations can self-determine, nor

¹³³ 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) 8.

¹³⁴ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 190; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 137.

¹³⁵ Wales Office, *Better Governance for Wales* (Cm 6582, 2005) 2; Richard Rawlings, 'The Welsh Way / Y Ffordd Gymreig' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 298.

¹³⁶ Simon Brooks, *Why Wales Never Was: The Failure of Welsh Nationalism* (University of Wales Press 2017) 126.

¹³⁷ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 296.

¹³⁸ James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995) 286.

¹³⁹ 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) 359.

the sole realistic outcome of devolution, the latter process has made it possible, more than ever.¹⁴⁰

In practice, the power of the constituent nations to secede if their citizens wanted so and, thus, the divisibility of the United Kingdom have become contemporary constitutional facts.¹⁴¹ Although Melding contends that there is more a 'tolerance of secession' than a right to secede and that it is substantively incomplete and imprecise,¹⁴² its existence relies on firm statutory and conventional grounds. Since Irish independence, and particularly since the ratification of the GFA, the right of the citizens of Northern Ireland to determine its constitutional status by a vote in a border poll has been recognised and enshrined.¹⁴³ The Northern Irish polity has a sovereign right to leave the United Kingdom and to join a reunified Ireland.¹⁴⁴ Despite continuous popular support for unionism, even among Catholics, the rising proportion of nationalists makes Irish

¹⁴⁰ 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) 8.

¹⁴¹ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 82; 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) 121-122; Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) para 18.

¹⁴² David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 6 and 11.

¹⁴³ Government of Ireland Act 1920 (c 67) s 3(1); Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) para 15; Michael Gallagher, 'How Many Nations Are there in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715, 722; Northern Ireland Act 1998 (c 47) s 1; Northern Ireland Office, *Belfast Agreement* (Cm 3883, 1998) Draft Clauses/Schedules for Incorporation in British Legislation, s 1; 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* (2nd edn, Palgrave 2006) 32; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 195; Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019) 116; Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 112.

¹⁴⁴ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 9.

reunification increasingly probable, and most Britons would not prevent that from happening.¹⁴⁵ The possibility of secession explains why no statutory provision guarantees the permanence of the Northern Irish devolution arrangements.¹⁴⁶ Still, this possibility has only been theoretical so far.

Regarding Scotland, even staunch unionists like Margaret Thatcher have long acknowledged that although this nation could not impose its decentralising wills on the British polity, it could secede if its citizens no longer consented to be Britons.¹⁴⁷ The SNP first claimed that it could declare the independence of Scotland unilaterally if it held a majority of Scottish seats in the Westminster Parliament and, after devolution, a majority of seats in the Scottish Assembly.¹⁴⁸ It has since acknowledged that secession could only be achieved following a referendum.¹⁴⁹ Certainly, central British institutions hold reserved powers on constitutional matters, such as the exercise of a substate right to self-determination, and are not bound by consultative referendums.¹⁵⁰ Moreover, as Scottish citizens and institutions

¹⁴⁵ Michael Gallagher, 'How Many Nations Are There in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715, 722; Christopher Farrington and Graham Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135, 140; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 64; Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 267.

¹⁴⁶ 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.

¹⁴⁷ John Ray, 'English Attitudes to Scottish Nationalism' (1981) 115(1) *Journal of Social Psychology* 141, 142; Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 624; Scotland Office, *Scotland in the Union. A Partnership for Good* (Cm 2225, 1993) 5-6.

¹⁴⁸ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 82.

¹⁴⁹ *ibid.*

¹⁵⁰ Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999) 263; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 88.

cannot make autonomous decisions regarding the scope, and even the existence, of devolution,¹⁵¹ they could not legally secede unilaterally. Still, concretely, central institutions could hardly, and did not want to, counter the will of Scots to establish their independent state legitimately and thus authoritatively.¹⁵²

When the SNP formed a majority government led by Alex Salmond in 2011, Scottish secession became a real possibility that troubled unionists since it could spell the end of the United Kingdom.¹⁵³ Considering the commitment of central institutions to respect the will of substate institutions¹⁵⁴ and the fact that only a minority of Scots supported independence,¹⁵⁵ David Cameron accepted to negotiate with Salmond about the holding of a referendum on independence. In October 2012, the Edinburgh Agreement was reached and empowered Scottish citizens to vote on the constitutional future of their nation during a 'legal, fair and decisive referendum' that would be held on September 18th, 2014.¹⁵⁶ While central British institutions temporarily ceded parts of their reserved powers so that the Scottish Parliament could organise the referendum, they yet imposed that devo-max, a very popular stance favouring an almost complete devolution of powers, would

¹⁵¹ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 564.

¹⁵² Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 117; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 81.

¹⁵³ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 9.

¹⁵⁴ Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 292-93.

¹⁵⁵ 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) 2.

¹⁵⁶ Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 32.

not be on the ballot.¹⁵⁷ That forced Scots to choose between renewed unionism (with a ‘vow’ to broaden the scope of devolution; which was mostly kept when the Scotland Act 2016 was enacted) and fully-fledged independence, which even some nationalists did not necessarily want¹⁵⁸.

During the referendum, unionists actively sought the support of these soft nationalists and had to refrain from criticising Scottish national distinctiveness or from inferring that Scotland could not make its own normative choices.¹⁵⁹ They instead argued that devolution was ‘the best of both worlds’;¹⁶⁰ a reasonable compromise between unitarism and independence, the latter being deemed risky and obsolete in contemporary times.¹⁶¹ Still, the British government pledged that it would accept the verdict and ‘initiate negotiations for Scotland’s departure from the UK’ if a simple majority of Scots voted for Scotland to become an independent country.¹⁶² The case being, negotiations should be

¹⁵⁷ 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) 9; 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) 197.

¹⁵⁸ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 190.

¹⁵⁹ David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 165; 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) 193.

¹⁶⁰ Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 61.

¹⁶¹ *ibid*; Ben Jackson, ‘The Political Thought of Scottish Nationalism’ (2014) 85(1) *Political Quarterly* 50, 53; 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) 193.

¹⁶² Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 32.

conducted to ensure that the process leading to the end of Westminster's jurisdiction over Scotland would be unravelled.¹⁶³

While 55% of Scots voted to remain within the British Union, the 2014 Referendum was momentous for three reasons. First, the Edinburgh Agreement displayed how the British constitutional framework could accommodate substate nationalist self-determination claims with flexibility and avoid tensions like those that plagued the debates on Irish Home Rule.¹⁶⁴ Second, the issue of Scottish secession was addressed in accordance with federal principles such as the valuation of consent, mutual respect, and dialogue. It can then be argued that these principles have provided a way to ease the relationships between central and substate institutions, and substantially shaped a considerable part of contemporary British constitutionalism. Third, the referendum highlighted both the distinctiveness of Scotland within the United Kingdom and the frail unity of this state, which later fuelled significant tensions between the British constituent nations.¹⁶⁵

8.2.2. English Backlash against Constitutional Evolution

While British sovereignty was eroded from within its borders to accommodate substate nationalism,¹⁶⁶ it was also eroded from the

¹⁶³ *ibid* 12 and 54.

¹⁶⁴ 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) 200.

¹⁶⁵ Stephen Tierney and Katie Boyle, 'A Tale of Two Referendums: Scotland, the UK and Europe' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 50; *ibid* 197; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 272.

¹⁶⁶ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 15.

outside, so its exercise could comply with EU law.¹⁶⁷ As the exercise of British sovereignty became increasingly deconcentrated at the turn of the millennium, many English citizens have felt left behind. Although most of them have accepted devolution while rejecting the implementation of English national or regional arrangements, it has long been signalled that the asymmetrical character of this process could fuel English alienation in due time.¹⁶⁸ Certainly, the contemporary reassertion of substate nationalisms increased several English citizens' consciousness and assertiveness of their unique national identity, which progressively ceased to be conflated with Britishness.¹⁶⁹ However, since its distinct interests were not upheld by its own institutions as in the other substate nations, England, as such, could become politically voiceless.¹⁷⁰ Its treatment could also be deemed unfair since its fellow constituent nations received, in the initial stages of devolution, more public expenditure (as set by the operation of the Barnett Formula) than it in proportion.¹⁷¹

¹⁶⁷ Michael Kenny, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8, 10; 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) 188; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 85.

¹⁶⁸ Robert Hazell, 'Introduction: What Is the English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 12; John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 129; Michael Kenny, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8, 10.

¹⁶⁹ John Curtice, 'What the People Say – If Anything' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 131; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctional Theory of Governance*, vol 2 (Oxford University Press 2016) 123.

¹⁷⁰ 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; Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48, 69; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 112; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 40; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 281.

¹⁷¹ Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 281.

Consequently, the inability to devise English devolution arrangements, reform the British constitution more comprehensively, or preserve orthodox, and historically English, parliamentary sovereignty has prevented England from feeling at ease within a constitutionally multinational British polity.¹⁷² In fact, this nation could hardly accept that it would no longer be neither the leading entity of an empire, nor that of a centralised state.¹⁷³

Furthermore, European integration has been deemed very disruptive for numerous English citizens. Since the United Kingdom, contrary to Germany and France, had no direct interest or inclination to pool its sovereignty after WW2,¹⁷⁴ its commitment to a constitutional European integration has always been, at best, lukewarm.¹⁷⁵ Although most Britons tolerated this process indifferently for decades, the increased codification of British law (due to, in part, the primacy of EU law) and devolution progressively changed the situation. That was particularly true in England, where the roots of parliamentary sovereignty are. Traditional British constitutionalism is neither intrinsically worse nor better than the essentially continental European one, but their

¹⁷² Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 87; 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, 158; Andrew Gamble, 'The Conservatives and the Union: The "New English Toryism" and the Origins of Anglo-Britishness' (2016) 14(3) *Political Studies Review* 359, 361.

¹⁷³ Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 230; Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 37; Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 174.

¹⁷⁴ Robert Colls, *Identity of England* (Oxford University Press 2002) 143-44; Robert Colls, 'What Is British National Identity and How Do We Get It?' (2012) 52(52) *Soundings* 100, 109.

¹⁷⁵ Jack Black, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32(2) *Innovation: The European Journal of Social Sciences* 191, 200; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 85.

differences are decisive. Beyond purely legal issues, the clashes between civil and common law and between constitutional and parliamentary supremacies shed light on two antagonistic value systems, especially regarding the appreciation of federal ideas and principles.¹⁷⁶ Although it was not expressly intended for the United Kingdom to become a federal state due to devolution, it became considered that, rightly or wrongly,¹⁷⁷ it would likely become a federated entity within a European federal union. Accordingly, Pilkington noted that many Britons, especially in England, conflate federalism with centralism and apprehend it as an attack on their core constitutional identity, which has long been rooted in parliamentary sovereignty.¹⁷⁸ The ensuing conceptual confusion has given federalism a bad name in the United Kingdom, and even more in England.

Ultimately, the concerns engendered by devolution and, more precisely, by European integration led many citizens to think that the British polity had lost control over its destiny. Leaving the EU, through a process named Brexit, would become both the way to back control¹⁷⁹ and the national constitutional project of England,

¹⁷⁶ John Redwood, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999) 7-8; Ben Wellings and Helen Baxendale, 'Euroscpticism and the Anglosphere: Traditions and Dilemmas in Contemporary English Nationalism' (2015) 53(1) *Journal of Common Market Studies* 123, 131; Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 619; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 16.

¹⁷⁷ Daniele Conversi, 'Between the Hammer of Globalization and the Anvil of Nationalism: Is Europe's Complex Diversity under Threat?' (2014) 14(1) *Ethnicities* 25, 41; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [91].

¹⁷⁸ Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 11.

¹⁷⁹ David Bailey and Leslie Budd, 'Brexit and Beyond: a Pandora's Box?' (2019) 14(2) *Contemporary Social Science* 157, 169; Jack Black, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32(2) *Innovation: The European Journal of Social Sciences* 191, 194; Oran Doyle, Aileen McHarg and Jo Murkens, 'The Constitutional Tensions of

which could seek to uphold a parliamentary, and rather unitary, sovereignty more efficiently.¹⁸⁰ Some months after the 2014 Scottish Referendum, David Cameron acknowledged that central institutions should be more responsive to English wills,¹⁸¹ and opened the door to the holding of a referendum on European integration. It was held on June 23rd, 2016,¹⁸² and 52% of Britons supported Brexit. While most Scots and Northern Irish rejected this option and only a short majority of Welsh supported it, the votes of the English Brexiter majority were decisive.¹⁸³

Brexit' 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) 7; Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 167.

¹⁸⁰ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 178; Ben Wellings and Helen Baxendale, 'Euroscepticism and the Anglosphere: Traditions and Dilemmas in Contemporary English Nationalism' (2015) 53(1) *Journal of Common Market Studies* 123, 127; Michael Kenny, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8, 8-9 and 11; Stephen Tierney and Katie Boyle, 'A Tale of Two Referendums: Scotland, the UK and Europe' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 40; Michael Keating, 'The European Question' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 118; Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 18; Jack Black, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32(2) *Innovation: The European Journal of Social Sciences* 191, 201 and 203; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 201; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 138; Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 167; Oran Doyle, Aileen McHarg and Jo Murkens, 'The Constitutional Tensions of Brexit' 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) 7.

¹⁸¹ Michael Kenny, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8, 9.

¹⁸² European Union Referendum Act 2015 (c 36) s 1(1) and 1(4).

¹⁸³ Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on "The Border in the Mind"' (2017) 19(3) *British Journal of Politics & International Relations* 497, 498; Jack Black, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32(2) *Innovation: The European Journal of Social Sciences* 191, 204.

Nonetheless, Mullen notes that Brexit could hardly satisfy increasingly influential and demanding English nationalists.¹⁸⁴ In fact, Brexit alone could not stop the crumble of parliamentary sovereignty, which they hold dear, since it was not challenged only by European integration.¹⁸⁵ Quite ironically, some Brexiters even argued that this institution should not be empowered to counter the popular will expressed by the 2016 referendum.¹⁸⁶ The willingness of Brexiters to prevent Parliament from enacting norms that would stop Brexit raised doubts on their sincerity of their attachment to parliamentary sovereignty.¹⁸⁷ However, although the debates on Brexit highlighted that Parliament still plays a fundamental constitutional role nowadays,¹⁸⁸ MPs, although they were Remainers in majority, felt compelled to honour the result of the referendum and thus to get Brexit done.¹⁸⁹ That is another signal that Parliament no longer holds the monopoly on the exercise of constituent powers relying on popular will that can now be

¹⁸⁴ Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 287.

¹⁸⁵ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1037; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 282.

¹⁸⁶ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1020, 1023 and 1024; Mark Elliott, Jack Williams and Alison Young, 'The *Miller* Tale: An Introduction' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 7.13.

¹⁸⁷ Paul Craig, 'Brexit in the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 118; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 126-27.

¹⁸⁸ Philip Norton, 'Parliament: The Best of Times, The Worst of Times?' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 176.

¹⁸⁹ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 110; 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) 328.

expressed by politically binding referendums.¹⁹⁰ Still, the acceptance by Brexiters, especially in England, of this breach of parliamentary sovereignty does not entail that they have come to terms with the new, multi-faceted, British constitutional order.

8.2.3. Substate Nationalism and Brexit

The referendum on Brexit displayed how complex were not only the relationships between the United Kingdom and European institutions but also those between its constituent nations. As glimpsed previously, two nations (Scotland and Northern Ireland) opposed Brexit. In contrast, two others (Wales and England) supported it. Still, England would have imposed its will on its fellow constituent nations. After Brexit, while the United Kingdom could hope to ‘take back control’ from the EU institutions, it yet was a deeply disunited polity.¹⁹¹ This process, which was meant to settle the controversial case of European integration, placed identity issues related to the definition of Britishness at the centre of societal debates.¹⁹² Considering England’s growing resentment towards the other nations and its will to make the United Kingdom a more unitary state again, the antagonisms between the constituent nations on Brexit have highlighted more profound

¹⁹⁰ 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 15.75; 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) 328.

¹⁹¹ Cathy Gormley-Heenan and Arthur Aughey, ‘Northern Ireland and Brexit: Three Effects on “The Border in the Mind”’ (2017) 19(3) *British Journal of Politics & International Relations* 497, 498; 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) 173.

¹⁹² Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 18.

disagreements.¹⁹³ Even devolution, which had been continuously extended and deepened, was jeopardised by Brexit and by the claims underlying it.¹⁹⁴

For instance, the Welsh Government contended that the constitutional shock engendered by Brexit could only be mitigated by undertaking an extensive constitutional reform to strengthen the legal safeguards of the devolution arrangements.¹⁹⁵ Furthermore, leaving the EU could entail that, in turn, some nations would leave the United Kingdom.¹⁹⁶ In this regard, Brexit was met particularly sourly in Scotland, especially by nationalists, because undertaking it contradicted several statements made by unionists during the 2014 referendum. Even though some unionists were Eurosceptics, they claimed that since a Scottish state could not automatically (and likely) become a member of the EU after secession,¹⁹⁷

¹⁹³ Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 512-13; 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 13.7.

¹⁹⁴ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 171.

¹⁹⁵ 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 13.8.

¹⁹⁶ 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) 76; 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, 298; Jo Murkens, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution' (2017) 80(4) *Modern Law Review* 685, 696; 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) 121.

¹⁹⁷ Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 50; Stephen Tierney and Katie Boyle, 'A Tale of Two Referendums: Scotland, the UK and Europe' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 47; Michael

Scotland had to remain within the United Kingdom to be within the EU.¹⁹⁸ Bearing in mind most Scots' Europeanism, securing Scotland's place within the EU was a decisive factor in the unionist victory.¹⁹⁹ Those who voted on this basis could then legitimately feel betrayed after Brexit.²⁰⁰ Especially since most Scots were against it, Brexit would be 'a "significant and material change in the circumstances that prevailed in 2014", sufficient to justify a second independence referendum'²⁰¹ according to the SNP Government led by Nicola Sturgeon.²⁰² However, despite the long-standing stance of central British institutions that they would respect Scots' will, the practical inability of Scotland to secede unilaterally and the persistently weak popular support for independence make it hard to determine if a second referendum might be held and successful.²⁰³ Even if Scottish institutions asserted that Brexit

Keating, 'The European Question' in Michael Keating (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017) 107.

¹⁹⁸ Stephen Tierney and Katie Boyle, 'A Tale of Two Referendums: Scotland, the UK and Europe' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 41.

¹⁹⁹ *ibid*; Aileen McHarg, 'Navigating without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16(3) *International Journal of Constitutional Law* 952, 963; 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 13.8.

²⁰⁰ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 207.

²⁰¹ 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 13.8.

²⁰² Stephen Tierney and Katie Boyle, 'A Tale of Two Referendums: Scotland, the UK and Europe' in Andrea Biondi and Patrick Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016) 41; *ibid*; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 293.

²⁰³ Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 525; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 63; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 207.

infringed the nation's right to self-determination and raised doubts on its constitutionality, they could realistically seek very few concrete and direct remedies.²⁰⁴

In fact, Brexit became a reality even if few constituent nations supported it. Brexit was not even characterised as an extensive constitutional reform affecting the status of the constituent nations, which could potentially hold a conventional veto in such circumstances.²⁰⁵ Brexit would rather be the withdrawal from an international treaty.²⁰⁶ Accordingly, British central institutions could exercise unilaterally their reserved powers on foreign and European affairs, which are residuals of the royal prerogative.²⁰⁷ In practice, the role of substate institutions regarding EU law was then limited to the implementation of the European norms and policies that were within their jurisdictions.²⁰⁸ Nonetheless, it cannot be assumed from this situation that the United Kingdom is definitely not a federal state or that its constituent nations endured a wrong during the debates on Brexit. As seen previously, when state sovereignty is divided, it is normal that the central entity holds

²⁰⁴ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 563; 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.

²⁰⁵ Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 518.

²⁰⁶ *Re McCord's Application* [2016] NIQB 85 [121]; Michael Zander, 'A Nation Divided?' (2016) 166(7726) *New Law Journal*.

²⁰⁷ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 184; Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 9; *Somerville v Scottish Ministers* (HM Advocate General for Scotland intervening) [2007] UKHL 44 [16]; *Whaley v Lord Advocate* [2007] UKHL 53 [8]; Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1035; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 518.

²⁰⁸ Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 62; Cabinet Office, *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001) 9; *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [4].

exclusive powers,²⁰⁹ such as those on foreign affairs, to secure the coherence of state action and its cohesion.²¹⁰ It would then be legal, and sensible, that substate entities have no say on decisions that are outside of their jurisdictions, even though they could have a significant impact on them.

