

**Nationalism and Devolution: An Enquiry into the  
Changing Dynamics of the Territorial Constitution of the  
United Kingdom**

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**Submitted in fulfilment of the requirements for the degree of Doctor of  
Philosophy (PhD)**

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### Summary:

The United Kingdom is in a prolonged episode of constitutional unsettlement. Contemporary accounts have moved to analyse and explain this process as a recent phenomenon, isolated to the age of 'globalisation', and neglecting the historical aspects of the dynamics of the territorial constitution. This thesis seeks to investigate the historical basis of the recent shifts in constitutional practice, placing them in context. It aims to do this in three ways. First, it examines the nature of the UK's territorial constitution; its dynamics and the relationships between its four constituent parts – England, Scotland, Wales and Northern Ireland – and the historical processes that led to its formation. Second, it turns the structural elements of the territorial constitution into the external sphere, exploring how the influences of national identity and nationalism, as well as the wider construction of the global sphere, have influenced the development of the territorial constitution. Third, it charts the effects of devolution on the territorial constitution. This analysis focusses specifically on the events that led to the introduction of devolution in 1998, and the subsequent effects this has had on the traditional dynamics and arrangement of authority within the territorial constitution. This thesis then concludes with a discussion of the effects of the recent Brexit process on the territorial constitution. This thesis argues that central to understanding the dynamics of the territorial constitution lies the delicate balance between the legal and political conceptions of power and authority, in particular sovereignty. This thesis concludes that the future of the territorial constitution lies in understanding its past, the motivations for its construction and the long origins of its current turn towards unsettlement.

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# Introduction

## The Context of this Thesis

The United Kingdom of Great Britain and Northern Ireland<sup>1</sup> is suspended in a prolonged episode of constitutional unsettlement. Since the introduction of devolution in 1998, the balance of political thought and constitutional enquiry has increasingly moved to challenge the traditional conceptions of the UK as a unitary state, defined by a single locus of sovereign authority, and able to facilitate a sense of unionising identity to continually bind its four component parts – England, Scotland, Wales and Northern Ireland.<sup>2</sup>

Presenting themselves as distinct challenges to the UK's constitutional order, these recent events have been the subject of study by political theorists, political scientists, lawyers and historians. The first groups has examined the overarching structure of the territorial constitution, focussing on its origins, context and evolution since devolution;<sup>3</sup> the second has moved to consult the political significance of shifts in national identity and allegiance, and the constitutional arguments associated with the demands of sub-state nationalist groups;<sup>4</sup> the third has focussed on the normative changes to key concepts such as sovereignty, competence and

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<sup>1</sup> Hereinafter the 'United Kingdom' or 'UK'.

<sup>2</sup> Finding a single terminological classification which fits accurately for all parts of the territorial constitution of the United Kingdom is, to a significant extent, a task incapable of scientific definition. Traditionally, this has been encapsulated in the identification of the 'home nations' or more recently in the 'four nations' approach. Whilst useful, this approach has its limitations for, on the one hand, it simplifies the unique territorial politics in Northern Ireland – a territory consisting of two nationally identifying communities. Moreover, it fails to recognise the distinctive cultural differences which exist in England, most particular in the identification of a Cornish nation, and the distinctive cultural identities of other regions such as Yorkshire or the North East. In this regard, this thesis will, when describing the UK as a whole, use the title of 'component parts' to describe England, Scotland, Wales and Northern Ireland. When referring to these units separately, terms such as territory, nation, region, country or cultural group will be used.

<sup>3</sup> Oliver, D., *Constitutional Reform in the UK*, (Oxford: Oxford University Press, 2003); Wright, A., *Who Governs Scotland?* (London: Routledge, 2005); Wicks, E., *The Evolution of a Constitution*, (Oxford: Hart, 2006)

<sup>4</sup> Hadfield, B., (ed.) *Northern Ireland: Politics and the Constitution*, (Buckingham: Open University Press, 1992); Keating, M., *Plurinational Democracy: Stateless Nations in a Post-Sovereign Era*, (Oxford: Oxford University Press, 2001); Keating, M., *The Independence of Scotland*, (Oxford: Oxford University Press, 2009)



capacity;<sup>5</sup> while the fourth group has used historical methods to provide context to the political and structural changes taking place in the territorial constitution.<sup>6</sup>

In the majority of these approaches, however, the applied methods of investigation have generally been isolated to territorialised, nation-specific frames of analysis – focussing on specific parts of the UK, in either a single<sup>7</sup> or comparative<sup>8</sup> context. Indeed, in regard to consulting the theme of constitutional unsettlement from a UK-wide perspective, this thesis notes that far fewer studies have emerged, particularly in the period after 1998.<sup>9</sup>

To some extent, this must be seen as a reflection of the realities of the territorial constitutional itself, and the asymmetrical and bi-lateral nature of the devolution process. This imbalance in the UK's constitutional architecture has necessitated investigations linked to constitutional change in certain parts of the UK, as opposed to the UK as a whole. However, while recognising the logic in these approaches, this thesis argues that by consulting the theme of constitutional

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<sup>5</sup> Loughlin, M., *The Idea of Public Law*, (Oxford: Oxford University Press, 2003); Walker, N., 'Late Sovereignty in the European Union', in Walker, N., (ed.) *Sovereignty in Transition: Essays in European Law*, (Oxford: Hart, 2006), pp. 3-32; Bradley, A., 'The Sovereignty of Parliament – Form or Substance?', in Jowell, J. and Oliver, D., (eds.) *The Changing Constitution*, 6<sup>th</sup> Ed. (Oxford: Oxford University Press, 2007), pp. 25-58; MacCormick, N., *Questioning Sovereignty*, (Oxford: Oxford University Press, 2008); Jaklic, K., *Constitutional Pluralism in the EU*, (Oxford: Oxford University Press, 2014)

<sup>6</sup> Morgan, K. O., *Rebirth of a Nation: A History of Modern Wales*, (Oxford: Oxford University Press, 2002);

Fry, M., *The Union: England, Scotland and the Treaty of 1707*, (Edinburgh: Birlinn, 2013); Devine, T., *Independence or Union: Scotland's Past and Scotland's Present*, (London: Penguin, 2017)

<sup>7</sup> Hadfield, B., (ed.) *Northern Ireland: Politics and the Constitution*, (Buckingham: Open University Press, 1992); Rawlings, R., *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, (Cardiff: University of Wales Press, 2003); Keating, M., *The Independence of Scotland*, (Oxford: Oxford University Press, 2009); Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: Cardiff University Press, 2012); Devine, T., *Independence or Union: Scotland's Past and Scotland's Present*, (London: Penguin, 2017)

<sup>8</sup> Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2006); Elias, A., *Minority Nationalist Parties and European Integration: A Comparative Study*, (London: Routledge, 2009); Elliott, J. H., *Scots and Catalans: Union and Disunion*, (London: Yale University Press, 2018)

<sup>9</sup> Nairn, T., *The Break-up of Britain: Crisis in Neo Nationalism*, (Manchester: New Left Books, 1977); Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 1999); Burrows, N., *Devolution*, (London: Sweet and Maxwell, 2000); Aughey, A., *Nationalism, Devolution and the Challenge to the United Kingdom State*, (London: Pluto Press, 2001); Bulpitt, J., *Territory and Power in the United Kingdom: An Interpretation*, (Colchester, ECPR Press, 2008); Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009)

unsettlement in the UK from a territorialised perspective, the scope for understanding the full essence of change taking place is distinctly reduced.

Perhaps as a reflection of this gap in enquiry, recent additions to the literature on constitutional change in the UK – from both an academic and governmental perspective – have increasingly come to frame the need for a more joined up, UK-wide approach. In its 2016 report, the House of Lords Committee on the Constitution outlined explicitly the risks of continuing to address the effects of the devolution process on a nation-specific basis: ‘taking the wishes of the devolved nations as a starting point, rather than the needs of the Union, risks perpetuating the existing approach of focusing on diversity at the expense of UK-wide solidarity.’<sup>10</sup> Furthermore, contributions from leading academics in the field of constitutional theory have also highlighted the gap in the current literature, and the need for joined up approaches to constitutional unsettlement, in order to fully understand the present influences on division within the territorial constitution.<sup>11</sup>

This thesis therefore seeks to fill this gap in the literature by enquiring into the issues associated with devolution and constitutional change, from a UK-wide perspective. To some extent, the execution of this task will relate to tying together the existing strands of territorialised enquiry, and recasting their findings onto a UK-wide frame. More significantly, in completion of this task, the original contribution of this thesis also seeks to identify common themes within the dynamics of constitutional change associated with the devolution process in the UK. In this

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<sup>10</sup> House of Lords, ‘*The Union and devolution*’, Select Committee on the Constitution, 10<sup>th</sup> Report of Session 2015-16, HL Paper 149 (25 May 2016), para. 252

<sup>11</sup> Aughey, A., *Nationalism, Devolution and Constitutional Change and the Challenge to the United Kingdom State*, (London: Pluto Press, 2001); Gamble, A., ‘The Constitutional Revolution in the United Kingdom’, *Publius*, Vol. 36, No. 1, (2006), pp. 19-35; Jeffrey, C. ‘Devolution, Britishness and the Future of the Union’, in Gamble, A., and Wright, T., (eds.) *Britishness: Perspectives on the British Question*, (Oxford: Wiley, 2009), pp. 112-121; McEwen, N., ‘Still better together? Purpose and power in intergovernmental councils in the UK’, *Regional and Federal Studies*, Vol. 27, No 5, (2017), pp. 667-690; McHarg, A., ‘The Future of the United Kingdom’s Territorial Constitution: Can the Union Survive?’, (March 31, 2016) <<https://ssrn.com/abstract=2771614>> (Accessed: 02/02/18)

task, the frame of analysis of this thesis will further contribute to the literature in this area by extending the debate on constitutional change into the historical past; contextualising the significance of the devolution process within the long historical development of the UK's constitutional order.

## **Research Questions**

In recognition of the gap within the literature that this thesis seeks to address, the central research question of this thesis asks: 'how far has devolution changed the constitutional dynamics of the territorial constitution of the United Kingdom?' In framing this question, it is necessary to define what is meant by reference to the *dynamics* of the territorial constitution, in the context of this thesis. Fundamentally, this thesis employs a broad understanding of 'constitutional dynamics' as encompassing two decided themes within the school of constitutional theory.

First, this thesis references constitutional dynamics as the political relationships within the territorial constitution and, in particular, between central government and the devolved periphery – Scotland, Wales and Northern Ireland. Second, this thesis also uses the term constitutional dynamics to refer to the distinct normative and theoretical relationships that exist within the territorial constitution in regards to the exercise of sovereign competence. On this point, the essence of the debate will focus on an analysis of the substantive form of the balance of power within the territorial constitution.

Assisting in the completion of this research project into how far devolution has changed the constitutional dynamics of the UK's territorial constitution, the essence of the debate in this thesis is summarised into three broad sub-research questions:

- 1) What constitutional relationships emerged after the various Unions that came to form the United Kingdom?
- 2) What are the current challenges facing the United Kingdom's territorial constitution from a theoretical and a normative perspective?
- 3) How far has devolution instigated a change in the dynamics of the territorial constitution?

The answers to these sub-research questions will not be chapter specific, but will relate to themes connected to the analysis flowing through each of the five substantive chapters of this thesis. A final set of thematic conclusions on these questions will be provided in the concluding chapter of this thesis.

## **Methodology**

In answering the research questions outlined above, this thesis will employ an interdisciplinary research design. Summarised broadly, the central tenets of this approach will rely upon the consultation of academic literature in the disciplines of law, politics and history, employed in the analysis of the UK territorial constitution. Maintaining as its central totem the theoretical analysis of the dynamics of the territorial constitution, this thesis will employ a mix of historical and theoretically informed methods to investigate the various processes, challenges and changes taking place within the territorial constitution.

Informing this research design, this thesis is constructed on the methodological understanding that in order to understand the events of the present, it is first necessary to understand their context and relationship to the past.<sup>12</sup> In holding this position, it is important to make clear that

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<sup>12</sup> Hopkins, J., *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, (London: Cavendish, 2002), p. 165; Loughlin, J., 'Political and Administrative Asymmetries in a Devolving

the argument in this thesis does not seek to formulate a distinct causality as effecting the current period of constitutional unsettlement, but instead seeks to rely upon the position that through historical investigation, elements of contemporary experience and debate are able to be explained by reference to their wider context, and prior influences in the historical past.

This methodology has been chosen over methods of doctrinal or comparative legal investigation for two reasons. First, it is recognised that the nature of this thesis is not solely one of legal analysis and critique, but of constitutional theory into an interdisciplinary concept – the territorial constitution. As a result, it is argued that the diverse nature of sources used in this thesis necessitates a departure from traditional methods of pure legal analysis. In this regard, an opinion is held that the use of historically informed methods of theoretical analysis offers a more malleable approach to address the range of legal and political issues associated with the central research question of this thesis.

Second, it is argued that the use of an historically informed, interdisciplinary research design affords distinct advantages over traditional methods of legal analysis, in capturing the wider issues associated with constitutional unsettlement. While legal methods of doctrinal or comparative analysis will be used to inform certain parts of this thesis – in particular Chapters Four and Five – the use of a broader interdisciplinary design for the thesis as a whole, affords allowance for the analysis of issues in history and political theory, associated with constitutional change. By undertaking this approach, it is predicted that the chosen methodology will assist in obtaining a more rounded picture of the issues associated with the central research question than would be possible through traditional doctrinal or comparative legal methods.

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United Kingdom’, in Requejo, F., and Nagel, K-J., *Federalism beyond Federations*, (Farnham: Ashgate, 2011), pp. 37-59 at 37

In further justifying this approach, it is noted that this thesis seeks to build upon similar methodological approaches employed by historians, political scientists, political and legal theorists, in previous studies of constitutional unsettlement in the UK, and other jurisdictions.<sup>13</sup>

In each of these studies, a premium has been placed on the value of employing methods of historical contextualisation and reflection to gain new insights on contemporary change; both in relation to substantive issues of constitutional structure,<sup>14</sup> as well as broader normative issues associated with changes in the global political economic environment, and patterns of national and political identity.<sup>15</sup>

This thesis seeks to use these previous studies as a model of methodological practice, albeit reframing their design to address the issues of contemporary unsettlement from a UK-wide perspective. By using this approach of building upon previous studies on the territorial constitution, it is felt that this thesis is afforded a solid base for methodological critique, while also maintaining a distinct originality in the format of its UK-wide research design. With this in mind, the final part of this introduction will now outline the structure of this thesis.

## **Structure of this thesis**

Chapter One will begin this thesis with an analysis of the processes and factors that led to the formation of the United Kingdom of Great Britain and Northern Ireland. The objectives of this

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<sup>13</sup> For similar research methodologies, see: Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988); Hopkins, J., *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, (London: Cavendish, 2002); Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester, ECPR Press, 2008)

<sup>14</sup> Rokkan, S., and Urwin, D. W., *Economy, Territory, Identity: Politics of West European Peripheries*, (London: Sage, 1983); Keating, M., 'Reforging the Union: Devolution and Constitutional Change in the United Kingdom', *Publius*, Vol. 28, No. 1, (1998), pp. 217-234

<sup>15</sup> Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988); Elias, A., From "full national status" to "independence" in Europe: The case of Plaid Cymru – the Party of Wales', in McGarry, J., and Keating, M., (eds.) *European Integration and the Nationalities Question*, (London: Routledge, 2006), pp. 193-215; Hepburn, E., 'Degrees of Independence: SNP Thinking in an International Context', in Hassan, G., (ed.) *The Modern SNP: From Protest to Power*, (Edinburgh: Edinburgh University Press, 2009), pp. 190-203

chapter may be divided into two parts. First, it seeks to lay the foundation for the later analysis of the dynamics of the territorial constitution by providing the necessary content and context from which to analyse the contemporary events and episodes of constitutional unsettlement. Second, it seeks to chart and analyse the formation and development of the UK through a long historical process – focussing in particular on the development of its constitutional structure, and the relationships between central government and the periphery.

In pursuing this objective, this chapter begins from the position that in order to understand the formation of the UK, it is first necessary to recognise the central role played by England in that process.<sup>16</sup> From this perspective, the structure of the chapter is arranged into three parts, each of which frames its analysis on the basis of political relations between a largely English orientated centre, and the three units of the Celtic periphery – Wales, Scotland and Ireland.

In Part One, the debate will analyse the initial political relationships that developed between England and the periphery, in an attempt to formalise an initial definition of the relational character and dynamics of the territorial constitution. Central to this part of the chapter will be the critique of the existing theory of Jim Bulpitt. This will argue that in order to understand Bulpitt's recognition of the formation of the UK as having emerged from a transition from formal English overlordship of the periphery, to a defined moment of political union, it is first necessary to understand the factors that led to England first assuming overlordship of the periphery.<sup>17</sup>

In Part Two of the chapter, the debate will move to consult the Acts of Union that transformed the informal empire of English overlordship into a crystallised constitutional entity. This part of the chapter will focus specifically on the processes that led to formal political union between

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<sup>16</sup> Gamble, A., 'The Constitutional Revolution in the United Kingdom', *Publius*, Vol. 36, No. 1, (2006), pp. 19-35

<sup>17</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester, ECPR Press, 2008), p. 85-94

England and the periphery, as well as analysing the constitutional structures that emerged after the respective Unions. Part Three will then analyse the 19<sup>th</sup> century and early-20<sup>th</sup> century beginnings of nationalism in the periphery, drawing particular attention to the processes that led to the independence of the Irish Free State in 1922, as well as the effects of this process on mobilising nationalist movements in Scotland and Wales.

The focus in Chapter Two will then move to recast the substantive debate on the structure and dynamics of the UK's territorial constitution by exploring the role of identity within this process. Fundamentally, the essence of the analysis in this chapter will be concerned with locating the personality of Britishness as a state-based identity. This vein of theoretical enquiry is important in answering the central research question of this thesis, as it relates to the relationship between the individual and the state. Through understanding the personality of the state, and its relationship to the individual, this chapter seeks to understand the wider normative dynamics which influence the balance of power and stability of constitutional systems.

In seeking to achieve this end, the overarching aim of this chapter is to anticipate cotemporary debates on the rise of sub-state nationalism in the non-English parts of the UK, and to provide the historical understanding on the factors influencing a sense of unionised state-based identity in the UK. In addressing this issue, the argument in this chapter will provide a contextual frame for the later analysis of Chapters Three and Four, which will focus on the causes and normative challenges that the recent rise in sub-state nationalism poses to the dynamics of the UK territorial constitution.

In achieving this aim, Parts One and Two of this chapter will be framed by a theoretical discussion of the idea of the nation-state. Part One will chart the rise of the state as a political entity from the 16<sup>th</sup> century, while Part Two will deal with the theoretical interpretation of the nation as source of imagined political community attached to the state. Following this, Part



Three will then apply this theoretical core to the case study of the United Kingdom, seeking to identify the essence of ‘Britishness’ – its influences, tenets, and relationship to the dynamics of the territorial constitution. It is hoped that through such analysis of the political aspects of identity and allegiance within the territorial constitution, we may better understand the overarching logic ruling the current processes in the forecasted ‘decline in Britishness’ as a form of identity – discussed in Chapters Three and Four – and the impacts this may have upon the devolution process, and the dynamics of the territorial constitution.

Chapter Three seeks to deal with the first of the substantive challenges to the territorial constitution of the United Kingdom by consulting the external factors linked to the reconfiguration of the global political sphere. Central to the analysis in this chapter will be a consultation of the overarching rubric of ‘globalisation’, which has in recent years increasingly been seen as embodying a distinctive challenge to the state.<sup>18</sup>

Part One of this chapter will begin the analysis by considering what is meant by the all-encompassing rubric of ‘globalisation’ and, more specifically, how is it associated with the wider movements in the global order which have come to challenge the tradition hegemony of the state. After considering this, Part Two of the chapter will build upon this theme by identifying the specific constitutional challenges associated with globalisation; dealing specifically with the substantive, theoretical and normative issues it poses to the state. In this part of the chapter, a particular premium will be placed on understanding the essence of the sub-state challenge, its relationship to the devolution process, and its increasing interconnectedness and reliance upon the processes and institutions associated with ‘globalisation’.

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<sup>18</sup> Keating, M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, (Oxford: Oxford University Press, 2001); Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004); Tierney, S., (ed.) *Nationalism and Globalisation*, (Oxford: Hart, 2015)

Through consulting these issues, a valuable premium will be gained into the wider context and interconnected web of challenges associated with the rise of multi-level governance and devolution in the UK. This will then contribute to answering the central research question of this thesis by understanding the place and significance of devolution within the wider catalogue of normative challenges facing the state. Following this, Part Three will then conclude this chapter by translating the theoretical arguments raised in Parts One and Two, into a practical analysis of the constitutional objectives and political challenges posed by sub-state nationalist groups in the UK and, in particular, the role of globalisation in influencing these challenges.

Chapter Four deals with the substantive constitutional challenges raised by the devolution process. The analysis in this chapter relates directly to the central research question of this thesis as it explores the political processes which led to the introduction of devolution in 1998, and the substantive constitutional challenges devolution have since posed to the dynamics of the territorial constitution. With this in mind, the analysis in this chapter will be divided into two parts. Part One will address the processes that led to the devolution settlements of 1998 – and the absence of a system of devolved government in England. The analysis in this part of the chapter will be divided into two sections. The first section will discuss the road to devolution, looking at the substantive political factors which motivated attitudes towards devolution in each of the four component parts of the UK. The second section will then adopt a theoretical analysis to investigate as to whether or not an overarching ‘logic’ exists in explaining the move towards devolved government in the second half of the 20<sup>th</sup> century.

In Part Two, the focus will turn to analysing the substantive elements of the devolution settlements. This part of the chapter will also be divided into two sections. The first section will explore the substantive constitutional provisions of the devolution settlements, and will identify four themes as indicative of the resulting personality of devolved government. The second section will then transfer the substantive analysis into a theoretical consideration of the

challenge's devolution has raised for the arrangement of power and authority within the territorial constitution.

Chapter Five concludes the substantive debate of this thesis by analysing the challenges posed to the UK's territorial constitution by its recent decision to leave the European Union. The overarching aim of this chapter is to bring the arguments raised in this thesis into contemporary perspective by focussing on the unfolding events of the Brexit process. Through pursuing this approach, it is recognised that valuable insights can be drawn into the dynamics of the devolution process, and the relationships which exist between the devolved administrations and the UK Government – thus providing valuable contemporary analysis into the central research question of this thesis.

In addressing these issues, this chapter is divided into two parts. Part One will deal with the substantive political challenges that have emerged within the territorial constitution as a result of the Brexit process. Focussing specifically on the constitutional aspects of these challenges, this part of the chapter will identify three key constitutional events that have emerged in response to Brexit – the *Miller* case, the European Union (Withdrawal) Bill and the competing constitutional ideologies between the UK Government and the devolved administrations. This part of the chapter will then conclude with the recognition that overarching all three of these issues lies the broader concern of ensuring the *equality* and *security* of the devolution settlements within the territorial constitution.

In recognition of these two issues, Part Two of the chapter will then seek to investigate the possible constitutional solutions available for rebalancing the territorial constitution and ensuring the *equality* and *security* of the devolution settlements. The debate in this part of the chapter will fall upon discussion of the rubric of 'federalism' as a category for constitutional change. The debate on this issue will be divided into two sections, separating out the

institutional and normative interpretations of the federal idea. A conclusion will then be reached as to the effectiveness of a federal design in the future development of the UK's territorial constitution.

## **Conclusion**

At the heart of this thesis lies the recognition of the contemporary environment of the territorial constitution as being in a period of decided unsettlement. This thesis seeks to contribute to the debate on this issue by reframing the investigation onto a UK-wide canvas, drawing on historical and theoretical points of analysis to better understand the factors influencing the current episode of constitutional unsettlement, and its relationship to the devolution process.

# Chapter 1

## A Short History of the Territorial Constitution

### 1.1. Introduction

The aim of this chapter is to explore the events, processes and themes that led to the formation of the United Kingdom of Great Britain and Northern Ireland. Fundamentally, this chapter is about context, and providing the structural basis for the later engagement with the central research question of this thesis. In this regard, this chapter employs a UK-wide frame of analysis to investigate the constitutional and political relationships which emerged between central government and the periphery and, in doing so, provides an historical basis from which later analysis of the changing dynamics of the territorial constitutional will be based.

In moving to achieve this aim, this chapter is divided into three parts. Part One will analyse the initial political relationships that developed between England and the periphery, in an attempt to formalise an initial definition of the relational character of the territorial constitution. Part Two will consult the Acts of Union that transformed the informal empire of English overlordship into a crystallised constitutional entity. This part will focus specifically on the process that led to formal political union, as well as the constitutional structures that emerged after the respective Unions. Part Three will then analyse the 19<sup>th</sup> century and early-20<sup>th</sup> century beginnings of nationalism in the periphery, drawing particular attention to the processes that led to the independence of the Irish Free State in 1922, as well as the effects of this process on mobilising nationalist movements in Scotland and Wales.

## 1.2. A Time before Union

Before considering the Acts of Union – and disunion – which came to form the United Kingdom of Great Britain and Northern Ireland, we must first discuss the period of constitutional history in the British Isles before these unions took place. The aim of the first part of this chapter is to chart this debate. The analysis in this part of the chapter will be divided into two sections. The first will consider the factors which enabled England to emerge as the primary state actor within the British Isles, and what processes led to its initial political relationship with the periphery. The second will consider the interactions England had with the periphery and, in doing so, will seek to develop a theoretical understanding of the early origins of the political relationship between England and the periphery.

### 1.2.1. England

England developed early as a state. From as early as the 11<sup>th</sup> century, we find clear examples of the development of a system of common law, centralised court politics and a developing bureaucracy in England.<sup>19</sup> Moreover, the economic power, military scale and territorial size of England – strengths significantly enhanced by the limited area of the British Isles – meant that it emerged from an early point as the main political actor within those islands.

In the 13<sup>th</sup> century, this advantage was extended to include the early development of a system of parliamentary representation in England. While this would not reach political maturity and assume an axis of legislative supremacy until after the late-17<sup>th</sup> century,<sup>20</sup> it was conducive in

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<sup>19</sup> Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988), p. 26; Alcock, A., *A Short History of Europe*, (Basingstoke: Palgrave MacMillan, 2002), p. 99

<sup>20</sup> Embarking upon a debate on the historical development of Parliamentary sovereignty lies outside of the objectives of this chapter. For a detailed overview of its main positions, see: Pocock, J. G. A., *The Ancient Constitution and the Feudal Law*, (Bath: Cedric Chivers, 1974), p. 152; Dickinson, H. T., 'The Eighteenth-Century Debate on the Sovereignty of Parliament' *Transactions of the Royal Historical Society*, Vol. 26, (1976), pp. 189-210 at 201-202; Goldworthy, J., *The Sovereignty of Parliament*, (Oxford: Clarendon Press, 2001), p. 230; Wicks, E., *The Evolution of a Constitution*, (Oxford: Hart, 2006), p. 19; The conclusion reached by many

guaranteeing the relative stability and flexibility of the English state from an early period – giving it a distinct advantage over its continental rivals.<sup>21</sup>

Thus, from an early stage, we find England as holding the ‘potential power’<sup>22</sup> to exert its political control over the British Isles – a factor which has led many historians to attribute the eventual formation of the United Kingdom as a product of English expansionism within the provided geographical limits of the British Isles.<sup>23</sup>

However, throughout much of the medieval period, we find the tendency of English foreign policy within the British Isles as favouring a policy of indirect feudal overlordship, as opposed to the direct territorial control of the periphery.<sup>24</sup> Indeed, as will be analysed in this chapter, England’s early interaction with the periphery was largely confined to periods of brief political strife to reassert its authority as feudal overlord, rather than pursuing an active programme of territorial expansion – being more *reactive* than *proactive*.<sup>25</sup>

Illustrative of this mentality, an emerging consensus within historical discourse has increasingly come to post the position that the eventual ‘Unions’ that would come to form the UK were far from *inevitable* and, instead, were strategic responses to key political junctures in

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in the identification of parliamentary sovereignty by the 18<sup>th</sup> century was that it was a legal fiction, unlimited in theory, but in practice, subject to certain conditions of practice, and the recognition that ‘it would not be wise for any parliament to test the full extent of its authority’ – in this regard affording a distinct advantage to the development of a flexible constitutional system. Dickinson, H. T., ‘The Eighteenth-Century Debate on the Sovereignty of Parliament’ *Transactions of the Royal Historical Society*, Vol. 26, (1976), pp. 189-210 at 209-210; See also: Goldworthy, J., *The Sovereignty of Parliament*, (Oxford: Clarendon Press, 2001), p. 232

<sup>21</sup> Ullmann, W., *Medieval Political Thought*, (Harmondsworth: Penguin, 1975), p. 154-155; Strong, C. F., *Modern Political Constitutions*, (London: Sidgwick & Jackson, 1972), p. 20-25; Elton, G. R., *England under the Tudors*, (London: Routledge, 1991), p. 166-168

<sup>22</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester, ECPR Press, 2008), p. 84

<sup>23</sup> Brazier, R., ‘The Constitution of the United Kingdom’, *The Cambridge Law Journal*, Vol. 58, No. 1 (March, 1999), pp. 96-128 at 99

<sup>24</sup> Schama, S., *A History of Britain: Volume 1 – At the Edge of the World? 3000BC to 1603AD*, (London: BBC, 2003), p. 161

<sup>25</sup> Davies, R. R., *Domination and Conquest: The experience of Ireland, Scotland and Wales 1100-1300*, (Cambridge: Cambridge University Press, 1990), p. 69

England's political history.<sup>26</sup> Central to this approach in analysing the formation of the UK, we find the work of the political scientist, Jim Bulpitt.

For Bulpitt, the processes that would come to eventually form the UK could be explained by two main points. First, was the fact that England was the primary and irreplaceable driver behind the political integration of the British Isles to form the UK.<sup>27</sup> Second, that this process took place over a long period, and was not conducive to a single event or agenda, but rather took place between two transitional periods – *informal* and *formal* empire.<sup>28</sup>

During informal empire,<sup>29</sup> Bulpitt argued the links were established whereby England assumed control over the periphery as a 'satisfied imperialist', and developed a clear constitutional practice in relation to the periphery, which he termed the 'official mind':

'The structure of the informal Empire followed the English "official mind" regarding territorial politics: indirect rule, parsimony, autonomy of court politics from peripheral interference and sufficient control at the margin.'<sup>30</sup>

Indeed, for Bulpitt, it was during the period of informal empire that the essence of English statecraft in the British Isles first emerged.<sup>31</sup> However, in beginning to construct his argument at the period of informal empire, this thesis argues that Bulpitt fails to draw attention to the origins of the political processes that would come to influence the development of the 'official mind', and the logic of English constitutional practice concerning the periphery. Where this thesis therefore seeks to extend the debate on the formation of the UK is in extending its

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<sup>26</sup> See, for example: Gamble, A., 'The Constitutional Revolution in the United Kingdom', *Publius*, Vol. 36, No. 1, (2006), pp. 19-35 at 21; Simms, B., *Britain's Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016)

<sup>27</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester, ECPR Press, 2008), p. 84

<sup>28</sup> *Ibid.*, p. 85-94

<sup>29</sup> Bulpitt provided the following dates as conducive to the emergence of informal empire in each of the three peripheral parts of the British Isles: Wales (1284), Scotland (1603), Ireland (1603). *Ibid.*, p. 83

<sup>30</sup> *Ibid.*, p. 85-86

<sup>31</sup> *Ibid.*, p. 86



understanding into the earlier historical past, beyond Bulpitt's starting point of informal empire.

To this end, this thesis argues for an extension of Bulpitt's methodology, to the effect of the inclusion of a third category before 'informal empire', what we will term, for the interests of continuity: 'pre-empire'. This title, however, must be recognised as misleading in regards to the fact that it does not seek to document a period before English-peripheral relations but, rather, hypothesises the period whereby English political authority first came to be exercised over the periphery – a period that is therefore vital in the explanation of the eventual move to informal as well as formal empire.

Within this period, it is argued that the fundamental character of English statecraft in the British Isles first emerged. In the debate that follows, an argument will be recorded that the start of *informal* empire was not conducted on a clean slate but was, instead, the thickening of the already established bonds of the *pre-empire* period. Thus, in recognition of this argument, let us now begin charting its course and consulting the beginning of England's constitutional relationship with the periphery.

### **1.2.2. Defining the Periphery**

The argument of this section of the chapter aims to demonstrate the existence of a constitutional relationship between England and the periphery in the period of 'pre-empire'. In presenting this argument, the analysis in this section of the chapter will fall under three frames of analysis. The first will consider the emergence of the pre-empire mentality in England's relationship with Wales, the second, Scotland, and the third, Ireland. This will then be followed by a summary and synthesis of the main points of the argument presented in this section of the chapter.

### 1.2.2.1. Wales

In defining the periphery, and in particular the relationship of the periphery with England, it is necessary to begin our analysis in the area which first encountered conflict with England; Wales. Defined by some as England's first 'colony',<sup>32</sup> the relationship between England and Wales – or those areas later identified under those titles – has a rich history which stretches back to the age of the Anglo-Saxon heptarchy, and the actions of Mercian kings to secure their western border against marauding Welsh tribes.<sup>33</sup> However, for the purposes of this thesis, we will begin our discussion of Anglo-Welsh relations in the period after 1066.

Yet, to talk of *Wales* during this period is to falsely assume its structure as conforming to a unified territory, under one ruler, and set within the limits of today's porous border with England. Rather, Wales during the medieval period, while possessing a significant degree of cultural and linguistic uniformity, was divided territorially into a patchwork of minor principalities and lordships. Writing in 1194, Gerald of Wales, defined its territorial composition as follows:

'For time immemorial Wales has been divided into three more or less equal parts. When I say equal I mean in value rather than in size. These are Gwynedd, or North Wales; South Wales, called in Welsh Deheubarth, which really means Right-Hand Wales, a sub-section of which, containing seven cantrefs, has been given the name of Demetia or Dyved; and Powys, which is in the middle and stretches eastwards.'<sup>34</sup>

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<sup>32</sup> Davies refers to Wales as the first example of English colonial expansion. Davies notes that during the period from the late 11<sup>th</sup> to the 14<sup>th</sup> Century, Wales was conquered and administered through methods of colonial practice, whereby unilateral actions of the English Crown stripped native Welsh lords of their lands and titles and forced polities of resettlement in the less fertile uplands of the Welsh hinterland. See; Davies, R. R., 'Colonial Wales', *Past & Present*, Vol. 65, No. 1, (November 1974), pp. 3-23 at 4-9

<sup>33</sup> See for example the earthen work defences of Watt's Dyke and Offa's Dyke which were constructed along what is today loosely defined as the 'Marches', to secure the western border of Mercia.

<sup>34</sup> Gerald of Wales, *The Journey Through Wales and The Description of Wales*, translated with an introduction by Lewis Thorpe (London: Penguin, 2004), p. 221

Indeed, it was only for a brief period of seven years (1057-1063), under the rule of Gruffydd ap Llywelyn, that Wales<sup>35</sup> was territorially united as one, under one ruler, a feat which John Davies notes as having ‘neither precedent nor successor’.<sup>36</sup>

Even under this brief period of unity, however, the borders of Wales were still impervious to a fixed territorial definition. Internally, dynastic feuds led to shifting boundaries between its three main parts. Externally, the repeated incursions of the Marcher Lords gradually shifted the border with England further west,<sup>37</sup> leading to the growth of the quasi-autonomous Anglo-Welsh borderland known as the March.<sup>38</sup>

It is upon this latter point that we find the basis of our analysis of Anglo-Welsh relations during the ‘pre-empire’ period. In making this connection, and based on the above-mentioned mosaic structure of Wales during the medieval period, we find that it is relatively impossible to attribute ‘Welsh’ diplomacy to a single identifiable source of authority. Rather, the disparate collection of Lords and Princes in Wales meant that English foreign policy was unable to assume a uniform direction, or coordinate negotiations with a single source of temporal authority in Wales.

Instead, we find that the system that emerged was largely colonial in nature, seeing the gradual creeping of English baronial conquest into Wales, led by the ambitions of the Marcher Lords, and not the direction of English crown authority. The culmination of this process had, by the

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<sup>35</sup> The lands controlled by Gruffydd ap Llywelyn, while encompassing most of North and Mid-Wales, failed to conquer those lands which today form the counties of Monmouthshire and Glamorgan.

<sup>36</sup> Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 98

<sup>37</sup> Strayer, J. P., *Medieval Statecraft and the Perspectives of History*, (Princeton: Princeton University Press, 1971), p. 341

<sup>38</sup> The origins of the Welsh Marches date back to 1082 and the decision of William I to gift lands at strategic points along the Welsh border to three of his most faithful followers – Hereford to William Fitzosbern; Shrewsbury to Roger Montgomery; Chester to Hugh the Fat of Avranches – their charge was to defend and advance the border into Wales; a strategic plan which John Davies writes both helped to secure England’s western border, but also provided a useful distraction to the landed elite of England which helped to unify the realm. Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 101

mid-13<sup>th</sup> century, seen the growth of the March confine any definition of an independent *Wales* as solely relatable to the Principality of Gwynedd.

However, despite the ambiguous and shifting territorial boundaries of medieval Wales, a clear sense of a distinct Welsh society endured in the hinterlands of the North and West. The Welsh language and its accompanying rich literary culture of poetry and prose saw a distinct Welsh high culture endure, at least within the noble and clerical elite.<sup>39</sup> This was supported by a unique system of Welsh customary law, far removed from that of the English common law and which, while differing in substance between the various territorial parts of Wales, maintained an overarching legal culture through its means of practice.<sup>40</sup>

As Wales – or rather, Gwynedd – journeyed into the 13<sup>th</sup> century, however, its territorial nucleus increasingly began to shrink, concentrating itself in the mountainous heartland of Snowdonia and Anglesey. Despite securing notable concessions from the English King Henry III under the Treaty of Montgomery (1267), including the recovery of Welsh lands and the symbolic recognition by an English King of Llywellyn ap Gruffydd as ‘Prince of Wales’, the overarching trend that began to appear was that of an accelerated decline in *Welsh* autonomy.

Following the ascension of Henry III’s successor, Edward I, as king of England in 1272, English foreign policy towards Wales entered a new era. Unlike Henry III, Edward was a strong king, able to secure the support of the majority of the English baronial class and, from this effective base, more readily able to concentrate his attentions towards the periphery. Nevertheless, it must be noted that Edward’s approach, at least initially, was more reflective of

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<sup>39</sup> Morgan, K. O., *Rebirth of a Nation: A History of Modern Wales*, (Oxford: Oxford University Press, 2002), p. 90

<sup>40</sup> First codified in the 10<sup>th</sup> century under the reign of Hywel Dda, King of Deheubarth, the system of Welsh law was based on a bottom-up customary legal culture of *Volksrecht*, as opposed to the top-down nature of the English *Kaiserrecht*. See; Jenkins, D., ‘The Medieval Welsh Idea of Law’, *The Legal History Review*, Vol. 49, No. 3 (1981), pp. 323-348 at 326

the developing English ‘official mind’, and in favour of indirect control of Wales through overlordship, as opposed to its direct territorial conquest.<sup>41</sup>

However, when in 1274 Llywellyn refused to continue to swear fealty to the English crown, and instead sought to negotiate for a new relationship with England, Edward was forced to turn to the extremes of military action to subdue Wales. In an unprecedented show of force, in 1277 he entered Wales at the head of a 15,000 strong army and set about the task of subjugating the Welsh princes. While the ensuing conflict bears little sway on the argument of this chapter, its culminating event, the Statute of Rhuddlan, marks a significant point in the early history of the territorial constitution.

Under the unilaterally imposed terms of Rhuddlan, Wales lost any notion of independence, as well as the majority of its institutional distinctiveness. The dynastic line of the Welsh princes was distinguished; a system of English-style shires was imposed across Llywellyn’s former lands in Gwynedd; taxes replaced the traditional tribute of goods by citizens to their local lords; the English common law replaced Welsh law in all criminal matters; a network of castles were constructed to subdue the population of Llywellyn’s former lands in Gwynedd and, in 1301, Edward of Caernarfon (later Edward II), was confirmed as the first English heir to the throne to hold the title of ‘Prince of Wales’, a tradition which continues to this day.<sup>42</sup>

In constitutional terms, Wales, after Rhuddlan, largely became a territorial shell. Nevertheless, the terms agreed at Rhuddlan are fundamental in two ways for understanding the later political and constitutional history of Wales, as well as the rest of the UK. First, it reflected the maturity of the English state and its confidence to export its administrative system to the periphery<sup>43</sup> – a trend that would later be carried forward in Ireland and, to a lesser extent, Scotland. Second,

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<sup>41</sup> Schama, S., *A History of Britain: Volume 1 – At the Edge of the World? 3000BC to 1603AD*, (London: BBC, 2003), p. 161

<sup>42</sup> Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 162-165

<sup>43</sup> *Ibid.*, p. 162

it marked the beginning of the end of a Welsh identity based on civic institutions, and the beginning of a sense of Welsh identity defined by its distinctive language and culture. In many respects, Rhuddlan not only marked the beginning of English informal empire in Wales, but also the beginning of Wales' definition as a culturally, as opposed to an institutionally, distinct unit of the UK state.

#### **1.2.2.2. Scotland**

In 1237, the Treaty of York fixed the Anglo-Scottish border on the Tweed-Solway line; a line which while subject to some later fluctuations and areas of 'debatable land', continues to define the border to this day.<sup>44</sup> A little under three decades later, in 1266, the Treaty of Perth – a peace accord signed with the Norwegians following their defeat at the Battle of Largs – transferred the Outer Hebrides and the Isle of Man to the Scottish crown. Thus, by the middle of the 13<sup>th</sup> century, Scotland's external borders were relatively well defined – a factor which, amongst others noted below, would lead to Scotland experiencing a significantly different relationship with England than had been seen in Wales.

However, despite the well-developed certainty of the territorial limits of the Scottish crown's authority, its ability to consolidate its control within its borders was far less successful. Unlike England, medieval Scotland was relatively under developed in its system of local administration, with a weak monarchy and a comparatively decentralised – or never truly unified – territory.<sup>45</sup> Indeed, the direct authority of the Scottish crown during this period was only effectively exercisable in the areas of the lowland belt and along the east coast up to Aberdeen. The rest of Scotland in the highlands, islands and along the border with England

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<sup>44</sup> Barrow, G. W. S., *The Kingdom of the Scots*, (London: Edward Arnold, 1973), p. 139; The final settlement of the 'Debatable Lands' took place in the Anglo-Scottish Treaty of 1551. Lynch, M., *Scotland: A New History*, (London: Century, 1991), p. 207

<sup>45</sup> Massie, A., *The Royal Stuarts*, (London: Jonathan Cape, 2010), p. 25-26

remained a largely clan-based society, ruled by a largely autonomous noble class that the Scottish crown was not in a position to challenge.<sup>46</sup>

Nevertheless, while Scotland remained a weak state, its comparative size and early success in defining at least its external borders, went a long way in influencing a distinctly different relationship with England than had been experienced in Wales. While it must be recognised that England saw the leaders in both areas as subservient, an early precedent is able to be traced whereby English foreign policy was far more respectful of Scotland's external borders and made few large-scale – unprovoked – territorial advancements into Scotland.

In various treaties made between England and Scotland in 1057, 1157 and 1174, despite each of their contents being the result of the defeat of a Scottish invasion of Northumbria, the English crown made no demands for territorial concessions – apart from the retreat of Scottish troops from Northumbria – and sought only monetary compensation and, more significantly, the recognition of the English King as *dominus rex* over Scotland.<sup>47</sup>

What is perhaps most significant about these events is the fact that, despite each resulting from a Scottish invasion of England, the English response in each instance left Scotland as an independent realm; subservient to, but not part of, England. Indeed, as we have already seen, this era of Anglo-Scottish relations culminated in the Treaty of York (1237) which bilaterally agreed the border between the two countries, a phenomenon which has no relation in the history of Anglo-Welsh relations. In explaining the curiously respectful nature of Anglo-Scottish relations during this period, we may draw three conclusions.

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<sup>46</sup> *Ibid.*, p. 25

<sup>47</sup> Mackie, J. D., *A History of Scotland*, (London: Allen Lane, 1978), p. 36; Barrow, G. W. S., *Kingship and Unity: Scotland 1000-1306*, (London: Edward Arnold, 1981), p. 54; Stringer, K. J., *Earl David of Huntingdon: A Study in Anglo-Scottish History*, (Edinburgh: Edinburgh University Press, 1985), p. 28; Lynch, M., *Scotland: A New History*, (London: Century, 1991), p. 75

First, the foreign policy of the English crown during this period was primarily directed south to interaction with France and the English Angevin Empire. Thus, for as long as Scotland remained relatively subservient – and the minor nature of the incursions into Northumbria never amounted to a serious threat – the English had neither the will or the strategic resources to ‘conquer’ Scotland. Moreover, the absence of an encouraged baronial conquest in the Scottish March similar to that in Wales and Ireland, meant that Scotland remained united.

Second, the significance of Scotland as having one king, ruling – at least in theory – over the majority of the territory north of England, meant that English foreign policy could be effectively directed towards securing the obedience of one central figure, as opposed to the mosaic collection of princes and kings in Wales and Ireland.

Third, as already mentioned, the essence of the English ‘official mind’ during this period was resistant to the inclusion of new territory. Instead, we find evidence of a preference for a robust English governmental core as distinct from its surrounding geo-political interests, without the burden of administering, policing and, most importantly, consulting, new territorial conquests. This situation was to fundamentally change by the end of the 13<sup>th</sup> century.

The inauguration of the English nominated, Scottish noble, John Balliol, as King of Scotland in 1292, following the earlier successor crisis of 1290, had seemed to deliver a system of government ideal to the satisfaction of Edward I who had, less than a decade earlier, successfully completed the subjugation of Wales. However, while fostering close relations with England, Balliol’s actions were counterproductive in securing the support of his own nobility. In 1295, less than three years into his reign, a Parliament of Scottish nobles meeting at Stirling, usurped Balliol of his title and took direct control of Scottish affairs.<sup>48</sup>

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<sup>48</sup> Barrow, G. W. S., *Robert Bruce and the Community of the Realm of Scotland*, (Edinburgh: Edinburgh University Press, 1988), p. 63



While this action was detrimental for Edward's foreign policy towards Scotland – removing his puppet King and placing the obstacle of an enhanced Scottish Parliament in his way – the overarching essence of the Edwardian response came as a result of the Scottish Parliaments accompanying decision to seek an alliance with the King of France. The signing of the Auld Alliance in 1295 transformed Scotland in English eyes.

The once relatively controllable acts of the Scottish kings had now been exported to the far more problematic external sphere, creating a scenario that not only delivered an unruly northern neighbour, but also created the possibility of England having to fight a coordinated war on two fronts.<sup>49</sup> Moreover, it also increased Scotland to the position of a realm independent of English control and enmeshed within the wider European political theatre – Scotland was now a matter for consideration in English foreign affairs, rather than merely the pursuit of English policy within the British Isles.

Unsurprisingly, in the same year as the Franco-Scottish alliance was forged, Edward I marched into Scotland at the head of an army intent on subduing Scotland through the use of force. As was the case in Wales a decade before, Edward's campaign was unremitting in its brutality and etched with triumphal symbolism at every opportunity; sacking Berwick, capturing a number of significant Scottish castles across the lowlands and, most symbolically, removing the Stone of Destiny – the primordial symbol of Scottish kingship – and transporting it to London. As noted by Mackie, the 'threat' posed by the Auld Alliance had shown the extremes of Edwardian foreign policy when faced with a threat to the stability of the dynastic Empire.<sup>50</sup>

Yet, despite significant English success over the first years of the invasion, Edward's death while fighting in the Scottish March in 1307 resulted in a fundamental change of direction. This change would primarily become associated with the Scottish King who had ascended to

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<sup>49</sup> Simms, B., *Britain's Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016), p. 47

<sup>50</sup> Mackie, J. D., *A History of Scotland*, (London: Allen Lane, 1978), p. 68

the throne the year before Edward's death, Robert Bruce. While it is important to discuss his celebrated military successes over Edward II, most notably at Bannockburn in 1314, the significance of Robert Bruce in the case of this thesis relates more to his wider skills of statecraft. In 1320, after several military successes over the English, Robert Bruce, together with a gathering of Scottish barons, freeholders and thirty-nine 'lay magnates' sent a letter – 'The Declaration of Arbroath' – to the Pope at Avignon seeking papal recognition of Scotland as a free and independent nation.