However, the ability of the central institutions to impose Brexit on a constituent nation without its consent has weakened the legitimacy of this process and, collaterally, that of British unionism.²¹¹ The rejection by the members of central institutions of an SNP proposal on Brexit,²¹² which would have granted to each constituent nation a constitutional veto, as provided by several federal constitutions,²¹³ displays a relative reluctance to intimate multinationalism into constitutional practice.²¹⁴ Since this rejection was motivated by the fear that some constituent nations could veto the will of England (which would have happened), it has effectively led to the disregard of these nations' will.²¹⁵ More broadly, it has signalled a reluctance to get rid of unitary institutional patterns so

²⁰⁹ JC Banks, *Federal Britain?* (Harrap 1971) 243; 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.

²¹⁰ Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 39; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 4.8.2; HC Deb 16 June 2015, vol 597, col 189 (Mr Chris Philip); HC Deb 16 June 2015, vol 597, col 192 (Mr Dominic Grieve).

²¹¹ Aileen McHarg, 'Navigating without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16(3) *International Journal of Constitutional Law* 952, 966.

²¹² HC Deb 16 June 2015, vol 597, cols 190 and 192 (Mr Alex Salmond).

²¹³ *ibid* col 189 (Mr Alex Salmond).

²¹⁴ *ibid*; Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 519.

²¹⁵ Richard Ekins and Graham Gee, 'Miller, Constitutional Realism and the Politics of Brexit' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 17.11; Ezequiel Gonzalez-Ocantos and Elias Dinas, 'Compensation and Compliance: Sources of Public Acceptance in the U.K. Supreme Court's Brexit Decision' (2019) 53(3) *Law & Society Review* 889, 903.

that federal principles can be institutionalised,²¹⁶ even though that might be key in safeguarding British unity in contemporary times. Accordingly, Rawlings warns that when central and substate institutions do not interact in accordance with the principles of ‘mutual benefit, comity and parity of esteem’, troubled constitutional times could come.²¹⁷ Potentially, the divergent interests of the constituent nations, whose salience has been exacerbated by Brexit, could no longer be conciliable, which could drive some of these nations out of the United Kingdom.

²¹⁶ HC Deb 16 June 2015, vol 597, col 191 (Mr Dominic Grieve).

²¹⁷ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 36.

8.3.The Legal Consequences of Brexit on British Constitutionalism

The Britons' choice to leave the EU placed them at a crossroads. Taking back control endowed them with more liberty but also forced them to reflect on how they wanted their state to be governed. Incremental and tailor-made solutions could not necessarily provide durable solutions to intricate and fundamental problems. Accordingly, deciding whether the rejection of multi-level European governance shall lead to the rollback of devolution has become a constitutional and societal priority.

8.3.1. Brexit and Constitutional Authority

In a break with how the British constitution was devised for centuries, Brexit is not the outcome of a cautious evolution but both the result and the trigger of legal and political revolutions. The enactment of the EU (Withdrawal) Act, which took effect on January 31st, 2020, entailed the repeal of the ECA without other formality.²¹⁸ This statute provides that EU law is no longer an intrinsic and authoritative source of British law and normatively supersede statutes.²¹⁹ The Supreme Court recognised that it would be a constitutional statute since it would reverse decades of a transformative process of European integration.²²⁰ By enacting this Act, Parliament proved that it still held constituent, sovereign, powers because it repealed a constitutional statute (the ECA)

²¹⁸ European Union (Withdrawal) Act 2018 (c 16) s 1; European Union (Withdrawal) (No 2) Act 2019 (c 26) s 1(4).

²¹⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [80]; European Union (Withdrawal) Act 2018 (c 16) s 6(1).

²²⁰ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [81].

narrowing the scope of its powers.²²¹ Still, arranging how British sovereignty shall be exercised after Brexit, particularly while considering devolution, was very complex for this institution.

In practice, Brexit engendered a power vacuum without providing the steps to fill it. Undeniably, the British government, which mostly made unilateral decisions on this matter, could, and sought to, play a decisive role in shaping a new constitutional order.²²² Still, determining whether Parliament or the government held the last word regarding the conclusion of a withdrawal agreement, which could make Brexit a reality, has long been controversial. Although the Prime Minister was always considered to be the main British interlocutor with the European institutions,²²³ especially while considering her broad prerogative over foreign affairs,²²⁴ she could not change British law, and thus get Brexit done, without the support of Parliament.²²⁵ That was particularly complicated since there was a hung parliament from 2017 to 2019. Moreover, a return to the *status quo ante* that prevailed before parliamentary sovereignty crumbled at the turn of the millennium seemed unlikely. So, as noted by Douglas-Scott, Brexit has highlighted three significant limits to parliamentary powers: the authoritativeness of referendums; the confusion between

²²¹ Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 355.

²²² Kevin O'Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 206.

²²³ European Union (Notification of Withdrawal) Act 2017 (c 9) s 1(1).

²²⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [5].

²²⁵ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1032; Alan Page, 'Article 50: The Final Say' (2017) 62(2) *Journal of the Law Society of Scotland* 12; 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 9.32.

European and British sovereignties; and the importance of the role of substate institutions.²²⁶

The Supreme Court addressed the most important constitutional issues related to Brexit by issuing the 2017 *Miller* ruling. It decided that although the referendum decision to leave the EU had a binding political force upon which the exercise of prerogative powers shall rely, it was devoid of legal effect if it was not asserted statutorily.²²⁷ This ruling is consequent with the fact that ‘only Parliament may limit or abrogate rights (consistently with the common law principle of legality)’²²⁸ in conformity with core, albeit intangible, constitutional guarantees.²²⁹ Ultimately, the balance between parliamentary and governmental powers was struck so that the exercise of the discretion intrinsic to ministerial prerogative would be conditional on the approval of Brexit by Parliament.²³⁰

At first glance, it could be claimed that, in the *Miller* ruling, the highest British Court upheld parliamentary sovereignty in its orthodox sense.²³¹ However, this court confirmed the existence of

²²⁶ Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79(6) *Modern Law Review* 1019, 1019-20 and 1034.

²²⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [112], [121] and [124].

²²⁸ Sionaidh Douglas-Scott, ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 79(6) *Modern Law Review* 1019, 1027.

²²⁹ *ibid*; 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 9.32.

²³⁰ European Union (Withdrawal) Act 2019 (c 16) s 1(1) and 1(2); European Union (Withdrawal) (No 2) Act 2019 (c 26) s 1(4).

²³¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [45] and [46]; Mark Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76(2) *Cambridge Law Journal* 257, 281; Keith Ewing, ‘Brexit and Parliamentary Sovereignty’ (2017) 80(4) *Modern Law Review* 711, 724; Jo Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80(4) *Modern Law Review* 685, 689; Mark Elliott, Jack Williams and Alison Young, ‘The *Miller* Tale: An Introduction’ in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) paras 7.73-7.74.

a new, multi-level, framework of governance and shed light on its fundamental elements. Indeed, the Supreme Court used its legal authority to assert what the contemporary British constitutional order is instead of letting political actors define it exclusively. That marked a neat departure from a traditionalist judicial reluctance to take affirmative stances on politically controversial constitutional matters, which were long ruled and adjudicated by Parliament.²³²

Justices were yet reluctant to be prescriptive when they were asked to adjudicate issues that could be characterised as political, thus, regrettably, refusing to clarify the state of British law.²³³ While they acknowledged the theoretical and practical relevance of constitutional questions on the adequate role and powers of substate institutions, they tended to dodge them. They also overlooked that, considering their normatively consequential nature even from a legal perspective, core elements of the political constitution, such as conventions, could not be disregarded or grasped in isolation.²³⁴ Justices, as bystanders regarding the treatment of conventions, refused to recognise, define, and employ them in a manner that could have revolutionised British adjudication and strengthened constitutional accountability.²³⁵

²³² Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1153; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43, 58; Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' 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) 283 and 290.

²³³ Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 282-83.

²³⁴ *ibid* 278; Richard Ekins and Graham Gee, '*Miller*, Constitutional Realism and the Politics of Brexit' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 17.34; Alison Young, '*Miller* and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 18.77.

²³⁵ Alison Young, '*Miller* and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller*:

The authority of the norms that shaped devolution, whether statutory or conventional, appeared as, and potentially more, unclear after the *Miller* ruling than it was previously. The transposition of the Sewel Convention into the Scottish and Welsh Devolution Acts could have strengthened the judicial safeguard of its substance.²³⁶ However, in their ruling, the Supreme Court showed an almost complete deference towards the political sphere regarding both the definition and the operation of this device.²³⁷ Indeed, Justices refused to uphold conventional guarantees on the composite character of British constitutionalism despite their inclusion in statutes, which shall generally make them enforceable.²³⁸ Justices then interpreted the substance of devolution too formally and underestimated how doing so would hamper both its efficiency and its legitimacy.²³⁹ Even if the Supreme Court likely only wanted to avoid taking overly assertive stances on very sensitive political issues, the *Miller* ruling has led

Brexit and Beyond (Hart Publishing 2018) para 18.77; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146, 1151.

²³⁶ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 141.

²³⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [151]; Tom Mullen, 'The Brexit Case and Constitutional Conventions' (2017) 21(3) *Edinburgh Law Review* 442, 446; Jo Murkens, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution' (2017) 80(4) *Modern Law Review* 685, 686 and 693.

²³⁸ Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80(4) *Modern Law Review* 711, 725.

²³⁹ Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 523; Jo Murkens, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution' (2017) 80(4) *Modern Law Review* 685, 690-91; 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) paras 13.12 and 13.80; Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' 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) 279.

to, according to, among others, Murkens,²⁴⁰ ‘a reassertion of the English principle of absolute legislative supremacy’.²⁴¹ Consequently, the Justices’ position as bystanders has legitimised an enhanced centralisation of British constitutional governance against the intents and the principles underlying devolution.²⁴²

Furthermore, the *Miller* ruling confirmed the non-existence of legal substate national vetoes on initiatives that could transform British constitutionalism, even against the will of some constituent nations.²⁴³ It reiterated a Northern Irish judicial finding that the devolution arrangements did not circumscribe the prerogative powers of central institutions, especially on reserved matters.²⁴⁴ Although central institutions could have had a political duty to consult substate institutions on Brexit, there was no legal duty to do so,²⁴⁵ and even less to secure their consent. Accordingly, Ewing argues that the Justices’ reasoning in the *Miller* ruling is concerning because it infers that the Sewel Convention is a normatively inferior source of law whose substance can simply not

²⁴⁰ Jo Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80(4) *Modern Law Review* 685, 690.

²⁴¹ Mark Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76(2) *Cambridge Law Journal* 257, 286; Keith Ewing, ‘Brexit and Parliamentary Sovereignty’ (2017) 80(4) *Modern Law Review* 711, 722; Tom Mullen, ‘The Brexit Case and Constitutional Conventions’ (2017) 21(3) *Edinburgh Law Review* 442, 447; *ibid*; Farrah Ahmed, Richard Albert and Adam Perry, ‘Judging Constitutional Conventions’ (2019) 17(4) *International Journal of Constitutional Law* 1146, 1151 and 1153.

²⁴² 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) paras 13.12 and 13.65.

²⁴³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [135].

²⁴⁴ *Re McCord’s Application* [2016] NIQB 85 [102], [107], [108], [122], [144] and [152].

²⁴⁵ 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) 170; Alison Young, ‘*Miller* and the Future of Constitutional Adjudication’ in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 18.75.

be enforced and authoritative.²⁴⁶ Even more fundamentally, this ruling infers that substate legislatures only play a 'subordinate constitutional role' compared to that of Parliament.²⁴⁷ Certainly, the Supreme Court did not intend to expressly and directly weaken the constitutional status of the constituent nations, but it did so concretely by its substantive ambivalence.²⁴⁸ Therefore, this institution failed to apprehend the central role of devolution properly within the contemporary British constitutional order since it construed it from an overly legalistic perspective.²⁴⁹

Nevertheless, it must be kept in mind that Justices only investigated in the *Miller* ruling whether substate institutions could obstruct the exercise of prerogative and parliamentary powers to prevent Brexit.²⁵⁰ The conclusions it drew cannot be interpreted extensively. Still, this ruling was a missed opportunity to build on a growing judicial recognition of the constitutional status of devolution.²⁵¹ Although he notes that 'devolution has already transformed the UK's unitary system of government "irreversibly" and will continue to do so',²⁵² Murkens also argues that this ruling

²⁴⁶ Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80(4) *Modern Law Review* 711, 722.

²⁴⁷ Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 6.

²⁴⁸ Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512, 523; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 27; Aileen McHarg, 'Navigating without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16(3) *International Journal of Constitutional Law* 952, 962.

²⁴⁹ Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80(4) *Modern Law Review* 711, 722.

²⁵⁰ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 141.

²⁵¹ Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 302; 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, 16.

²⁵² Jo Murkens, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution' (2017) 80(4) *Modern Law Review* 685, 693.

has unduly comforted English societal actors in making unitary and centralising stances.²⁵³ The Justices' legalistic approach has ignited 'the tension between the legal doctrine of parliamentary sovereignty and the quasi-federal political-constitutional structure of the modern UK'.²⁵⁴ The Supreme Court has then fed jurisprudentially those who oppose the rise of a British federal order and compromised the success of a fruitful and durable multi-level system of governance.²⁵⁵ Therefore, it failed to mitigate the ambiguities and concerns engendered by Brexit regarding the multinational and multi-level character of British constitutionalism.

8.3.2. British Multi-Level Governance after Brexit

The negotiations on Brexit displayed the vulnerability of a multinational United Kingdom. Brexit and its aftermath have shed light on a relative rejection of federal principles within the British institutional practice and a central lack of consideration for the wills of the constituent nations.²⁵⁶ In practice, Brexit released centripetal and centrifugal forces in a United Kingdom that have undermined its unity and its constitutive diversity. Brexit has then imbalanced, though not necessarily flawed irremediably, what could be a British federal balance for two diametrically opposed reasons.

First, the existence of the Northern Irish peace settlement, which the implementation of devolution arrangements has secured, has

²⁵³ *ibid.*

²⁵⁴ Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257, 286.

²⁵⁵ 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) 170.

²⁵⁶ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 19; David Bailey and Leslie Budd, 'Brexit and Beyond: a Pandora's Box?' (2019) 14(2) *Contemporary Social Science* 157, 167.

been troubled by Brexit. This process has reignited community tensions at an unprecedented level since the ratification of the GFA.²⁵⁷ Although preventing a return to the Troubles was not a priority during the referendum campaign, it became so during the negotiations with the EU.²⁵⁸ British rulers faced a dilemma whose solution would be consequential. On one side, upholding the GFA requires opening the border between Northern Ireland and the Irish Republic as much as possible to optimise cooperation and concord between them.²⁵⁹ This requirement has been fundamental to seeking and safeguarding peace within Ireland.²⁶⁰ However, on the other side, not setting a definite boundary with the EU would make Northern Ireland a gateway for goods and individuals that could enter the British territory unchecked from Ireland, in accordance with EU norms on free circulation.²⁶¹ This accommodative solution, according to staunch unionists, would make Brexit look like an empty shell. Whether Brexit was respectively characterised as 'hard' or 'soft', it would either spell the end of the GFA, which requires the indistinct treatment of British and Irish citizens,²⁶² or be effectless due to those Northern Irish breaches. Getting Brexit done would either separate Northern Ireland from the rest of

²⁵⁷ Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 8; Kevin O'Rourke, *A Short History of Brexit: from Bentry to Backstop* (Pelican 2019) 104.

²⁵⁸ 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) 98.

²⁵⁹ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 238.

²⁶⁰ Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 59.

²⁶¹ Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 262; Kevin O'Rourke, *A Short History of Brexit: from Bentry to Backstop* (Pelican 2019) 248.

²⁶² Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 36; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 238.

Ireland, at the risk of resuming bitter community tensions,²⁶³ or from the other constituent nations.²⁶⁴ Moreover, since several Irish nationalists, as some Scottish nationalists, saw devolution arrangements less as devices through which their nation could be accommodated within the United Kingdom than as a stepping stone to leave this state, Brexit might provide this opportunity.²⁶⁵ The long-standing fear of Northern Irish unionists that European integration would weaken British unity²⁶⁶ could then come true.

Certainly, the constant disagreements between Irish and British officials on the optimal extent of European integration limited its role in the rapprochement between these states.²⁶⁷ Nonetheless, the GFA could have hardly been reached and implemented efficiently without Ireland and the United Kingdom belonging to a

²⁶³ 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) 71.

²⁶⁴ Oran Doyle, Aileen McHarg and Jo Murkens, 'The Constitutional Tensions of Brexit' 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) 13.

²⁶⁵ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 232.

²⁶⁶ 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; James Anderson, 'Rethinking National Problems in a Transnational Context' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 125, 129 and 134; 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* (2nd edn, Palgrave 2006) 305-306; Paul Dixon, 'Rethinking the International and Northern Ireland: A Critique' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2nd edn, Palgrave 2006) 423; 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) 92.

²⁶⁷ James Anderson, 'Rethinking National Problems in a Transnational Context' in David Miller (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998) 134; Jonathan Tonge, *Northern Ireland* (Polity 2006) 34.

common European legal framework.²⁶⁸ The British negotiators on Brexit did not take lightly the impact of leaving this framework on Northern Ireland and the need to avoid the erection of a fully-fledged international border. They agreed with their European counterparts that they should ‘keep the border invisible and frictionless’²⁶⁹ to secure peace and prosperity.²⁷⁰ The continuous implementation of the GFA was also viewed as a prerequisite of any sensible withdrawal agreement.²⁷¹ Accordingly, the United Kingdom could hardly make unilateral and isolated decisions on Northern Ireland since its peculiar arrangements were shaped by both devolution and EU law.²⁷²

However, the inability of British rulers to apprehend Northern Irish issues as issues of territorial governance that were directly related to devolution and, more broadly, to understand British constitutionalism holistically complicated negotiations.²⁷³ For instance, seeking to leave the Customs Union and the Single

²⁶⁸ *Re McCord’s Application* [2016] NIQB 85 [90] and [106]; Máire Braniff and Sophie Whiting, ‘Deep Impact: The Fiction of a Smooth Brexit for Northern Ireland’ (2017) 23(4) *Juncture* 249, 251; Cathy Gormley-Heenan and Arthur Aughey, ‘Northern Ireland and Brexit: Three Effects on “The Border in the Mind”’ (2017) 19(3) *British Journal of Politics & International Relations* 497, 502; Jo Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80(4) *Modern Law Review* 685, 693; 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 13.8; Kevin O’Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 117 and 124.

²⁶⁹ Kevin O’Rourke, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019) 248.

²⁷⁰ Michael Keating, ‘Brexit and the Territorial Constitution of the United Kingdom’ (2018) 98(1) *Droit et Societe* 53, 66; Cabinet Office, *Revised Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland* (2019) 3; *ibid* 248 and 283.

²⁷¹ European Union (Withdrawal) Act 2018 (c 16) s 10(1).

²⁷² Máire Braniff and Sophie Whiting, ‘Deep Impact: The Fiction of a Smooth Brexit for Northern Ireland’ (2017) 23(4) *Juncture* 249, 251.

²⁷³ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 16.

Market without introducing border controls was an opportunistic, incoherent, and unrealistic British stance.²⁷⁴ Still, a compromise, which took the form of a tailor-made agreement for Northern Ireland setting a customs border between Great Britain and Ireland, was found and implemented.²⁷⁵ This solution showed that the issues related to Brexit could be addressed asymmetrically.²⁷⁶ Nevertheless, other constituent nations, especially Scotland, did not have, due to the insensitivity of central institutions towards their claims, such an opportunity to maintain closer deeper links with the EU.²⁷⁷ Their wills on consequential matters would have been disregarded unilaterally by central institutions in an unresponsive and somewhat unfair manner. Furthermore, even the Northern Irish institutions, whose functioning was suspended in 2017 because no consociational government could be formed, could not have a decisive say over Brexit, which correlatively strengthened central institutions effectively.²⁷⁸ Therefore, as concluded by Keating, the idea of a 'territorially differentiated Brexit' would have never been taken seriously.²⁷⁹

The other disruptive impact of Brexit on the British territorial constitution has been the attempt of central institutions to centralise power at the expense of substate jurisdictions. Since EU

²⁷⁴ Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 66; Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 262; Kevin O'Rourke, *A Short History of Brexit: from Bentry to Backstop* (Pelican 2019) 248.

²⁷⁵ Cabinet Office, *Revised Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland* (2019) 3.

²⁷⁶ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 173.

²⁷⁷ *Ibid.*

²⁷⁸ Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 8.

²⁷⁹ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 172.

norms on a broad range of topics had to be replaced by new, British, norms, the United Kingdom could not leave the EU orderly without reshaping its constitutional framework.²⁸⁰ Still, the division of powers between central and substate institutions was made in a manner that empowered both of them to act on EU law matters.²⁸¹ Brexit then made it necessary to review this division substantively and structurally.²⁸² Even before debates could be held on the content of these norms, choosing which institutions shall be empowered to enact them was necessary and, effectively, difficult. Devolution Acts were then amended by the Westminster Parliament, but only based upon secondary legislation to which the Sewel Convention does not apply, as provided by the Withdrawal Act.²⁸³

Consequently, there was a clash between those who viewed this review as an opportunity to consolidate state and parliamentary powers and those who apprehended it as an opportunity to

²⁸⁰ Paul Craig, 'Brexit in the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 103.