The corpus of the Declaration, laid out the case of Scottish independence, relying on a primordial – and to a large extent invented – history of the Scottish nation in justifying its claims.<sup>51</sup> To many contemporary writers inclined towards the position of Scottish nationalism, the significance of the Declaration is symbolic as the first documented claim to national independence in western Europe.<sup>52</sup> To some extent, we may note these claims as correct, however, it is also important to recognise the nuanced understanding of independence within the supranational religious structure of medieval Europe, as well as underlying aim of the Declaration as primarily seeking the *legitimacy* of Bruce as King of Scots, rather than seeking a direct declaration of the popular *independence* of Scotland – aside from confirming Scotland as free of English overlordship.<sup>53</sup>

Despite an initial success, by 1321 the aims of the Declaration had failed, and the Anglo-Scottish conflict continued.<sup>54</sup> It was not until 1328 and the Treaty of Edinburgh-Northampton

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<sup>51</sup> Broun, D., 'The Declaration of Arbroath: Pedigree of a Nation?', in Barrow, G. W. S., (ed.) *The Declaration of Arbroath: History, Significance, Setting*, (Edinburgh: Society of Antiquities of Scotland, 2003), pp. 1-23 at 5

<sup>52</sup> Barrow, G. W. S., *Robert Bruce and the Community of the Realm of Scotland*, (Edinburgh: Edinburgh University Press, 1988), p. 310; MacCormick, N., 'Is There a Constitutional Path to Scottish Independence?', *Parliamentary Affairs*, Vol. 53, (2000), pp. 721-736 at 729

<sup>53</sup> Barrell, A. D. M., *Medieval Scotland*, (Cambridge: Cambridge University Press, 2000), p. 122

<sup>54</sup> The immediate response of the Papacy to the Declaration was to issue a papal decree for Edward II to make peace with Scotland. Peace talks began in 1321 but broke down within a matter of weeks. Edward used the breakdown of the talks as a political weapon against the Scots, notifying the Papacy which, in the years that follows, issued no less than six Papal Bulls excommunicating 'all invaders of England'. The aftermath of the Declaration was, therefore, short lived in its success. Scott, D. M., *Robert the Bruce: King of Scots*, (Edinburgh: Cannongate, 1988), p. 197

that hostilities were formally ended; the Treaty re-fixing the border at the earlier position agreed under the Treaty of York and, more significantly, recognising Scotland as independent of English overlordship. While another sustained period of conflict emerged between the two realms no less than four years later and, once again, surrounded attempts by England to subdue Scotland, for the remainder of the 14<sup>th</sup> century, Scotland remained independent.

The enduring security mechanism of the Auld Alliance, as well as England's renewed interest in a south facing foreign policy aimed at France and Spain, meant that for much of the 15<sup>th</sup> and 16<sup>th</sup> centuries, Anglo-Scottish conflict remained relatively subdued. Moreover, following the Protestant Reformation from the mid-16<sup>th</sup> century, the geopolitical map of Europe became redrawn: Scotland's positive reception of the Reformation meant that its interests increasingly became conjoined with those of Protestant England, and increasingly came to drift from the Catholic foreign policy of France, leading to the eventual collapse of the Auld Alliance in 1560.

Symbolically, the climax of this renewed sense of Anglo-Scottish cooperation was achieved in 1603 when the Stuart King James IV of Scotland, and cousin of the deceased Elizabeth I of England, ascended to the throne of England. The resulting Union of the Crowns, while maintaining Scotland and England as independent states, linked them in a personal union under a common monarch.

The period of informal empire had now begun in Scotland, however, in contrast to the earlier experience of Wales, we find that its fruition was not the result of military conquest, but of the dynastic fortune of the House of Stuart; informal empire by way of circumstance, as opposed to desire, at least from an English perspective.<sup>55</sup>

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<sup>55</sup> There is significant evidence that the Stuart King, James VI of Scotland, was receptive of assuming the throne of England – there is, however, little similar accord from the English position of being receptive to Personal Union with Scotland. See: Massie, A., *The Royal Stuarts*, (London: Jonathan Cape, 2010)

### 1.2.2.3. Ireland

Similar to events in Wales and Scotland, Ireland's experience during the pre-empire period was devoid of explanation by way of a single English approach to the periphery. Yet, despite the individual circumstances in Ireland, we find clear evidence that, similar to Wales and Scotland, the basis of later English attitudes towards Ireland developed during the period prior to its entry into England's informal empire – although in Ireland, their manifestation took a distinctly more severe and colonial form.

In order to understand this experience, we are able to locate a central tenet in Ireland's constitutional history as linked to religion. Indeed, in 1154, we find the first formal constitutional proclamation of England's relationship with Ireland through Pope Adrian IV's issuance of the Papal Bull *Laudabiliter* – granting the English King, Henry II, the legitimacy to invade Ireland to subdue the 'rude and ignorant' Irish, and to bring the semi-autonomous Catholic Church in Ireland in line with the newly ordained papal reforms.<sup>56</sup>

What is important to note in regards to Adrian's Bull, however, is that its legitimacy was not for the conquest of a formal *Kingdom* of Ireland, but rather for the territorial unit of Ireland itself – granted under the aged authority of the Donation of Constantine.<sup>57</sup> Indeed, throughout the medieval period, the constitutional arrangement of Ireland was more similar to that of Wales than Scotland, made up of a mosaic of smaller kingdoms, periodically arranged under the feudal authority of a native High King of Ireland.

Yet, despite the papal mandate for the invasion of Ireland, the first English expedition to cross the Irish Sea in 1166 drew its motivation more from noble ambition rather than any sense of a moral or religious crusade. Leading the invasion was Richard FitzGilbert de Clare, Earl of

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<sup>56</sup> Orpen, G. H., *Ireland Under the Normans, 1169-1216: Vol. 1*, (Oxford: Clarendon Press, 1911), p. 295-296

<sup>57</sup> This was a legacy of the Roman Empire and referred to the Imperial proclamation made by Constantine the Great which gave the Church authority over all islands. Ullmann, W., *Medieval Papalism: The Political Theories of the Medieval Canonists*, (London: Routledge, 2012), p. 108

Pembroke (*'Strongbow'*), acting upon a promise to assist the deposed King Dermot MacMurrough of Leinster recover his kingdom.

Strongbow's offer of assistance, however, did not come without its price and, in return for aiding Dermot, he was guaranteed the hand of his eldest daughter in marriage and the succession of the Kingdom of Leinster – a title that he quickly inherited following Dermot's death in 1171.<sup>58</sup> However, the gravity of Strongbow's success, and in particular his new title as *King* of Leinster, was to stoke significant disquiet in the Court of Henry II. In that same year, Henry embarked for Ireland at the head of an army.

The overarching significance of Henry's arrival in Ireland, was that it was not at the head of an army intent on the conquest of Leinster or the deposition of Strongbow, but on reconfirming Strongbow's allegiance to the King of England as his feudal overlord.<sup>59</sup> Indeed, by the time of his departure from Ireland in 1172, Henry had confirmed Strongbow as Lord of Leinster. Although, it is upon this point that we find the crucial exercise of the English 'official mind' in Ireland: the reduction of Strongbow's titular authority from *King* to *Lord* of Leinster – reconfirming Henry as his feudal overlord, but maintaining the essence of peripheral autonomy similar to that seen in Wales and Scotland.<sup>60</sup>

Yet, despite the possibility for comparison between Henry's actions in Ireland and those which he also undertook in Scotland and Wales, there is also a distinct difference in the way Henry, and indeed later English monarchs, approached Ireland compared to Scotland or Wales. Fundamentally, this may be summarised as the existence of a heightened sense of anxiety over

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<sup>58</sup> In reality, Strongbow's authority as King of Leinster failed to extend much further from the coastal strongholds, and the majority of the hinterland of Leinster remained under the control of those loyal to Rory O'Connor, King of Connaught and High King of Ireland. Curtis, E., *A History of Medieval Ireland: From 1086 to 1513*, (Abingdon: Routledge, 2012), p. 46, 52-53

<sup>59</sup> Curtis, E., *A History of Medieval Ireland: From 1086 to 1513*, (Abingdon: Routledge, 2012), p. 56

<sup>60</sup> Strongbow also divided Strongbow's demesne, creating the new Lordship of Meath out of the northern portion of the Kingdom of Leinster, and bestowing it upon his trusted Lord, Hugh DeLacy – an act of political stratagem designed as a countermeasure to Strongbow's authority in Ireland. *Ibid.*, p. 63

the political situation in Ireland. Whether down to the fact of Ireland's unique geographical separation from England by the Irish Sea, or the initial precedent of potential disloyalty set by Strongbow, we find the emerging trend of English constitutional actions as increasingly more concerned with the guarantee of control than seen in Scotland or Wales.

Less than three years after subduing Strongbow, the Treaty of Windsor (1175), ratified by the Papacy, confirmed Henry II as Lord of Ireland – nullifying the historical title of the native High King of Ireland, and providing Henry with the supreme temporal overlordship of Ireland, but holding the title on trust from the Papacy.<sup>61</sup> In reality, however, the effects of Windsor did little to bring Ireland under the direct control of the English Crown, and the hinterland remained unconquered for the majority of the next century.

Indeed, in further comparison to Wales, the system of territorial control in Ireland after Windsor continued primarily along the lines of the gradual advancement of the Anglo-Irish Marcher Lords into the hinterland. To coordinate this action, evidence pertains to the existence of an Irish Parliament from the late-13<sup>th</sup> century.<sup>62</sup> Similar to the actions of its medieval namesake in England, the composition and purpose of the Parliament was primarily concerned with coordination between the Anglo-Irish elite and the English King in matters relating to the collection of revenues and mobilisation of armies when required.<sup>63</sup> However, from the beginning of the 14<sup>th</sup> century, the Irish Parliament also came to be increasingly autonomous of English influence, governing Ireland with a high degree of autonomy, and an increasing sense of identity and custom separate from that of England.<sup>64</sup>

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<sup>61</sup> Otway-Ruthven, A. J., *A History of Medieval Ireland*, 2<sup>nd</sup> Ed. (London: Ernest Benn, 1980), p. 56

<sup>62</sup> Some evidence exists of a Parliament being called at Castledermot from 1264, although the overarching consensus appears to pin the formal beginnings of an Irish Parliament as being established by Edward I in 1297. Richardson, H. G., and Sayles, G. O., *The Irish Parliament in the Middle Ages*, (Philadelphia: University of Pennsylvania Press, 1964), p. 58-61

<sup>63</sup> Curtis, E., *A History of Medieval Ireland: From 1086 to 1513*, (Abingdon: Routledge, 2012), p. 173

<sup>64</sup> Richardson, H. G. and Sayles, G. O., *The Irish Parliament in the Middle Ages*, (Philadelphia: University of Pennsylvania Press, 1964), p. 68

Initially, this seems not to have produced any notable response from England, either as a result of its distraction with events in France, or the recognition that the governance of Ireland required a unique style of governance, particularly for the control of the significant hinterland. Nevertheless, by the mid-14<sup>th</sup> century, the reality of the Irish Parliament's increasing shift away from England, and the development of a clear sense of separated political identity within the Anglo-Irish elite, forced England to act.

In 1366, the Irish Parliament, under the direct request of Edward II, represented by the Lord Deputy of Ireland, Lionel of Antwerp, passed the Statute of Kilkenny. Under the terms of the Statute, English-Irish marriages were forbidden and the English language was enforced upon all residents of English controlled areas of Ireland, as were the traditions of English law, dress and customs.<sup>65</sup> Viewed retrospectively, the terms of Kilkenny marked a turning point in the governance of Ireland, shifting it from a conquering to a colonial administration.<sup>66</sup>

While the success of the programme of cultural segregation instigated at Kilkenny is open to continued historical debate, the actions of the English Crown in Ireland over a century later was a further demonstration of the continued English anxiety over the governance of Ireland during the pre-empire period. Under the premiership of Gerald FitzGerald as Lord Deputy of Ireland in the late 15<sup>th</sup> century, evidence suggests of a further move in Ireland that tested the limits of English tolerance with the periphery. Under FitzGerald, the motions of the Irish Parliament became increasingly maverick, and FitzGerald himself increasingly synonymous with an Irish premier as opposed to the King's representative in Ireland.

In a response characteristic of the English 'official mind' and the need to control the periphery, an English force was swiftly sent to Ireland, FitzGerald removed, and the prominent English noble, Edward Poynings installed as the new Lord Deputy of Ireland. Unlike FitzGerald,

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<sup>65</sup> Otway-Ruthven, A. J., *A History of Medieval Ireland*, (London: Ernest Benn Ltd, 1980), p. 291

<sup>66</sup> Curtis, E., *A History of Medieval Ireland: From 1086 to 1513*, (Abingdon: Routledge, 2012), p. 235, 252-253

Poyning's was a staunch follower of the English Crown and, in 1495, presided over the passage of the Statute of Drogheda (*Poyning's Law*), which insisted that any future meeting of the Irish Parliament, or indeed any future legislation put forward by the Parliament, could only be enacted following the approval of the English Crown, by way of the English Parliament.<sup>67</sup>

Poyning's Law was a method of attempting to cement Westminster supremacy over the Parliament at Dublin Castle, and to stop Ireland from being used as a landing pad or 'back door' for an attack on England.<sup>68</sup> However, what is perhaps most interesting in the passage of Poyning's Law is the absence of direct territorial control by England over Ireland, as seen in Wales in 1294. Indeed, while undeniably subservient to the English Crown, the Irish Parliament and the Kingdom of Ireland remained as symbolic of the continued distinction between Ireland and England (and Wales).

Yet, while the Statutes of Kilkenny and Drogheda had enforced a clear system of colonial rule upon Ireland, it was not until the 16<sup>th</sup> century that the true extent of cultural and societal division intensified in Ireland.

Due to the inefficacy of the Henrician reformation to take hold in Ireland – arguably as a result of Irish resistance to the English origins of the reforms<sup>69</sup> – a divide began to emerge between Protestants and Catholics in Ireland. As a result, the English response was to instigate a clear system of territorial control over Ireland.

First, in 1542, Henry VIII was confirmed under the new title of King of Ireland. The justification for this adaptation in the titular form of the Crown in Ireland was essentially a response to the Henrician Reformation, and an attempt to re-legitimise English control over

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<sup>67</sup> Ellis, S. G., *Ireland in the Age of the Tudors 1447-1603*, (London: Longman, 1988), p. 93

<sup>68</sup> Simms, B., *Britain's Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016), p. 33

<sup>69</sup> Elton, G. R., *England under the Tudors*, (London: Routledge, 1991), p. 180



Ireland – a matter which had previously drawn its legitimacy from Papal proclamation.<sup>70</sup> While not overtly altering much in terms of the overall governance of Ireland, the 1542 declaration was nonetheless significant in making further reference to the fact of Ireland as constitutionally distinct from the rest of England – a factor which served only to enhance the idea of Ireland as a colonial possession of the English state.<sup>71</sup>

Second, while producing significant effects in the territorial isolation of Ireland, the effects of the Henrician revolution also had significant effects on the arrangement of Irish society, and the crystallisation of the sense of what it was to be Irish. As noted by Ellis, in the period prior to the Henrician reformation, the traditional understanding of Irish identity was constructed through the cultural distinction between *Gaedhil* and the *Gaill*: the former being a primarily linguistic identity, synonymous with the label of ‘Irish’, and extended across the Gaelic speaking population of Ireland and, more significantly, into the Gallic speaking populations of the Western Isles and the Highlands of Scotland – the latter of these terms (*Gaill*) was used to distinguish the linguistic and cultural ‘others’ in these areas, namely the English and Scots speaking populations.<sup>72</sup>

The ability to ascribe Irishness as a Pan-Gaelic identity was, to a large extent, aided by the additional shared custom of the Catholic faith – a factor which disappeared following the reformation.<sup>73</sup> Thus, following 1542, we also find that the arrangement of identity in Ireland crystallised into a distinct territorial form, confined to the island of Ireland – following the positive reception of the reformation in Scotland – and dictated by the boundaries of religious observance as opposed to linguistic uniformity attached to the idea of *Faith and Fatherland*

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<sup>70</sup> *Ibid.*, p. 180

<sup>71</sup> Perceval-Maxwell, M., ‘Ireland and the Monarchy in the Early Stuart Multiple Kingdom’, *The Historical Journal*, Vol. 34, No. 2, (Jun, 1991), pp. 279-295, at 280

<sup>72</sup> Ellis, S. G., *Ireland in the Age of the Tudors 1447-1603* (London: Longman, 1998), p. 251

<sup>73</sup> *Ibid.*, p. 259

within Ireland.<sup>74</sup> Indeed, after this period, the new *Gaedhil* was increasingly constructed by the union of native Irish and Anglo-Irish Catholics against the new influx of English sponsored Protestantism.<sup>75</sup>

Indicative of the newly reconfigured arrangement of social allegiance in Ireland was the events that took place in Ulster from 1594-1610. Owing to the new bounds of religious affiliation, the native Irish nobility became increasingly hostile to the will of the Protestant English. In 1594, the actions of the Ulster Confederacy, led by Hugh O'Neill, resulted in nearly a decade of conflict with England. The result was the ultimate defeat of the Confederacy, and the flight of the native Irish early from Ulster – to be replaced by the large-scale influx of Protestants into the new Ulster Plantation.

After 1610, the island of Ireland was, in its entirety, under the control of the English crown, thus for the first time unifying the English Kingdom of Ireland. While not amounting to a formal act of statutory recognition or dynastic union as was the case in Wales and Scotland, the completion of the territorial annexation of Ireland was, for Bulpitt, the indication of the formal beginnings of the period of informal empire in Ireland.

Under this transition into informal empire, we find that similar to Scotland, little in fact changed in the governance of Ireland. The Irish Parliament continued to exist, and to be legislatively subordinate to the English Parliament under the continuing existence of Poyning's Law. Moreover, a clear religious and cultural divide continued, and would be further enhanced over the coming century through the expansion of the Ulster Plantation and the attempts to secure the Protestant ascendancy in Ireland.

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<sup>74</sup> *Ibid.*, p. 259

<sup>75</sup> Interestingly, the new *Gaedhil* was inclusive of the non-Gaelic speaking Anglo-Irish (Old English) settler population who identified with the Catholic faith, identified against the Protestant identifying *Gaill*. *Ibid.*, at p. 264

### **1.2.3. Summary**

The arguments presented in this section of the chapter may be summarised under three broad headings.

First, we find the early emergence of England's relationship with the periphery. By the 11<sup>th</sup> century in Wales and Scotland, and by the middle of the 12<sup>th</sup> in Ireland, England was recognised as the feudal overlord, certainly in theory, if not always in reality. Thus, by the end of the 12<sup>th</sup> century, the existence of 'pre-empire' was represented in each of the four constituent parts of the British Isles.

Second, in all three parts of the periphery, the initial position of England was to maintain a preference of abstract control as opposed to intervention or direct control. While the incursions by Marcher Lords into the periphery, particular in Wales and Ireland, gradually extended the line of English controlled land into the periphery, their actions were uncoordinated, and arguably not part of a grand plan.

Instead, it may be argued that the English Crown's acquiesce in affording free reign to the Marcher Lords was more to safeguard the obedience of the nobility through the promise of a continuously expanding empire, as opposed to being part of a strategy to assume territorial control of the periphery. No more is this the case than in Scotland after the Treaty of York, where we see a clear definition of the unwillingness for English conquest – this is, of course, reversed by the Scottish Wars of Independence a little over two centuries later.

Third, the arrival of 'informal empire' in each of the three parts of the periphery was the result of intense moments of military and political unsettlement, and not of the inevitable conclusion of a process of the gradual crystallisation of feudal relations to form a more cohesive and unionising set of constitutional relationships.

Finally, as an overall conclusion, we find a clear acknowledgement from the corpus of this first section of the chapter, that the bonds of political and constitutional relationship between England and the periphery began in a period before the arrival of informal empire. In this regard, we may extent Bulpitt's analysis of the historical construction of the United Kingdom back to the 11<sup>th</sup> century. In the next section of the chapter, we will see how the constitutional processes and ideologies established in the pre-empire period continued to influence the eventual jump from informal to formal empire.

### **1.3. Union and Revolution**

This section of the chapter will seek to isolate and analyse the three processes of Union that took place between England and the three peripheral parts of the British Isles. The three unions will be addressed chronologically, beginning with Wales (1536), followed by Scotland (1707) and Ireland (1801). Within the discussion in this section of the chapter, emphasis will be placed on identifying the fundamental logic within England that motivated the shift to instigating formal empire.

#### **1.3.1. Anglo-Welsh Union**

Under the terms of the Anglo-Welsh Union, we find what Bulpitt defined as the first example of the English shift from 'informal' to 'formal' Empire.<sup>76</sup> However, unlike the later examples of political union and formal empire in Scotland and Ireland, the Anglo-Welsh Union shows far less evidence of being the result of an English response to a breach of the 'official mind'. Indeed, the Union was more akin to an administrative exercise, designed to replace the failing

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<sup>76</sup> Bulpitt, J., *Territory and Power in the United Kingdom: An Interpretation*, (Colchester: ECPR, 2008), p. 83

system of Marcher lordships which had become relatively lawless hinterlands, and to provide an effective mechanism for the better governance of Wales.<sup>77</sup>

To this end, the terms of the Acts of Union<sup>78</sup> formally dissolved and reconfigured the Marcher lordships, which came to form part of either the existing network of six Welsh counties, or five newly created counties along the border with England.<sup>79</sup> In reflection of this union, twenty-four Welsh members were admitted into the English House of Commons; the first territorial expansion of the English Parliament to comprise representatives from the Celtic periphery.<sup>80</sup>

As well as providing for administrative uniformity, the Acts also made it possible for the completion of the application of the laws of England into Wales, removing the last vestiges of Welsh customary law, and creating a unified legal system between the two countries. To some commentators, such as the historian Glanmor Williams, the effects of the Acts in this area were not that significant; merely confirming what had been a gradual and relatively organic assimilation of the two legal systems since the passage of the Statute of Rhuddlan, three centuries before.<sup>81</sup>

However, as noted by Peter R. Roberts, the provisions of the Acts did not create a system whereby the two legal systems were immediately congruent. Rather, the Acts expressly tasked the existing Council of Wales and the Marches, based at Ludlow, with breaking down the administrative and legal differences between the two countries, to a point at which they were

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<sup>77</sup> Elton, G. R., *England under the Tudors*, (London: Routledge, 1991), p. 176-178

<sup>78</sup> The Anglo-Welsh Union was divided into two pieces of legislation: the first was the Laws in Wales Act 1536, which passed the majority of the measures associated with the Union, the second was the Laws in Wales Act 1543, largely acknowledged as rectifying and adding to the provisions of the 1536 Act.

<sup>79</sup> As an interesting point of observation, the network of counties created in Wales under the terms of the 1536 Act remained largely intact in their territorial frames until the reforms made under the Local Government Act 1972.