²⁸¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [129]; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 28; 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 13.5.

²⁸² Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 19; 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 13.6; John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 406; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 282.

²⁸³ Scottish Government, *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (SP 313, 2018) para 47; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 31-32.

consolidate devolution.²⁸⁴ The latter feared that the members of British central institutions could use Brexit as a pretext to undertake a power grab, without the consent of substate institutions, in order to make British constitutional governance more integrated.²⁸⁵ Those members argued that, to preserve the benefits of the coordinate approaches based upon common European norms, the matters formerly ruled by EU law and implemented by substate entities shall be included within the central jurisdiction.²⁸⁶ However, their claims were based upon a highly questionable understanding of the Sewel Convention, according to which it merely sets indicative duties that could be disregarded, in an unprecedented manner though, when no legislative consent motion can be adopted.²⁸⁷ Moreover, their stance simultaneously contradicted the principle of subsidiarity, which has been at the core of devolution, and the continuous pledge that devolution shall continuously be extended rather than

²⁸⁴ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 36; 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; John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 406.

²⁸⁵ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 19; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 7; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 144; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 284.

²⁸⁶ Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019, 1037; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [130]; Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 8-9, 20, 25 and 35; Alan Greer, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134, 136; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Société* 53, 67; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 284.

²⁸⁷ Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 38; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 285.

being rolled back. Finally, the core of their functional arguments was refuted by Elliott and Thomas, who contend that British constitutional governance shall remain multi-level instead of becoming unitary and centralised again, as before 1998, for it to be efficient after Brexit.²⁸⁸ Still, even if a direct constitutional clash between central and substate institutions could have been prevented regarding Brexit, this process has raised considerable doubts on the constitutional worth of the British multi-level and devolved frameworks of governance.

8.3.3. Brexit and the British Territorial Constitution

Amidst the constitutional turmoil engendered by Brexit, Scottish and Welsh institutions actively fought against the centralisation of British constitutional governance. They sought to ensure that Brexit would not affect the governance of essentially composite polities without being open to opportunistic tampering. An authoritative normative and financial balances between reserved and devolved jurisdictions in a manner that would roll back the decentralisation made possible by devolution.²⁸⁹ Accordingly, they refused to consent to the enactment of initial versions of Withdrawal Bills that would have stripped them from all their powers to implement the successors of EU norms.²⁹⁰ They did not oppose fundamentally the upholding of common British frameworks based upon the European ones (regarding agriculture, for example), but considered that such frameworks shall be

²⁸⁸ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 375.

²⁸⁹ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 9; John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 407.

²⁹⁰ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 171.

devised collegially instead of being imposed domineeringly by central institutions.²⁹¹ Still, while they could have gained the opportunity to broaden their powers and devise their own norms regardless of shared concerns and needs,²⁹² substate institutions wanted to work cohesively. As the need for strengthening coordination mechanisms was recognised as a necessity for improving governance,²⁹³ the institutionalisation of shared rule in a federal sense could then be enhanced.

Concretely, more than ever before, the constituent nations cooperated legislatively and strategically in a bitter power struggle against rather unitarian British conservative governments.²⁹⁴ They took action to preserve their jurisdictions, whose scope and extent were compromised, by using legal and political British constitutional devices. Scottish and Welsh governments issued substate Continuity Bills that could mitigate the legislative gaps following Brexit as the British Continuity Bills were intended to do.²⁹⁵ These Bills were different from those debated in the central

²⁹¹ Cabinet Office, *Revised Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland* (2019) 2; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 285.

²⁹² Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 283.

²⁹³ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 222; 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) 38.

²⁹⁴ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 22; 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) 56; Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' 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) 284.

²⁹⁵ European Union (Withdrawal) Act 2018 (c 16) s 3(1), 12(1), 12(3), 12(5) and 24(1).

Parliament because they formalised the devolution of the substate powers that were previously related to EU matters.²⁹⁶ However, it was somewhat debatable to assert that these substate concerns were justified. In a reassuring manner, the British Government asserted that devolution arrangements shall not be rolled back because of Brexit.²⁹⁷ Still, this assertion was substantively paradoxical, and its veracity was questionable since the upholding of a unitary parliamentary sovereignty was a corollary of this process.²⁹⁸

Furthermore, the secessionist leanings of the Scottish Government and the feeling among substate nationalists that Brexit fundamentally distorted devolutionist ideals could hardly foster trust among central and substate entities and compromises between them.²⁹⁹ The members of central institutions felt entitled to act unilaterally if the legislative consent of substate institutions was sought, though not obtained, if state unity was compromised.³⁰⁰ During debates on the EU (Withdrawal) Act 2018,

²⁹⁶ Simon Parsons, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*, 18; 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) 56.

²⁹⁷ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 25.

²⁹⁸ Michael Zander, 'A Nation Divided?' (2016) 166(7726) *New Law Journal*; Christopher McCorkindale and Aileen McHarg, 'Litigating Brexit' 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) 284.

²⁹⁹ HL Deb 12 March 2018, vol 789, col 1407 (Lord Wallace of Tankerness); Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 286.

³⁰⁰ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 28; Alan Greer, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134, 136; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 37; Tom Mullen, 'Brexit and

the British Government, despite its acceptance of significant amendments proposed by substate institutions, disregarded persistent (mainly Scottish) objections to this Bill because they would have been made in bad faith.³⁰¹ So, while British officials acknowledged that the Sewel Convention was applicable regarding Brexit,³⁰² they contended that its effects were limited. Although they understood the political importance of substate legislative consent motions,³⁰³ they hardly considered that adopting these motions was a firm prerequisite to the enactment of a Withdrawal Act. The claim that the Sewel Convention would guarantee a say, but not a veto, for constituent nations when central institutions want to overstep their jurisdictions, beyond the specific circumstances of Brexit, has since gained ground.³⁰⁴ It has also shaken the foundations of devolution, quite worryingly.

In Spring 2018, the joint Scottish and Welsh front was yet broken when Welsh institutions dropped their Continuity Bill and consented to the enactment of the Bill devised by central institutions.³⁰⁵ The Welsh Government consented to the

the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 286.

³⁰¹ Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 37; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 291; Simon Parsons, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*, 18.

³⁰² 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 13.13.

³⁰³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [139].

³⁰⁴ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 172; Aileen McHarg, 'Devolution in Scotland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 291.

³⁰⁵ Simon Parsons, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*, 18.

enactment of common British norms to preserve the substance of formerly European frameworks after Brexit if their operation was devolved after a transition period.³⁰⁶ As noted by Mullen, the existence of a (short) Welsh Brexiter majority and a more conciliatory nationalist approach, which is not very demanding and not secessionist, made it unlikely for Scottish and Welsh interests to be durably aligned.³⁰⁷ While Welsh nationalists chose to trust that shared rule mechanisms could help to safeguard their jurisdictions from domineering centralisation in a federal manner, Scottish nationalists were uncompromising, regardless of the risk of being isolated.³⁰⁸ While the Scottish perspective on Brexit was also shaped by federal principles, Scottish rulers prioritised the substate power to self-rule and the gain of a differentiated relationship with the EU over the valuation of British shared rule.³⁰⁹

Scottish institutions were reluctant to give their legislative consent to the enactment of any statute that would considerably narrow their jurisdiction, even for a limited time and for efficiency reasons.³¹⁰ They claimed that the centralisation of powers following Brexit could only be acceptable if it was objectively proved to be necessary rather than merely convenient.³¹¹ They welcomed central amendments in that sense, as they signalled an understanding of this threat that had to be mitigated.³¹² Nonetheless, the Scottish Government still considered that the

³⁰⁶ Welsh Government, *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (Memorandum 02, 2018) 2.

³⁰⁷ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 216; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 287.

³⁰⁸ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 216-217.

³⁰⁹ Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 36.

³¹⁰ Scottish Government, *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (SP 313, 2018) paras 15, 35-37 and 47.

³¹¹ *ibid* paras 39-40.

³¹² *ibid* paras 40 and 48.

British norms on the transfer of EU powers were posited in overly conditional and restrictive terms.³¹³ Accordingly, it did not withdraw its Continuity Bill which, despite doubts on its constitutionality,³¹⁴ was found to be, *a priori*, within its devolved jurisdiction as it mostly reasserted the existence of devolved Scottish powers.³¹⁵

However, when the British Parliament enacted and implemented the final Withdrawal Act in 2020, it could (logically) take precedence over any devolved statute on the exercise of powers that were ruled by EU law.³¹⁶ Central institutions would then have a normative tool empowering them to impose their wills on any reluctant constituent nation. Indeed, the EU (Withdrawal Agreement) Act 2020 conspicuously provided that the British Parliament, because of its powers over foreign affairs, shall control the transfer of formerly European law into British law.³¹⁷ Although this Act, for example, provided that the Chief Justices from the constituent nations had to be consulted before the enactment of regulations on the judicial powers to adjudicate Brexit issues,³¹⁸ substate nations and institutions were confined to the backseat. Certainly, the view that substate powers shall not be taken back by Parliament has mostly prevailed from a normative perspective.³¹⁹ Moreover, the British commitment to implement 'substantive non-legislative arrangements articulating agreed ways of working between the administrations' is sensible and fosters a constructive engagement that central and substate

³¹³ European Union (Withdrawal) Act 2018 (c 16) Schedule 2, s 1, 2 and 8.

³¹⁴ *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [7] and [11].

³¹⁵ *ibid* [33], [90] and [310].

³¹⁶ *ibid* [33]; Simon Parsons, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*, 18.

³¹⁷ European Union (Withdrawal Agreement) Act 2020 (c 1) s 38.

³¹⁸ European Union (Withdrawal) Act 2018 (c 16) s 6(5A) and 6(5C); *ibid* s 26(1)(d).

³¹⁹ Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 60.

institutions shall work together.³²⁰ Still, the general behaviour of the members of central institutions, who were somewhat imperious towards substate officials during the negotiations on Brexit, cannot be overlooked. Accordingly, the will to foster institutional dialogue beyond what statutes provide gives few realistic guarantees that it can mitigate power struggles and serve the interests of each constituent entity following Brexit.

Even if this process was not officially meant to lead to a direct rejection of multinationalism and devolution, that would have been one of its most noticeable effects.³²¹ It has shed light on the persistently unitarian and centralising mindset of most members of central institutions and on their reluctance to consider the substate nations as equal partners, which is what federated entities shall be.³²² For instance, although they were consulted punctually,³²³ members of Scottish and Welsh institutions could not uphold substate interests continuously within the British team that negotiated Brexit with EU officials.³²⁴ So, despite the relatively broad acceptance that the constituent nations can self-determine and secede, accommodating them within the British constitutional order has been considerably harder concretely.³²⁵ That has been particularly conspicuous amidst constitutional turmoil.

³²⁰ Cabinet Office, *Revised Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland* (2019) 7.

³²¹ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 26 and 35-6; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 286.

³²² Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 286.

³²³ *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [7].

³²⁴ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 172.

³²⁵ Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 286.

Consequently, not only the future of devolution but also that of British multi-level constitutional governance seems uncertain.³²⁶ The informal and aggregative character of the territorial British constitution, whose legal safeguards remain lacking,³²⁷ has made it, at best, very hard to find definite, coherent, and legitimate answers to the issues raised by Brexit.³²⁸ This disruptive process should have yet been an opportunity to undertake extensive constitutional reforms,³²⁹ which could have finalised or dismantled those initiated in the 1990s. Still, concretely, negating institutionally the fundamentally multinational character of the United Kingdom would likely bring about its dislocation. Although there exist political and popular wills to resurrect, if it even existed, a constitutionally unitary state whose Parliament is sovereign, this option is unrealistic in contemporary times.³³⁰ As, for instance, neither British nor Irish political actors favour the establishment of a British-Irish federal state since there is no common interest for

³²⁶ Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 29; Gordon Anthony, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018) 1.

³²⁷ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 261.

³²⁸ Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 39; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 54; Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 276.

³²⁹ David Bailey and Leslie Budd, 'Brexit and Beyond: a Pandora's Box?' (2019) 14(2) *Contemporary Social Science* 157, 166-67; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 273 and 278; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 140; Jeff King, 'The Democratic Case for a Written Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 439.

³³⁰ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 258 and 278; Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 171; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 90.

it,³³¹ there is no interest within the constituent nations to re-establish a British unitary state without the (unlikely) consent of their citizens. While devolution has become a constitutive societal element of the British Kingdom, it should yet be institutionalised more properly, particularly by the firmer entrenchment and the optimised operationalisation of federal principles.

³³¹ Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edn, Athlone Press 1996) 299.

9. The Possibility of British Federalism

Having analysed the essence of the core concepts of this thesis, which are federalism; British constitutionalism; and devolution, it is now time to answer the central research question. Building on the foundations laid in previous chapters, I argue that the United Kingdom is a federal state, though in substantive rather than formal terms. Although the United Kingdom cannot be characterised as a federation, the establishment of the devolution arrangements has led to the efficient implementation of federal principles in practice. Despite their shaky and structurally incomplete legal entrenchment, these principles have shaped the governance of the multinational British Union in contemporary times.

The argument made in this chapter proceeds as follows. First, I contend that this state cannot be characterised as a federation because key federal features and principles are insufficiently safeguarded from a legal perspective. However, I note that British constitutionalism is shaped by several structuring federal principles and features, even though they might not be apprehended from a mostly legal perspective. Finally, I conclude that the contemporary constitutional governance of the United Kingdom is substantively federal since political mechanisms have upheld its multinational nature and divided state sovereignty pragmatically.

9.1. The Non-Existence of a British Federation

Looking for the intrinsic components of federalism is worthless if the importance of constitutionalising them by various means is underestimated. Federal principles shall structure the supreme constitution and its necessary corollary legal devices are then highly valued to ensure that political and societal actors abide by the commitments at the core of any federal pact. Still, since there is no such thing as a codified and canonical British constitution, setting in stone federal principles seems rather doubtful.

9.1.1. Distinguishing a Federation from a Federal State

For many thinkers, federalism has been chiefly apprehended as a formal and legal concept that shall be grasped in strict terms.¹ However, as seen previously, federalism is neither a purely legalistic nor an essentially socio-political concept. As highlighted by Hueglin and Fenna, federalism ‘comprises both a commitment to federal principles (like liberalism, which denotes a commitment to liberal principles) and the existence of complex federal arrangements in practice’.² Consequently, as found in the second chapter, the establishment of checklists listing the features that shall inexorably be present within a federal state does not permit to conceptualise federalism correctly.³ Federalism does not provide a uniform and extensive system of constitutional

¹ Bruno Theret, ‘Du principe federal a une typologie des federations: quelques propositions’ in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 107.

² Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 37.

³ Bruno Theret, ‘Du principe federal a une typologie des federations: quelques propositions’ in Jean-François Gaudreault-Desbiens and Fabien Gelinias (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 114.

governance as much as it helps to keep composite polities together by the flexible upholding of certain principles, such as the division of state sovereignty. A state can then be federal even when what some would consider to be intrinsic federal institutional characteristics are not integrated, completely or even partially, within its legal constitutional framework.

This understanding of federalism is coherent with Friedrich's finding that the actualisation of the federal spirit, which is 'a firm determination to maintain both diversity and unity by way of a continuous process of mutual adaptation', is decisive to ascertain whether a state is federal.⁴ Accordingly, a federal state shall be the outcome of a process making possible the union of diverse entities in a manner that is peculiar to a particular time and place.⁵ In fact, Pagano notes that federalism is a dynamic concept whose constitutional embodiments shall reflect the interaction between conflicting forces in a specific societal setting.⁶ In this regard, when Simeon compares federalism to snow, he highlights that this is not because the embodiments of federalism can vary substantially depending on contexts that it can simply not have some intrinsic defining traits.⁷ An overly theoretical, literal, and universalised understanding of federalism is not only misleading, but also fundamentally inaccurate.

⁴ Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 175.

⁵ *ibid* 7.

⁶ 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.

⁷ 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) 99.

The pragmatism and versatility that shall characterise federalism may yet make it an ambiguous concept that would be distorted by relativistic reasoning.⁸ This sound concern underlines the need for federalism to rely on a few clear and solid substantive pillars, even if they shall take varied forms concretely. As noted by Wheare, the existence of core federal features and principles is not essentially antagonistic to the importance of implementing them with responsiveness to unique societal realities.⁹ Balancing these elements is what makes federalism so relevant in so many diverse polities to institutionalise the alliance between state unity and substate diversity.

In practice, federal states shall seek to divide sovereignty and to empower its constituent entities to both self-rule and shared rule, without overly focusing on how that is done formally. The most significant disparities between federal states are based upon the extent to which they rely on legal or institutional devices or on relatively intangible socio-political mechanisms to achieve these aims.¹⁰ That is another critical reason why analysing the federal character of a state from mainly formalistic and structuralist perspectives is inauspicious. Some states can then be federal in a political sense, though not necessarily in a legal sense. Indeed, in contemporary times, states in which power is decentralised, deconcentrated, or devolved on contractual bases have been

⁸ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 19; Preston King, *Federalism and Federation* (Croom Helm 1982) 71 and 78; Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 16; 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) 108.

⁹ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 15.

¹⁰ Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 4; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 68.

integral parts of federal studies, even though their sovereignty is not formally and unshakably divided.¹¹

Bearing these considerations in mind, it is crucial to compare the core components of a federal state with those of a federation. Although both terms have a lot in common, not every state characterised as federal is also a federation. Finding what fundamentally distinguishes them is critical in ascertaining whether the United Kingdom is becoming a federal state. According to Elazar, 'a federation is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers'.¹² Still, he essentially restates the main characteristics of a state that implements federal principles, regardless of how it does so. Therefore, his definition of a 'federation' is substantively incomplete compared to those formulated by other authors.

Actually, what shall typify a federation is the supreme character of the state constitution, which shall divide state sovereignty by the

¹¹ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 301; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 18; 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) 22; 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; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 6; 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) 63; Jaime Lluç, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 147.

¹² Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 7.

formalised establishment of distinct and exclusive federal and federated jurisdictions and constituent powers.¹³ This constitution shall not be amended unilaterally and shall, ideally, be posited into a canonical document.¹⁴ Operationally, this constitution shall entrench federal principles through the operation of specific formal and legal devices.¹⁵ In that vein, Watts contends that the alliance between self-rule and shared rule, and the non-existence of any omnipotent overarching sovereign entity, shall be constitutionally embedded in priority.¹⁶ According to Saunders, the existence of shared rule is particularly decisive in the establishment of a federation.¹⁷ That would recognise the importance for the constituent entities of sharing a constructive engagement to rule together a composite state.¹⁸ In that vein, Suksi contends that a federation shall secure the interests of the federated entities within federal central legislative institutions to actualise shared rule, as a corollary, and the valuation of the multiplicity of identities.¹⁹

¹³ 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) 94-95; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 226; 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.

¹⁴ Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 226; 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.

¹⁵ Preston King, *Federalism and Federation* (Croom Helm 1982) 20-21; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 319.

¹⁶ 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.

¹⁷ 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) 342-43.

¹⁸ *ibid.*

¹⁹ Markku Suksi, 'Sub-State Governance through Territorial Autonomy: On the Relationship between Autonomy and Federalism' in Alain-G Gagnon and

Nevertheless, a federation must not be a state ruled under overly formalistic norms. Although a normatively supreme constitutional device shall be the cornerstone of a federation, the spirit of the law shall supersede its letter, since its provisions shall be interpreted and enforced flexibly.²⁰ As wisely devised and substantively relevant they might be, formal norms alone are insufficient to uphold and safeguard federal principles if their interactions with other key, and somewhat intangible, governance practices and processes are lacking.²¹ Despite the usually posited character of the constitution of a federation, usages and conventions are yet very useful to understand the legal essence of federal constitutionalism beyond the literal content of express provisions.²² In this regard, the societal characteristics shaping the polity cannot be overlooked when implementing the federal principles entrenched in the supreme constitution of a federation.²³ Accordingly, establishing institutional symmetry (an orthodox formalistic feature that is commonly present in the constitutions of federations) shall not be done, especially in a multinational state,

Michael Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012) 63.

²⁰ 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.

²¹ Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 18; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 27 and 275.

²² KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 225.

²³ *ibid* 19; Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 226-27; 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) 116.

if that jeopardises other federal principles like the fair treatment of the constituent entities.²⁴

Consequently, a federation is a type of federal state in which federal principles are formally entrenched in a manner that guarantees legally that they will have supreme authority over any other norm. In contrast, in a federal state that is not a federation, federal principles can, at least theoretically, be implemented without a canonical constitution.²⁵ As noted by Gagnon, while a federation is an institutionalist concept, federalism, in its broad sense, primarily 'refers to traditions, a culture, a spirit, a way of acting and even an ideology'.²⁶

However, when a state cannot be characterised as a federation because its constitution does not enshrine federal principles firmly enough, it shall be determined why, and on which bases. It can yet be characterised as federal. All states that are established as composite embodiments of pacts recognising the autonomy and the diversity of distinct constituent entities would be substantively federal, even though they might not be structurally federal.²⁷ According to Friedrich, a state is federal when federal and federated jurisdictions are respected and secured, even if that is

²⁴ Greg Marchildon, 'Postmodern Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 442.