<sup>80</sup> Elton, G. R., *England under the Tudors*, (London: Routledge, 1991), p. 178

<sup>81</sup> While the Henrician reforms undoubtedly altered the system of administration and the structure of the legal system in Wales, it is debateable as to how significant a 'shift' took place in the abandonment of Welsh law. As noted by Glanmor Williams, the shift away from the traditional customary based system of Welsh law had entered a noticeable decline long before the Henrician reforms in the mid-16<sup>th</sup> century, with the Acts of 1536 and 1543 merely affirming what was already a *de facto* reality; see, Williams, G., *Renewal and Reformation: Wales c. 1415-1642* (Oxford: Oxford University Press, 1993), p. 274-275

unnoticeable; a role which Roberts claims was not completed in full until the end of the century.<sup>82</sup>

Indeed, for almost two centuries after the Acts themselves, we find that Wales retained an air of institutional distinctiveness within the apparatus of the English state. In administrative matters, the Council of Wales continued to exercise the royal prerogative in Wales, until its abolition in 1689. In judicial matters, the Courts of Great Session continued to sit in Wales – with the exclusion of Monmouthshire which was attached to the Oxford circuit – until 1830. In legislative affairs, Wales was routinely specified as a unit of territorial distinction accompanying England until the passage of the Wales and Berwick Act in 1746:

‘in all Cases where the Kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any Act of Parliament, the same has been and shall be from henceforth be deemed and taken to comprehend and include the Dominion of Wales and Town of Berwick upon Tweed.’<sup>83</sup>

Thus, we find that while reaching a destination of complete institutional assimilation, the initial realities of the Anglo-Welsh Union, while creating a formal legal Union, were merely the beginning of the process of eventual assimilation, which was not completed in full until the 18<sup>th</sup> century. In this regard, we may draw two important conclusions as to the nature of the Anglo-Welsh Union:

First, is the lack of any notable opposition to the Union, or the later processes of further assimilation. Indeed, as noted by John Davies, following the disbanding of the Council of Wales and the Marches in 1689, the majority of the Welsh gentry simply turned their attentions to the growing metropolitan capital of London; a location which would become a central theatre

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<sup>82</sup> Roberts, P. R., ‘The Union with England and the Identity of ‘Anglican’ Wales’, *Transactions of the Royal Historical Society*, Vol. 22, (1972), pp. 49-70 at 53

<sup>83</sup> As quoted in; Roberts-Wray, K., *Commonwealth and Colonial Law*, (London: Stevens & Sons, 1966), p. 29

in the development of Welsh politics well into the 20<sup>th</sup> century.<sup>84</sup> In this regard, the Union was, from a functional point of view, a relatively organic transition in the incorporation of Welsh political society into England.

Second, the Acts failed to create – and arguably never sought to achieve – a unified culture between England and Wales. While the terms of the 1536 Act prohibited the use of Welsh in the law courts and all other processes of state – a phenomenon that would remain until 1942<sup>85</sup> – it made little effort for any proactive assimilation. Instead, paradoxically, the accompanying events of the Henrician revolution in breaking with the supranational authority of the Catholic church provided the conditions whereby the linguistic identity of Wales was able to continue, following the widespread translation of the bible into Welsh after 1562.<sup>86</sup>

Thus, in conclusion, we find that under the terms of the Union, Wales was incorporated into the English state, having by the 18<sup>th</sup> century lost virtually any measure of institutional distinctiveness. However, while congruent, we also find that Wales managed to retain a distinct cultural identity for much of this period; a reflection of the ‘victory’ of the Welsh language and culture,<sup>87</sup> but also, of the operation of the English official mind, which sought legal unity, but made little effort for cultural congruency.

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<sup>84</sup> ‘Instead, the Welsh gentry embraced London with its half a million inhabitants, among them Welshmen who would play a central role in the history of their country.’ Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 284

<sup>85</sup> Provision was made under the Welsh Courts Act 1942 for the right to use Welsh in judicial proceedings. The long title of the Act read as follows; ‘An Act to repeal section seventeen of the statute 27 Hen. 8. c. 26, to remove doubt as to the right of Welsh speaking persons to testify in the Welsh language in courts of justice in Wales, and to enable rules to be made for the administration of oaths and affirmations in that language, and for the provision, employment, and payment, of interpreters in such courts.’ The scope of the reform, however, was decidedly narrow, and it was not until later reforms in 1967 and 1993 that the complete parity of equality was established for the use of Welsh in legal proceedings. See: Welsh Language Act 1993, s. 22

<sup>86</sup> Rokkan, S., and Urwin, D. W., *Economy, Territory, Identity: The Politics of West European Peripheries*, (London: Sage Publications, 1983), p. 85

<sup>87</sup> Rokkan and Urwin define Wales as a ‘victorious periphery’ on account of its success in maintaining a linguistic identity contrary to that of the metropolitan standard. *Ibid.*, p 85

### 1.3.2. Anglo-Scottish Union

As was concluded in the previous discussion on Scotland in this chapter, the beginnings of Scotland's place in informal empire began in 1603 following the Union of the Crowns. Under this arrangement, the Stuart King, James I/VI sat on the thrones of both England and Scotland, thus joining the two kingdoms together in a personal union. Yet, while united under a common monarch, the Union of the Crowns failed to unite the two kingdoms in legal or political terms, a reality well identified by Dicey and Rait:

‘Under the union the King of England was the same person as the King of Scotland. But, as King of England, he had, constitutionally, no authority in Scotland, and as King of Scotland, he had no authority in England. Hence, it resulted that no law passed by the English Parliament had operation in Scotland, and no law passed by the Scottish Parliament has operation in England.’<sup>88</sup>

Thus, for the majority of the 17<sup>th</sup> century, while formal political union between the two independent kingdoms was often discussed, and even became a brief reality under the Cromwellian Protectorate (1653–1659), England and Scotland remained independent sovereign states.<sup>89</sup> In illustrating this fact, we find that for much of the period of the Union of the Crowns, both kingdoms pursued distinct, and at times opposing, objectives in areas such as trade and foreign affairs.

From the mid-17<sup>th</sup> century, the English Royal Navy actively enforced the terms of the Navigation Acts, restricting all foreign vessels from trading with England's overseas colonies: a measure originally designed to counter the Dutch monopoly on transatlantic trade, but which owing to the constitutional reality of the Union of the Crowns, also saw the Acts' enforcement against Scotland. In response to their exclusion from English overseas markets, in 1695 several

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<sup>88</sup> Dicey, A. V., and Rait, R. S., *Thoughts on the Union between England and Scotland*, (London: MacMillan and Co., 1920), p. v

<sup>89</sup> For a discussion on the various propositions for political union between England and Scotland, see: Devine, T., *Independence or Union: Scotland's Past and Scotland's Present*, (London: Penguin, 2017), p. 4-14; For a detailed account of the constitutional and political structure of the Cromwellian Protectorate, see: Lynch, M., *Scotland: A New History*, (London: Pimlico, 1992), p. 283-286



members of the Scottish noble and merchant elite formed the Company of Scotland, aiming to mitigate the effects of the Navigation Acts and establish a Scottish colony in the Isthmus of Panama – an area known as the ‘Darien’.<sup>90</sup>

Whether by poor coordination, disease, or a refusal by the English to lend their support, the Darien scheme failed within its first few years, bankrupting many of its investors, and having severe economic repercussions for Scotland.<sup>91</sup> The effects of the failure to colonise the Darien were further compounded by the reality of the English conflict with France, Scotland’s historical ally and still largest trading partner, which saw vital revenue streams restricted by an English blockade of French ports.<sup>92</sup>

Reflective of this fact, the actions and ideology of the Scottish Parliament became increasingly protectionist. In 1703, the Scottish Parliament passed two pieces of legislation designed to protect Scotland’s economy and trading interests. The first, the Wine Act, declared that Scotland would continue to trade with France despite English hostilities. The second, the Wool Act, restricted English wool imports into Scotland in an attempt to defend Scotland’s woollen industry and promote exports.

While the effects of this mercantilist turn had little effect on England in practical economic terms, the Acts had a significant symbolic impact of demonstrating the increasingly unpredictable and volatile actions of its partner in the Union of the Crowns. However, the long-term significance of the 1703 legislation in influencing the English desire for political union is still a matter of significant contestation within the historical community.<sup>93</sup> A factor that is less

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<sup>90</sup> Lynch, M., *Scotland: A New History*, (London: Pimlico, 1991), p. 307-308

<sup>91</sup> The English were reluctant to provide support for the Darien expedition owing to its strategic position next to Spain’s Southern and Central American Colonies, and the English desire to maintain the vital support of Spain against France. Devine, T., *Independence or Union: Scotland’s Past and Scotland’s Present*, (London: Penguin, 2017), p. 8

<sup>92</sup> Devine, T., *Independence or Union: Scotland’s Past and Scotland’s Present*, (London: Penguin, 2017), p. 15

<sup>93</sup> Lynch, M., *Scotland: A New History*, (London: Pimlico, 1991), p. 309

contested, is the Scottish Parliament's actions in 1704 in connection with the security of the protestant succession within the dynastic empire of the British Isles.<sup>94</sup>

The inability of Queen Anne to produce a surviving heir to the throne made it increasingly obvious to the English that a successor must be chosen from the Protestant Kingdoms of Europe. In 1701, the English Parliament passed the Act of Settlement – which under the prerogative also extended to Ireland – safeguarding the succession of the two kingdoms to the protestant granddaughter of James I, Electress Sophie of Hanover.

However, owing to the constitutional makeup of the Union of the Crowns, the English Parliament was unable to extend the Act of Settlement to Scotland, and thus required the Scottish Parliament to pass identical legislation in recognition of Sophie as heir to the Stuart throne in Scotland. Yet, in an act of unmistakable defiance, the Scottish Parliament refused to implement similar terms and, in 1704, passed the Act of Security, guaranteeing the right of the Scottish Parliament to elect its own successor to Anne as Queen of Scotland.

Compounded together, the increasing economic and political hostility of the Scottish Parliament towards England had a watershed effect of swiftly realigning attitudes south of the border. Faced with the increasingly maverick actions of the Scottish Parliament to the north, and a protracted war with France to the south, it was with surprising ease that a majority of the English Parliament were so quickly converted to favour formal political union with Scotland.<sup>95</sup>

Within a year of the Scottish Parliament passing the Act of Security, the English Parliament began its action for securing a Union with Scotland.

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<sup>94</sup> Devine, T., *The Scottish Nation: A Modern History*, (London: Penguin, 2012), p. 8

<sup>95</sup> Simms, B., *Britain's Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2017), p. 47; Devine, T., *Independence or Union: Scotland's Past and Scotland's Present*, (London: Penguin, 2017), p. 19-20

In an act of unashamed economic coercion designed to subdue Scottish opposition, the English Parliament passed the Alien Act in 1705. The terms of the Act threatened that if the Scottish Parliament did not come to the negotiating table on a political union by Christmas Day of that year, Scots would be barred from English economic markets, both colonial and domestic, and be treated as ‘aliens’ within England.<sup>96</sup> Faced with such strong political and economic pressure, along with the dire reality of a Scottish economy that had never truly recovered from the Darien incident, a Scottish parliamentary delegation was quickly assembled and sent south to London in November 1705.

Yet, while mindful of the reality that an agreement needed to be reached with England, the Scottish Parliament was far from united on how such a Union would be constructed. Those in the Court Party, aligned to Queen Anne, were largely receptive to the idea of an incorporating Union. However, they faced notable opposition from the Country Party, Jacobite Cavaliers, and the anti-union lobby known as *Squadron Volante*, who were vehemently opposed to Scotland’s incorporation into England, and instead favoured the status quo, or a more dramatic loosening of the bonds of dynastic union.<sup>97</sup>

For opponents of the Union such as William Seton of Pitmedden, himself an eventual convert to the idea of incorporating union, the initial prospect of incorporation spelt the erosion of ancient Scottish freedoms. Instead, Pitmedden, along with others in the Country Party, advocated in favour of a ‘federal union’ with England.<sup>98</sup> We find a useful demonstration of the logic of the Scottish anti-incorporationist argument through the writing of Pitmedden’s ally and fellow Parliamentarian, James Hodges:

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<sup>96</sup> The Act was repealed by the incoming Whig Government of November 1705, though the wheels of Union had already been set in motion. See; Devine, T., *Independence or Union: Scotland’s Past and Scotland’s Present*, (London: Penguin, 2017), p. 19

<sup>97</sup> Devine, T. M., *Scotland’s Empire 1600-1815*, (London: Penguin, 2004), p. 56

<sup>98</sup> Fry, M., *The Union: England, Scotland and the Treaty of 1707*, (Edinburgh, Birlinn, 2013), p. 116

‘Now, when I speak of a Federal Union, in distinction from a Union of Incorporation, I do not mean such an Union, as consisting barely in Articles of Confederacy betwixt the two Kingdoms, otherways [sic] altogether disunited; but an Union of a closer Nature, whereby both Kingdoms are to be united under one common Monarch of both.’<sup>99</sup>

In expanding upon this quote, we find the essential idea of Hodges’ federal union as resting on a Union of the Crowns, with certain additional articles of confederation in regards to foreign alliances, war and trade: a scheme which proposed little in the way of departure from what had existed between the two kingdoms since 1603.<sup>100</sup> Indeed, in this regard, we find a distinct blurring of Hodges’ idea from what is in the modern sense seen as a clear division between federal and confederal union. When viewed from this perspective, we find that the principle of ‘federal union’ at the time of Hodges’ writing was largely still in its infancy – at least when compared against its modern construction – lacking a distinctive institutional form or precedent, and largely reliant on the continental examples of the United Provinces and the Swiss Confederacy.<sup>101</sup>

In both of these examples, the arrangement of sovereignty – itself still a developing concept – was still internally constructed in its absolute form; a construction that we may today synonymise more with the distinction between the ‘unitary state’ and the ‘confederation’, as opposed to ‘federation’.<sup>102</sup> In characterising this point, we find a useful aid in the theoretical

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<sup>99</sup> Hodges, J., *The Rights and Interests of the TWO British Monarchies Inquir’d into, and Clear’d; with special Respect to An United or Separate STATE*, (Edinburgh, 1703), p. 7

<sup>100</sup> Bowie, K., *Scottish Public Opinion and the Anglo-Scottish Union, 1699-1707*, (Woodbridge: The Boydell Press, 2007), p. 75

<sup>101</sup> ‘No one [in England or Scotland], it is true, knew exactly what a federative Union meant. We must remember that the only forms of federal government much known to Scotsmen, or indeed to Englishmen, were supplied by Holland and Switzerland. One speaker in the Scottish Parliament referred to Sweden and Denmark as “united by a federal compact under one monarch”, but the constitution of the United Provinces seems to have been in the minds of the Scotsmen who demanded federal union.’ Dicey, A. V., and Rait, R. S., *Thoughts on the Union between England and Scotland*, (London: MacMillan and Co., 1920), p. 223

<sup>102</sup> Goldstein, L. F., *Constituting Federal Sovereignty: The European Union in Comparative Context*, (London: John Hopkins University Press, 2001)

commentary of Johannes Althusius who, writing in the early-17<sup>th</sup> century, distinguished between *complete* and *partial* confederation<sup>103</sup> as means of state configuration.

Indicative of the Althusian distinction was its reliance on the absolute and binary separation of sovereignty as either the possession of the central government (*complete confederation*<sup>104</sup>) – what we may today term the ‘unitary state’ – or remaining in the possession of the provinces (*partial confederation*<sup>105</sup>) – what we today may distinguish as a ‘confederation’. Interestingly, we find no distinction in Althusius’ work to the idea of sovereignty as *divided* within the state, or of federal union as a ‘middle ground’ between the two absolute constructions of the unitary state and confederation – a principle that is commonly regarded to have only truly gained institutional form in the United States at the end of the 18<sup>th</sup> century.<sup>106</sup>

Indeed, at the time of the Anglo-Scottish deliberations on the Union, the Swiss Confederation exercised a form of government that amounted to little more than a defensive alliance, with no easily definable system of central government, and a diverse mix of governmental styles employed in its respective Cantons, each of which remained sovereign in absolute terms.<sup>107</sup> In the example of the United Provinces, we find a more developed system of central government,

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<sup>103</sup> The Althusian definition of ‘confederation’ must not be confused with the modern definition; instead, it was a broad term of normative description and commentary on the state in general, as opposed to a single constitutional category.

<sup>104</sup> ‘A complete confederation is one in which a foreign realm, province, or any other universal association, together with its inhabitants, are fully and integrally co-opted and admitted into the right and communion of the realm by a communicating of its fundamental laws and right of sovereignty. To the extent that they coalesce and are united into one and the same body they become members of that one and the same body.’ – Carney, F. S., *The Politics of Johannes Althusius*, (London: Eyre and Spottiswoode, 1965), p. 84

<sup>105</sup> ‘A partial confederation is one in which various realms or provinces, while reserving their rights of sovereignty, solemnly obligate themselves one to the other by a treaty or covenant made preferable for a fixed period of time. Such a partial confederation is for the purpose of conducting mutual defence against enemies, for extending trust and cultivating peace and friendship among themselves, and for holding common friends and enemies, with a sharing of expenses.’ – Carney, F. S., *The Politics of Johannes Althusius*, (London: Eyre and Spottiswoode, 1965), p. 84

<sup>106</sup> ‘What distinguished federal from other forms of government is that neither the central nor the regional government is subordinate to the other as in unitary or confederal political systems’ Watts, R. L., *New Federation*, (Oxford: Oxford University Press, 1966) p. 355, as cited in; King, P., *Federalism and Federation*, (London: Croom Helm, 1982), p. 134

<sup>107</sup> Dardanelli, P., ‘Switzerland: Europe’s first federation’, in Loughlin, J., Kincaid, J., and Swenden, W., (eds.) *Routledge Handbook of Regionalism and Federalism*, (Abingdon: Routledge, 2013), pp. 248-258 at 249

facilitated through the operation of the *Staten Generaal*, however, its scope was – at least in theoretical terms – limited by the retention of sovereignty in the Provinces.<sup>108</sup>

Thus, for the deliberations on the Anglo-Scottish Union, there existed little or no theoretical or practical distinction of ‘federal union’ – at least in its modern form – from which to base an argument for a form of non-incorporating Union of any notable separation from the Union of the Crowns. Yet, while lacking in structural distinctiveness, we find the arguments for ‘federal union’ as more significant in highlighting the underlying political anxiety in Scotland of subordination *to*, as opposed to equality *with*, England. Indeed, to a large extent, these arguments have altered little in the more than three centuries of Union after 1707, and continue to inform the position of nationalists in Scotland to this day<sup>109</sup> – as will be demonstrated in Chapters Four and Five of this thesis.

Yet, despite an organised opposition, and to some extent an open hostility towards incorporating union in Scotland,<sup>110</sup> the strength of English argument, and the positive reception of the compromises made during the deliberations, led to an inevitable consensus in favour of incorporating union. On the 16<sup>th</sup> January 1707, the Scottish Parliament ratified the Act of Union

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<sup>108</sup> Goldstein identifies the early Dutch system as a ‘hybrid’; ‘in part merely a mutual defence pact but in part an eternal union from which each [province] has perpetually abjured the option of secession.’ In theoretical terms, the Provinces remained sovereignty for much of the seventeenth century. In practical terms, however, the authority of the *Staten-Generaal* was increasingly seen as binding upon the Provinces, although, its operative scope was confined to the need for the unanimous decision of the Provinces, a principle which reflected their theoretical position as sovereign actors. See; Goldstein, L. F., *Constituting Federal Sovereignty: The European Union in Comparative Context*, (London: John Hopkins University Press, 2001), p. 73-75

<sup>109</sup> In the build-up to the Scottish Independence Referendum 2014, the First Minister, Alex Salmond, symbolically relied upon the words of Andrew Fletcher of Saltoun, who addressed the Scottish Parliament in 1706 to declare his opposition to incorporating union on the grounds that incorporation ran contrary to the logical interdependence of nations and the need for national self-governance in order to protect its interests. The Guardian, ‘Alex Salmond’s Hugo Young lecture – full text’, 25 January 2012, <<https://www.theguardian.com/politics/2012/jan/25/alex-salmond-hugo-young-lecture>> (Accessed: 27/02/18); In another speech, the First Minister declared his position as follows: ‘Whatever changes take place in our constitution, we will remain close to our neighbours. My dearest wish is to see the countries of Scotland and England stand together as equals. There is a difference between partnership and subordination – the first encourages mutual respect, the second breeds resentment.’ Through reflective analysis, we see a number of similarities in the underlying logic of the SNP and the anti-incorporation lobby in 1706. The Telegraph, ‘Alex Salmond: I will end 304 years of Scottish ‘subordination’ to the English’, 19 May 2011, <<https://www.telegraph.co.uk/news/uknews/scotland/8521695/Alex-Salmond-I-will-end-304-years-of-Scottish-subordination-to-the-English.html>> (accessed: 27/02/18)

<sup>110</sup> Devine, T. M., *Scotland’s Empire 1600-1815*, (London: Penguin, 2004), p. 55

by 110 votes to 67, an action which, when taken together with the earlier ratification of the Act of Union in England in 1706, completed the Union process. Taking place on the 1<sup>st</sup> May 1707, the two nations formally ceased to exist and the new state of Great Britain emerged.

From a legal perspective, the Anglo-Scottish Union created a unitary state, with the source of legal authority coming from the supremacy of the Crown and Parliament – this construction has been the subject of much contemporary debate in regards to Scottish nationalism.<sup>111</sup> In political terms, however, the Union was only partial in its practical application upon Scotland.<sup>112</sup> Under the provisions of the Treaty, Scotland retained a number of its administrative structures: the continued existence and independence of the Scottish Kirk, education and legal systems, and local administrative system of burghs.<sup>113</sup>

For Tom Devine, this reality was well demonstrated in the initial decades after the Union, up to the Jacobite rebellion of 1745, whereby the administration of Scottish affairs fell primarily to the Secretary of Scotland,<sup>114</sup> Archibald Campbell, 3<sup>rd</sup> Duke of Argyll, rather than the Prime Minister Warpole; ‘Westminster was sovereign in law, but in practical terms Scotland was Argyll’s domain.’<sup>115</sup> Moreover, in the Highlands, up until its abolition after the 1745 rebellion, the system of local administration continued as a primarily clan-based system, with little

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<sup>111</sup> Two conceptions of the ‘Union’. Under the Scottish construction, 1707 marked the Union of two sovereign states to form a new state – thus, the independence of one of those states would mean the end of the Union and by result the end of the State of ‘Great Britain’. Under the English construction, Scotland was absorbed into England, which was then redefined to form ‘Great Britain’. Thus, from an English perspective, upon Scottish independence nothing would fundamentally change in Westminster – the parliament would continue, albeit with jurisdiction over a smaller territorial area, but fundamentally Scottish independence would just be the ‘secession of a smaller state’. MacCormick, N., ‘Is There a Constitutional Path to Scottish Independence?’, *Parliamentary Affairs*, Vol. 53, (2000), pp. 721-736

<sup>112</sup> Paterson, L., ‘Scottish home rule: Radical break or pragmatic adjustment?’, *Regional and Federal Studies*, Vol. 8, No. 1, (1998), pp. 53-67 at 54

<sup>113</sup> Keating, M., ‘Reforging the Union: Devolution and Constitutional Change in the United Kingdom’, *Publius*, Vol. 28, No. 1, (Winter, 1998), pp. 217-234 at 219

<sup>114</sup> The office of Secretary of Scotland was abolished following the 1745 Jacobite Rebellion.