²⁵ Preston King, *Federalism and Federation* (Croom Helm 1982) 78.

²⁶ A-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (Routledge 2009) 3.

²⁷ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 302; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 4; Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005) 19; Malcolm Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 248 and 271. 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) 402.

not done by the enforcement of formal and supreme constitutional provisions.²⁸ In accordance with a contractualistic understanding of federalism, the political recognition that the organic ties between the constituent entities are constitutive of a polity would be the core condition for implementing a federal pact.²⁹ Such a pact shall be the bedrock of a federal state, which would be a federation if this pact was formalised and if the abidance by its provisions can be enforced.

Therefore, I draw two decisive conclusions. First, a federal constitution and a federal system of governance cannot be conflated.³⁰ Second, although a federation is necessarily a federal state from a conceptual perspective, the reverse is not automatically accurate. Consequently, the case of the United Kingdom, whose devolution arrangements could introduce ‘federal arrangements, principles, or practices’ in its constitutional

²⁸ Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968) 173.

²⁹ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 4 and 12; 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) 197; 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) 19; 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) 103; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 4.

³⁰ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 4; KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 20-21, 33 and 225; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 21; DV Verney, ‘Federalism, Federative Systems, and Federations: The United States, Canada, and India’ (1995) 25(2) *Publius: The Journal of Federalism* 81, 89; Michael Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012) 42 and 271; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 20.

governance as Elazar hypothesised before they were enacted,³¹ becomes particularly interesting to study. I can then investigate the potential federal nature of the British state bearing in mind the rather uncoded and uncanonical nature of its constitution.

9.1.2. Parliamentary Sovereignty in a Federation

While Keating acknowledges that federal ideas have been influential in the United Kingdom since the nineteenth century, he argues that they could only be implemented correctly under two conditions.³² The Westminster Parliament shall cease to be the legal British sovereign, and the effectively hegemonic status of the English constituent entity shall be constrained so that each constituent entity can be treated fairly in all circumstances.³³ Otherwise, the devolution arrangements would not be entrenched within a supreme constitution dividing federal and federated sovereignties, as that seems to be the case.³⁴ Indeed, the resilience of the long-standing ideal of parliamentary sovereignty, which fundamentally clashes with that of federal constitutional sovereignty,³⁵ displays a reluctance to put federal principles at the centre of British constitutionalism.³⁶ That is not a minor concern when determining whether the United Kingdom is a federation.

³¹ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 44.

³² Michael Keating, 'Brexiteer and the Nations' (2019) 90(2) *Political Quarterly* 167, 175.

³³ *ibid.*

³⁴ *id.*, 'Brexiteer and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Société* 53, 55.

³⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 78; KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 12; Preston King, *Federalism and Federation* (Croom Helm 1982) 143.

³⁶ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 202; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 112; 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) 46; Colin Turpin and Adam Tomkins, *British Government and*

In a functional federal state, it is often contended that central and substate entities shall be, as much as possible, on an equal footing and abide by the provisions of the ideally supreme federal pact to which they are parties.³⁷ As noted by Bogdanor, '[a] multinational state needs clear constitutional guidelines so that there is clarity about the place of each of the territories in the wider system of the United Kingdom'.³⁸ When a central institution holds the last word on any matter within the state, power and sovereignty can hardly be divided fairly, unequivocally, and permanently.³⁹ Accordingly, there shall be clear, stable, and durable mechanisms to prevent, and even forbid, the Westminster Parliament from overstepping or abolishing federated jurisdictions.⁴⁰ If there is a possibility for a sovereign Parliament to exercise its non-constituent powers to disregard the substance of what would be a British federal pact, this central institution cannot be federal.⁴¹

In a federation, parliamentary sovereignty only prevails when both central and substate legislatures exercise it.⁴² Still, that is not the case in the United Kingdom since its central Parliament is still

the Constitution (7th edn, Cambridge University Press 2011) 215; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 65.

³⁷ Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 629.

³⁸ Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 277.

³⁹ Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 32; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 119.

⁴⁰ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 156; Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 191; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 46.

⁴¹ Oonagh Gay, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997) 7.

⁴² David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 26.

legally omnipotent.⁴³ Certainly, since the turn of the millennium, the Westminster Parliament has not systematically taken advantage of its legally dominant position.⁴⁴ Nonetheless, this central institution can devise the rules structuring multi-level governance in a potentially domineering manner.⁴⁵ Moreover, since only the norms enacted by substate institutions can be reviewed judicially so that their jurisdictional conformity can be controlled,⁴⁶ British legislative supremacy is one-sided and, thus, quite unfair.

Consequently, since the central Parliament is legally empowered to set unilaterally the constraints on its normative powers and the scope of devolved jurisdictions, both the multinational and the federal characters of the United Kingdom are at its whim, which makes them quite frail.⁴⁷ Although the Northern Irish arrangements, in conformity with the GFA, cannot be amended unilaterally, that might yet be the case for the Scottish and Welsh

⁴³ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 15; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 552; 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) 7.

⁴⁴ Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 17.

⁴⁵ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 327-28.

⁴⁶ *Whaley v Watson* [2000] SC 340, 355; *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 56 [46]; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 59; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 55.

⁴⁷ 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; 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; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 32.

arrangements.⁴⁸ It must be acknowledged that securing the permanence of these arrangements by using binding legal devices ‘would require broad reform on the basis of the UK’s uncoded constitution’.⁴⁹ The Devolution Acts, which were enacted unilaterally by the British Parliament, are more the outcomes of orthodox parliamentary sovereignty than those of a challenge to it that might lead to the establishment of a British federation.⁵⁰ Since the British rules of recognition have remained formally parliamentary instead of becoming multinational (and federal),⁵¹ that signals that the central Parliament has refused to overly undermine a status quo that serves it well.

9.1.3. Falling Short of Federation

Seeking to typify the British multi-level governance system is not as such an innovative enterprise. In this regard, Watts’ insights constitute a particularly brilliant basis for assessing its federal character. His thinking relies on the argument that functional

⁴⁸ 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; Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017) 25.

⁴⁹ House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government’s Draft Scotland Clauses* (HC 1022, 2015) 33.

⁵⁰ 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) 296-97; Andreas Rahmatian, ‘Brexit and Scotland: Centralism, Federalism or Independence?’ (2018) 26(4) *European Review* 616, 629; Mark Elliott, ‘Parliamentary Sovereignty in a Changing Constitutional Landscape’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 32.

⁵¹ 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) 301; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 253-54.

federations should have six characteristics.⁵² He considers that three of them are present in the United Kingdom. Distinct institutional levels of government have been established since devolution, hold independent jurisdictions that are delineated statutorily, and work together through the operation of intergovernmental processes.⁵³ Still, he contends that the non-existence of both ‘federal policy-making institutions’ and adjudicators hampers the fairness of relationships between the constituent entities and the federal nature of their constructive engagement.⁵⁴ But more fundamentally, he argues that the absence of ‘a supreme written constitution not unilaterally amendable by either order of government, and requiring for amendment the consent of a significant proportion of the constituent units’⁵⁵ entails that a sovereign Parliament cannot put a British federation on sufficiently firm grounds legally.⁵⁶

Accordingly, although devolution has been made possible by the enactment of statutes that are somewhat akin to substate written constitutions,⁵⁷ the Devolution Acts could hardly be integral parts of a supreme federal British constitution.⁵⁸ Certainly, they have been interpreted judicially with more care than ordinary statutes considering their substantively constitutional worth and their

⁵² 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) 219-20.

⁵³ *ibid* 202 and 219.

⁵⁴ *ibid*.

⁵⁵ *ibid* 202.

⁵⁶ *ibid* 219-20.

⁵⁷ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 104; Malcolm Cameron and Tulia Falsetti, ‘Federalism and the Subnational Separation of Powers’ (2005) 35(2) *Publius* 245, 261.

⁵⁸ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 276; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 47; 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) 108.

intended transformative effect on governance.⁵⁹ The English and Welsh High Court asserted in the *Brynmawr* ruling that the Welsh Devolution Acts hold a constitutional status whose substance and authority shall not be limited by ordinary parliamentary statutes, to which they would be normatively superior.⁶⁰ However, Devolution Acts have not empowered the constituent nations to control their destiny by exercising formal constituent powers within their jurisdictions.⁶¹ Indeed, only the Westminster Parliament can amend these Acts, the Standing Orders of substate institutions, and the scope of substate powers.⁶² Cameron and Falleti then argue that, since the substate nations do not hold independent constituent powers, such as those to amend unilaterally their own constitutional devices, the United Kingdom cannot be a federation.⁶³

For his part, Tierney deems that the constitution of the United Kingdom can hardly be that of a federation for essentially two reasons specifically related to the division of ordinary normative powers. He considers that its substance is overly ambiguous, which hampers its efficiency, and that the fact that it is set statutorily empowers Parliament, from a legal perspective, to act

⁵⁹ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [11]; *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 [73].

⁶⁰ *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr)* [2011] EWHC 519 [87].

⁶¹ Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 291.

⁶² Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 34-35; Scotland Act 1998 (c 46) Schedule 1, Part 1, s 4(1); Government of Wales Act 2006 (c 32) s 95(1); Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.2.18; Graeme Cowie, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018) 8.

⁶³ Malcolm Cameron and Tulia Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245, 261.

unilaterally as a constituent institution.⁶⁴ Indeed, in accordance with an orthodox understanding of parliamentary sovereignty, this institution has never definitively surrendered the legal powers it devolved to the constituent nations.⁶⁵ As noted by Hueglin and Fenna, '[devolved] powers exist only as long as to the extent that Parliament so decides; they are delegated powers that can be withdrawn at any time'.⁶⁶ Since Parliament can make decisions compromising the status and the powers of the constituent nations without having a legal duty to obtain their consent, these nations cannot be the federated entities of a federation.⁶⁷

The impossibility of establishing a British federation due to the persistent sovereignty of the central Parliament sheds light on another decisive socio-political reason explaining this reality. The demographic, political, and economic dominance of England has consistently been such that the primacy of its interests has been

⁶⁴ 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) 170; 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) 108.

⁶⁵ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 40; *Whaley v Watson* [2000] SC 340, 353; Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 283; Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 113; Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 143; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 112; *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 56 [45]; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 115; HL Deb 12 March 2018, vol 789, col 1406 (Lord Empey).

⁶⁶ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 32.

⁶⁷ KC Wheare, *The Constitutional Structure of the Commonwealth* (Clarendon Press 1960) 58; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 152; 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) 46; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 32.

systematised within the British constitutional order.⁶⁸ Parliament, whose members are overwhelmingly English, has tended over time, even unconsciously, to conflate English interests with those of the Union, and would thus act in a biased and centralising manner.⁶⁹ The exercise of a predominantly English parliamentary sovereignty has had spillover effects throughout the British polity, within which centripetal forces are very powerful.⁷⁰ For instance, as policies that are important for the whole state are devised in Westminster, the concrete powers of substate institutions can readily be subjected to the wills of representatives from the English nation.⁷¹

Since they could already do so extensively within central institutions, it is understandable that English citizens have never deemed it opportune to be endowed with their own institutions to self-rule. But even if England self-ruled in accordance with its own, national, devolution arrangements, it would be so powerful as a federated entity that the resulting disbalances of power would make the United Kingdom the most unequal federation ever.⁷²

⁶⁸ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 108 and 181; Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 5.

⁶⁹ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 133 and 175; 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) 301.

⁷⁰ McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 79.

⁷¹ 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; Russell Deacon, *Devolution in the United Kingdom* (2nd edn, Edinburgh University Press 2012) 250-51.

⁷² Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 33; Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 224; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 135; Vernon Bogdanor, 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156, 160; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 71; House of Lords Select Committee on the

Moreover, the proposal to divide England into autonomous regions that would be more equivalent to the other constituent nations can hardly be implemented legitimately considering the continuously weak popular support for this solution.⁷³ Still, more broadly, the non-existence of a distinct English constitutional identity makes it hard to consider that this nation can be a genuine federated entity.⁷⁴ Devolution could hardly trigger the federalisation of the United Kingdom in a comprehensive manner as long as it only affects 15 percent of Britons, which considerably complexifies the development of fair multinational and intergovernmental relationships.⁷⁵ Although the constituent nations might be statutorily equal to England, the balance would systematically tilt in favour of this nation. Therefore, the hegemonic status of England and the sovereignty of an effectively English Parliament, which consolidates this hegemony, would make a British federation very fragile if only it could exist.

Consequently, according to Watts, since the United Kingdom is ‘a polity with virtually all the features of a federation but with some unilateral overriding central powers (usually emergency powers)’⁷⁶, it shall instead be characterised as a ‘decentralised

Constitution, *The Union and Devolution* (HL 149, 2016) 70; Andrew Gamble, ‘The Conservatives and the Union: The “New English Toryism” and the Origins of Anglo-Britishness’ (2016) 14(3) *Political Studies Review* 359, 367; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 185; Mark Elliott, ‘Parliamentary Sovereignty in a Changing Constitutional Landscape’ in Jeffrey Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 31.

⁷³ McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 70.

⁷⁴ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 163; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 37; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 12.

⁷⁵ 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.

⁷⁶ *ibid* 219-20.

union'.⁷⁷ At least legally speaking, the British polity would be a 'union state': an aggregate of nations assembled through a sum of bilateral statutes.⁷⁸ While federal principles might be implemented to accommodate substate nationalisms pragmatically, they can definitely not shape the whole British legal framework, and more precisely its institutional and constitutional centres.⁷⁹ In practice, as found previously, there are signs that federal self-rule (except in England) and shared rule (though imperfectly institutionally) can exist in the United Kingdom. Nonetheless, the sovereignty of its Parliament, instead of that of a canonical constitution, prevents this state from being a federation.

⁷⁷ id, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 236.

⁷⁸ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 156; Michael Keating, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217, 219; Colin Pilkington, *Devolution in Britain Today* (Manchester University Press 2002) 7-8; 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) 37; 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, 271; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 1.

⁷⁹ Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 6; Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 187; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 1; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 253-54.

9.2. Placing the United Kingdom on the Federal Spectrum

Bearing in mind the necessity for the core attributes of a federation to be entrenched within a supreme codified constitution, the conclusion that the United Kingdom cannot be characterised as such should not be controversial. However, it is incorrect to terminate the analysis there and asserting that this state simply cannot be federal. As glimpsed previously, a federation is only a class of federal states characterised by its very formal and rigid legal constitutional structure. It is crucial and opportune to evaluate whether British constitutionalism can entrench federal principles through alternative, substantively socio-political, processes and mechanisms.

9.2.1. The Federal Spectrum

In practice, determining whether a state is federal or not is not like settling whether an object is entirely black or white. Federalism can only be conceptualised properly and make sense when none of the shades of grey shaping it is overlooked. Despite the insightfulness and the usefulness of typologies and exegetic assessments, looking for a perfect and unique way to institutionalise federal principles is as vain as it is inopportune. These principles cannot be apprehended in absolute terms, especially since pragmatism is intrinsic to federalism. That is how apparently conflicting elements, such as unity and diversity, shall be balanced so that a composite polity can be well governed with responsiveness to its fundamental characteristics.

In contemporary times, the substantive complexity of federalism shall be appreciated rather than disregarded or abhorred because it is what makes its constitutionalisation so relevant in diverse

contexts. Two reasons motivate this claim. First, implementing federal principles cannot be done efficiently in isolation from the processes through which other policy and constitutional aims can be achieved. For instance, federal states shall guarantee their constituent entities that they can enjoy their right to internal self-determination regardless of their national status.⁸⁰ Second, studying federalism from epistemologically plural perspectives requires debunking long-standing assumptions, especially these related to what would ineluctably be its formal nature.⁸¹ Consequently, I shall ascertain if and how the division of sovereignty, which is a staple of federalism, can be done without solely using purely legalistic devices.

For federalism to transcend formalism and be conciliated with self-determination and multinationalism, it shall be conceptualised as a continuum rather than as a fixed and definite idea. States can be placed on a federal spectrum based upon the concrete extent to which they divide sovereignty and diffuse the exercise of normative powers in fulfilment of federal principles.⁸² More precisely, the

⁸⁰ Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 10.

⁸¹ 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) 343.

⁸² 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) 215; 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) 338; 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) 23; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 234; 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) 60; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 103.

multinational, unitary, centralised, and symmetrical characters of a polity; the extent of substate legislative institutions; the efficiency of the institutions actualising shared rule; and the constitutional safeguard of federal principles would be the most critical elements structuring this spectrum.⁸³ A federation, regardless of the extent of powers held by its substate entities, is at an extremity of this spectrum and embodies an ideally formal, and somewhat integral, understanding of federalism.⁸⁴ Assessing, for example, whether a state guarantees that its constituent entities can self-rule enables us to find out where, rather than if, a state is on the federal spectrum.⁸⁵ In other words, as evoked by Livingston, it shall not be asked whether states are federal, but to which degree they are, which astutely refutes the common argument that federalism must have uniform embodiments.⁸⁶

In that vein, examining the extent to which federal principles can structure the division of sovereignty through the recourse to informal and political constitutional devices helps us to appreciate their genuine character in a multinational polity. Federal and multinational states certainly share numerous distinctive substantive features, such as the desire to conciliate state unity with societal diversity.⁸⁷ In this regard, some authors argue that

⁸³ 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) 75; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 19.

⁸⁴ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 36.

⁸⁵ 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) 17.

⁸⁶ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 272.

⁸⁷ David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 187; Stephen Tierney, *Constitutional Law and National*

many European states that grant extensive self-rule to their substate entities through decentralisation shall be characterised as federal, even though their global constitutional structure is not shaped by federal principles.⁸⁸ Still, the extensive transfer of powers to substate entities in these states would mainly be the outcome of political agreements, which could easily be revoked if their content is not formally entrenched.⁸⁹ In fact, it is highly debatable whether the existence of a framework of multi-level governance is in itself sufficient to establish a federal state.⁹⁰ Nevertheless, if federalism is apprehended as a spectrum, the existence of such a framework empowering diverse jurisdictions to coexist within a state, with few regards for its formal attributes, might be sufficient to make this state substantively federal.⁹¹

Pluralism (Oxford University Press 2004) 103; Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 143; 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) 111; 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.

⁸⁸ Rainer Arnold, 'The Voice of Lander, Regions and Communities in the European Union' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 352; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 152; Michael Keating and Guy Laforest, 'Federalism and Devolution and Devolution: The UK and Canada' 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) 1.

⁸⁹ Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 191; 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) 2.

⁹⁰ Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 17 and 95; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 2.

⁹¹ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 35-36; Greg Marchildon, 'Postmodern

Another decisive element to consider when devising a federal spectrum is the constitutional role of federated entities. The less they can exercise their own powers without central supervision,⁹² and the less these powers are normative rather than merely administrative,⁹³ the less federal principles can be implemented. Moreover, substate entities can hardly be federated if they are not endowed with representative democratic institutions,⁹⁴ which shall also provide citizens, albeit indirectly, a say on decisions affecting the state as a whole⁹⁵. Accordingly, what distinguishes federalism

Federalism and Sub-State Nationalism' in Ann Ward and Lee Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009) 443; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 13.

⁹² KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 19; Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 49; 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) 197; Malcolm M Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008) 21 and 29; 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; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 167; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 60.

⁹³ Bernard Burrows and Geoffrey Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980) 33.

⁹⁴ KC Wheare, *Modern Constitutions* (2nd edn, Oxford University Press 1966) 22; Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205, 231; 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; Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) 9; Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 270.

⁹⁵ Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 24-25; Liesbet Hooghe and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016) 18; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A*

from decentralisation institutionally is that the rulers of federated entities shall be held accountable by their citizens more than being subjected to the will of central rulers.

However, the conflation between self-rule and citizen accountability that helps to identify federated entities does not enable to determine, as such, whether they shall necessarily hold jurisdiction over a delineated territory.⁹⁶ Although federalism is not intrinsically and strictly territorial, it is concretely opportune for a federated entity to have its own territory, over which it can be sovereign within its jurisdiction, so that it can self-rule more efficiently.⁹⁷ Nonetheless, there exist two modes of federal governance, which have to be studied to understand federalism more accurately, that are substantively personal, based to some extent on the identity of the citizens of substate entities: consociationalism and confederalism.

Consociational arrangements are based upon the recognition of minority groups, regardless of their concentration on a precise territory within a state. These arrangements, like federal ones, primarily seek to secure the autonomy of substate entities and their

Postfunctionalist Theory of Governance, vol 2 (Oxford University Press 2016) 153.