<sup>115</sup> Devine, T., *Independence or Union: Scotland’s Past and Scotland’s Present*, (London: Penguin, 2017), p. 51

relationship to central government – or indeed the rest of lowland Scotland – other than a formal oath of allegiance to the Crown.<sup>116</sup>

Indeed, while the Union prescribed legal incorporation upon Scotland, it initially made little effort to extend this incorporation into the administrative or cultural realm of Scotland, and left many of the concerns of ‘low politics’ and domestic affairs in the hands of Scots themselves.<sup>117</sup>

To some extent, this was merely a practical application of the constitutional mind, transferring over the control of ‘high politics’ in Scotland to the new Parliament of Great Britain, but leaving ‘low politics’ relatively undisturbed from its pre-union configuration – so long as Scots refrained from challenging the sovereignty of the new British Parliament.<sup>118</sup>

More significantly, however, was the reality that the Anglo-Scottish Union was not in itself designed to build a new British *nation*, but to safeguard the geopolitical security system of Great Britain from outside influence: it was a ‘marriage of convenience’ for both nations, as opposed to a coming together of companionable brethren.<sup>119</sup> Indeed, it appears that the aims of the architects of the Union had little concern with the design of any social or cultural nation, and pursued a pragmatic approach that would have a significant effect on allowing for a unique Scottish political identity to endure:

‘... the men who drafted the Treaty of Union carefully left every institution in England and every institution in Scotland untouched by the Act, provided that the existence of such institutions was consistent with the main objects of the Act. Hence the extraordinary success of the Act. It destroyed everything which kept the Scottish and the English people apart; it destroyed nothing which did not threaten the essential unity

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<sup>116</sup> While restrictions had been placed on the Highland Clans following the Rising of 1715, most notably in relation to the possession of weapons, there was little attempt to reform the fundamental mechanics of the Clan based system prior to the Rising of 1745. Riding, J., *Jacobites: A New History of the '45 Rebellion*, (London: Bloomsbury, 2017), p. 495

<sup>117</sup> McCrone, D., ‘Scotland Out the Union? The Rise and Rise of the Nationalist Agenda’, *The Political Quarterly*, Vol. 83, No. 1, (January-March 2012), pp. 69-76 at 72

<sup>118</sup> Keating, M., ‘Reforging the Union: Devolution and Constitutional Change in the United Kingdom’, *Publius*, Vol. 28, No. 1, (Winter, 1998), pp. 217-234 at 218

<sup>119</sup> McCrone, D., ‘Scotland Out the Union? The Rise and Rise of the Nationalist Agenda’, *The Political Quarterly*, Vol. 83, No. 1, (January-March 2012), pp. 69-76 at 72-73



of the whole people; and hence, lastly, the supreme glory of the Act, that while creating the political unity it kept alive the nationalism both of England and of Scotland.’<sup>120</sup>

Therefore, while uniting Scotland in a formal legal union with England, and creating the new state of Great Britain, we find that the Anglo-Scottish Union was, from a political perspective, only a partial union. Indeed, while 1707 proved to be the ‘end of an auld song’ for the Scottish Parliament, it had little effect on the everyday lives of Scots who, aside from the reforms attached to the Jacobite Rebellions in 1715 and 1745, continued to maintain a strong degree of administrative freedom in the regulation of their civil society.

### **1.3.3. Anglo-Irish Union**

In Part One of this chapter, we saw how the experience of pre-empire in Ireland had, by the 15<sup>th</sup> century, developed into a clear system of colonial government. Carrying forth into the period of informal empire, after 1610, Ireland maintained its position as separated from and subordinate to England, both as a whole, through Poynings Law, and through the particular segregation of Irish Catholics, who were disenfranchised and excluded from public office. The essence of such division was further enhanced in 1690, following the victory of the Williamite forces over the Jacobites at the Battle of the Boyne, an event that Ignatieff describes as instilling ‘the founding myth of ethnic superiority’ of Protestant community in Ireland.<sup>121</sup>

However, despite this long historical past, from 1750 onwards there is evidence of concessions being granted to Irish Catholics, beginning with their admission into the military, the right to hold property and, in 1793, the beginnings of Catholic enfranchisement amongst the nobility.

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<sup>120</sup> Dicey, A. V., and Rait, R. S., *Thoughts on the Union between England and Scotland*, (London: MacMillan and Co., 1920), p. 361-362

<sup>121</sup> Ignatieff, M., *Blood and Belonging*, (London: Vintage, 2001), p. 169

Moreover, following the passage of the 1782 constitution, the restrictions of Poynings Law were lifted, allowing the Irish Parliament considerable legislative freedoms.<sup>122</sup>

Yet, despite the success of Irish Parliamentarians such as Henry Grattan in securing such reforms, the system of governance in Ireland continued to maintain the Protestant ascendancy and to restrict Catholic membership from the Irish Parliament. As a direct reflection of this fact, a growing movement developed within the Catholic community in opposition to the system of governance employed in Ireland. The essence of such resentment crystallised in 1791 through the formation of the Society of United Irishmen, a unique collection of Catholic Irishmen and a minority of Protestant landowners, each with the agenda of freeing Ireland from the perceived oppression of British rule. From an early stage, the actions of the Society were militant and, in 1798, mobilised in force across Ireland in protest against British Rule.

For the historian Roy Foster, the 1798 rebellion marked one of the most concentrated periods of violence in Irish history, resulting in an estimated death toll on both sides of more than 30,000.<sup>123</sup> Its result, when taken in context with the Napoleonic Wars with France, demonstrated to the British Government that Ireland could no longer be relied upon to govern itself. Fearing French intervention, and the possibility of Ireland being used as a staging post for an invasion of Great Britain, the Whig Prime Minister, William Pitt the Younger, hastily introduced legislation for an Anglo-Irish Union.<sup>124</sup>

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<sup>122</sup> Foster, R. F., *Modern Ireland: 1600-1972*, (London: Penguin, 1989), p. 241-258; Curtis, E., *A History of Ireland: From Earliest Times to 1922*, (London: Routledge, 2000), p. 266-272

<sup>123</sup> Foster, R. F., *Modern Ireland: 1600-1972*, (London: Penguin, 1989), p. 280

<sup>124</sup> While there is some evidence to suggest that Pitt and others around him were inclined towards an Anglo-Irish Union as early as 1792, the undeniable catalyse of the Union was the 1798 rebellion, and the looming spectre of France – a situation not massively dissimilar from the events that led to the Anglo-Scottish Union a little under a century before. See: Fieldhouse, D., ‘British Imperialism in the late eighteenth century: Defence or Opulence?’, in Madden, F., and Robinson, K., (eds.) *Essays in Imperial Government*, (Oxford: Basil Blackwell, 1963), pp. 23-46 at 38; Simms, B., *Britain’s Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2017), p. 112

In this regard, we find little divergence between the motivations for Anglo-Irish Union than had been experienced in Scotland a little under a century before. Similarly, the English response of political union in Ireland was a reply to a short period of political instability and insubordination. The Union in 1801 was, as in 1707, a flagrant exercise of the English ‘official mind’ in securing its strategic interests through the application of its political superiority: it was the result of strategic foreign and military policy, designed for the control, as opposed to the integration of Ireland.<sup>125</sup>

Yet, alongside the sterile pragmatism of this argument, we also find a high degree of evidence that the Union was, at least from a Catholic perspective, conducive to the aspirations of many of the Irish themselves. Indeed, evidence shows that opposition towards the Union in Ireland was greater, as a percentage, within the Protestant as opposed to the Catholic community – the latter of which found recompense in the promises of Catholic emancipation and economic prosperity attached to the Union.<sup>126</sup> Conversely, for the Protestant minority in Ireland, such promises raised anxieties as to the ability to protect the Protestant ascendancy from an empowered Catholic majority.<sup>127</sup> Despite such protests from the Anglo-Irish elite, however, the Union with Ireland was driven forward with haste – largely as a result of the persuasive

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<sup>125</sup> Ward, A. J., ‘A constitutional background to the Northern Ireland crisis’, in Keogh, D., and Haltzel, M. H., (eds.) *Northern Ireland and the Politics of Reconciliation*, (Cambridge: Cambridge University Press, 1993), pp. 33-51 at 34-35; Foster, R. F., *Modern Ireland 1600-1972*, (London: Penguin, 1988), p. 280; Simms, B., *Britain’s Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016), p. 11

<sup>126</sup> Unusual among the proponents of the Union, though perhaps indicative of the wider support for the Union, was the economist, and anti-Imperialist, Adam Smith: ‘By a union with Great Britain, Ireland would gain, besides the freedom of trade, other advantages much more important, and which would much more than compensate any increase of taxes that might accompany that union. By the union with England, the middling and inferior ranks of people in Scotland gained a compleat [sic] deliverance from the power of an aristocracy which had always before oppressed them. By an union with Great Britain the greater part of the people of all ranks in Ireland would gain an equally compleat [sic] deliverance from a much more oppressive aristocracy; an aristocracy not founded, like that of Scotland, in the natural and respectable distinctions of birth and fortune; but in the most odious of all distinctions, those of religious and political prejudices; distinctions which, more than any other, animate both the insolence of the oppressors and the hatred and indignation of the oppressed, and which commonly render the inhabitants of the same country more hostile to one another than those of different countries ever are. Without a union with Great Britain, the inhabitants of Ireland are not likely for many ages to consider themselves as one people’. Smith, A., *Wealth of Nations*, (Oxford: Oxford University Press, 2008), p. 461

<sup>127</sup> Lecky, W. E. H., *A History of Ireland in the Eighteenth Century*, (London: University of Chicago Press, 1972), p. 429

politics applied by Lord Castlereagh<sup>128</sup> – coming into effect on the 1<sup>st</sup> January 1801, less than three years after the 1798 rebellion.

Under the terms of the Union itself, while transferring control over the high politics of war, trade and foreign affairs to the new Parliament of ‘the United Kingdom of Great Britain and Ireland’ at Westminster, the everyday administration of Ireland continued to be conducted in Ireland. Similar to arrangements in Scotland after 1707, the terms agreed in 1801 left the majority of domestic affairs in Ireland under the control of a Lord Lieutenant and Chief Secretary, overseeing a system of Irish departments and boards based at Dublin Castle.<sup>129</sup>

Yet, despite maintaining a system of Irish administrative independence, the architects of the Union failed to deliver upon several of the promises made in the run up to the Union. After 1801, the majority of Catholics remained unfranchised and excluded from participating in the governance of Ireland – the repercussions of which helped maintain a cultural barrier restricting the full integration of the Irish catholic community into mainstream British society.<sup>130</sup> Moreover, a distinct economic disparity also continued after 1801 between the industrialised Protestant areas of Ulster and Dublin, and the largely agrarian Catholic hinterland of the rest of Ireland.<sup>131</sup> In an ironic twist of fortune, the community which was most optimistic about the Union in 1801 had come to suffer at the hand of an British acquiesce, and of an indifference towards Ireland after the security of Union had been guaranteed.

Such indifference, as well as the continued lack of rights for the Irish Catholic majority, meant that resentment towards the Union did not take long to emerge. Indeed, to some extent, we may see the Union as ultimately sowing the seeds of its own destruction in isolating such a large

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<sup>128</sup> Wallace, M., *British Government in Northern Ireland*, (Newton Abbot: David and Charles, 1982), p. 13

<sup>129</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 11

<sup>130</sup> Hepburn, E., and McLoughlin, P. J., ‘Celtic Nationalism and Supranationalism: Comparing Scottish and Northern Ireland Party Responses to Europe’, *The British Journal of Politics and International Relations*, Vol. 13, No. 3, (2011), pp. 383-399 at 387

<sup>131</sup> Keating, M., *State and Regional Nationalism*, (London: Harvester Wheatsheaf, 1998), p. 32

portion of the population from the political process. The effects of this rising resentment will be considered in Part Three of this chapter.

#### **1.3.4. Summary**

In summary, the arguments developed in this section of the chapter have provided us with three themes which prove central in reflecting upon the processes of Union that took place between England and the periphery.

First, as a point of overarching critical observation on each of the three Unions, we are able to locate a consensus that the motivation for full political union in each instance was a matter dominated and controlled by England. However, in agreement with Bulpitt, we find that in events surrounding each of the three Unions, there existed little evidence to suggest that their conclusion was a pre-ordained or inevitable process.<sup>132</sup> Rather, an overarching conclusion as to the motivation for Union must be seen as relating to the wider geo-political context of each of the Unions, and reflecting the needs for security and control in English foreign and domestic policy, as opposed to the culmination of a deeper desire for integration between England and the periphery.<sup>133</sup>

Second, in each of the above Unions, we find their conclusion as making immediate provision for the absolute and unchallengeable construction of sovereignty vested in the Crown in Parliament. To a significant extent, this legal doctrine reflects the above-mentioned practical realities in English foreign policy in guaranteeing control and authority over the periphery, with each Union abolishing the peripheral governance structures and creating a formal unitary construction of authority.<sup>134</sup> Thus, as a result of each of the three Unions, the formal

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<sup>132</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester: ECPR Press, 2008), p. 85-86

<sup>133</sup> Simms, B., *Britain's Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016)

<sup>134</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester, ECPR Press, 2008), p. 90

constitutional construction that emerged was that of a unitary state, whereby the single, absolute and supreme source of legal authority became enshrined in the symbolism of the Crown in Parliament.<sup>135</sup>

Third, while concentrating legal authority in a single unitary centre, we must also recognise the political reality that each of the Unions provided – to varying degrees – for the administrative autonomy for the periphery. While unifying certain key aspects of functional and symbolic importance, most notably the emphasis on a common Protestantism – though never widely received in Ireland – and the facilitation of economic integration, each of the three Unions left intact varying degree of peripheral autonomy.

For political scholars studying the construction of such constitutional systems, the lack of complete administrative congruency across the territory of formal unitary states has given rise to the theoretical category of the ‘Union State’<sup>136</sup> – or, as is more reflective of the constitutional realities of the UK, the ‘State of Unions’.<sup>137</sup> In explaining this category, we find its fundamental construction as located in the understanding that ‘while administrative standardization prevails over most of the territory, the union structure entails the survival in some areas of variations based upon pre-union rights and infrastructures.’<sup>138</sup>

In this regard, we find a notable distinction between the legal and political arrangement of authority and power within the state. Relating back to the work of Bulpitt, we find perhaps the most readily available translation of the realities of the Union State as demonstratable through the distinction between ‘high’ and ‘low’ politics. The former of which, relating to matters such as defence, foreign affairs and high finance, are indivisibly constructed in the unitary centre,

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<sup>135</sup> Goldsworthy, J., *The Sovereignty of Parliament*, (Oxford: Clarendon Press, 2001), p. 232

<sup>136</sup> Rokkan, S., and Urwin, D., *Economy, Territory, Identity: Politics of West European Peripheries*, (London: Sage, 1983), p. 181

<sup>137</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009)

<sup>138</sup> Rokkan, S., and Urwin, D., *Economy, Territory, Identity: Politics of West European Peripheries*, (London: Sage, 1983), p. 181

whereas matters concerning the latter, summarised broadly under the heading of ‘domestic affairs’, may be exercisable through administratively devolved, regional entities.<sup>139</sup> The effective application and continuation of the latter is, however, at all times subject to its respect of the overarching authority of the unitary centre – a matter which, if breached, may result in the repeal of peripheral autonomy, as seen in part in the case of Scotland following the Jacobite Rebellion of 1745-46.

In addition to the continuing existence of pre-union rights and infrastructures in each of the three Unions discussed above, we also find the absence of an enforced sense of cultural unity from the newly cast central government. Indeed, with perhaps the exception of Catholic Ireland which experienced a policy of colonial government, neither the Scottish or Welsh examples of Union, aside from certain linguistic standards in administration and a common set of legal norms, contained the rigid promotion of a new *national* culture attached to the State.

On this basis, the tentative conclusion is proposed that the incomplete sense of UK-wide cohesion created by the Unions, resulted in the development of a *national* society built on weak foundations – a factor which it is argued proved influential in the eventual rise of sub-state nationalism in each of the peripheral nations of the State of Unions.<sup>140</sup> The next part of this chapter will now begin to examine this trend.

#### **1.4. The Rise of Nationalism**

The final theme to be considered in this chapter relates to the beginnings of dis-union within the United Kingdom. The debate in this part of the chapter will take place under two headings.

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<sup>139</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester: ECPR Press, 2008), p. 82

<sup>140</sup> Nairn, T., *The Break-up of Britain: Crisis in Neo Nationalism*, (London: New Left Books, 1977); Gamble, A., ‘The Constitutional Revolution in the United Kingdom’, *Publius*, Vol. 36, No. 1, (2006), pp. 19-35 at 26; Devine, T., *The Scottish Nation: A Modern History*, (London: Penguin, 2012)

The first will discuss the rise of nationalism in Ireland, charting the growth of opposition to the Union of 1801 and the rise of the Home Rule movement, and finishing with the independence of the Irish Free State in 1922. The second section will discuss the rise of nationalism in Scotland and Wales and their relationship to events in Ireland, concluding with a summary of the political and constitutional position of these two parts of the UK at the time of Irish independence.

The decision to close the debate of this chapter at 1922 is largely due to the fact that it provides us with two useful summary points – first, it the contemporary configuration of the United Kingdom of Great Britain and Northern Ireland; second, is the fact that after 1922, we find the initial beginnings of devolution, both as a system of constitutional reality in Northern Ireland, and as an increasingly advocated for constitutional objective in Scotland and Wales.

#### **1.4.1. Ireland**

As was established Part Two of this chapter, the legacy of the Anglo-Irish Union in 1801 saw the continuation of notable division within Ireland, centred primarily around the continued suppression of the rights of Irish Catholics. Thus, following the beginnings of Catholic emancipation in 1829, and the further widening of the franchise in 1867 and 1884, it is hypothesised that this had a significant effect upon the political landscape in both Ireland and the UK as a whole.

After the franchise reforms, for the first time, the Irish Catholic majority, a significant proportion of which were sympathetic to Irish nationalism, entered into the mainstay of British politics. The initial effects of this transition can be seen through the growth of autonomy seeking groups such as the Repeal Movement. Led by the veteran Irish nationalist, Daniel O’Connell, the constitutional aims of the Movement related to the repeal of the Act of Union



– although the extent of the literal application of the term ‘repeal’ remained ambiguous, and included ambitions for home rule, federation and the secession of Ireland as a republic.<sup>141</sup>

In 1842, the radical arm of the Movement, the Young Irelanders, inspired by events in continental Europe, attempted to stage a ‘Revolution’ for Irish independence in South Tipperrary. The actions of the groups were quickly shut down by local law enforcement officials, but the overarching message of the attempted revolution went a long way in demonstrating the continued existence of underlying radicalism in Ireland.<sup>142</sup> Indeed, compounded against the effects of the Great Famine, the period after the 1840s proved to be a turning point in convincing an increasing proportion of the Irish population that Ireland’s best interests would be served by autonomy from the United Kingdom.<sup>143</sup>

Following the widening of the franchise to include all Irish males – both Catholic and Protestant – by 1884, this underlying current in Irish society became a politicised reality. At the 1885 general election, out of the 103 Irish seats at Westminster, 85 returned MPs from one of the nationalist parties.<sup>144</sup> For the first time, the threat of Irish nationalism had landed as a coordinated block on the doorstep at Westminster.

Confronted with such a clear demonstration of dissatisfaction with the Union in Ireland, together with the increasing activity of the Fenians in instigating political unrest and militant activity in England, the response of the UK Government was driven into once again confronting the issue of Ireland. To a large extent, what we will now come to see as the UK Government’s response can be seen as a reflection of the continuing anxiety within England as to the ability

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<sup>141</sup> Foster, R. F., *Modern Ireland 1600-1972*, (London: Penguin, 1988), p. 308-309; Ward, A. J., ‘A constitutional background to the Northern Ireland crisis’ in Keogh, D. and Haltzel, M. H. (eds.) *Northern Ireland and the Politics of Reconciliation*, (Cambridge: Cambridge University Press, 1993), pp. 33-51 at 36-37

<sup>142</sup> Foster, R. F., *Modern Ireland 1600-1972*, (London: Penguin, 1988), p. 316

<sup>143</sup> Rokkan, S., and Urwin, D., *Economy, Territory, Identity: The Politics of West European Peripheries*, (London: Sage Publications, 1983), p. 89; Keating, M., ‘Rethinking Sovereignty: Independence-Lite, Devolution-Max and National Accommodation’, *REAF*, No. 16, (October, 2012), pp. 9-29 at 14

<sup>144</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 17

to *control* Ireland – a factor which this chapter has traced back to the 13<sup>th</sup> century. However, in a deviation from the previous trend by the UK Government of treating instability in Ireland with the emphasis of greater political control, the response in the mid-19<sup>th</sup> century was to cater to the opposite extreme.

In 1886, the Liberal Prime Minister, William Ewart Gladstone, laid forth before Parliament a Bill advocating for Home Rule for Ireland, beginning what would become a more than thirty-year struggle at Westminster for an answer to the Irish Question.<sup>145</sup> While the undeniable logic of the Bill was to deal with the Irish Question by way of offering the concession of self-government to the Irish – offering an autonomous Home Rule Parliament for Ireland, with competence over all matters apart from defence, foreign relations and indirect taxation, although removing Irish representation at Westminster<sup>146</sup> – the reality of its implementation proved wildly controversial, both at Westminster and in Ireland.

On the one hand, the nationalists, treated the 1886 proposals with suspicion on the basis that by not offering full independence, and expressly maintaining the legislative supremacy of the UK Parliament over Ireland, the solution of Home Rule would continue to restrict the ability of the Irish Parliament to defend Irish interests. On the other hand, many unionists in both Ireland and the rest of the UK, saw the terms offered by Gladstone as conducive to the possibility of embarking Ireland upon an uncontrollable road to secession, and the ultimate defeat of the Union.<sup>147</sup>

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<sup>145</sup> A total of four Home Rule Bills were laid before Parliament between 1886 and 1920. The first (1886) was defeated in the House of Commons; the second (1893) was defeated in the House of Lords; the third (1914) made it through the Commons and was passed through the Lords by way of the Parliament Act 1911, but failed to reach implementation due to the outbreak of the First World War; the fourth and final Bill (1920) was successful in receiving Royal Assent, becoming the Government of Ireland Act 1920 – largely a recast form of the 1914 Bill – but failed to be fully implemented in Southern Ireland due to its independence in 1922.

<sup>146</sup> Wallace, M., *British Government in Northern Ireland*, (Newton Abbot: David and Charles, 1982), p. 14

<sup>147</sup> Kendle, J., *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, (Kingston: McGill-Queens University Press, 1989), p. 15

To some extent, the nature of this debate, which pre-dated the 1886 Bill, was to create a stalemate between the two groups of opinion on Ireland. For Liberal Irishmen such as Isaac Butt, a logical solution to this stalemate that would answer the Irish Question while also guaranteeing the stability of the UK as a whole, was to be found through a federal solution:

‘England, Scotland and Ireland, united as they are under one sovereign should have a common executive and a common national council for all purposes necessary to constitute them, to other nations, as one state, which each of them should have its own domestic administration and its own domestic Parliament for its own internal affairs.’<sup>148</sup>

Indeed, Butt was not alone in his proposal and throughout the 1880s several prominent members of the UK Parliament – both liberal and conservative – from Joseph Chamberlain to Benjamin Disraeli, declared their preference for a UK-wide federal solution to the Irish Question.<sup>149</sup> Interestingly, the logic of a federal solution, as well as its positive reception by many Unionists, appears to have been motivated by the anticipation that the devolution of power across the four parts of the UK would reduce the risk of a snowball effect emanating from Ireland, and divert the other parts of the UK away from any trajectory towards separatism.<sup>150</sup>

However, on the not incorrect recognition that the demands made by Ireland could not be compared to those in the rest of the UK, Gladstone made clear his position that the primary concern of Home Rule was, above all else after 1886, an attempt to answer the Irish Question.<sup>151</sup> Yet, despite highlighting the importance of seeking a solution to the Irish Question, the failure of the 1886 Bill to pass beyond the Commons, and of the further defeat

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<sup>148</sup> Isaac Butt, ‘Home Government for Ireland, Irish Federalism: Its Meaning, Its Objectives, and Its Hopes’ (3<sup>rd</sup> Ed., Dublin, 1871), p. 15-16, as quoted in; Kendle, J., *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, (Kingston: McGill-Queens University Press, 1989), p. 13

<sup>149</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 45-46

<sup>150</sup> Townsend, C., ‘The Home Rule Campaign in Ireland’, in Dickinson, H. T., and Lynch, M., (eds.) *The Challenge to Westminster: Sovereignty, Devolution and Independence*, (East Linton: Tuckwell Press, 2000), pp. 102-112 at 105

<sup>151</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 46

of the 1893 and 1914 Bills, only added to frustrations in Ireland, which was still governed by the Protestant dominated Dublin Castle regime.

The culmination of this frustration erupted on the streets of Dublin in 1916. The Easter Rising, though short, amounted to the significant turning point in the crisis in Ireland, and is seen by many as the point of no return in Home Rule debate in Ireland. Unpossessed of the gift of hindsight, however, in 1920 the UK Government made what would be its final attempt in legislating for Home Rule in Ireland. In a dramatic turn of events, and in part as an acknowledgement of the dire need for a solution to the conflict in Ireland, the Bill passed.