⁹⁶ Antoine Messara, 'Principe de territorialite et principe de personnalite en federalisme compare: le cas du Liban et perspectives actuelles pour la gestion du pluralisme' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005) 228; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 38-39; 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) 26.

⁹⁷ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006) 38; 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) 7.

participation within central institutions.⁹⁸ As noted previously, the Northern Irish devolution arrangements implement some consociational principles. Operationally, two elements fundamentally distinguish federalism from consociationalism. First, consociationalism relies on the idea that a divided polity can only be peaceful and functional when minority groups hold guaranteed places within central institutions and when citizen identities are fixed and essentialised.⁹⁹ Entrenching a special status to definite minority groups that is based upon their distinct identities is meant to ensure their members' participation in civic life without it being affected by abusive power struggles and majoritarian claims.¹⁰⁰ Such a rejection of multiple identities clashes with the federal principle that loyalties and belongings shall be divided and plural.¹⁰¹ Second, consociational arrangements, as they prioritise

⁹⁸ Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 388; Jonathan Tonge, *Northern Ireland* (Polity 2006) 26; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 13; 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) 34; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 174.

⁹⁹ 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; 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) 56; 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.

¹⁰⁰ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 20; 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.

¹⁰¹ Anna Moltchanova, *National Self-Determination and Justice in Multinational States* (Springer 2009) 60; Michel Seymour and Alain-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012) 11.

the protection of minority rights over the normative empowerment of autonomous substate entities,¹⁰² foster shared rule before securing substate self-rule.¹⁰³ However, federal arrangements do not hierarchise these fundamentally complementary components of federal sovereignty.

For their part, confederations are flexible arrangements gathering states, which are akin to federated entities that hold vast constituent powers and normative autonomy more than being cohesive polities, as federal states usually are. There is no actual confederal shared rule, and each entity must consent to the enactment of any constitutional provision.¹⁰⁴ Accordingly, confederal central institutions only exist if the constituent entities of a confederation want so and are seldom accountable to citizens.¹⁰⁵ Consequently, the federal character of both consociational and confederal arrangements is lacking because they prioritise either self-rule or shared rule instead of seeking to constitutionalise their alliance. They should yet be included on a federal spectrum because they aim to actualise a core substantive federal principle: autonomy.

¹⁰² Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 22; 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) 20 and 37.

¹⁰³ Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 388 and 392; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 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) 40 and 43; Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 141.

¹⁰⁴ Preston King, *Federalism and Federation* (Croom Helm 1982) 142.

¹⁰⁵ Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 235; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 174.

Sturm deems that working autonomy arrangements must have five elements: distinct institutional identities, financial autonomy, regional parties, substate policy-making, and distinct political cultures.¹⁰⁶ Moreover, Watts considers that autonomous regions shall hold defined legislative and executive powers without subordination, be endowed with the financial resources to exercise these powers, and count on institutional guarantees that their existence cannot be revoked unilaterally.¹⁰⁷ In that vein, Benedikter asserts that substantial legislative powers shall be devolved permanently to substate entities, so that they can be substantively equal to the central entity and, ultimately, that the rule of law is secured.¹⁰⁸ These considerations are all important to determine the extent of autonomy that substate entities shall hold within a state, whether it is characterised as federal or not.

Comparing autonomy arrangements with federal ones displays some important conceptual confluences between autonomy and federalism. Indeed, they are frequently the embodiments of pragmatic and *ad hoc* political solutions to internal self-determination issues.¹⁰⁹ Autonomy arrangements, as federal

¹⁰⁶ 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) 140.

¹⁰⁷ Ronald L Watts, 'Multinational Federations in Comparative Perspective' in Michael Burgess and John Pinder (eds), *Multinational Federations* (Routledge 2007) 231.

¹⁰⁸ Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 60.

¹⁰⁹ 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) 76; 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) 217.

ones, challenge unitary sovereignty and value multi-level governance, especially when it makes self-rule possible.¹¹⁰ Still, the institutional heterogeneity of autonomy frameworks¹¹¹ and the uncertainty surrounding their constitutional status¹¹² prevent them from integrally implementing federal principles, especially formally. Autonomy arrangements often institutionalise only self-rule, since most autonomists fear that shared rule, which values shared identities and interests, ineluctably triggers uniformising tendencies compromising the distinctiveness, which is deemed essential, of substate entities.¹¹³ Furthermore, autonomy arrangements may be implemented only in parts of a state whose general governance might remain predominantly unitary, and are not always integral parts of state constitutions.¹¹⁴ Consequently,

¹¹⁰ 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) 21; Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 136; 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) 27.

¹¹¹ Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 18 and 245; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 154.

¹¹² Lauri Hannikainen, 'Self-Determination and Autonomy in International Law' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 91.

¹¹³ Hans-Joachim Heintze, 'On the Legal Understanding of Autonomy' in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer 1998) 25; Thomas Benedikter, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009) 9; 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) 43; Jaime Lluich, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134, 153 and 155; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 160 and 180-82; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 105.

¹¹⁴ Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 141; Jenna Bednar, *The Robust Federation:*

the ensuing lacking concern for securing shared rule and state unity makes autonomism closer to decentralisation than to classical federalism, especially from a legal perspective.

For their part, quasi-federations are states whose constitutions are akin to these of federations, although federal principles are not plainly integrated into their governance processes, which entails that the latter are not substantively federal.¹¹⁵ Conversely, in union-states and federacies, federal principles are staples of both their constitutions and processes of governance.¹¹⁶ They cannot be characterised as federations simply because, respectively, they do not entrench these principles formally¹¹⁷ and because some

Principles of Design (Cambridge University Press 2009) 18; Markku Suksi, *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 139; 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) 18; 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) 76; Markku Suksi, 'Autonomous Areas as a Constitutional Feature in the People's Republic of China and Finland' in Jaime Lluch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014) 217; 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) 38.

¹¹⁵ Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press 2009) 19.

¹¹⁶ Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 7 and 22; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 235; 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.

¹¹⁷ Daniel Elazar, 'The Role of Federalism in Political Integration' in Daniel Elazar (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984) 22.

substate entities do not have the attributes of federated entities¹¹⁸. Still, union-states, although their constitutive acts can legally be repealed by central institutions,¹¹⁹ are compacts¹²⁰ that were established to conciliate state unity with national diversity, as federal states do.¹²¹ Their constitutive acts, which usually entrench substantively federal principles, likely have a binding political force.¹²² That might be the case of the United Kingdom if it is characterised, as argued by Watts, as a union-state.¹²³ Its constitutionalism would then be substantively federal. Consequently, apprehending federalism as a spectrum displays that the upholding of its core principles does not ineluctably have to be done formally and symmetrically and that they can be embodied by tailor-made constitutional arrangements.¹²⁴ In fact,

¹¹⁸ id, *Exploring Federalism* (University of Alabama Press 1987) 7; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 235; 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.

¹¹⁹ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 47; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 235; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 167.

¹²⁰ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 7.

¹²¹ Stein Rokkan and Derek Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983) 181.

¹²² Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 48; Jaime Lluich, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014) 168.

¹²³ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 172; Ronald L Watts, 'Comparing Forms of Federal Partnerships' in Dimitrios Karmis and Wayne Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005) 236.

¹²⁴ KC Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 34; 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) 214; Jim Bulpitt, *Territory and Power in the United Kingdom* (Manchester University Press 1983) 19; DV Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) *Publius: The Journal of Federalism* 81, 84; Sergio Ortino,

regardless of orthodox formalistic postulates, a federal division of sovereignty can be done through the necessary alliance between legal and political constitutionalisms, which is particularly conspicuous in the United Kingdom.

9.2.2. Federalism and British Constitutionalism beyond Legalism

In the same manner that the legal and the political components of British constitutionalism are comparable to the two sides of the same coin, a similar assertion shall be made regarding federalism. Accordingly, the absence of a formal supreme constitution that entrenches federal principles does not entail that the United Kingdom cannot be placed on a federal spectrum. Indeed, normative supremacy cannot be assessed from a strictly positivistic perspective, especially to apprehend the nature of sovereignty in a state.¹²⁵ Despite the usefulness of formal entrenchment to remove the division of sovereignty from ordinary political debates, Chapman argues that an uncoded constitution, like the British one, can safeguard federal principles appropriately.¹²⁶ As noted by Cornes, 'the technical retention of legal sovereignty is only half of the picture', and the other is that normative power shall be divided between central and substate

'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) 281; Liesbet Hooghe and Gary Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016) 153.

¹²⁵ Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 139; 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.

¹²⁶ 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) 85-86.

institutions based upon their shared constructive engagement.¹²⁷ In fact, a political analysis of British unionism, rather than a strictly legalistic and anglocentric one, displays that, especially in Scotland, this concept is substantively more federal than unitary,¹²⁸ although that would be imperfectly assumed and institutionalised.¹²⁹ This insight fits well with the pragmatism that defines a British constitution that has never been designed, particularly in its territorial dimension, to comply with a fixed set of formal and rigid criteria.¹³⁰

In practice, devolution was devised as a compromise between legal and political constitutionalism so that a division of sovereignty could be executed and safeguarded without making parliamentary sovereignty crumble following the enactment of a canonical code.¹³¹ Although British constitutionalism has become increasingly legal since the end of the twentieth century, its political side has remained both the most efficient and dignified.¹³² The existence of alternatives to formal constitutional entrenchment, paired with a primarily English distrust of federal ideas, could

¹²⁷ Richard Cornes, 'Cartographers of the New Constitutional Settlement: The United Kingdom's Top Courts and Devolution' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 435.

¹²⁸ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 9; Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 24.

¹²⁹ Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 9.

¹³⁰ House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 44.

¹³¹ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 186; 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) 173; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 37.

¹³² Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 32-33.

explain why constitutional reformers were never able to muster enough popular support to establish a British federation.¹³³ Moreover, since the autonomist claims of the substate nations can be accommodated suitably due to the flexibility of the devolution arrangements, such a project would be of limited interest concretely.¹³⁴ Accordingly, a British federal framework can be established to address societal issues by mostly political means, without risking to face constitutional revolutions or stalemates caused by the reluctance to formalise exhaustively British constitutionalism.¹³⁵

However, while the flexibility intrinsic to devolution has permitted it to carry various senses over time,¹³⁶ it would have institutionalised federal principles quite intangibly and, to some extent, erratically.¹³⁷ The British implementation of these principles has been hampered by the somewhat fragmentary character of devolution and by continuous doubts on the steadiness of devices like the Sewel Convention.¹³⁸ It is open to question whether the will of an English majority to ‘take back control’ will never lead to the

¹³³ 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) 117.

¹³⁴ 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) 48-49 and 59; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 33.

¹³⁵ Michael Gordon, ‘Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit’ (2019) 30(1) *King’s Law Journal* 125, 144.

¹³⁶ House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 69; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 39.

¹³⁷ Christopher Farrington and Graham Walker, ‘Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland’ (2009) 17(2) *Irish Studies Review* 135, 147; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 14; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 324.

¹³⁸ 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) 301; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 267.

resurgence of a British unitary and parliamentary sovereignty.¹³⁹ As Gavin Little observed presciently almost two decades ago, ‘the gap between constitutional doctrine and the political reality of devolution may widen to the extent that the former becomes increasingly difficult to sustain’.¹⁴⁰

To fill this gap, Gordon argues that enacting a codified constitution may help to address long-standing issues in a more principled and coherent manner.¹⁴¹ Nevertheless, it cannot be overlooked that constitutional statutes like the Devolution Acts have acquired a powerful political binding force and even set ‘constitutional limits as real as any laid down in a written constitution’.¹⁴² Furthermore, a formal constitution cannot set in stone its content eternally, because it shall be amendable to remain responsive to popular wills, and legitimate, over time.¹⁴³ The inability to amend a formal constitution might even jeopardise the accommodation of the substate nations and then undermine the worth of a federal pact.¹⁴⁴ Although legal entrenchment can contribute to strengthen the safeguard of key constitutional principles, they cannot be authoritative if citizens and political actors do not abide by them in

¹³⁹ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 142.

¹⁴⁰ Gavin Little, ‘Scotland and Parliamentary Sovereignty’ (2004) 24(4) *Legal Studies* 540, 566.

¹⁴¹ 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) 154.

¹⁴² Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 32-33.

¹⁴³ Vernon Bogdanor, *The Monarchy and the Constitution* (2nd edn, Oxford University Press 1995) 181; David Feldman, ‘Constitutional Conventions’ in Matt Qvortrup (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015) 96; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government’s Draft Scotland Clauses* (HC 1022, 2015) 16.

¹⁴⁴ 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) 48-49.

practice.¹⁴⁵ That is just another important reason why the legal and political aspects of devolution shall not be viewed as antagonistic alternates. Rather, the adaptable balance between them, all imperfect it may be effectively, can provide a sound way to institutionalise federal principles in the United Kingdom.

9.2.3. Flexible Federal Principles in Northern Ireland

In practice, federal principles can only be transplanted suitably into the British polity if their implementation is consistent with its peculiar constitutional features.¹⁴⁶ The versatility of the British Union, 'which has successfully sustained a myriad of both formal and informal institutional relationships',¹⁴⁷ cannot be underestimated to explain its resilience, which has been fostered in a substantively federal manner.¹⁴⁸ Still, these relationships have also relied on peculiar British constitutional features that somewhat contradict an abstract understanding of federalism. Due consideration of these features prevents making the mistake of not including the United Kingdom on the federal spectrum because its constitution cannot entrench federal principles in absolute terms.

In this regard, the Northern Irish case is particularly telling. The breaches of federal principles that have occurred in this nation shall be assessed from a contextualised perspective and beyond theoretical assumptions. The unilateral suspension of substate institutions, first in 1972 when they were considered responsible for causing the 'Troubles' and at multiple times since 1998 when

¹⁴⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 300.

¹⁴⁶ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 36.

¹⁴⁷ Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 183.

¹⁴⁸ *ibid* 182-83.

power-sharing executives could not be formed, would indeed contravene federal principles.¹⁴⁹ Northern Irish self-rule could only be exercised when central institutions unilaterally decided to make it possible, which could signal the existence of a domineering relationship of subordination antagonistic to the federal spirit.

Still, that is not the first time that traditional British constitutional principles had to be compromised to mitigate the bitter tensions between nationalists and unionists. During the debates on Home Rule, even Dicey argued that a referendum, which was foreign to the British constitutional tradition, should settle the matter due to the gravity of parliamentary stalemates.¹⁵⁰ If constitutional crises occur 'where a constitution no longer makes politics possible',¹⁵¹ they are regular in Northern Ireland, which is the sole constituent nation that needs to foster the coexistence between distinct communities by peculiar institutional means.¹⁵²

Since the implementation of federal principles alone hardly settles constitutional crises, their disregard by British central institutions says more about the intricate societal conflicts that have shaped Northern Ireland than about what would be their visceral rejection of federalism. In practice, the unilateral decisions made by these institutions on Northern Irish matters were never meant to constrain domineeringly the autonomy of this constituent entity.

¹⁴⁹ Stefan Wolff, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387, 409.

¹⁵⁰ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 43.

¹⁵¹ Richard Ekins and Graham Gee, 'Miller, Constitutional Realism and the Politics of Brexit' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 17.13.

¹⁵² Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) para 13; John Henry Whyte, *Interpreting Northern Ireland* (Clarendon Press 1991) 219; Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edn, Athlone Press 1996) 3 and 8.

They have acted more out of necessity, using their prerogative powers to deal with emergencies in precise and extreme circumstances,¹⁵³ than with the intent of breaching a British federal pact. The enforcement of the GFA even compels them to guarantee that nationalists and unionists abide by their commitments to rule Northern Ireland together in (relative) harmony through the institutionalisation of power-sharing mechanisms.¹⁵⁴ When that is not possible, direct rule, despite its concrete operational lacunas,¹⁵⁵ appears as the least faulty option to ensure sound constitutional governance.¹⁵⁶ Indeed, the frequent suspensions of the devolution arrangements have always been intended to last only until the functioning of power-sharing institutions could resume, instead of being the deliberate first steps towards centralization.¹⁵⁷

¹⁵³ *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 516 and 518; Vernon Bogdanor, *The Monarchy and the Constitution* (2nd edn, Oxford University Press 1995) 178; Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 187; AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 264.

¹⁵⁴ Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) paras 3 and 11-12; Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 101; John Morison, 'Constitutionalism, Civil Society and Democratic Renewal in Northern Ireland' in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2nd edn, Palgrave 2006) 240; Jonathan Tonge, *Northern Ireland* (Polity 2006) 213; David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183, 208.

¹⁵⁵ 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* (2nd edn, Palgrave 2006) 46.

¹⁵⁶ Jonathan Tonge, *Northern Ireland* (Polity 2006) 32 and 213-14.

¹⁵⁷ Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982) paras 2 and 6; 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) 172; 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) 64.

Accordingly, even in their initial form, Bogdanor argues that Northern Irish devolution arrangements were quasi-federal due to the effect of authoritative British political constitutional duties.¹⁵⁸ In fact, these arrangements have fostered federal constitutional behavioural standards, like the need for deference, that have been intimated by institutions, especially by the judicial ones that deciphered their sense.¹⁵⁹ Due to the peculiarity of the Northern Irish realities, these arrangements had to be tailor-made and devised asymmetrically, regardless of long-standing practices that could be substantively unitary. As noted by Burgess, their flexibility and their responsiveness, which have been crucial to 'accommodate, when necessary, a wide diversity of political relationships', have highlighted the substantively federal character of the United Kingdom.¹⁶⁰

¹⁵⁸ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 290.

¹⁵⁹ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 276-77; Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 290.

¹⁶⁰ Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 115.

9.3. The United Kingdom as a Federal State

Federal principles have been key in keeping a multinational British polity united following the enactment of Devolution Acts which mostly dovetailed the core characteristics of its constitutionalism. Although these principles might not have a legally binding strength, they decisively shape the present and the future of a United Kingdom, whose composite nature is more recognised than ever nowadays. Indeed, over the last decades, British constitutional governance has evolved considerably since the exercise of state sovereignty has been increasingly divided for the benefit of autonomous constituent nations. Nevertheless, it remains to be determined how federal principles can be authoritative staples of the contemporary British constitution by the effect of essentially political mechanisms.

9.3.1. Safeguarding Federal Principles

In contemporary times, the devolution arrangements have embodied a decisive shift away from unitarism so that British governance, as a whole, could become multi-level and substantively federal. In the absence of a formal constitution superseding the authority of Parliament, which can still repeal these arrangements, political devices and mechanisms have been very useful to entrench the principles underlying devolution and, ultimately, federalism.¹⁶¹ These devices and mechanisms have contributed to institutionalise harmonious relationships between all constituent nations.¹⁶² They have also eased the accommodation

¹⁶¹ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 43; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 290.

¹⁶² Michael Burgess, 'Constitutional Change in the United Kingdom: New Model or Mere Respray' in Neil Colman McCabe (ed), *Comparative Federalism in the*

of their nationalist claims without constantly having to rethink the structure of the British constitution from top to bottom.¹⁶³ While I made thorough analyses on some of these devices (like the Sewel Convention), I shall now determine how the British political constitution can become, and remain, that of a federal state.

Although the Devolution Acts were not directly intended to incorporate federal principles into British formal law, their interpretation and their political implementation have been guided by these principles.¹⁶⁴ Conventional norms on this matter are far from being merely declaratory as they can shape British institutional practices and be binding on societal actors, and especially on parliamentarians.¹⁶⁵ Despite the persistence of a significant legal parliamentary power to roll back the devolution arrangements unilaterally, that could hardly be achieved considering the fundamental status of devolution within the British political constitution.¹⁶⁶ Accordingly, Elliott observes that,

Devolution Era (Lexington Books 2002) 174; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 39.

¹⁶³ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 156; 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, 74; 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) 201.

¹⁶⁴ 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, 74.

¹⁶⁵ Peter Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137, 155; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 186; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 170.

¹⁶⁶ Robert Hazell, 'Conclusion: What Are the Answers to English Question?' in Robert Hazell (ed), *The English Question* (Manchester University Press 2006) 233; Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 330; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 13.3.30; HL Deb 8 December 2015, vol 767, col 1501 (Lord Keen

politically, 'devolution schemes both acknowledge and conjure into life a constitutional principle that requires respect for the autonomy of the devolved institutions'.¹⁶⁷ Furthermore, Elliott and Thomas note that 'the political and constitutional reality of the modern territorial constitution is that power has been dispersed across the UK in ways that are, in all relevant practical senses, irreversible'.¹⁶⁸

More precisely, the Devolution Acts are safeguarded through what Elliott labels as their 'contingent entrenchment'.¹⁶⁹ In practice, they can only be repealed with 'a special majority in the UK Parliament, the consent of the Scottish Parliament, or the consent of the Scottish electorate as expressed through a referendum'.¹⁷⁰ Moreover, despite their essentially symbolic character, the statutory provisions asserting the permanent character of substate institutions and jurisdictions are unambiguous and express political statements on their cardinal constitutional worth.¹⁷¹

of Elie); Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 120; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 32-33; *ibid* 38.

¹⁶⁷ Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 37.

¹⁶⁸ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 330.

¹⁶⁹ House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 15.

¹⁷⁰ David Marquand, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175, 180; 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; Iain McLean, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012) 330; House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 15.

¹⁷¹ House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015) 14 and 16; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 14; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 304 and 330; Stephen Tierney, 'Parliament and the Brexit Process: The Battle for Constitutional

In that vein, I note that the concept of British parliamentary sovereignty has evolved politically and even jurisprudentially so that, without being wholly discarded conceptually, the exclusive and permanent character of substate normative powers cannot be compromised.¹⁷² Accordingly, the Sewel Convention serves as a ‘self-denying ordinance’¹⁷³ preventing the Westminster Parliament from countering the transformative norms it enacted to divide the exercise of normative sovereignty.¹⁷⁴ The operationalisation of the multinational, and substantively federal, nature of the United Kingdom shall not be merely rhetorical. While substate institutions are still formally subordinate to the central Parliament that established them statutorily, they are yet fully-fledged ‘[loci] of power’¹⁷⁵ that have to be completely autonomous while acting within their jurisdictions.¹⁷⁶ As noted previously, central and substate institutions shall hold the same kind of normative powers when they enact primary or subordinate legislation.¹⁷⁷ Substate institutions can even legislate on reserved matters if Parliament empowers them to do so, *inter alia* by the inclusion of Henry VIII clauses, which underlines that it can consider substate assemblies as its equals.¹⁷⁸ Each constituent entity shall then hold the powers

Supremacy in the United Kingdom’ (2022) 12(1) *Notre Dame Journal of International and Comparative Law*, Article 3, 18.

¹⁷² Gavin Little, ‘Scotland and Parliamentary Sovereignty’ (2004) 24(4) *Legal Studies* 540, 548; HL Deb 24 November 2015, vol 767, col 604 (Lord Wallace of Tankerness).

¹⁷³ Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005) para 128.

¹⁷⁴ *ibid.*

¹⁷⁵ Vernon Bogdanor, ‘Devolution: Decentralisation or Disintegration?’ (1999) 70(2) *The Political Quarterly* 185, 185.

¹⁷⁶ *ibid.*; Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 116.

¹⁷⁷ Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 57 and 60; *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [120] (diss).

¹⁷⁸ 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) 79; Mark Elliott, ‘Parliamentary Sovereignty in a Changing Constitutional Landscape’ in Jeffrey

to rule itself and the state, in a shared manner, by exercising its part of a divided British sovereignty. Therefore, the unbridled exercise of parliamentary sovereignty is rather theoretical nowadays since, in compliance with federal principles, Parliament can hardly legislate over devolved matters (which are not merely delegated concretely).¹⁷⁹

If the members of central institutions decided to disregard the consequences of such an evolution by ignoring the effective constraints on them, they would likely pay a heavy political price.¹⁸⁰ That is coherent with the inherently democratic character of British political constitutionalism, which relies on the responsiveness to the popular will, whether it be national or multinational.¹⁸¹ Certainly, the citizens of the constituent nations have the right to decide to re-establish direct rule. However, this decision cannot be

Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 36; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 288.

¹⁷⁹ Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 188; Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 546 and 561-62; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 112 and 115; 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) 195; 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) 73.

¹⁸⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982) 33; *MacCormick v Lord Advocate* [1953] SC 396 [3]; 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) 110; Nick Barber, *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021) 290.

¹⁸¹ David McCrone, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001) 180-81; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 346; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 37; Michael Gordon, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125, 147.

imposed on them by central institutions that would not have sought their consent to do so beforehand. In fact, the authoritativeness of the devolution arrangements is primarily rooted in the consent of the citizens of the constituent nations, which was first expressed in referendums, to be governed in conformity with these arrangements.¹⁸² Respect for citizens' consent, which is an essential federal principle, is a pillar of contemporary British multinational governance.

The responsiveness of the devolution arrangements to peculiar societal realities and its corollary asymmetrical structure, despite their potential institutional lacunas, have been vital in securing their authority in diverse contexts.¹⁸³ Even the reluctance of English citizens and rulers to establish specific devolution arrangements, which would make the existence of English self-rule doubtful,¹⁸⁴ reflects a substantively federal commitment to respect the popular will expressed in each entity.¹⁸⁵ So, setting limits on central unilateralism, regardless of their forms, has transformed the functioning of British constitutionalism at its core, even though its formal structure remains relatively unitary.¹⁸⁶

¹⁸² Noleen Burrows, *Devolution* (Sweet & Maxwell 2000) 24; McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013) para 109.

¹⁸³ Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three Effects on "The Border in the Mind"' (2017) 19(3) *British Journal of Politics & International Relations* 497, 501.

¹⁸⁴ Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 16.8.6.

¹⁸⁵ HL Deb 8 December 2015, vol 767, col 1501 (Lord Keen of Elie).

¹⁸⁶ Constitution Unit, *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996) 50; 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; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 48.

Ultimately, these evolutions of British constitutionalism might lead to the enactment of a canonical supreme text that would enshrine the division of state sovereignty and the importance of federal principles.¹⁸⁷ That may optimise the guarantee that the United Kingdom is a federal state, both legally and politically. So, the establishment of a British federation could be less a revolutionary constitutional moment than the efficient recognition of long-standing facts.¹⁸⁸ However, there is a risk that the establishment of a British federation would reduce the adaptability characterising a mostly political framework of multi-level governance. In this regard, Gordon and Elliott worry that safeguarding devolved arrangements through legalistic and rigid mechanisms would undermine the valuation of dialogue between the constituent nations to find common grounds and resolve jurisdictional conflicts.¹⁸⁹ Despite the insightfulness of this concern, it overlooks the absence of a firm division between the legal and political components of British constitutionalism, and the need for them to be conciliated. Fulfilling this need is decisive in ensuring the proper implementation of federal principles in the United Kingdom.

9.3.2. Institutionalising Federal Principles

The institutionalisation of federalism in the United Kingdom is crucial to making sense of its principles. The constituent nations

¹⁸⁷ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 80-81.

¹⁸⁸ Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 146; Gordon Anthony, 'Sovereignty, Consent and Constitutions: The Northern Ireland References' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 14.30; Vernon Bogdanor, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 253.

¹⁸⁹ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 354; Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 55.

must be endowed, on a coherent and principled basis, with the tools by which they can hold normative autonomy and affirm their distinctiveness.¹⁹⁰ The role and the functioning of the institutions that operationalise British multi-level governance in a federal manner shall be investigated thoroughly, and particularly beyond legalistic and structural perspectives. Still, the fact that the British framework of multi-level governance was not devised comprehensively following a rational template would limit the constitutional value of devolution concretely.¹⁹¹ As noted by McEldowney, '[this] form of administrative, legislative, and financial agreement is federal in form but remains lacking an overarching constitutional settlement that recognizes the reality of devolved powers'.¹⁹²

Nonetheless, according to Elazar, the pragmatism and the versatility that characterise British institutions have been key in building and maintaining 'a multiplicity of quasi-federal arrangements'.¹⁹³ The pact between the constituent nations could then evolve at the same pace as the British polity, whose aggregative and diverse character has been recognised at the expense of the quest for a shared Britishness.¹⁹⁴ More precisely, since devolution, it has been recognised that autonomous nations coexist within the United Kingdom and rule this state jointly

¹⁹⁰ Tom Mullen, 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276, 291.

¹⁹¹ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 229; Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 180.

¹⁹² John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 407.

¹⁹³ Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) 229.

¹⁹⁴ Scotland Office, *Scotland in the Union. A Partnership for Good* (Cm 2225, 1993) 39-40; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 274; 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) 177.

in a manner that transcends unitarism.¹⁹⁵ Therefore, despite the long-standing assumption that federal principles could hardly be British,¹⁹⁶ their implementation, beyond half-measures, are even essential to make the British constitution fit together with the British polity.

However, in some circumstances, the differences between the constituent nations seem more substantial than what they have in common, which might lead to a breaking point. To make devolution work, federal principles, such as the valuation of trust, mutual respect, deference, and subsidiarity, shall be integral parts of the political culture and the institutional practice of a multinational United Kingdom.¹⁹⁷ Federal principles are instrumental to balance divergent interests and needs and provide recognition and fairness to all the constituent nations.¹⁹⁸ While conflicts between constituent entities and institutions and substate expressions of discontent are inevitable, these principles can provide the solutions, by the valuation of both subsidiarity and

¹⁹⁵ Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 81.

¹⁹⁶ Andreas Rahmatian, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616, 628.

¹⁹⁷ Cabinet Office, *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002) 9 and 15; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 186; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 346; 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; Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 16.8.7.

¹⁹⁸ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 197 and 207; 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.

interdependence, that are needed to break dead ends.¹⁹⁹ In accordance with the British valuation of political constitutionalism, interinstitutional mechanisms favouring dialogue between them have been preferred to adversarial adjudicative processes, which tend to engender zero-sum games, to settle conflicts.²⁰⁰ This approach can then foster constructive engagement and make shared rule, despite its formal imperfections, possible.

Still, a notable blind spot of political constitutionalism to make this outcome happen, especially in a state whose sovereignty has long been parliamentary, is its potential legitimisation of majoritarianism and of conflicts of interests. As exposed by Brexit, intergovernmental mechanisms can be flawed by the possibility for central institutions to be simultaneously judges and parties in the making of consequential decisions, which undermines their functional and impartial character.²⁰¹ When a state like the United Kingdom is divided into several diverse entities, courts shall actively uphold cardinal constitutional principles not against democratic political governance, but rather to strengthen its essence.²⁰²

As highlighted previously, it is opportune for courts to act as guardians of a supreme federal pact, enforce it, and adjudicate

¹⁹⁹ Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 158.

²⁰⁰ HL Deb 21 July 1998, vol 592, col 791 (Lord Sewel); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 4.

²⁰¹ Alan Greer, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134, 137; 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) 61.

²⁰² Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 51.

issues related to its enforcement fairly and impartially so that federal principles can be implemented appropriately.²⁰³ Despite the non-existence of a British canonical constitution, judges can interpret the provisions of the Devolution Acts, make sense of them concretely, and assert their constitutional significance.²⁰⁴ Ultimately, their rulings might lay the foundations for a fairer, less unitary, and more federal British constitutional culture.²⁰⁵

It is open to question, especially while considering the limited multinational character of the British Supreme Court, whether British courts are the best-suited institutions to guarantee the execution of a substantively federal pact. Historically, the judges' powerlessness to review statutes made them poor guardians of the Northern Irish settlement and of the rights of the Irish Catholic minority, which explains why they could not preclude and mitigate the Troubles.²⁰⁶ Even since devolution, there has been a continuous concern, which was noted previously, that British judicial institutions would systematically be biased for the central

²⁰³ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 45.

²⁰⁴ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 566; Richard Cornes, 'Cartographers of the New Constitutional Settlement: The United Kingdom's Top Courts and Devolution' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 440; Graham Gee, 'Devolution and the Courts' in Robert Hazell and Richard Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007) 277; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 114 and 117; Jeff King, 'The Democratic Case for a Written Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 433.

²⁰⁵ Richard Cornes, 'Cartographers of the New Constitutional Settlement: The United Kingdom's Top Courts and Devolution' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 440; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 310.

²⁰⁶ Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edn, Athlone Press 1996) 116.

entity, and thus that they could not guard a British federal pact impartially.²⁰⁷ In that vein, Feldman and Gee argue that the House of Lords, which was the highest Appellate Jurisdiction until 2009, missed a critical opportunity, in the first years after devolution, to devise a more multinational and less unitary understanding of British constitutionalism.²⁰⁸ Courts would have even counterbalanced the centrifugal forces that reshaped the British constitution, both substantively and procedurally, at the turn of the millennium.²⁰⁹ In fact, judicial rulings played a less decisive role than political devices such as the Memorandum of Understanding and Concordats to foster harmonious and fruitful relationships between the constituent nations.²¹⁰

Nevertheless, it cannot be overlooked that the British judiciary has never been entirely unified, especially considering the uniqueness of the Scottish legal system, which signals a potential for the rise of a federal British judicial order.²¹¹ Moreover, the establishment of a Supreme Court in 2009 has made possible the adjudication of issues related to multi-level governance independently from other central (and rather centralising) institutions, even in conformity with federal principles.²¹² Bogdanor

²⁰⁷ 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) 299.

²⁰⁸ David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329, 350; 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.

²⁰⁹ 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.

²¹⁰ 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) 299.

²¹¹ David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 45.

²¹² *ibid.*

also predicted that the concomitant crumble of parliamentary sovereignty and rise of devolution could at last empower Justices to strike down parliamentary statutes jeopardising the substance of the Devolution Acts.²¹³ The provisions securing the permanence of substate institutions, actualising substate self-rule, and positing the political commitments intrinsic to the 'Vow' could then be enforced judicially,²¹⁴ although that still has to be done. Then, Justices could become, in Cornes' words, 'the cartographers of the new constitutional order' that is shaped by federal principles instead of revolving around an omnipotent Parliament concretely.²¹⁵

In practice, the British Supreme Court has developed an ambiguous case law regarding the nature of its powers to safeguard the devolution arrangements and to uphold their content in a federal manner. It has been reluctant to strike down incompatible statutes without first allowing political actors to fix them through political dialogue.²¹⁶ This approach is certainly coherent with the nature of a federal political culture. However, it signals a reluctance to enforce substantively constitutional provisions authoritatively and to force the implementation of federal principles. Still, albeit cautiously, the *Jackson* and *Axa* rulings have highlighted that the core principles and features of devolution have become integral parts of the constitutional

²¹³ Vernon Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185, 188.

²¹⁴ 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) 112.

²¹⁵ Richard Cornes, 'Cartographers of the New Constitutional Settlement: The United Kingdom's Top Courts and Devolution' in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Editions Yvon Blais 2005) 440.

²¹⁶ Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 296.

common law beyond their statutory form.²¹⁷ The central Parliament remains sovereign, but the legality of its action, which can be reviewed, is conditional on its respect of substate jurisdictions.²¹⁸

Furthermore, the Supreme Court has insisted on the importance of the principle of subsidiarity when adjudicating jurisdictional matters.²¹⁹ That indicates its commitment to act in deference to substate wills and needs, even though the terms of its action remain uncertain.²²⁰ It has recognised 'the diverse constitutional essence of the United Kingdom and the fact that multiple legal systems, with their own particularities, coexist within it',²²¹ which are key federal characteristics. These developments have signalled an increased judicial commitment from the highest British court, though not exclusively, to develop a coherent doctrine on devolution and to ensure the functional implementation of federal principles.²²² Qvortup has even characterised the Supreme Court as a 'de facto constitutional court', akin to those in federal states.²²³

This central institution has even significantly nuanced its stance, asserted in the *Miller* ruling, on its inability to enforce common law and conventional norms. In the *Cherry* ruling, Justices deemed

²¹⁷ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 236.

²¹⁸ *ibid* 237.

²¹⁹ *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [118] and [119] (diss).

²²⁰ *ibid*.

²²¹ John McEldowney, 'Federalism' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019) 419.

²²² Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) para 4.4.6; Christopher McCorkindale, Aileen McHarg and Paul Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289, 307; *ibid* 416.

²²³ 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) 56.

that Prime Minister Boris Johnson's decision, which was based upon prerogative, to prorogue Parliament so that a risky confidence vote on Brexit could be avoided was illegal because it infringed core elements of constitutional morality.²²⁴ Justices could serve as counterweights to the, theoretically, absolute and unlimited rule of British rulers endowed with extensive prerogative powers.²²⁵ This ruling has also raised important questions on the judicial power to narrow the scope of parliamentary sovereignty.²²⁶ Beyond this specific case, this ruling has shown that Justices can adjudicate matters that are not strictly legal and formal,²²⁷ particularly to ensure the proper operation of institutional processes (whether central or substate).²²⁸ Jeopardising the existence and the scope of devolved jurisdictions would be a breach of common law constitutional principles and courts could provide remedies that would not be exclusively declaratory.²²⁹ Consequently, this judicial development might attenuate, if not end, the 'law-convention dichotomy' that long hampered the rise of British judicial review.²³⁰ Federal principles, which have become staples of contemporary common law constitutionalism since the turn of the millennium, could then take their rightful place within the contemporary British constitutional order.

²²⁴ *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [30], [37] and [69].

²²⁵ *Re McCord's Application* [2016] NIQB 85 [83]; *ibid* [38]; 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, 17.

²²⁶ *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [49].

²²⁷ *ibid* [31].

²²⁸ *ibid* [34].

²²⁹ Jack Williams, 'Prerogative Powers after *Miller*: An Analysis in Four E's' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) para 8.28.

²³⁰ TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 241.

9.3.3. A Federal Ethos in British Constitutionalism

Although the United Kingdom cannot be characterised as a federation because its constitution does not entrench formally federal principles, they have become integral parts of its constitutional governance. Tierney observes that this state has been ‘on a federal trajectory since 1998’ because it can institutionalise and safeguard both self-rule and shared rule in a practical manner.²³¹ Moreover, as noted by Keating, ‘the territorial units have assumed elements of sovereignty and do not regard themselves as mere creatures of Westminster’,²³² which are typical elements of federal relations between entities. In that vein, Cornes contends that, concretely, ‘Westminster no longer has more than a residual, perhaps at times partnership, role to play’ on devolved matters.²³³ Although the federalisation of the United Kingdom may not have been intended, it has become a constitutional reality.²³⁴ In fact, while Tierney deems that the British state has drifted towards federalism without institutionalising federal principles in strict compliance with a theoretical formalistic

²³¹ 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) 106 and 121.

²³² 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.

²³³ Richard Cornes, ‘Cartographers of the New Constitutional Settlement: The United Kingdom’s Top Courts and Devolution’ in Jean-François Gaudreault-Desbiens and Fabien Gelin (dir), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie* (Éditions Yvon Blais 2005) 435.

²³⁴ Robert Colls, ‘What Is British National Identity and How Do We Get It?’ (2012) 52(52) *Soundings* 100, 105; David Melding, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013) 32; Jo Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80(4) *Modern Law Review* 685, 692.

template,²³⁵ the governance of this state has already become substantively federal.

Furthermore, the United Kingdom drifted towards federalism even before the enactment of the Devolution Acts. According to Livingston, bearing in mind that federalism has to be conceptualised beyond formalism, the political and societal structures of this state were already federal in the 1950s. Despite the formally unitary character of modern British constitutionalism, ‘there [were] many elements of federalism in the British society, and the diversities that constitute this federal quality [were] reflected and articulated through various instrumentalities of a federal type’.²³⁶ Quite daringly and interestingly, Livingston notes that central institutions would have even empowered the constituent nations to exercise shared rule since their representation in Parliament was guaranteed and their representatives could benefit from special procedures to make national claims.²³⁷ Livingston’s insights shed light on the constitutive role of a British federal pact that would have long been overlooked because its content was not enshrined in a formal constitution. His prescient analyses, which already acknowledged the dual nature of constitutionalism, are relevant nowadays, as devolution has enhanced the recognition and the safeguard of a substantively constitutive British federal ethos.

Certainly, the institutionalisation of multinational and multi-level frameworks of governance and the implementation of federal

²³⁵ 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) 121.

²³⁶ WS Livingston, *Federalism and Constitutional Change* (Oxford University Press 1956) 269-70.

²³⁷ *ibid* 270.

principles remain incomplete in the United Kingdom. Extensive transformations, such as those induced by devolution, take time before becoming integral parts of institutional practice and constitutional thinking. It is indeed normal that, as cautioned by Bagehot, '[a] new Constitution does not produce its full effect as long as all its subjects were reared under an old Constitution, as long as its statesmen were trained by that old Constitution'.²³⁸ Moreover, the mechanisms actualising the British federal ethos shall continuously evolve so that the diversity of the constituent nations can be recognised adequately and accommodated without jeopardising a fluid state unity.²³⁹ Still, despite its imperfections, especially from a formalistic perspective, the British constitutional framework embodies a unique federal pact that has last thanks to its complexities and its nuances, rather than despite them. Contemporary constitutional evolutions reflect a synthesis between the need for a flexible and multinational understanding of unionism and the upholding of the staples of British constitutionalism, which are yet not immutable.²⁴⁰ Since 'the union is a family resemblance concept, without shared normative foundations',²⁴¹ it has been crucial to devise constitutional frameworks based upon what an actual British polity, rather than

²³⁸ Walter Bagehot, *The English Constitution* (2nd edn, first published 1872, D. Appleton & Company 1904) 3.

²³⁹ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 565; Iain McLean and Alistair McMillan, *State of the Union* (Oxford University Press 2005) 252; 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) 301; Nick Pearce and Michael Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34, 36; Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 58.

²⁴⁰ Scotland Office, *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009) para 2.3; Nick Barber, *The Constitutional State* (Oxford University Press 2010) 182; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 21 and 41.