Under the terms of the Government of Ireland Act 1920, the island of Ireland was to be separated into two parts – North and South – the former largely as a concession to Protestant opposition to Home Rule to the Catholic majority.<sup>152</sup> In addition, the Act made provision for the establishment of bicameral Parliaments in Belfast and Dublin, each of which being comprised of a Senate and House of Commons.<sup>153</sup> Overarching these institutions, it was intended that a Council of Ireland be created, headed by a Lord Lieutenant, and comprising ministers from both Northern and Southern Ireland<sup>154</sup>. The underlying aim of the Council was for the eventual merging of both parts of Ireland to form a single unified Parliament – the creation of which would be dependent upon the success of Acts agreed by absolute majority in each of the Houses of Commons in both Northern and Southern Ireland.<sup>155</sup>

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<sup>152</sup> ‘For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs’, Government of Ireland Act 1920, s. 1(2)

<sup>153</sup> Government of Ireland Act 1920, s. 1(1)

<sup>154</sup> Government of Ireland Act 1920, s. 2

<sup>155</sup> ‘The Parliaments of Southern Ireland and Northern Ireland may, by identical Acts agreed to by an absolute majority of members of the House of Commons of each Parliament at the third reading... establish, in lieu of the Council of Ireland, a Parliament for the whole of Ireland consisting of His Majesty and two Houses (which shall be called and known as the Parliament of Ireland...’ Government of Ireland Act 1920, s. 3(1)

The political realities that surrounded the Act, however, prevented it from ever becoming a reality in Southern Ireland. In 1922, following the inability of the two sides to reach a compromise to the Irish War of Independence, Southern Ireland seceded from the Union to form the Irish Free State – becoming an autonomous Dominion within the British Commonwealth of Nations.<sup>156</sup>

In its wake, Northern Ireland was left as the last remaining part of the United Kingdom on the island of Ireland. With the reality that the region had been under devolved government since 1920, the system of Northern Irish devolution continued after 1922 – a fact that will be discussed in more depth in Chapter Four. Although, at this point, it is useful to highlight that the under the new configuration of the United Kingdom of Great Britain and Northern Ireland, the construction of legal authority remained concentrated, in indivisible terms, in the UK Parliament at Westminster. However, from 1922, Northern Ireland was a devolved part of the union, enjoying legislative competence over a range of domestic matters, and being largely left to its own devices.

#### **1.4.2. Scotland and Wales**

While it is important to understand the primacy of the Home Rule campaign in Ireland during the late-19<sup>th</sup> and early-20<sup>th</sup> century, attention must also be afforded to the effects of the Irish Question over this period on the other three component parts of the UK. As reflected upon by several commentators on the constitution, the efficacy of the Home Rule campaign in Ireland had a clear influence on motivating similar, though to some extent more restrained, movements in Scotland and Wales.<sup>157</sup> From both a top-down and a bottom-up perspective, Home Rule for Scotland and Wales, as well as less frequent debate on a similar mechanism for England –

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<sup>156</sup> Wallace, M., *British Government in Northern Ireland*, (Newton Abbot: David and Charles, 1982), p. 17

<sup>157</sup> Dicey, A. V., *England's Case Against Home Rule*, (London: John Murray, 1886), p. 134

either as a whole or regionally – was a readily discussed topic for much of the period of the Irish Question.

Broadly, this wider debate, while associated with the calls for federation, came to be known under the more unique banner of ‘Home Rule All Round’ – the logic of which was well captured in a speech made by William Ewart Gladstone in Dalkeith, Midlothian on the 26<sup>th</sup> November 1879:

‘We have got an overweighted Parliament; and if Ireland or any other portion of the country is desirous and able to arrange its affairs, that by taking the local part or some local part of its transactions off the hands of Parliament, it can liberate the strengthened Parliament for Imperial concerns, I say I will not only accord reluctant assent, but I will give a zealous support to any such scheme.’<sup>158</sup>

In unpacking this quote, we find Gladstone’s vision of Home Rule All Round as a practical exercise in alleviating strain on the UK Parliament; a call for administrative efficiency and the unburdening of the UK Parliament at a time of particular external stress and intense foreign policy.<sup>159</sup> For other prominent figures in the Liberal Party such as Joseph Chamberlain, the merits of Home Rule All Round were similarly practical, though informed by a greater understanding of the possibility of negative reaction and competition between the four component parts of the UK, should Home Rule be employed only in part, or on an asymmetrical basis.

In addition to the periods of Liberal support for Home Rule All Round, it must nevertheless be noted that such proposals were, at all levels, unfettering in their clarification that Home Rule would not amount to the division of sovereignty within the UK.<sup>160</sup> Indeed, while sometimes

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<sup>158</sup> Gladstone, W. E., *Midlothian Speeches 1879*, (Leicester: Leicester University Press, 1971), p. 87

<sup>159</sup> Several crises and challenges in the Imperial theatre, as well as in the wider international realm in the Ottoman Empire, as well as the rise of the USA and Germany as geopolitical rivals to the hegemony of the British Empire, meant that the concerns of the UK Parliament were, for the majority of this period, focussed more on the external theatre of defence and foreign affairs as opposed to domestic policy. See: Alcock, A., *A Short History of Europe*, (London: Palgrave Macmillan, 2002), p. 200-207

<sup>160</sup> ‘Nothing can be done, in my opinion, by any wise statesman or right-minded Briton to weaken or compromise the authority of the Imperial Parliament, because the Imperial Parliament must be supreme in these

compared with federalism, there is little evidence to suggest that Home Rule All Round was, from a bottom-up or a top-down perspective, ever widely advocated as a means of dividing the sovereign competence of the UK Parliament.

Instead, its general application was constructed in conformity with the ‘official mind’ – the alleviation of domestic concerns from the UK Parliament for the efficiency of external affairs, while maintaining the overarching unitary state idea of the unconditional sovereign supremacy of Parliament over the periphery. By the 1890s, however, Gladstone, along with a majority in the Liberal Party, had come to abandon the idea of Home Rule All Round, due in large part to the perceived unworkability of England within any scheme. Instead, the primary focus of Home Rule was narrowed to the particular issue of the Irish Question.

The eclipse of the national Liberal Party’s commitment to Home Rule All Round, however, did not signal the demise of its campaigning in Scotland and Wales. Instead, a number of groups associated with the Liberal Party in both nations came to maintain a continued, and to a large extent enhanced, vision of Home Rule. Motivated from a bottom-up perspective, these new groups came to produce tailored visions of Home Rule for both nations as isolated entities, moving away from the idea of Home Rule as a UK-wide experience. While appearing as a relatively minor point, this shift was, to some extent, the signal of the beginning of the designs of Home Rule as a nation specific instrument, and a point of departure from any meaningful vision of devolution as a UK-wide policy.

In Scotland, the primary vessel for this new vision of Home Rule became associated with the actions of the Scottish Home Rule Association (SHRA). From its formation in 1880, the SHRA came to form the totem for an individual Scottish campaign for Home Rule, associated with

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three Kingdoms. And nothing that creates a doubt upon that supremacy can be tolerated by an intelligent and patriotic man.’ Gladstone, W. E., *Midlothian Speeches 1879*, (Leicester: Leicester University Press, 1971), p. 87

the Liberal Party.<sup>161</sup> Unlike in Ireland, however, the rhetoric employed by the SHRA maintained a consistent commitment to *equality* with England within the existing borders of the UK, and refrained to venture into a position of seeking independence from the UK. Indeed, the SHRA held little commitment to ever seeking divided sovereignty from the UK Parliament.<sup>162</sup>

In total, between the groups Liberal dominated phase from 1880-1918, the SHRA proposed a total of thirteen separate resolutions in the UK Parliament for Scottish Home Rule; each of which, while ultimately unsuccessful, served as a symbolic affirmation of the continuing voice in favour of Home Rule in Scotland.<sup>163</sup>

Yet, despite serving a clear symbolic purpose of underlining the will of the Scottish Liberal Party, the actions of the SHRA remained inevitably linked to the wider fortunes of the national Liberal Party and to events unfolding in Ireland. As a result, following the uncontrollable final act of the Irish Question in 1918-1920, and the subsequent decline of the Liberal Party and of the accompanying salience of Home Rule in British political discourse, the fortunes of the SHRA entered a phase of relative decline after about 1910.

In 1918, the SHRA was reformed by the Scottish Labour MP, Ronald Muirhead, as a group aligned to, though not expressly affiliated with, the Labour Party in Scotland. As noted by Keating, the initial fortunes of the reformed SHRA looked promising, particular following the

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<sup>161</sup> The actions of the SHRA were built upon the earlier advancements of the Association for the Vindication of Scottish Rights, which campaigned primarily on the platform of enhanced Scottish representation at an administrative level, both domestically and at central government. The SHRA enhanced these earlier commitments and moved towards a more defined position of Home Rule, seeking legislative and executive devolution to Scotland. See: Elliott, J. H., *Scots and Catalans: Union and Disunion*, (London: Yale University Press, 2018)

<sup>162</sup> Morton, G., 'The First Home Rule Movement in Scotland, 1886-1918', in Dickinson, H. T., and Lynch, M., (eds.) *The Challenge to Westminster: Sovereignty, Devolution and Independence*, (East Linton: Tuckwell Press, 2000), pp. 113-122; Elliott, J. H., *Scots and Catalans: Union and Disunion*, (London: Yale University Press, 2018), p. 189

<sup>163</sup> Morton, G., 'The First Home Rule Movement in Scotland, 1886-1918', in Dickinson, H. T., and Lynch, M., (eds.) *The Challenge to Westminster: Sovereignty, Devolution and Independence*, (East Linton: Tuckwell Press, 2000), pp. 113-122 at 114



election of Ramsay MacDonald's minority Labour Government in 1924. Yet, frustrations over the groups failure to make an effective impact at Westminster, coupled with the increasing opposition within the Labour Party towards accommodating the interests of Home Rule, led to its eventual foundering and fragmentation. In response, in 1928, Muirhead broke away to form the National Party of Scotland, the first independent political party expressly inclined to the goal of Scottish self-government, and the antecedent to the Scottish National Party.<sup>164</sup>

Where the elements of early-Scottish nationalism where more successful over this period came in the realm of administrative devolution within central government. In 1884, as a response to the open dissatisfaction with the Scottish Education Act 1872 – creating a Scottish Education Board in London as opposed to Edinburgh<sup>165</sup> – the UK Conservative Government under Lord Salisbury revived the office of Secretary for Scotland, accompanied by a Scottish Office based at Whitehall. The continued attachment of the latter to the perceived view of Scotland as ruled from Westminster resulted in its base eventually being transferred to Edinburgh.

Similar to events in Scotland, the embryonic growth of nationalism in Wales over the 19<sup>th</sup> century and into the 20<sup>th</sup> century achieved the majority of its initial political expression through its association with the Liberal Party.<sup>166</sup> Although, unlike in Scotland, the lack of a distinct political or *institutionalised* identity in Wales meant that early Welsh nationalism developed more in line with the defence and recognition of cultural and linguistic identity as opposed to a distinct brand of political nationalism.

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<sup>164</sup> Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988), p. 92

<sup>165</sup> It is debated as to how far the effects of the Act were in themselves negative upon Scotland in any practical sense, being beneficial in fostering the advancement of compulsory universal education in Scotland. The main elements of grievance, however, concerned the effects of the Act in providing the administration of the new Scottish Education Board in London as opposed to Edinburgh; fostering the idea of the historical rights of Scotland as being diluted within an increasingly London-centric administrative Union. Elliott, J. H., *Scots and Catalans: Union and Disunion*, (London: Yale University Press, 2018), p. 188

<sup>166</sup> Robbins, K., 'Cultural Independence and Political Devolution in Wales', in Dickinson, H. T., and Lynch, M., (eds.) *The Challenge to Westminster: Sovereignty, Devolution and Independence*, (East Linton: Tuckwell Press, 2000), pp. 81-90 at 86

Indeed, for Kenneth O. Morgan, the early objectives of Welsh nationalism could be summarised as seeking administrative reforms against the ‘unholy trinity’ of the bishop, the brewer and the squire, as opposed to any perceived opposition to Westminster.<sup>167</sup> Illustrative of this fact was the reality that in 1881, the first piece of UK Parliamentary legislation for over a century<sup>168</sup> to deal with Wales as separate from England concerned the Sunday closing of public houses – a strong symbol of the Welsh Methodist movement.<sup>169</sup> Moreover, for the remainder of the Liberal dominated period of Welsh nationalism into the early 20<sup>th</sup> century, the issue of primary political salience and representation of grievance in Wales related not to any demands for legislative autonomy, but related to the desire for the disestablishment of the Church of England in Wales.<sup>170</sup>

While on the whole the Welsh population remained relatively unreceptive towards Home Rule for much of the 19<sup>th</sup> century, the development of events in Ireland had a particular influence on the growing educated class emerging from Wales’ first University at Aberystwyth. Finding inspiration from the writings of Irish figures such as Parnell, as well as the wider continental examples of young radicalism, these figures went on to form the bedrock of many of the early Welsh nationalist movements during this period.

Most prominent of these early groups was the movement within the Liberal Party known as *Cymru Fydd* (Young Wales).<sup>171</sup> While the origins of the group first emerged in the expatriate Welsh population in England, with branches forming in London and Liverpool from 1886, the movement quickly came to establish itself in Wales and by 1891 had branches across Wales. Headed by the charismatic figure of the North Walian solicitor, and future Liberal Prime

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<sup>167</sup> Morgan, K. O., ‘Welsh Nationalism: The Historical Background’, *Journal of Contemporary History*, Vol. 6, No. 1, (1971), pp. 153-172 at 168

<sup>168</sup> Since the Wales and Berwick Act 1746

<sup>169</sup> Sunday Closing (Wales) Act 1881

<sup>170</sup> Davies, J., *A History of Wales*, (London: Penguin, 2007)

<sup>171</sup> Morgan, K. O., *Wales in British Politics 1868-1922*, (Cardiff: University of Wales Press, 1991), p. 104

Minister, David Lloyd George, the group quickly became known for its enthusiasm and political ambition.

Progressing along similar lines as the SHRA, *Cymru Fydd* quickly showed signs of a clear ‘unionist-nationalism’ in its constitutional ambitions, and as early as 1890 maintained a consistent advocacy in favour of Home Rule in Wales. The most notable of these proposals came in 1891, when the Liberal MP for East Glamorgan, Alfred Thomas, introduced the National Institutions (Wales) Bill into the House of Commons. The Bill itself failed to progress beyond first reading, however, its corpus was nonetheless significant in demonstrating the embryonic advancement of arguments for Welsh devolution.

Amongst its advocacy for the administrative representation of Wales at Westminster through the creation of a Welsh Education Board, University of Wales and an office of Secretary of State for Wales, the Bill noted the ambitious aim for a ‘Council for Wales’<sup>172</sup> to be based at Aberystwyth and which, as noted by Rawlings, had all the hallmarks of an early form of ‘national executive devolution’.<sup>173</sup>

Yet, as meteoric as had been its rise from 1886, the fortunes of *Cymru Fydd* were short lived. After the failure of Lloyd George to convince the South Wales Liberal Federation to amalgamate with its Northern counterpart in 1891, the group swiftly lost much of its political capital and was, by the end of the century, effectively obsolete.<sup>174</sup> While Home Rule did, to a lesser extent, continue as a salient issue in Wales into the 20<sup>th</sup> century, the overarching

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<sup>172</sup> National Institutions (Wales) Bill 1891, clauses 14-30

<sup>173</sup> Rawlings, R., *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, (Cardiff: University of Wales Press, 2003), p. 25; As included in the Bill, the intention was to draw the membership of the Council from Welsh local authorities, with its Councillors holding the power to pass secondary legislation on a number of devolved matters, though still remaining subordinate to Westminster in sovereign terms. National Institutions (Wales) Bill 1891, clauses 14-30

<sup>174</sup> Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 453

arrangement of Welsh nationalism after 1891 largely returned to its traditional roots of cultural and linguistic defence, moving away from any active constitutional strategy.

Yet, this is not to see the brief golden age of Welsh nationalism during the late 19<sup>th</sup> century as failing to produce a lasting impact on Welsh politics. As a result of the *Cymru Fydd* period, significant concessions were made that advanced Welsh civil society, creating a Welsh system of School boards in 1889, as well significant land reforms and the inauguration of the University of Wales in 1893.<sup>175</sup> Indeed, by the turn of the 20<sup>th</sup> century, Wales had made significant strides in its re-emergence as a polity separated from England.

For some, such as J. C. Banks, the concessions made by the Liberals to the enhancement of civil society in Scotland and Wales amounted to a feat of political strategy that, while delivering little in the way of substantive reform, allowed the Liberals to remain as the symbolic party of the periphery. Indeed, Banks went as far as to claim that the success of the Liberal strategy of piecemeal reform during this period ‘stultified the national movements for a generation’.<sup>176</sup>

However, when viewed retrospectively, the success of the Liberal strategy in keeping Scottish and Welsh nationalisms relatively well subdued in their constitutional objectives, the actions of the Liberal Party would come to affect a number of more significant effects in the later emergence of well mobilised political nationalisms in both nations.

Certainly, in Wales, the Liberal concessions to the representation of Welsh civil society had the notable effect of transforming Wales into a distinct political and territorialised entity; reversing, as it were, the shadow of the Wales and Berwick Act, and the idea of Wales as merely a *part* of England. Indeed, by the turn of the 20<sup>th</sup> century, it is correct to observe that

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<sup>175</sup> Davies, D. H., *The Welsh Nationalist Party, 1925-1945*, (Cardiff: University of Wales Press, 1983), p. 8

<sup>176</sup> Banks, J. C., *Federal Britain?*, (London: George G. Harrap & Co., 1971), p. 79

Wales had matured into a 'distinct entity within the British polity'.<sup>177</sup> Additionally, in Scotland, the Liberal concessions to Scottish civil society, as well as notable representation in central government, created a scenario whereby Scotland was well placed to seek additional concessions during the next 'episode' of sub-state nationalist resurgence in the 1930s.

Where perhaps agreement can be made with Banks, however, is that the Liberal concessions were effective in curtailing the emergence of a well-established, or at least a long-reaching, sense of Scottish or Welsh nationalism that pursued a concrete constitutional strategy. Rather, it would take much broader changes, emerging during the aftermath of the First World War, to truly drive this shift in the nationalist psyche in Scotland and Wales towards a set of conditions favourable to the division of sovereignty. These changes may be summarised by two broad and equally significant sets of events:

First, the traditional reliance on the Liberal Party as the voice of the periphery at central government entered a spiral of unreversed decline during the 1920s. To a large extent, this was due to the Party having extinguished its own political salience; disestablishment had been successful in Wales by 1919, both Scotland and Wales had received a significant bolstering of their civil societies and, more significantly, the independence of the Irish Free State in 1922 had removed one of the central vestiges of Liberal Party from UK domestic affairs.

As a result of the decline in the Liberal Party, the traditional totem of peripheral representation became undefined and only partially succeeded to the emerging successor of the Liberals in the periphery, the Labour Party.<sup>178</sup> Correspondingly, the identification of an effective political

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<sup>177</sup> Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988), p. 95

<sup>178</sup> By the 1922 general election, the Party secured 142 seats in the House of Commons, replacing the Liberals as the largest party in both Scotland and Wales – a shift which was to a large extent motivated by the translation of the growing support for the trade union movements in the industrial heartlands of Scotland and Wales, a factor catalysed by the global economic misfortunes of the inter-war period.

voice for peripheral concerns, and in particular an outlet for the discussion of Scottish or Welsh self-government became, to a large extent, removed from the theatre of UK politics.

While a selection of prominent members of the early Labour Party, such as Keir Hardie, Ronald Muirhead and Ramsay MacDonald,<sup>179</sup> were sympathetic to Home Rulers in Scotland and Wales and indeed the early ambitions of the Party were favourable to Home Rule, a notable majority in the Party remained committed to an ‘internationalist’ position. Inevitably, the latter would win forth as the dominant position, placing socio-economic cohesion and a centralised UK state above the interests of nationalist groups for self-government.<sup>180</sup> Thus, similarly to the effects of the declining position of the Liberal Party after 1922, the early Labour Party’s opposition to Home Rule by the 1930s had the significant influence of further restricting the political voice of nationalism in Scotland and Wales.

Second, in accompaniment to the negative effects of the shifting political representation of the periphery, events within the international sphere during this period also transpired to influence the reorganisation of nationalism in Scotland and Wales. The most notable of these events concerned the effects of the global financial crash during the inter-war period. Viewed from the perspective of hindsight, we find the impact of the crash as having two effects:

First, its wide-reaching effects on the prosperity of the individual citizen as a result of the global crash served as a symbolic affirmation of the weakness of the British Empire to withstand the

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<sup>179</sup> In 1898, Hardie delivered a speech in Merthyr Tydfil in which he declared his view that socialism and Welsh nationalism were relatable and necessarily complementary concepts; ‘the red dragon... emblazoned on the red flag of socialism’. Hardie’s view was, however, a minority within the early Labour Party. Ward, P., *Red Flag and Union Jack: Englishness, Patriotism and the British Left, 1881-1924*, (Woodbridge: The Boydell Press, 1998), p. 48; In 1918, Ronald Muirhead refounded the Scottish Home Rule Association, albeit now attached – unofficially – to the Labour Party, and actively campaigned in central government for Scottish self-government. Moreover, the fortunes of Ramsay MacDonald’s success to be elected as Prime Minister of a minority Labour Government in 1924; a result which would be overly optimistic due to the weak position of the MacDonald’s government, but nevertheless showed the success of Scottish Home Rulers to enter the ranks of the UK Government. See: Elliott, J. H., *Scots and Catalans: Union and Disunion*, (London: Yale University Press, 2018), p. 206

<sup>180</sup> Morgan, K. O., ‘Welsh Nationalism: The Historical Background’, *Journal of Contemporary History*, Vol. 6, No. 1, (1971), pp. 153-172 at 168

effects of the economic depression; challenging the illusion of the nation-state as the unquestionable vessel for guaranteeing the prosperity and political allegiance of its citizens.

Second, the response of increased centralisation and government control in alleviating the effects of the economic depression served to compound the spectre of the under-representation of Scotland and Wales within the governmental process and to increase desires for representative self-government.

While the essence of this third element served as part of a much broader and far-reaching process of political economic transformation – the corpus of which will be discussed in more detail in Chapter Three – it is nonetheless significant to note that by the 1920s, the ideological bond of the citizen to the state had begun to be seriously questioned in parts of Scotland and Wales.<sup>181</sup>

Read collectively, the mix of a reduced political voice following the decline of the Liberal Party, the removal of Home Rule as a salient political issue at Westminster after 1922, and the beginnings of the weakening of the British Imperial project, created a significant vacuum for new nationalist groups to form; this vacuum was filled with relative haste in the aftermath of the independence of the Irish Free State.

In 1925, a collection of Welsh academic and clerical figures united to form *Plaid Cymru* (the Party of Wales). Almost a decade later, in 1934, the union of the Scottish Home Rule Association and the National Party in Scotland led to the creation of the Scottish National Party. The aims of these groups will be considered at length in Chapter Three, however, at this stage, it is of value to mention that within both groups, a set of constitutional objectives emerged that differed significantly from the earlier operation of Scottish or Welsh groups within the Liberal

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<sup>181</sup> Williams, G. A., *When Was Wales? A History of the Welsh*, (London: Black Raven Press, 1985), p. 181; Devine, T. M., 'The Break-Up of Britain? Scotland and the End of Empire', *Transactions of the Royal Historical Society*, Vol. 16, (2006), pp. 163-180

Party; nationalism had now begun to move from a ‘unionist-nationalist’<sup>182</sup> to a ‘pure nationalist’ persuasion, whereby self-government and not administrative independence were the new salient political issues.

## 1.5. Conclusion

The aim of this chapter has been to capture the constitutional and political processes that influenced the formation of the United Kingdom of Great Britain and Northern Ireland. By way of a summary of the argument presented in this chapter, we may distinguish its corpus as consisting of three main points that will serve as a useful guide for the later discussions in this thesis.

First, we may conclude from the above analysis that the formation of the UK took place as a practical response to critical junctures in English political history, as opposed to being the result of an inevitable process. Moreover, it has been noted that the essence of this process emerged from a longer historical past than was advocated by Bulpitt, and was at all points conditioned by the English desire for overlordship over the periphery. Indeed, we find that the eventual arrival of ‘formal empire’ was the conclusion of a gradual *thickening* of the various Anglo-peripheral relationships in response to wider geopolitical circumstances, as opposed to a holistic process of inevitable Union.