²⁴¹ Michael Keating, 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167, 167.

on what an ideal and somewhat illusory one, is. Otherwise, they would have been dysfunctional and illegitimate.

Accordingly, despite the non-existence of distinct English norm-making institutions and of a genuine federal chamber, none of these elements shall be characterised as ‘essential elements of the federal idea’²⁴², particularly considering ‘the flexibility of federal models’.²⁴³ In that vein, Marquand argues that facts shall supersede (formal) law while evaluating the federal character of the British Union.²⁴⁴ That is in this spirit that the British devolution arrangements can be implemented, and to some extent enforced, with a pragmatism that transcends abstract legalism.²⁴⁵

For instance, especially since Dicey’s orthodox argument that the Westminster Parliament could never bind itself was refuted concretely, this institution can cede unconditionally some of its powers to the substate nations.²⁴⁶ Although these entities hold at best limited independent substate constituent powers, Cameron and Falleti consider that, due to their extensive ability to self-rule autonomously, they are federated entities of a ‘de facto federal system’.²⁴⁷ Additionally, the cooperation between central and substate institutions, so that they can conciliate conflicting values and interests and ensure a certain normative harmonisation after

²⁴² 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) 106 and 121.

²⁴³ *ibid.*

²⁴⁴ David Marquand, ‘Federalism and the British: Anatomy of a Neurosis’ (2006) 77(2) *Political Quarterly* 175, 180.

²⁴⁵ *ibid.*

²⁴⁶ Vernon Bogdanor, *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001) 297; 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) 70.

²⁴⁷ Maxwell Cameron and Tulia Falleti, ‘Federalism and the Subnational Separation of Powers’ (2005) 35(2) *Publius* 245, 261-62.

devolution, signals the incorporation of the principles underlying shared rule into British constitutional practice.²⁴⁸ These are only some reasons why Murkens astutely asserts that '[the] sharing of power, the decentralisation of authority, and the coordination of policy between different parties and governments are more typical of a federal system than of the unitary Westminster model'.²⁴⁹ Moreover, while the devolution arrangements have been tailored to dovetail substate realities, they have had a constitutive role for the whole United Kingdom, since their implementation has been decisive to keep it united amidst troubled times.²⁵⁰ In fact, the devolution of state powers to substate institutions is only one element of a broader transformation of this state into one whose constitution has become increasingly supreme.²⁵¹

In the long run, however, two issues shall be addressed to preserve a federal ethos that the political effects of devolution might imperil. First, since devolution has reignited national identity claims following the establishment of autonomous substate norm-making institutions, there is a risk that a common sense of belonging, Britishness, crumbles.²⁵² Despite the advantages for the substate nations to be part of a composite polity, whether for economic, social, political, cultural, and security reasons, a federal

²⁴⁸ Johanne Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134, 134 and 158; 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) 66.

²⁴⁹ 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) 168.

²⁵⁰ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 184.

²⁵¹ *ibid* 289.

²⁵² Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 16; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 41; *id*, *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019) 268.

union shall be valued beyond the instrumental benefits it provides to its members.²⁵³ Since a federal state could not last if its constituent entities prioritised their autonomy (and self-rule) and became at best apathetic about shared governance and identity, a will to live together is essential so that it can thrive.²⁵⁴ Although most Britons, and even substate nationalists, have continuously felt that their state and substate identities can be conciliated,²⁵⁵ identity multiplicity shall never be taken for granted to keep a federal ethos alive. In this regard, initiatives that permit to modernise Britishness so that it becomes simultaneously more cohesive and inclusive²⁵⁶ through the valuation of dialogue between its constituent nations²⁵⁷ are particularly vital.

Second, Brexit has highlighted that the decline of parliamentary sovereignty is far from being a closed case.²⁵⁸ Accordingly, in the

²⁵³ House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 24.

²⁵⁴ Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 338.

²⁵⁵ Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) para 142; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 27; 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) 111; Scotland Office, *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013) 20; Ben Jackson, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50, 55; 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) 17.

²⁵⁶ Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) paras 8-9, 182, 185, 193 and 195; 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) 51; 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) 17.

²⁵⁷ 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* (2nd edn, Palgrave 2006) 319.

²⁵⁸ Michael Keating, 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53, 64.

near future, federal principles might become the pillars of the codified constitution of a British federation or fall into oblivion. Nevertheless, harking back to an epoch when the Westminster Parliament was the sovereign of a unitary polity is politically unrealistic. In fact, that epoch never existed.²⁵⁹ The parliamentary Union between the English, Welsh, Scottish, and Northern Irish nations was never fundamentally meant, despite some centralising English ambitions,²⁶⁰ to cause their dilution into an essentially unitary whole.²⁶¹ Despite the sovereign status of the central Parliament, '[distinct] bodies of local, regional and transnational law encouraged eclecticism, forum-shopping and the collision as well as the cross-fertilisation of legal systems'.²⁶² The substance of federal principles has been implemented for centuries although their embodiments might have been intangible and generated controversy.²⁶³ These principles have permitted to keep diverse

²⁵⁹ Gavin Little, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540, 557; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 315; 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) 169; 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) 280.

²⁶⁰ Robert Schutze, 'Introduction: British "Federalism"?' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018) 3.

²⁶¹ Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 14; Tom Nairn, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000) 132; Robert Colls, *Identity of England* (Oxford University Press 2002) 38; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004) 338; Linda Colley, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009) 17; Michael Keating, *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009) 18; House of Lords Select Committee on the Constitution, *The Union and Devolution* (HL 149, 2016) 14; 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) 280.

²⁶² 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) 280.

²⁶³ James Anderson, 'Arrested Federalisation? Europe, Britain, Ireland' in Graham Smith (ed), *Federalism: The Multiethnic Challenge* (Longman 1995)

substate nations together into a united polity and recognise them constitutionally both flexibly and efficiently. They are indeed fundamental elements of the contemporary constitution of a multinational British Union.

282; Michael Burgess, *The British Tradition of Federalism* (Leicester University Press 1995) 16.

Conclusion

In this thesis, I sought to determine whether the United Kingdom has become a federal state since the turn of the millennium. To do that, I investigated the existence of institutional and substantive links between three core concepts that may appear very disparate and even antagonistic at first glance: federalism; British constitutionalism; and devolution. So that this somewhat counter-cultural investigation can provide thorough and fulfilling answers, I had to make critical analyses challenging common thoughts and traditionalist postulates. Based upon a theoretical analysis of these three concepts, combined with a close examination of devolution across Wales, Scotland, and Northern Ireland, I concluded that the United Kingdom has become a federal state in substance, if not in form. However, to do so, I first had to understand the fundamental characteristics of the three core concepts of this thesis, which was the object of the first part of this thesis.

Regarding federalism, I argued that the form of federal arrangements is subsidiary to their functional ability to implement firm substantive principles. Conceptually, federalism is essentially contractual. A federal constitution is then the embodiment of a pact shaped by principles such as consent and fairness. Operationally, a federal state can only exist if the exercise of sovereignty is divided and held jointly and freely by its constituent entities. They shall be treated with fairness, without any central domination. Therefore, federal constitutional governance must primarily transcend unitarism through legal and political means.

As with federalism, I noted that constitutionalism intrinsically has two sides, legal and political, that are mutually interdependent. I examined how the functional character and the legitimacy of the

British constitution could be secured so that this instrument could be binding. In fact, despite the peculiar non-existence of a formal British constitution, there is a British political constitution that can set binding norms. These norms, whether ordinarily statutory or conventional, can constrain the sovereignty of the Westminster Parliament and compel political actors to abide by some standards of constitutional behaviour.

Building on the findings related to the authority of the British constitution, I took a closer look at the alliance between British constitutionalism and multinationalism. Although it was long deemed unitary, the British constitution is the outcome of a pact between the English, Welsh, Scottish, and Northern Irish nations, which were never assimilated into a homogeneous British nation. Instead of triggering a historical rupture, devolution is a process through which British constitutionalism can recognise and institutionalise more accurately its fundamentally multinational character. In practice, the devolution arrangements have endowed the constituent nations, except England, with a distinct institutional voice and empowered them to devise norms and defend their interests not exclusively within central state institutions.

Having laid out the conceptual foundations of this thesis, I could note that federal principles have shaped the British constitutional system. There exist ways to implement them by the work of a primarily informal constitutional framework. To assess the merits of this hypothesis, I examined in the second part of this thesis whether the British constituent nations can exercise normative powers in accordance with these principles. I evaluated whether these nations can self-rule, rule the United Kingdom jointly, in a shared manner, and be sure that the division of British sovereignty is entrenched and secured.

In that vein, I assessed whether the Scottish, Welsh, and Northern Irish devolution arrangements have empowered substate nations to self-rule. Since the exercise of federal sovereignty shall be divided, these entities shall be totally autonomous when making decisions on matters within the jurisdictions set by the Devolution Acts. These entities shall be able to make choices that reflect their peculiar realities. I concluded that there is such thing as British self-rule in a federal sense because the contemporary governance of the United Kingdom is fundamentally multi-level and responsive to diverse substate national wills.

Afterwards, I studied the nature of the relationships between central and substate entities and institutions. In a federal state, constituent entities shall not only self-rule on their own turf but also participate actively and constructively in state governance. So that shared rule can be operationalised federally, federal principles like fairness and heterarchy shall be institutionalised. I concluded that there has been a continuous constructive engagement to mitigate power struggles by valuing dialogue between entities and institutions. However, the lack of recognition that common state institutions shall be multinational has prevented the rise of a British shared rule in a federal sense.

I then sought to square the circle, to discover how a sovereign Parliament can enact the Devolution Acts and restrain itself from repealing them unilaterally. Any federal arrangement shall be endowed with a constitutionally supreme status within a polity. Its existence and its authoritativeness shall not purely depend on the good will of central institutions. Accordingly, I investigated how British constitutional norms can be binding without being formal. For instance, I explained how the Sewel Convention could

entrench the principles underlying devolution (and, potentially, federal principles) and guarantee their implementation. Although the intent to set in stone devolution and multi-level governance is quite clear nowadays, doubts persist on the efficiency and on the steadiness of the devices that safeguard them.

I can then ascertain that there is a federal potential in the United Kingdom, despite its rather inconsistent and incomplete institutionalisation. But before determining whether the British state has become federal, which is the crux of both this thesis and its third part, it was opportune to examine the links between federalism and British constitutionalism beyond devolution. I observed that the British constitution has never been so close as it is now to embracing federalism comprehensively. Nonetheless, a central reluctance from the members of central institutions to challenge some long-standing assumptions by undertaking a constitutional revolution has complicated, though not prevented, the federalisation of British constitutionalism.

I highlighted that devolution is just one of the multiple constitutional changes that put the traditional doctrine of parliamentary sovereignty under pressure at the turn of the millennium. These changes have since accentuated the formal and legal dimensions of British constitutionalism. Moreover, the opportunity to strengthen and secure the substantively federal character of the United Kingdom through devolution has been coupled with the increased assertiveness of substate national claims. However, these momentous transformations led to Brexit, which was based upon the promise that Britons, especially in England, would 'take back control' over their polity. Bearing in mind the impact of Brexit, few things could then be sure and absolute regarding British constitutionalism, even devolution.

Before answering the central research question of this thesis, I yet needed to distinguish federations from federal states. Accordingly, I concluded that the United Kingdom is not a federation due to the lacking formalisation of federal principles within its constitutional order, especially at its institutional centre. Still, I noted that these principles have been implemented and constitutionalised in a multinational British polity, especially since devolution. It has moved towards federalism over time, and its constitutional governance is substantively federal nowadays.

Consequently, I conclude that the United Kingdom has become a federal state. Eschewing a formalistic approach that focuses exclusively on the legal sides of federalism and British constitutionalism, I can apprehend the links between these concepts and devolution from a holistic and multi-faceted perspective. Despite their importance, the words contained in supreme constitutional documents, statutes, and judicial rulings are meaningless if they do not substantively shape the polity in which they are intended to be authoritative. Therefore, this thesis makes an original contribution to legal and constitutional scholarship by apprehending its core concepts and the links between them beyond their most salient and formal aspects.

Bibliography

British Acts

Act of Union (Ireland) 1800 (c 38).

Cities and Local Government Devolution Act 2016 (c 1).

Constitutional Reform Act 2005 (c 4).

Declaratory Act 1720 (c 5).

European Union Referendum Act 2015 (c 36).

European Union (Notification of Withdrawal) Act 2017 (c 9).

European Union (Withdrawal) Act 2018 (c 16).

European Union (Withdrawal) Act 2019 (c 16).

European Union (Withdrawal) (No 2) Act 2019 (c 26).

European Union (Withdrawal Agreement) Act 2020 (c 1).

Government of Ireland Act 1920 (c 67).

Government of Wales Act 1998 (c 38).

Government of Wales Act 2006 (c 32).

Laws in Wales Act 1542 (c 26).

Northern Ireland (Temporary Provisions) Act 1972 (c 22).

Northern Ireland Act 1998 (c 47).

Northern Ireland (St Andrews Agreement) Act 2006 (c 53).

Northern Ireland (Executive Formation and Exercise of Functions)
Act 2018 (c 28).

Regional Assemblies (Preparations) Act 2003 (c 10).

Regional Development Agencies Act 1998 (c 45).

Poynings' Law 1495 (10 Hen. 7 c 4).

Scotland Act 1998 (c 46).

Scotland Act 2012 (c 11).

Scotland Act 2016 (c 11).

The National Assembly for Wales (Transfer of Functions) Order
1999 (no 672).

Union with England Act 1707 (c 7).

Wales Act 2014 (c 29).

Wales Act 2017 (c 4).

British Case Law

Anderson, Reid and Doherty v The Scottish Ministers [2002] SC 63.

Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Company Ltd. [1914] AC 237.

Attorney-General v De Keyser's Royal Hotel [1920] AC 508.

Attorney General v National Assembly for Wales Commission [2012] UKSC 53.

AXA General Insurance Company Ltd v Lord Advocate [2011] UKSC 56.

BH and H v Lord Advocate [2012] UKSC 24.

Blackburn v AG [1971] 1 WLR 1037.

Burmah Oil Co. (Burma Trading) Ltd v Lord Advocate [1965] AC 75.

Hoekstra v HM Advocate No 4 [2001] 1 AC 216.

Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61.

MacCormick v Lord Advocate [1953] SC 396.

Martin v Most [2010] UKSC 10.

Madzimbamuto v Lardner-Burke [1969] 1 AC 645.

McIntosh v HM Advocate [2003] 1 AC 1078.

Millar v Procurator Fiscal (Elgin) [2001] SCCR 741.

Mills v HM Advocate [2002] 3 WLR 1597.

Montgomery v HM Advocate [2001] SLT 37.

Pham v Secretary of State for the Home Department [2015] UKSC 19.

Procurator Fiscal, Kirkcaldy v Kelly [2003] JCJ No 80.

R (Factortame Ltd) v Secretary of State for Transport (No 2) [1991] 1 AC 603.

R v Her Majesty's Advocate & Anor [2002] UKPC D3.

R (Jackson) v Attorney General [2005] UKHL 56.

R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr) [2011] EWHC 519.

R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3.

R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41.

Re Agriculture Sector (Wales) Bill [2014] UKSC 43.

Re McCord's Application [2016] NIQB 85.

Re Northern Ireland Human Rights Commission [2002] HRIR 35.

Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill
[2015] UKSC 3.

*Re UK Withdrawal from the European Union (Legal Continuity)
(Scotland) Bill* [2018] UKSC 64.

Robinson v Secretary of State for Northern Ireland [2002] UKHL
32.

*Somerville v Scottish Ministers (HM Advocate General for
Scotland intervening)* [2007] UKHL 44.

The Case of Proclamations (1610) 12 Co. Rep. 74.

The Zamora [1916] 2 AC 77.

Thoburn v Sunderland CC [2003] QB 151.

Whaley v Lord Advocate [2007] UKHL 53.

Whaley v Watson [2000] SC 340.

Canadian Case Law

Re: Resolution to Amend the Constitution, [1981] 1 RCS 753.

Reference Re Secession of Quebec, [1998] 2 SCR 217.

Articles

Ahmed, F and A Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461.

- - , R Albert and A Perry, 'Judging Constitutional Conventions' (2019) 17(4) *International Journal of Constitutional Law* 1146.

Albert, R and D Kenny, 'The Challenges of Constitutional Silence: Doctrine, Theory, and Practice' (2018) 16(3) *International Journal of Constitutional Law* 880.

Allan, TRS, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45(2) *Cambridge Law Journal* 305.

Bailey, D and L Budd, 'Brexit and Beyond: a Pandora's Box?' (2019) 14(2) *Contemporary Social Science* 157.

Baker, J, 'The Unwritten Constitution of the United Kingdom' (2013) 15 *Ecclesiastic Law Journal* 4.

Barber, N, 'Laws and Constitutional Conventions' (2009) 125 *Law Quarterly Review* 294.

Beatson, J, 'Reforming an Unwritten Constitution' (2010) 126 *Law Quarterly Review* 48.

Black, J, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32(2) *Innovation: The European Journal of Social Sciences* 191.

Bogdanor, V, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *The Political Quarterly* 185.

- - 'The West Lothian Question' (2010) 63(1) *Parliamentary Affairs* 156.

- - 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32(1) *Oxford Journal of Legal Studies* 179.

Bradbury, J, '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.

Braniff, M and S Whiting, 'Deep Impact: The Fiction of a Smooth Brexit for Northern Ireland' (2017) 23(4) *Juncture* 249.

Cameron, M and T Falleti, 'Federalism and the Subnational Separation of Powers' (2005) 35(2) *Publius* 245.

Chaney, P, "'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.

Colls, R, 'What Is British National Identity and How Do We Get It?' (2012) 52(52) *Soundings* 100.

Connell, L, 'Scottish Nationalism and the Colonial Vision of Scotland' (2004) 6(2) *Interventions* 252.

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

Douglas-Scott, S, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) *Modern Law Review* 1019.

Elliott, M, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) *Cambridge Law Journal* 257.

Evans, A, 'An Interlude of Agreement? A Reassessment of the Conference on Devolution's "Consensus" on Powers' (2015) 29(4) *Contemporary British History* 421.

Ewing, K, 'Brexit and Parliamentary Sovereignty' (2017) 80(4) *Modern Law Review* 711.

Farrington, C and G Walker, 'Ideological Content and Institutional Frameworks: Unionist Identities in Northern Ireland and Scotland' (2009) 17(2) *Irish Studies Review* 135.

Feldman, D, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) *Cambridge Law Journal* 329.

Finlayson, A, 'Nationalism as Ideological Interpellation: The Case of Ulster Loyalism' (1996) 19(1) *Ethnic and Racial Studies* 88.

Gallagher, M, 'How Many Nations Are There in Ireland?' (1995) 18(4) *Ethnic and Racial Studies* 715.

Gamble, A, 'The Conservatives and the Union: The "New English Toryism" and the Origins of Anglo-Britishness' (2016) 14(3) *Political Studies Review* 359.

Gardner, J, 'Can There Be a Written Constitution?' (2009) *Oxford Legal Studies Research Paper* 2009, 1.

Gee, G and G Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273.

Goldsworthy, J, 'Abdicating and Limiting Parliament's Sovereignty (2006) 17(2) *King's Law Journal* 255.

Gonzalez-Ocantos, E and E Dinas, 'Compensation and Compliance: Sources of Public Acceptance in the U.K. Supreme Court's Brexit Decision' (2019) 53(3) *Law & Society Review* 889.

Goodwin, M, M Jones and R Jones, 'Devolution, Constitutional Change and Economic Development: Explaining and Understanding the New Institutional Geographies of the British State' (2005) 39(4) *Regional Studies* 421.

Gordon, M, 'Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit' (2019) 30(1) *King's Law Journal* 125.

Gormley-Heenan, C and A Aughey, 'Northern Ireland and Brexit: Three Effects on "The Border in the Mind"' (2017) 19(3) *British Journal of Politics & International Relations* 497.

Gover, D and M 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.

Grant, WP and RJC Preece, 'Welsh and Scottish Nationalism' (1968) 21(3) *Parliamentary Affairs* 255.

Greer, A, 'Brexit and Devolution' (2018) 89(1) *Political Quarterly* 134.

Griffith, JAG, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1.

Hannum, H, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1.

Jackson, B, 'The Political Thought of Scottish Nationalism' (2014) 85(1) *Political Quarterly* 50.

Jaconelli, J, 'Do Constitutional Conventions Bind?' (2005) 64(1) *Cambridge Law Journal* 149.

Jenkins, D, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183.

Kavanagh, A, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) *King's Law Journal* 43.

Keating, M, 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom' (1998) 28(1) *Publius* 217.

- - 'Brexit and the Territorial Constitution of the United Kingdom' (2018) 98(1) *Droit et Societe* 53.