Second, we find that the constitutional unit that emerged from these Unions was not a classic unitary state, but a distinctly qualified construction. In legal terms, we find that all power was vested in a single central source of authority – initially the Crown and, from the 17<sup>th</sup> century, Parliament. However, in political terms, we find that the extent of the Unions was not to provide

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<sup>182</sup> McCrone, D., ‘Scotland Out the Union? The Rise and Rise of the Nationalist Agenda’, *The Political Quarterly*, Vol. 83, No. 1, (January-March 2012), pp. 69-76 at 73



a similar construction of political authority. Rather, in each of the three ‘Unions’ – and in particular in Scotland – there remained a distinct package of continuing peripheral autonomy, characterised by the retention of certain pre-Union rights and infrastructures. As argued above, this was in essence a direct reflection of the logic of the Union itself; desiring *supremacy* and *control* over the periphery, but acquiescing as to the need for a single source of administrative action – a ‘State of Unions’, conditioned by the opinion of the English ‘official mind’ in drawing distinction between ‘high’ and ‘low’ politics.

Third, in reflection of the idea of the UK as a ‘State of Unions’, we find that as well as providing for a pluralised construction of political power, there was also a distinct lack of a single source of cultural identity. Rather, in each of the respective peripheral units, a sense of national identity continued after their respective Unions. In part, this was facilitated by the continuing administrative independence of the periphery – as seen in Scotland – however, it is argued that it was also the reflection of the broader acquiescence of central government in failing to enforce a sense of nation building – allowing for peripheral allegiances to continue, so long as their manifestation did not threaten the fundamental foundation of the state.

This chapter has demonstrated the United Kingdom as a ‘State of Unions’. It has been concluded that the terms of those Unions were far from inevitable, but instead emerged as pragmatic responses to particular political conditions. Moreover, this chapter has established that the ‘State of Unions’ did not create a single culturally homogeneous unit, but a multi-national state. The next chapter of the thesis will explore issue of political identity further, focussing specifically on the idea of Britishness as a state-based identity, and its influence upon the political dynamics in the territorial constitution.

## Chapter 2

### Identity and the State: Locating Britishness

The previous chapter of this thesis focussed on the formation of the United Kingdom as a unit of constitutional definition. This chapter now moves to investigate the factors that came to influence the individual placing their primary political identity in the institutional vessel of the state. This chapter is about locating Britishness; its tenets, salience, and historical influence upon the dynamics of the territorial constitution.

#### 2.1. Introduction

For the majority of the modern age, the nation-state has served as the ‘alpha and omega’ of personal identity.<sup>183</sup> For states, the idea of the nation-state has been crucial in securing the allegiance of its citizens.<sup>184</sup> For nationalists, the idea of congruence between nation and state has been a crusading ambition.<sup>185</sup> Yet, explaining the logic or construction of this hyphenated term has, for more than a century, baffled historians, political theorists, sociologists and, increasingly, constitutional theorists.

What forces constitute the fusion of two such apposing concepts as *nation* and *state*, into the formation of a system of identity which has led millions to, voluntarily, bear arms and fight for the cause? Moreover, in multi-national states such as the United Kingdom, what reasons have

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<sup>183</sup> Franck, T. M., ‘Clan and Superclan: Loyalty, Identity and Community in Law and Practice’, *The American Journal of International Law*, Vol. 90, No. 3 (July, 1996), pp. 359-383 at 360

<sup>184</sup> McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998)

<sup>185</sup> Anderson, B., ‘Introduction’, in Balakrishnan, G., (ed.) *Mapping the Nation*, (London: Verso, 2012)

existed for the individual to place their primary allegiance in the state, over and above other forms of cultural identity?

Recognising the importance of these questions for understanding the political dynamics of the territorial constitution, this chapter anticipates the later debates on the rise of sub-state nationalism, by focussing on understanding what factors have historically influenced the individual to place their primary political identity in the state. This chapter is about understanding Britishness, and in particular the significance that this state-based identity has held in influencing the political dynamics of the territorial constitution. In pursuing this line of enquiry, this chapter seeks to contribute to answering the central research question of this thesis by providing a valuable lens on understanding the wider factors – namely political identity – which influence the dynamics of constitutional systems. By understanding what factors originally influenced the individual to place their primary political loyalty in the UK state, it is seen that we will gain a greater base for analysis as to why, over the last century, this has begun to change. In achieving this aim, this chapter will be divided into three parts.

In Parts One and Two, emphasis will be placed on the theoretical dissection of the idea of the nation-state. Part One will discuss the concept of the state; considering how the state emerged as the primary political unit in the modern age, and as to how its construction laid the groundwork for a system of state-based identity to emerge. Part Two will then discuss the concept of the nation; defining its form, and forming a theoretical opinion as to why the nation became associated with the design of the state. Part Three will then apply the theoretical analysis of the preceding two parts of the chapter to the case study of the United Kingdom, seeking to identify the essence and tenets of ‘Britishness’, and their relationship to the wider political dynamics of the territorial constitution.

## 2.2. The State

For some, such as Joseph Strayer, the development of a system of European sovereign states – at least in the external sense – had become an almost inevitable trajectory from as early as the 13<sup>th</sup> century.<sup>186</sup> More broadly, we find a consensus within the academic literature that by the 17<sup>th</sup> century, the state had risen to become the primary vessel for political mobilisation.<sup>187</sup> In this part of the chapter, we will explore the themes and processes that led to this transition, charting the ascendancy of the state.

In beginning this investigation, we find the majority of historical accounts as accrediting the rise of the state, from around the 16<sup>th</sup> century, to a mix of military and economic changes within the wider geopolitical sphere. For Charles Tilly, these changes were primary military in nature, leading to the famed adage of ‘war made the state, and the state made war.’<sup>188</sup> Others, such as Alberto Alesina, chart the rise of the state as equally reflective of changes within the economic sphere, and the wider pressures of economic performance in instigating the rise of statal blocks.<sup>189</sup> The essence of these two accounts may be charted as follows:

Under what we may term the ‘military’ or ‘political’ reading of the rise of the state, we find the locus of explanation as framed by the identification that statal units emerged as a response to the rising costs of military conflict during the early-modern period. During this period, it is

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<sup>186</sup> As argued by Strayer, the concept of external sovereignty developed early and was relatively easy to enforce, especially if victorious in military conflict. Internal sovereignty was much harder to construct. By the mid-13<sup>th</sup> century, Strayer documents the state as worthy of defence at all costs, however, it would be at least another two centuries until the first coherent theories on internalised sovereignty would emerge from the work of Bodin and Hobbes. Strayer, J. P., *Medieval Statecraft and the Perspectives of History*, (Princeton: Princeton University Press, 1971), p. 344

<sup>187</sup> Seton-Watson, H., *Nations and States: An inquiry into the origins of nations and the politics of nationalism*, (London: Meuthen, 1977); Tilly, C., (ed.) *Coercion, Capital and European States*, (Oxford; Basil Blackwell, 1990); Horsman, M., and Marshall, A., *After the Nation-State: Citizens, Tribalism and the New World Disorder*, (London: Harper Collins, 1995); Ertman, T., *Birth of the Leviathan: Building States and Remines in Medieval and Early Modern Europe*, (Cambridge: Cambridge University Press, 1997); Wimmer, A., and Feinstein, Y., ‘The Rise of the Nation-State across the World, 1816 to 2001’, *American Sociological Review*, Vol. 75, No. 5, (2010), pp. 764-790

<sup>188</sup> Tilly, C., ‘Reflections on the History of European State-Making’, in Tilly, C., (ed.) *The Formation of National States in Western Europe*, (Princeton: Princeton University Press, 1975), pp. 3-83 at 42

<sup>189</sup> Alesina, A. and Spolaore, E., *The Size of Nations*, (London: MIT Press, 2003)

argued that a number of significant advancements in military technology, most notably the first widespread use of gunpowder units, significantly increased the cost of waging war.<sup>190</sup>

Indeed, as evidenced by Michael Mann, the estimated cost of warfare during this transitional phase rose significantly, from around 3-5% of state GNP in the pre-17<sup>th</sup> century, to up to 30% by the late-18<sup>th</sup> century.<sup>191</sup> As confirmed by Norman Davies, the trend in states over this period was to develop professionalised military forces; retain standing armies; and install complex administrative systems to administer them – leading to a significant strain being placed on the still largely feudal construction of the European political system.<sup>192</sup>

Economic historians also note that through the increased size, scale and longevity of military conflicts, the arrangement of resources – both physical and financial – began to be viewed as increasingly finite.<sup>193</sup> As a response, it is argued that states emerged as crystallised territorial blocks, framing their borders as distinct economic markets – or *national* economies – and creating a global system whereby the construction of power was increasingly constructed within the territorial boundaries of the state.

In response to these two factors, namely the sharp rise in military expenditure and the increased competition for economic resources, it is argued that a systematic and interdependent trend emerged whereby states needed ‘tax revenues to support an army, and an army to guarantee a flow of revenues’.<sup>194</sup> As noted by North and Thomas, the results of this dynamic would be over two centuries of almost continual military conflict and social transformation, in which states

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<sup>190</sup> Tilly, C., (ed.) *Coercion, Capital and European States*, (Oxford: Basil Blackwell, 1990), p. 76

<sup>191</sup> Mann, M., ‘The emergence of modern European nationalism’, in Hall, J. A., and Jarvine, I. C., (eds.) *Transition to Modernity*, (Cambridge: Cambridge University Press, 1992), pp. 137-166 at 151

<sup>192</sup> Davies notes the transfer from the feudal military mechanics of part-time shire raised armies, towards new professional military and naval castes, as forming one of the greatest strains on state expenditure during this period. Davies, N., *Europe: A History*, (Oxford: Oxford University Press, 1996), p. 519

<sup>193</sup> North, D. C., and Thomas, R. P., *The Rise of the Western World: A New Economic History*, (London: Cambridge University Press, 1973), p. 80-82; Alesina, A. and Spolaore, E., *The Size of Nations*, (London: MIT Press, 2003), p. 179

<sup>194</sup> Alesina, A. and Spolaore, E., *The Size of Nations*, (London: MIT Press, 2003), p. 180

sought to carve out their individual spheres of influence.<sup>195</sup> In retrospect, this can be seen as influencing three processes in the construction of states in Western Europe:

First, we find actions whereby states sought to increase their economic position through the increase of revenues. Initially, we find that this primarily took the shape of internalised reform through the raising of taxes and rents, and the development of large-scale bureaucracies<sup>196</sup> – monopolising the systems available to the state.

Second, from the 16<sup>th</sup> century, this was transferred to the external sphere after several western European states, most notably England and the United Provinces, began to pass mercantilist laws designed to monopolise trade with their emerging overseas Empires; framing them within protected, *national* economies of scale:<sup>197</sup>

‘As wars became more expensive, the sheer cost of warfare on the scale established by their large rivals overruled the financial resources of all but the most commercialised states.’<sup>198</sup>

Correspondingly, the once light and flexible economies of free-trading city-states such as Venice, Genoa or the Hansa, became subsumed within the jaws of the emerging Leviathans, as free-trade was replaced by state-based closed-market mercantilism.<sup>199</sup> For contemporary Marxist thinkers such as Hobsbawm or Frank, this process led to what may be observed as a ‘threshold principle’ on statehood, whereby it was assumed that only large states could effectively guarantee the security and prosperity of their citizens.<sup>200</sup>

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<sup>195</sup> North, D. C., and Thomas, R. P., *The Rise of the Western World: A New Economic History*, (London: Cambridge University Press, 1973), p. 80

<sup>196</sup> Ertman, T., *Birth of the Leviathan: Building States and Remines in Medieval and Early Modern Europe*, (Cambridge: Cambridge University Press, 1997), p. 157; North, D. C., and Thomas, R. P., *The Rise of the Western World: A New Economic History*, (London: Cambridge University Press, 1973), p. 81

<sup>197</sup> See: Chapter One (Section 1.3)

<sup>198</sup> Tilly, C., (ed.) *Coercion, Capital and European States*, (Oxford: Basil Blackwell, 1990), p. 83

<sup>199</sup> *Ibid.*, p. 83

<sup>200</sup> Franck, T. M., *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995), p. 142; Hobsbawm, E., *Nations and Nationalism Since 1780*, (Cambridge: Cambridge University Press, 2012), p. 31

To a significant extent, we find this as also being linked to the wider ideological shift in the imagining of size and scale as the embodiment of power and success, affected by the wider geopolitical landscape of statehood. Indeed, for Steinberg, while this period also saw the emergence of the doctrine of the *de jure* mutual exclusivity of state sovereignty, a distinct political dynamic – or reality – also emerged, whereby the *de facto* strength of state sovereignty was measured against the size and scale of the state, and its behavioural capacity to exercise those sovereign rights.<sup>201</sup> In this regard, we find the emphasis during this period was on the territorial expansion of the state, evidencable in three ways:

First, we find state sponsored expansion through the use of coercive means – being the invasion and conquest of neighbouring territories. This factor was particularly well versed in the territorial empires of Eastern Europe, but also in the initial expansion of Western European states such as France.<sup>202</sup>

Second, we find that as a result of the rising need for size and scale, certain political units also moved to form closer bonds of association with their neighbours through – voluntary<sup>203</sup> – acts of political union. The logic underpinning these political unions – increasingly defined as ‘federal unions’ after the 17<sup>th</sup> century – was generally for the provision of defence against foreign threats, and the taking advantage of increased economies of scale in a world of trade restrictions.<sup>204</sup> Indeed, under the Rikerian understanding of ‘coming together’<sup>205</sup> federalism, the instigation of the ‘federal bargain’ emerged in response to external threats, and the need for

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<sup>201</sup> Steinberg, R. H., ‘Who is Sovereign’, *Stanford Journal of International Law*, Vol. 40, No. 2, (2004), pp. 329-345 at 340

<sup>202</sup> Tilly, C., (ed.) *Coercion, Capital and European States*, (Oxford; Basil Blackwell, 1990), p. 87

<sup>203</sup> It must be recognised that the realistic motivations for political union were generally lopsided, comprising a dominant unit and a lesser unit – the former of which generally had the dominant role in instigating the Union (for example, see the example of Poland-Lithuania or the Anglo-Scottish Union, the former partner in each of these Unions being the strongest, as well as the primary driver for the initial bonds of political union.

<sup>204</sup> Alesina, A., and Spolaore, E., *The Size of Nations*, (London: MIT Press, 2003), p. 139

<sup>205</sup> The identification of Riker’s theory of the ‘federal bargain’ as conjucive to a ‘coming together’ interpretation of federation finds its basis in the works of Alfred Stepan, and Stepan’s critique of Riker in the contemporary understanding of federation as both a ‘coming together’ and a ‘holding together’ mechanism. Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-321

collective defence against those threats.<sup>206</sup> Further explanation of the general dynamics of the processes and logic of political union is cogently provided by the Australian jurist, K. C.

Wheare:

‘The need for common defence, the desire to be independent, geographical contiguity, and the hope of economic advantage all helped to produce a desire for union which was a force in leading England and Scotland to form the United Kingdom of Great Britain in 1707; the Italian states to form the Kingdom of Italy in the years from 1856 to 1864; the German states to form, first the North German Confederation of 1867, and then the German Empire of 1871; and the South African Colonies – Transvaal, Orange River, the Cape and Natal – to form the Union of South Africa in 1909.’<sup>207</sup>

Reflecting upon this quote, we find that the third element of state expansion came through the accompanying projection of state power in an international context, corresponding to the growth of global empires. In this regard, it must be noted that this process developed along two avenues, with Western European states developing salt-water Empires overseas in the Americas, Africa and Asia, while their Central and Eastern European counterparts expanded east to form the land-based Empires such as Russia, Austria or Prussia.

At all points, however, the core of the process of imperial expansion lay in the reality of colonial possessions ‘conceived not as ends in themselves but as assets to be deployed in defence of the European balance of power’.<sup>208</sup> Indeed, the arrangement of global Empires was a crucial tactic in the ‘breakdown of the international economy into regional trading blocs’ during times of economic competition between the European powers.<sup>209</sup> It is argued that Empires, therefore, were external support systems for the state, conditioned by the functional reality of a hostile geopolitical environment.

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<sup>206</sup> Riker, W. H., *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown and Company, 1964), p. 12-13

<sup>207</sup> Wheare, K. C., *Federal Government*, (London: Oxford University Press, 1951), p. 37

<sup>208</sup> Simms, B., *Britain’s Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2017), p. 161

<sup>209</sup> Lake, D. A., ‘British and American Hegemony Compared: Lessons for the Current Era of Decline’, in Frieden, J. A., and Lake, D. A., (eds.) *International Political Economy: Perspectives on Global Power and Wealth*, (London: Routledge, 2000), pp. 127-140 at 131



In this regard, we find the growth of the state as demonstrating a distinct transactional quality, whereby events in one territory motivated a response in another. We find a useful demonstration of this provided through Hobsbawm's quoting of a conversation between the French and British ambassadors in 1897:

‘If you were not such persistent protectionists’, the British premier told the French ambassador, ‘you would not find us so keen to annex territories.’<sup>210</sup>

In essence, the externally motivated and transactional nature of the growth of the state led to what many have attributed to a relatively inorganic, and impractical system whereby the state ballooned into a Leviathan of unprecedented size and scale. Indeed, in a contemporary account of the 18<sup>th</sup> century, the Scottish economist, Adam Smith noted how the expenditure of the British Empire, both in war and peace, placed an overburdening strain on the resources of Great Britain, and should be cut loose if not profitable.<sup>211</sup> Writing later in the 20<sup>th</sup> century, Norman Angell framed the presumed prosperity of Empire as a ‘Great Illusion’, and offered considerable qualitative evidence of the negative economic effects of the Imperial sphere.<sup>212</sup>

Reflective of these facts, as well as the wider discussion in this section of the chapter, we may conclude that the formation of the state was far from an inevitable process. Indeed, in the above constructed arguments, we have seen how the crystallisation of political units to form units of unprecedented political and economic size and scale was, to a significant extent, a process driven equally by external as well as internal factors.

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<sup>210</sup> Hobsbawm, E., *The Age of Empire 1875-1914*, (London: Weidenfeld & Nicolson, 1987), p. 67

<sup>211</sup> Smith, A., *Wealth of Nations*, (Oxford: Oxford University Press, 2008), p. 463-464

<sup>212</sup> Angell cited the ‘logical fallacy’ of European Imperialism, which associated territorial expansion with increased fortune. For Angell, evidence showed how the small state, aligned to free-trade policies, usually provided for greater prosperity in the national populace. Quoting examples, Angell highlighted how citizens of the militarily weak Dutch state were by on large wealthier than their counterparts in Germany, and those of Germany, wealthier than their counterparts in Russia, who possessed the largest army of the age. Angell, N., *The Great Illusion: A study of the Relation of Military Power in Nations to their Economic and Social Advantage*, (London: William Heinemann, 1910), p. 30-31

In reflection of the above arguments, we find that through the long transition into modernity, the significance of the state grew to such an effect that it became the primary political actor within the global sphere. This section of the chapter has argued that this transition took place primarily as a result of functionalist shifts within the international – and in particular the European – political economic sphere. As the costs of military expenditure rose, accompanied by the rise in economic tariff barriers, the formally lightweight political units of the medieval period were required to crystallise and expand, seeking revenue streams; from this, a society of states was born.

### **2.3. The Idea of the Nation-State**

In Part One of this chapter, we have seen the argument presented that the state grew, both administratively and territorially, as a response to the politico-economic conditions which emerged during the early-modern period. In this part of the chapter, we will investigate as to how the state, as an institutional entity, came to secure the allegiance of those within its territory, a process which subsequently gave rise to the idea of the ‘nation-state’.

In achieving this end, this part of the chapter will be divided into two sections. Section One will consider the theoretical positions associated with the identity of the nation by considering the existing schools of thought relating to the definition of nations and nationalism. Section Two will conclude by analysing the work of two political thinkers who gave much consideration as to the construction of identity as connected to the state – Giuseppe Mazzini and Carl Schmitt.

### 2.3.1. Current Theories on Nations and Nationalism

The debate in this section will consider the main schools of thought on nations and nationalism; its construction will be defined through a mixture of consultation of specific thinkers, as well as broader schools of theoretical thought.

#### A. The Continuity Arguments

The first school of thought on nations and nationalism relates to what John Breuilly defined as the ‘continuity arguments’,<sup>213</sup> relating to the idea of the nation as tied to pre-modern and primordial forms of identity. In defining this school of thought, we find its construction as comprising of two distinct strands. The first strand relates to the group of thinkers known as the primordialists, the second, the perennialist.

From the perspective of the primordialist school of nationalism theory, containing thinkers such as Edward Shils and Clifford Geertz, the identity of the ‘nation’ is constructed through a system of pre-modern indicators of allegiance. For both thinkers, the idea of the nation was constructed through the ineffable significance<sup>214</sup> placed upon the nexus of ‘assumed givens’<sup>215</sup> which constitute the nation.

Such *givens* refer to what Geertz described as the natural elements of the human construction of identity – attachment to a particular kinship group, religious community, common language

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<sup>213</sup> John Breuilly defines both primordialism and perennialism as ‘continuity arguments’, on the basis that their essential argument is in the location of the nation within a time immemorial history. See; Breuilly, J., ‘Dating the nation: how old is an old nation?’, in Ichijo, A., and Uzelac, G., (eds.) *When is the Nation? Towards an understanding of theories of nationalism*, (Abingdon: Routledge, 2005), pp. 15-39 at 23

<sup>214</sup> Shils, E., ‘Primordial, Personal, Sacred and Civil Ties’, *The British Journal of Sociology*, Vol. 8, No. 2, (1957), pp. 130-145, at 142

<sup>215</sup> Geertz, C., *The Interpretation of Cultures*, (London: Fontana, 1993), p. 259

or dialect, or set of social practices<sup>216</sup> – which in turn exude an overpowering coerciveness upon the construction of identity within a given community:

‘for virtually every person, in every society, at almost all times, some attachments seem to flow more from a sense of natural – some would say spiritual – affinity than from social interaction.’<sup>217</sup>

While Geertz acknowledged that the emergence of this specific strand of nation formation was most prevalent within weak civil polities, with low welfare provision,<sup>218</sup> the overarching essence of the primordialist argument maintains a connection that the roots of the nation emerged through a long historical process, being bottom-up constructions, devoid of state-sponsored nationalism.

The second strand of the continuity argument relates to what Anthony Smith defined as ‘perennialism’, relating to the identification of the nation as a time immemorial concept – perennial – but divergent from primordial accounts in its rejection of the nation as part of the ‘natural order’.<sup>219</sup> Indeed, we largely find the perennialist account of the nation as located in the historiography of writers such as Adrian Hastings, who justify the longevity of nations such as England and France, through the endurance of national symbols and terms, as well as vernacular languages. Using Hastings as a guide, let us now locate the main kernels of the perennialist approach to nations and nationalism.