- - 'Brexit and the Nations' (2019) 90(2) *Political Quarterly* 167.

Kendle, J, 'Federalism and the Irish Problem in 1918' (1971) 56 *History* 207.

Kenny, D, 'Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness' (2015) 38(2) *Dublin University Law Journal* 432.

Kenny, M, 'The Genesis of English Nationalism' (2016) 7(2) *Political Insight* 8.

Kumar, K, 'Empire and English Nationalism' (2006) 12(1) *Nations & Nationalism* 1.

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

Lenaerts, K, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205.

Little, G, 'Scotland and Parliamentary Sovereignty' (2004) 24(4) *Legal Studies* 540.

Lluch, J, 'Autonomism and Federalism' (2011) 42(1) *Publius the Journal of Federalism* 134.

- - 'Sovereignists and Associationists: Explaining the Origins of National Movements' *Political Orientation* (2011) 17(2) *Nationalism and Ethnic Politics* 203.

Maley, W, 'Laws and Conventions Revisited' (1985) 48(2) *Modern Law Review* 121.

Marquand, D, 'Federalism and the British: Anatomy of a Neurosis' (2006) 77(2) *Political Quarterly* 175.

McCorkindale, C, A McHarg and P Scott, 'The Courts, Devolution and Constitutional Review' (2018) 36 *University of Queensland Law Journal* 289.

McGrath, FC, 'Settler Nationalism: Ulster Unionism and Postcolonial Theory' (2012) 20(4) *Irish Studies Review* 463.

McHarg, A, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853.

- - 'Navigating without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16(3) *International Journal of Constitutional Law* 952.

- - and J Mitchell, 'Brexit and Scotland' (2017) 19(3) *The British Journal of Politics and International Relations* 512.

Morgan, K, 'Welsh Nationalism: The Historical Background' (1971) 6(1) *Journal of Contemporary History* 153.

Morton, P, 'Conventions of the British Constitution' (1991) 15(2) *Holdsworth Law Review* 114.

Mullen, T, 'The Brexit Case and Constitutional Conventions' (2017) 21(3) *Edinburgh Law Review* 442.

- - 'Brexit and the Territorial Governance of the United Kingdom' (2019) 14(2) *Contemporary Social Science* 276.

Munro, C, 'Laws and Conventions Distinguished' (1975) 91 *Law Quarterly Review* 218.

Munro, J, 'Thoughts on the "Sewel Convention"' (2003) 23 *Scots Law Times* 194.

Murkens, J, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution' (2017) 80(4) *Modern Law Review* 685.

Mycock, A, 'The Party Politics of the "New English Regionalism"' (2016) 14(3) *Political Studies Review* 388.

Oliver, P, 'Sovereignty in the Twenty-First Century' (2003) 14 *King's Law Journal* 137.

- - 'Abdicating and Limiting Parliament's Sovereignty – Reply to Goldsworthy' (2006) 17(2) *King's Law Journal* 281.

- - '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.

Page, A, 'Article 50: The Final Say' (2017) 62(2) *Journal of the Law Society of Scotland* 12.

Parsons, S, 'Brexit & Retained Devolved EU Law' (2019) 169 (7840) *New Law Journal*.

Pearce, N and M Kenny, 'The Empire Strikes Back' (2017) 146(5350) *New Statesman* 34.

Perry, A and A Tucker, 'Top-Down Constitutional Conventions' (2018) 81(5) *Modern Law Review* 765.

Peters, G, 'The United Kingdom Becomes the Untied Kingdom? Is Federalism Imminent, or Even Possible?' (2001) 3(1) *British Journal of Politics & International Relations* 71.

Phoenix, E, 'Northern Ireland from Partition to the Peace Process: A Historical Perspective' (2017) 22(1) *Palestine-Israel Journal of Politics, Economics & Culture* 17.

Poirier, J, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective' (2001) *Public Law* 134.

Rahmatian, A, 'Brexit and Scotland: Centralism, Federalism or Independence?' (2018) 26(4) *European Review* 616.

Rawlings, R, 'Concordats of the Constitution' (2000) 116(1) *Law Quarterly Review* 257.

Ray, J, 'English Attitudes to Scottish Nationalism' (1981) 115(1) *Journal of Social Psychology* 141.

Russell, M, '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.

Tickell, A, 'Does Westminster Need Holyrood's Consent to Repeal the *Human Rights Act 1998*?' (2015) 33 *Scots Law Times* 160.

Tierney, S, '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.

Verney, DV, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) *Publius: The Journal of Federalism* 81.

Wade, HWR, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172.

- - 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568.

Walker, G, 'Scotland, Northern Ireland and Devolution: Past and Present' (2010) 24(2) *Contemporary British History* 235.

Wellings, B and H Baxendale, 'Euroscepticism and the Anglosphere: Traditions and Dilemmas in Contemporary English Nationalism' (2015) 53(1) *Journal of Common Market Studies* 123.

White, A, 'Is Contemporary Ulster Unionism in Crisis? Changes in Unionist Identity during the Northern Ireland Peace Process' (2007) 16(1) *Irish Journal of Sociology* 118.

Winetrobe, B, 'Enacting Scotland's "Written Constitution": The *Scotland Act 1998*' (2011) 30(1) *Parliamentary History* 85.

Wolff, S, 'The Institutional Structure of Regional Consociations in Brussels, Northern Ireland, and South Tyrol' (2004) 10(3) *Nationalism and Ethnic Politics* 387.

Zander, Michael, 'A Nation Divided?' (2016) 166(7726) *New Law Journal*.

British Parliamentary Reports

HC Deb 14 November 1977, vol 939.

HC Deb 21 October 1999, vol 336.

HC Deb 23 January 2006, vol 441.

HC Deb 16 June 2015, vol 597.

HL Deb 21 July 1998, vol 592.

HL Deb 25 June 1999, vol 602.

HL Deb 10 April 2000, vol 612.

HL Deb 24 November 2015, vol 767.

HL Deb 8 December 2015, vol 767.

HL Deb 24 February 2016, vol 769.

HL Deb 21 March 2016, vol 769.

HL Deb 12 March 2018, vol 789.

British Official Documents and Agreements

Cabinet Office, *Devolution White Paper: 'Our Changing Democracy: Devolution to Scotland and Wales* (Cm 6348, 1975).

- - *Memorandum of Understanding and Supplementary Agreements* (Cm 5240, 2001).

- - *Your Region, Your Choice: Revitalising the English Regions* (Cm 5511, 2002).

- - *Memorandum of Understanding and Supplementary Agreements* (Cm 7864, 2010).

- - *The Implications of Devolution for England* (Cm 8969, 2014).

- - *Revised Frameworks Analysis: Breakdown of Areas of EU Law that Intersect with Devolved Competence in Scotland, Wales and Northern Ireland* (2019).

Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014).

Conference on Devolution: Letter from Mr. Speaker to the Prime Minister (Cm 692, 1920).

House of Commons Political and Constitutional Reform Committee, *Constitutional Implications of the Government's Draft Scotland Clauses* (HC 1022, 2015).

House of Commons Scottish Affairs Committee, *The Relationship between the UK and Scottish Governments* (HC 1586, 2019).

House of Lords Select Committee on the Constitution, *Constitution – First Report* (2001).

- - *The Union and Devolution* (HL 149, 2016).

McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013).

Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007).

Northern Ireland Office, *Northern Ireland: A Framework for Devolution* (Cm 8541, 1982).

- - *Belfast Agreement* (Cm 3883, 1998).

Royal Commission on the Constitution, *Royal Commission on the Constitution 1969 – 1973, Volume I, Report* (Cm 5460, 1973).

- - *Royal Commission on the Constitution 1969 – 1973, Volume I, Memorandum of Dissent* (Cm 5460-1, 1973).

Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000).

Scotland Office, *Scotland in the Union. A Partnership for Good* (Cm 2225, 1993).

- - *Scotland's Future in the United Kingdom – Building on Ten Years of Scottish Devolution* (Cm 7738, 2009).

- - *Scotland Analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, 2013).

- - *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, 2015).

Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right: The Blueprint for Scotland* (Campaign for a Scottish Parliament 1995).

Scottish Government, *Supplementary Legislative Consent Memorandum - Scotland Bill* (LCM (S4) 37.2, 2016).

- - *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (SP 313, 2018).

Scottish Office, *Scotland's Parliament* (Cm 3658, 1997).

Scottish Parliament Procedures Committee, *The Sewel Convention* (SP 428, 2005).

Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014).

Wales Office, *Better Governance for Wales* (Cm 6582, 2005).

- - *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020, 2015).

Welsh Government, *Supplementary Legislative Consent Memorandum – European Union (Withdrawal) Bill* (Memorandum 02, 2018).

Welsh Office, *A Voice for Wales* (Cm 3718, 1997).

Monographs

Adamson, D, *Class, Ideology and the Nation: A Theory of Welsh Nationalism* (University of Wales Press 1991).

Allan, TRS, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993).

Anthony, G, *Devolution, Brexit and the Sewel Convention* (The Constitution Society 2018).

Bagehot, W, *The English Constitution* (2nd edn, first published 1872, D. Appleton & Company 1904).

Baldersheim, H and M Keating (eds), *Small States in the Modern World* (Edward Elgar 2015).

Banks, JC, *Federal Britain?* (Harrap 1971).

Barber, N, *The Constitutional State* (Oxford University Press 2010).

- - *The United Kingdom Constitution – An Introduction* (Oxford University Press 2021).

Bartlett, T, *Ireland: A History* (Cambridge University Press 2010).

Bednar, J, *The Robust Federation: Principles of Design* (Cambridge University Press 2009).

Bell, J and G Engle, *Cross – Statutory Interpretation* (3rd edn, Butterworths 1995).

Bellamy, R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

Benedikter, T, *The World's Modern Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomies* (Rev edn, Euras 2009).

Biondi, A and P Birkinshaw (eds), *Britain Alone! The Implications and Consequences and UK Exit from the EU* (Wolters/Kluwer 2016).

Birch, A, *Political Integration and Disintegration in the British Isles* (George Allen & Unwin 1977).

Blackstone, W, *Commentaries on the Laws of England* (first published 1765, Liberty Fund 2011).

Bogdanor, V, *The Monarchy and the Constitution* (2nd edn, Oxford University Press 1995).

- - *Devolution in the United Kingdom* (2nd edn, Oxford University Press 2001).

- - *The New British Constitution* (Hart Publishing 2009).

- - *Beyond Brexit: Towards a British Constitution* (IB Tauris 2019).

Bradbury, J and J Mawson (eds), *British Regionalism and Devolution: The Challenges of State Reform and European Integration* (Routledge 1997).

Bradley, AW, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018).

Breen, K and S O'Neill (eds), *After the Nation?: Critical Reflections on Nationalism and Postnationalism* (Palgrave Macmillan 2010).

Brooks, S, *Why Wales Never Was: the Failure of Welsh Nationalism* (University of Wales Press 2017).

Brouillet, E, *La negation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Editions du Septentrion 2005).

Brzinski, J, TD Lancaster and C Tuschhoff (eds), *Compounded Representation in West European Federations* (Frank Cass 1999).

Bulpitt, J, *Territory and Power in the United Kingdom* (Manchester University Press 1983).

Burgess, M, *Federalism: A Dirty Word? Federalist Ideas and Practice in the British Political Tradition* (Federal Trust for Education and Research 1988).

- - *The British Tradition of Federalism* (Leicester University Press 1995).

- - *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford University Press 2012).

- - and A-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993).

- - and J Pinder (eds), *Multinational Federations* (Routledge 2007).

Burrows, B and G Denton, *Devolution or Federalism?: Options for a United Kingdom* (Macmillan 1980).

Burrows, N, *Devolution* (Sweet & Maxwell 2000).

Casey, T (ed), *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Palgrave Macmillan 2009).

Cassese, A, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).

Colley, L, *Britons: Forging the Nation 1707-1837* (3rd edn, Yale University Press 2009).

Colls, R, *Identity of England* (Oxford University Press 2002).

Colman McCabe, N (ed), *Comparative Federalism in the Devolution Era* (Lexington Books 2002).

Constitution Unit, *An Assembly for Wales* (1996).

- - *Scotland's Parliament, Fundamentals for a New Scotland Act* (1996).

Coupland, R, *Welsh and Scottish Nationalism: A Study* (Collins 1954).

Cowie, G, *Brexit: Devolution and Legislative Consent* (House of Commons Library 2018).

Cox, M, A Guelke and F Stephen (eds), *A Farewell to Arms?: Beyond the Good Friday Agreement* (2nd edn, Palgrave 2006).

Davies, C, *Welsh Nationalism in the Twentieth Century: The Ethnic Option and the Modern State* (Praeger 1989).

Deacon, R, *Devolution in the United Kingdom* (2nd edn, Edinburgh University Press 2012).

Dicey, AV, *Introduction to the Study of the Law of the Constitution* (8th edn, first published 1915, Liberty Fund 1982).

- - and R Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920).

Dorey, P (ed), *The Major Premiership: Politics and Policies under John Major, 1990-1997* (Palgrave Macmillan 1999).

Doyle, O, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom – Constitutions under Pressure* (Cambridge University Press 2021).

Dunoff, J and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press 2009).

Earle, V (dir), *Federalism: Infinite Variety in Theory and Practice* (F.E. Peacock Publishers 1968).

Elazar, D (ed), *Federalism and Political Integration* (2nd edn, University Press of America for the Jerusalem Center for Public Affairs 1984).

- - *Exploring Federalism* (University of Alabama Press 1987).

Elliott, M, J Williams and A Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018).

- - and R Thomas, *Public Law* (3rd edn, Oxford University Press 2017).

Erk, J and L Anderson (eds), *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (Routledge 2010).

Filippov, M, PC Ordeshook and O Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004).

Feeley, M and E Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press 2008).

Ferriter, D, *The Border: The Legacy of a Century of Anglo-Irish Politics* (Profile Books 2019).

Fisher, E, J King and A Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020).

Foley, M, *The Politics of the British Constitution* (Manchester University Press 1999).

Friedrich, CJ, *Trends of Federalism in Theory and Practice* (Frederick A. Prueger Publishers 1968).

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

- - and J Tully (dir), *Multinational Democracies* (Cambridge University Press 2001).

- - and M Keating (dir), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Palgrave Macmillan 2012).

Gaudreault-Desbiens, J-F and F Gelinass (dir), *Le federalisme dans tous ses etats: gouvernance, identite et methodologie* (Editions Yvon Blais 2005).

Gay, O, *Scotland and Devolution – Research Paper 97/92* (House of Commons Library 1997).

Gladstone, WE, *The Irish Question: I. The History of an Idea. II. Lessons of the Election* (John Murray Albemarle Street 1886).

Goldsworthy, J, *Parliamentary Sovereignty – Contemporary Debates* (Cambridge University Press 2010).

Gordon, M, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015).

Greer, S (ed), *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Palgrave Macmillan 2005).

Hanham, HJ, *Scottish Nationalism* (Faber 1969).

Hazell, R (ed), *The English Question* (Manchester University Press 2006).

- - and R Rawlings (eds), *Devolution, Law Making and the Constitution* (Rev edn, Imprint Academic 2007).

Hooghe, L and others, *Measuring Regional Authority. A Postfunctionalist Theory of Governance*, vol 1 (Oxford University Press 2016).

Hooghe, L and G Marks, *Community, Scale, and Regional Governance. A Postfunctionalist Theory of Governance*, vol 2 (Oxford University Press 2016).

Hueglin, T and A Fenna, *Comparative Federalism: A Systematic Enquiry* (Broadview Press 2006).

Ichijo, A, *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation* (Routledge 2004).

Jennings, I, *The Law and the Constitution* (5th edn, University of London Press 1959).

Jowell, J and C O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019).

Kanter, D, *The Making of British Unionism, 1740-1848: Politics, Government and the Anglo-Irish Constitutional Relationship* (Four Courts 2009).

Karmis, D and W Norman (dir), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005).

Keating, M, *State and Regional Nationalism: Territorial Politics in Western Europe* (Harvester Press 1988).

- - *The Independence of Scotland: Self-Government and the Shifting Politics of Union* (Oxford University Press 2009).

- - (ed), *Debating Scotland: Issues of Independence and Union in the 2014 Referendum* (Oxford University Press 2017).

- - and M Harvey, *Small Nations in a Big World. What Scotland Can Learn* (2nd edn, Luath 2015).

- - and G Laforest (eds), *Constitutional Politics and the Territorial Question in Canada and the United Kingdom: Federalism and Devolution Compared* (Palgrave Macmillan 2018).

Kidd, C, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge University Press 2008).

King, A, *Does the United Kingdom still Have a Constitution?* (Sweet and Maxwell 2001).

King, P, *Federalism and Federation* (Croom Helm 1982).

Levy, R, *Scottish Nationalism at the Crossroads* (Scottish Academic Press 1990).

Livingston, WS, *Federalism and Constitutional Change* (Oxford University Press 1956).

Lluch, J, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies (National and Ethnic Conflict in the 21st Century)* (University of Pennsylvania Press 2014).

- - (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Palgrave Macmillan 2014).

Marshall, G, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984).

May, T, *Parliamentary Practice* (25th edn, LexisNexis Butterworths 2019).

McCrone, D, *Understanding Scotland: The Sociology of a Nation* (2nd edn, Routledge 2001).

McGarry, J, R Simeon and K Basta (eds), *Territorial Pluralism: Managing Difference in Multinational States* (University of British Columbia Press 2015).

McLean, I, *What's Wrong with the British Constitution?* (2nd edn, Oxford University Press 2012).

- - and A McMillan, *State of the Union* (Oxford University Press 2005).

Melding, D, *The Reformed Union – The UK as a Federation* (Institute of Welsh Affairs 2013).

Miller, D (ed), *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (Longman 1998).

Moltchanova, A, *National Self-Determination and Justice in Multinational States* (Springer 2009).

Nairn, T, *After Britain: New Labour and the Return of Scotland* (Granta Books 2000).

O'Leary, B and J McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edn, Athlone Press 1996).

O'Rourke, K, *A Short History of Brexit: from Brentry to Backstop* (Pelican 2019).

Ortino, S, M Zagar and V Mastny (eds), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press 2005).

Pagano, M and R Leonardi (eds), *The Dynamics of Federalism in National and Supranational Political Systems* (Palgrave Macmillan 2007).

Philip, AB, *The Welsh Question: Nationalism in Welsh Politics, 1945-1970* (University of Wales Press 1975).

Phoenix, E, *Northern Nationalism: Nationalist Politics, Partition and the Catholic Minority in Northern Ireland, 1890-1940* (Ulster Historical Foundation 1994).

Pilkington, C, *Devolution in Britain Today* (Manchester University Press 2002).

Qvortrup, M (ed), *The British Constitution: Continuity and Change - A Festschrift for Vernon Bogdanor* (Rev edn, Bloomsbury 2015).

Rawlings, R, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitutional Society 2017).

Redwood, J, *The Death of Britain?: The UK's Constitutional Crisis* (Palgrave Macmillan 1999).

Requejo, F and K-J Nagel (eds), *Federalism beyond Federations: Asymmetry and Processes of Resymmetrization in Europe* (Ashgate 2011).

- - and M Caminal Badia (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (Routledge 2012).

Riker, W, *Federalism: Origin, Operation, Significance* (Little & Brown 1964).

Rokkan, S and D Urwin, *Economy, Territory, Identity: Politics of West European Peripheries* (Sage 1983).

Schutze, R and S Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

Scott, K, *Federalism: A Normative Theory and its Practical Relevance* (Continuum 2011).

Seldon, A (ed), *Blair's Britain: 1997-2007* (Cambridge University Press 2007).

Seymour, M and A-G Gagnon (eds), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan 2012).

Smith, G (ed), *Federalism: The Multiethnic Challenge* (Longman 1995).

Smith, TB, *British Justice: The Scottish Contribution* (Stevens 1961).

Suksi, M (ed), *Autonomy: Applications and Implications* (Kluwer 1998).

- - *Substate Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011).

Tierney, S, *Constitutional Law and National Pluralism* (Oxford University Press 2004).

Thatcher, M, *The Downing Street Years* (HarperCollins 1993).

Tonge, J, *Northern Ireland* (Polity 2006).

Treisman, D, *The Architecture of Government: Rethinking Political Decentralization* (Cambridge University Press 2007).

Turpin, C and A Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011).

Tomkins, A, *Our Republican Constitution* (Hart Publishing 2005).

Ward, A and L Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate 2009).

Wheare, KC, *The Constitutional Structure of the Commonwealth* (Clarendon Press 1960).

- - *Federal Government* (4th edn, Oxford University Press 1963).

- - *Modern Constitutions* (2nd edn, Oxford University Press 1966).

Whyte, JH, *Interpreting Northern Ireland* (Clarendon Press 1991).