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<sup>216</sup> For thinkers such as Van den Berghe, the natural indicators identified by Shils and Geertz can be summarised down to the base significance of ethnicity. For Van den Berghe, the organisation of society is inherently in favour of socio-biological homogeneity – mono-ethnicity – as opposed to the wider identities of culturally grouped primordial groups as identified by Shils and Geertz; Van den Berghe, P., *The Ethnic Phenomenon*, (Oxford: Elsevier, 1981), p. 18

<sup>217</sup> Geertz, C., *The Interpretation of Cultures*, (London: Fontana, 1993), p. 259-260

<sup>218</sup> ‘In modernizing societies, where the tradition of civil politics is weak and where the technical requirements for an effective welfare government are poorly understood, primordial attachments tend... to be repeatedly, in some cases almost continually, proposed and widely acclaimed as preferred bases for the demarcation of autonomous political units.’ The context of this definition was located in an analysis of the emergence of linguistic communities in post-colonial India, which Geertz saw as largely motivated by underdevelopment of the Indian state; Geertz, C., *The Interpretation of Cultures*, (London: Fontana, 1993), p. 260

<sup>219</sup> Smith, A. D., *Myths and Memories of the Nation*, (Oxford: Oxford University Press, 1999), p.5

In his main contribution, ‘The Construction of Nationhood’, Hastings pronounced the emergence of the nation as grounded in the transformation of ethnic groups into viable vernacular communities.<sup>220</sup> In this transformation, Hastings made particular reference to the role of religion, or rather the translation of religious texts, in facilitating the fostering of national cultures. He defined; ‘once an ethnicity’s vernacular becomes a language with an extensive living literature of its own, the Rubicon on the road to nationhood appears to have been crossed.’<sup>221</sup>

Moreover, Hastings also located the longevity of national terms or labels as essential on the fostering of collective identity. Taking the example of England, Hastings argued that the longevity of national labels – “England” or “English” – provided the markers for identity needed for common association: prescriptively applying the identification of an English nation to the time of the venerable Bede in the 8<sup>th</sup> century.<sup>222</sup>

However, in making such an account, we find that Hastings received considerable criticism on the limitations of his approach, both from historians and sociologists. Indeed, for Breuilly, Hastings’ reliance on the pervasion of certain political titles or labels was unrepresentative of the wider historical nature of these labels as having a distinctly different salience within different historical periods.<sup>223</sup> This view was largely confirmed by Strayer:

‘Though the ruler often took an ethnic title (*rex Anglorum, rex Francorum*, and so on), most of the *regna* were not ethnic units. The usual pattern was a dominant warrior group, drawn from several Germanic peoples, ruling a subject population which was Latin, Celtic, or Slav.’<sup>224</sup>

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<sup>220</sup> Hastings, A., *The Construction of Nationhood: Ethnicity, Religion and Nationalism*, (Cambridge: Cambridge University Press, 1997)

<sup>221</sup> *Ibid.*, p. 12

<sup>222</sup> *Ibid.*, p. 36

<sup>223</sup> Breuilly, J., ‘Dating the nation: how old is an old nation?’, in Ichijo, A., and Uzelac, G., (eds.), *When is the Nation? Towards an understanding of theories of nationalism*, (Abingdon: Routledge, 2005), pp. 15-39 at 22

<sup>224</sup> Strayer, J. P., *Medieval Statecraft and the Perspectives of History*, (Princeton: Princeton University Press, 1971), p. 341

Moreover, Strayer drew reference to the wider historical inaccuracy of Hasting's approach in defining the composition of medieval kingdoms as being uniform social structures, able to facilitate a single source of identity. Rather, for Strayer, the essence of the medieval kingdom was impervious to a fixed territorial definition, being a relatively autonomous field outside of its central core.<sup>225</sup> Thus, the idea of the nation as emerging within a specific regnum was a distinctly hard to prove historical concept – at least before the birth of the modern state. Indeed, since the second half of the 20<sup>th</sup> century, the essence of the continuity argument has met with considerable challenge within the academic literature, perhaps none more so than under the criticism of Ernest Gellner.

## **B. Ernest Gellner and the Modernist Turn**

For Gellner, nations were not natural, but rather a contingency, forged in response to precise political conditions – and in direct relationship to the emergence of the state.<sup>226</sup> In this regard, Gellner identified three stages in the evolution of the state as a condition of human organisation: the hunter-gather stage, where the state was not an option for organisation; the agrarian period, where the state was an emerging – though still optional – condition; the industrial stage, within which the state became a necessary condition for the facilitation of central sanctions and controls on large societies.<sup>227</sup>

In translating these historical periods into a theoretical design on the nation, Gellner saw the crucial element of the formation of nations and nationalism as taking place in the transition

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<sup>225</sup> Strayer, J. P., *Medieval Statecraft and the Perspectives of History*, (Princeton: Princeton University Press, 1971), p. 341

<sup>226</sup> Gellner, E., *Nations and Nationalism*, (Oxford: Blackwell, 2006), p. 6

<sup>227</sup> *Ibid.*, p. 5

from agrarian to industrial society – explainable in sociological terms through the definition of *high and low cultures*.

In the agrarian age, Gellner argued that the existence of *high cultures* was a phenomenon confined to, and maintained by, the clergy and the elite.<sup>228</sup> Gellner explained this on the grounds that in agrarian society, there existed a notable ‘distance’ in the arrangement of job specialisations – for example the division between the monk and the farmer was a considerable distinction, both financially and in terms of individual education and national consciousness.<sup>229</sup> Moreover, during the agrarian period, labour remained relatively static, with many of those in the *low culture* remaining in a fixed location for the majority of their lives. Gellner identified that following the existence of industrial society, the labour market became transformed, requiring a mobile and literate populace:

‘Let us recapitulate the general and central features of industrial society. Universal literacy and a high level of numerical, technical and general sophistication are among its functional prerequisites. Its members are and must be mobile, and ready to shift from one activity to another, and must possess that generic training which enables them to follow the manuals and instructions of a new activity or occupation... They must also be able to communicate by means of written, impersonal, context-free, to-whom-it-may-concern type messages. Hence these communications must be in the same shared and linguistic medium and script.’<sup>230</sup>

In order to achieve a standardized means of communication, Gellner identified that this was only possible through a developed education system, a phenomenon which he understood as not being able to have existed without the infrastructure, administration and finance of the state. Thus, Gellner saw the nation as a condition which emerged from the societal shift from an agrarian to an industrial society – connecting the construction of the nation to the modern period:

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<sup>228</sup> *Ibid.*, p. 49

<sup>229</sup> *Ibid.*, p. 26

<sup>230</sup> *Ibid.*, p. 34

‘It is not the case that the “age of nationalism” is a mere summation of the awakening and political self-assertion of this, that, or the other nation. Rather, when general social conditions make for standardized, homogeneous, centrally sustained high cultures, pervading entire populations and not just elite minorities, a situation arises in which well-defined educationally sanctioned and unified cultures constitute very nearly the only kind of unit with which men willingly and often ardently identify.’<sup>231</sup>

Under Gellner’s definition, we find at its core is the idea of the nation as formed at the point at which the *high culture* becomes universal, and is experienced by the majority of the population of the state, outside of the social elite.<sup>232</sup>

In earlier works, Gellner made it clear that the territorial stability and longevity of the ‘nation-state’ was made possible by the ability of state-based education systems to overwrite the ethnic chasms contained within the state; ‘the natural limit of the political unit... is the limit of the validity of its educational certificates.’<sup>233</sup> Thus, in identifying the nation as a primarily political unit of identity, attached to the age of industrial society, we find that Gellner saw the possibility for the nation to be ‘constructed’, to an extent. However, Gellner also saw instances upon which the state fails to coincide with the boundaries of a single high culture, and where there continues to exist one or more *wild cultures* within its territorial boundaries.<sup>234</sup>

In this regard, Gellner explained the existence of nationalist movements due to the fact that the industrial age inherited the political boundaries of the previous age, as well as its high and low cultures. In instances where the state fails to overwrite the ethnic chasms which exist within the various *high cultures* within a political unit – the state – nationalist movements are mobilised, which by result fight it out for the available state space.<sup>235</sup>

This argument, which Gellner summarises as ‘one nation, one state’, was constructed on the belief that in order to sustain the construction of the high culture in the industrial age, ‘every

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<sup>231</sup> *Ibid.*, p. 54

<sup>232</sup> *Ibid.*, p. 49

<sup>233</sup> Gellner, E., ‘Scale and Nation’, *Philosophy of the Social Sciences*, Vol. 3, (1973), pp. 1-17 at 13

<sup>234</sup> Gellner, E., *Nations and Nationalism*, (Oxford: Blackwell, 2006), p. 49

<sup>235</sup> *Ibid.*, p. 49-50



high culture now wants a state, and preferably its own.’<sup>236</sup> Thus, under the Gellnerian reading of nations and nationalism, the nation is a modern construct, emerging from the societal transition from the agrarian to the industrial age, and constructed as a response to the functional necessity of the state unit.

### **C. Anthony Smith and the addition of ethno-symbolism**

In approaching the work of Anthony Smith, we find an initial base of similarity between Smith and Gellner. Originally a student of Gellner, Smith broadly agreed with Gellner’s interpretation of the nation, and nationalism, as having both emerged as products of the modern age. However, Smith qualified his agreement by referring to the fact that the essence of the nation that emerged within this period was sustained by the memory of a deeper historical past:

‘striking the right balance between the obvious modernity of nationalism and the often premodern historical dimensions of ethnicity.’<sup>237</sup>

Indeed, under Smith’s reworked account of nations and nationalism, while the nation achieved a state of *consciousness* only during the modern era, its origins lie in the deep historical past, framed by the boundaries of ‘pre-modern ethnic communities.’<sup>238</sup> In this regard, we find Smith’s theory on nations and nationalism as a distinct nuance of the pre-existing approaches of the primordialists and the Gellnerian modernists.

### **D. Hobsbawm and ‘Invented Traditions’**

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<sup>236</sup> *Ibid.*, p. 49

<sup>237</sup> Smith, A. D., *The Ethnic Revival in the Modern World*, (Cambridge: Cambridge University Press, 1981), p. 51

<sup>238</sup> Smith, A. D., ‘The Origins of Nations’, *Ethnic and Racial Studies*, Vol. 12, No. 3, (1989), pp. 340-367 at 340

An initial engagement with the work of Eric Hobsbawm conjures up several themes of similarity with the writings of Gellner. In unison with Gellner, Hobsbawm saw the nation as a functionalist construction of modern state-based education systems.<sup>239</sup> Moreover, Hobsbawm also agreed with Gellner's description of the nation as an artificial construct, vertically constructed by a literal elite during the great transition from agrarian to industrial society: 'nations so not make states and nationalism but the other way round.'<sup>240</sup>

However, while in broad agreement with Gellner, we find that Hobsbawm also extended Gellner's theory by placing an emphasis on the condition that the nation can only be truly imagined when it is received by the social mass. Indeed, on this point, Hobsbawm drew example to the construction of the Italian or Polish nations, which he argued were largely the constructs of top-down processes, and which at the time of 'national independence' lacked a distinctly nationally conscious population.<sup>241</sup> Thus, for Hobsbawm, the essence of the *nation* – or rather, the nation's reception by the mass – is a factor to be constructed by the state:

“‘Invented Tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.’<sup>242</sup>

In unpacking this quote, upon first glance we would not be mistaken to draw similarity with Smith's concept of ethno-symbolism. However, unlike Smith, Hobsbawm saw the principle of 'invented traditions' as being processes emerging from the rise of nationalism; and denying the position of an ethno-symbolically mobile past. Indeed, as Hobsbawm directs us to understand,

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<sup>239</sup> 'Whatever our reservations, it is hard to deny that education (that is, in modern times state-wide public education) functions as an engine of national socialisation and identity formation.' Hobsbawm, E., *Fractured Times: Culture and Society in the Twentieth Century*, (London: Little Brown, 2013), p. 150

<sup>240</sup> Hobsbawm, E., *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 2012), p. 10

<sup>241</sup> Hobsbawm, E., *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 2012), p. 44

<sup>242</sup> Hobsbawm, E., and Ranger, T., (eds.) *The Invention of Tradition*, (Cambridge: Cambridge University Press, 2012), pp. 1-14 at 1

one of the central pillars in the strength of invented traditions is that of their vague and ill-defined construction:

‘The crucial element seems to have been the invention of emotionally and symbolically charged signs of club membership rather than the statutes and objects of the club. Their significance lay precisely in their undefined universality.’<sup>243</sup>

Historically, therefore, Hobsbawm saw the principle of national continuity as largely invented. For example, the reliance on the symbols of resistance used in the romanticizing of certain Western European national identities; the symbolism of the ‘national’ figureheads who opposed Roman expansion; Boudicia, Vercangetarix, Arminius, rely on romanticism as opposed to historical fact, and the subsequent invention of national anthems, flags, and traditions, are largely invented constructs.<sup>244</sup>

In this regard, and upon a similar seam of functionality to Gellner, Hobsbawm justified the emergence of the nation as indicative of certain *requirements* – political, technical, administrative, economic or other – and ranked ethnic markers of identity as only secondary conditions to the emergence of nationalism.<sup>245</sup> Moreover, Hobsbawm also reconfigured the definition of the nation as requiring a certain size and scale in order to be viable in the historic past. He called these ‘threshold principles’ and, arguing on a largely political economic perspective, saw national independence as achievable only by large states.<sup>246</sup>

Thus, in a similar strand of thought to Gellner, we find that Hobsbawm attached the significance of the nation, and of the formation of the nation, to a specific point in human history and, more importantly, to the wider idea of the size and mentality of the nation as

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<sup>243</sup> *Ibid.*, at 11

<sup>244</sup> Hobsbawm, E., and Ranger, T., (eds.) *The Invention of Tradition*, (Cambridge: Cambridge University Press, 2012), pp. 1-14 at 7

<sup>245</sup> Hobsbawm, E., *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 2012), p. 10

<sup>246</sup> Hobsbawm, E., *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 2012), p. 31

influenced and constructed by the wider geopolitical environment, and the functionalist requirements that it creates.

### **E. Benedict Anderson and the ‘Imagined Political Community’**

In consulting a final thinker on nations and nationalism, we now come to discuss the work of Benedict Anderson. In beginning this discussion, we find that Anderson moved away from the functionalist accounts of Gellner or Hobsbawm, but at the same time, also drew distinction from the ethno-symbolic or primordialism approaches of thinkers such as Smith or Geertz. Rather, Anderson’s account of the ‘imagined political community’ hinged on what Wimmer and Feinstein describe as ‘cultural modernization’.<sup>247</sup>

In this regard, we find that the essence of Anderson’s argument was that, while nations and nationalism emerged within the modern sphere, their construction was far more holistic than is proposed under the theories advocated by Gellner and Hobsbawm. On this point, the essence of Anderson’s theory rested on the emergence of sense of imagined political community as associated with the arrival of the print *revolution*<sup>248</sup> from the 15<sup>th</sup> century.<sup>249</sup> From this moment, Anderson identified that the illiterate mass was able to develop a common vernacular, and to develop a largely holistic sense of nation-building.<sup>250</sup>

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<sup>247</sup> Wimmer, A., and Feinstein, Y., ‘The Rise of the Nation-State across the World, 1816 to 2001’, *American Sociological Review*, Vol. 75, No. 5, (2010), pp. 764-790 at 768

<sup>248</sup> This is later expanded by Mann who saw the print revolution as only achieving a nation-building possibility from emergence of print *cultures* outside of the ecclesiastical and upper classes towards the end of the 17<sup>th</sup> Century; the growth in periodicals; the increased requirement of literacy in commerce and the law; and the expansion of the institutions of the state – both military and administrative – which required a literate workforce; see, Mann, M., ‘The emergence of modern European nationalism’, in Hall, J. A., and Jarvine, I. C., (eds.) *Transition to Modernity*, (Cambridge: Cambridge University Press, 1992), pp. 137-166 at 142-145

<sup>249</sup> Anderson, B., *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London: Verso, 2006)

<sup>250</sup> *Ibid.*, p. 109

For Anderson, the linguistic revolution found its greatest momentum through religious texts, primarily the Bible, being the first books to be widely translated from Latin to respective national languages. Such a revolution found particular advancement through the events of the Reformation, taking root firstly in the newly Protestant nations of the Dutch Republic and England, and which resulted in what Anderson defines as ‘large new reading publics.’<sup>251</sup>

However, while taking a largely poststructuralist approach to nation formation, we find a pervasive theme within Anderson’s writing which also attaches a distinct salience to the idea of the nation as being motivated by the state. Indeed, we find that Anderson made specific reference to the fact that the nation was a construct of the state – via the informalized elements of the literary culture, but which in itself was sponsored by the wider nation-building strategies of the state.<sup>252</sup>

## **Summary**

At this point, it is important to take stock of the theoretical schools of thought on nations and nationalism so far discussed. In reflection, we find that following a discussion of the central schools and thinkers on the theories of nationalism, the overarching consensus, with the exception of the primordialists, is that the nation emerged during the modern period – associated with the rise of the state as the primary political unit within the global sphere, as articulated in Part One of this chapter.

However, while articulating a broad consensus on the specific period within which the nation emerged, we find far less agreement within the literature as to the specific causes for the emergence of the nation. For ethno-symbolists such as Anthony Smith, the rise of the nation in

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<sup>251</sup> *Ibid.*, at p. 40

<sup>252</sup> McCrone, D. *The Sociology of Nationalism*, (London: Routledge, 1998) p. 85

the modern period was based on the mobilisation of pre-modern ethnic markers of identity; a theory that differs from the continuity arguments of the primordialists, but which maintains a distinct connection between the modern nation, and the pre-modern ethnic past.

Contrary to this view, we find the writings of functionalists such as Ernest Gellner and Eric Hobsbawm, the both of whom hold the position of the nation as being formed by the self-induced nationalism of the state, framed broadly through the operation of state-based education systems. Within this theory, the essence of the nation is not conditioned by the consciousness of an ethnic past, but on the top-down mobilisation of a system of pervasive high cultures, historically maintained by the literary and clerical elite, and filtered down to the masses during the modern period – primarily as a response to the shift towards a system of industrial society.

Bearing similarity to the modernist accounts of Gellner and Hobsbawm, we find that the work of Anthony Smith further extends the critique of the nation by articulating the view of the ‘imagined political community’. This largely poststructuralist account of the nation, while broadly agreeing the historical scope of nation formation argued by Gellner and Hobsbawm, focussed on the direct mobilisation of a sense of national community as coming through the more holistic development of print cultures. Anderson argues that through the development of large literate populations after the print revolution in the 16<sup>th</sup> century, the gradual trend emerged of the holistic development of a sense of nationhood, attached to the abstract de-ethicised idea of the imagined political community.

While agreeing with Anderson’s idea of the nation as an *imagined political community*, the argument in the next section of the chapter will seek to expand upon the formative account supplied by Anderson, and move to consider the factors that fundamentally helped to sustain the imagined political community from a symbolic perspective – in essence, the next section of the chapter will investigate the factors that led to the sustaining of identity mechanisms

attached to the state, and will seek to build a theoretical model with which to locate and analyse the tenets of Britishness.

### **2.3.2. An Alternative Approach to the Imagined Political Community**

The aim of this section is not to formulate a new theory on nations and nationalism, nor is it to necessarily discount the theoretical approaches discussed above. Indeed, the aim of this section of the chapter is not to create a new understanding on the ‘foundation’ of the nation but, instead, to draw a theoretical conclusion on the factors that allowed for the continuing sense of national attachment connected to the state. Indeed, it is noted from our analysis of the above framed theorists that their emphasis of enquiry falls primarily on the *birth* of the nation. This section of the chapter seeks to investigate as to what *sustained* a sense of national feeling – or an imagined political community – attached to the vestiges of the state.

In achieving this end, the corpus of this section of the chapter will be divided into three parts. The first two will consult the political theory of two influential thinkers on the role of the nation and the state – Giuseppe Mazzini and Carl Schmitt. The third part will then seek to frame a synthesis between these two thinkers, and develop a single theoretical approach for an analysis of the frame of Britishness, taking place in Part Three of this chapter.

#### *Mazzini and the Nation-State of Common Goals*

Beginning with Giuseppe Mazzini, we find that Mazzini is often placed by a number of political commentators within the intellectual tradition of liberal idealism. In this frame of analysis, the main aspects of Mazzini’s work to receive notable critique relate primarily to his writings on Italian nationalism and his role in that movement. Indeed, even within Mazzini’s wider writings on the state, we find a clear demonstration of his underlying ideology as a proponent for the

creation of an Italian state, as well as his opposition to the culturally heterogeneous Empires of Austria and the Ottomans – the former of which he often decried as being a fundamental barrier to the formation of a unified Italy.<sup>253</sup>

Yet, as an aside to the main emphasis of Mazzini's writing, we also find a rich vein of political theory in Mazzini's writing based on an analysis of the role of the state, and the relationship between the state and the identity of the citizen. In this regard, we find an argument presenting a primarily functionalist account of the role of the nation, comparable to the later work of Gellner, and frequently relied upon by Marxist theorists such as Hobsbawm.<sup>254</sup>

The main lines of Mazzini's theory on the nation and the state can be fruitfully approached through analysis of a series of essays published in 1871 – namely *Nationalism and Nationality* and *Principles of International Politics*. In consulting their corpus, we find that the primary basis of Mazzini's political view of the nation was maintained by an understanding of the constructed essence of the nation as being able to be forged by the unity of similar peoples – a critique in itself holding considerable comparison to the later functionalist accounts of the nation formulated by Gellner:

'give this man a Country... and establish a link of solidarity between his individual efforts and the efforts of all subsequent generations; place him in association with the labors of 25 to 30 million men who speak the same language, have similar habits and beliefs, profess faith in the same *goal*, and have developed specific tools for their work as required by the general conditions of their land, and... his strengths will be greatly multiplied, allowing him to feel up to the task. The national tradition and his own intellect, revitalized by a communal bond with the intellects of millions, reveal to him a *special goal*, placed along the way towards the *general goal*.'<sup>255</sup>

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<sup>253</sup> Mazzini's criticism of Austria was largely aimed at its territorial control of Venice and North-East Italy, and its wider diplomatic influence across much of the North of Italy, a fact that Mazzini saw as challenging the ability for Italian unity in those regions. Salvemini, G., *Mazzini*, trans. I. M. Rawson (London: Jonathan Cape, 1957), p. 76

<sup>254</sup> Hobsbawm, E., *Nations and Nationalism since 1780*, (Cambridge: Cambridge University Press, 2012)

<sup>255</sup> Mazzini, G., 'Nationalism and Nationality', in Recchia, S., and Urbinati, N., (eds.) *A Cosmopolitanism of Nations: Giuseppe Mazzini's Writings On Democracy, Nation Building and International Relations*, (Oxford: Princeton University Press, 2009), pp. 62-65 at 63



The *general goal*<sup>256</sup> to which Mazzini referred, equated to the transition of European states from a condition of despotism to democracy, leading eventually to a United States of Europe.<sup>257</sup> In this regard, we find Mazzini as having held a distinctly idealist view of the nation, constructed from a largely Hegelian position of the progress of modernity as commuting towards a specific end goal.<sup>258</sup> In achieving this end, Mazzini identified each state (and nation) within the European sphere as being conditioned to pursue a *special* goal, which would eventually equate to a condition of European unity.<sup>259</sup> Mazzini defined this position as follows:

‘The Nation is not simply a territory that ought to be strengthened by enlarging its size. Nor is it just a collection of men who speak the same language and follow the initiative of a single leader. It is instead an organic whole held together by a unity of common goals and efforts.’<sup>260</sup>

In unpacking this quote, we find that Mazzini saw shared conditions such as language, territory or race as ‘indications of nationality’, but viewed their capacity to form stable political units as dependent upon the identification of a *common goal* with which to bind the national community.<sup>261</sup> Through his identification of *common goals*, Mazzini saw the nation as a political construct designed to achieve the necessary conditions for a transition to a United States of Europe. Thus, for Mazzini, the nation was in essence a transitional mechanism to a society of European unity: ‘Humanity constitutes the *end* and the nation the *means*.’<sup>262</sup>

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<sup>256</sup> In his accompanying work of 1871, Mazzini framed the *general goal* as the third mission of the Italian people – the first being the *political unity* provided by the Roman Empire, and the second the *moral unity* provided by the Papacy – and framed the Italian people as the only truly homogenous nation in Europe capable of leading the defence of humanity; See, Mazzini, G., ‘Principles of International Politics’, in Recchia, S., and Urbinati, N., (eds.) *A Cosmopolitanism of Nations: Giuseppe Mazzini’s Writings On Democracy, Nation Building and International Relations*, (Oxford: Princeton University Press, 2009), pp. 224-240

<sup>257</sup> Recchia, S., and Urbinati, N., (eds.) *A Cosmopolitanism of Nations: Giuseppe Mazzini’s Writings on Democracy, Nation Building and International Relations*, (Oxford: Princeton University Press, 2009), p. 20

<sup>258</sup> Descombes, V., *Modern French Philosophy*, (Cambridge: Cambridge University Press, 1980), p. 28

<sup>259</sup> ‘If well organized, a Nation is like a factory, dedicated to a specific branch of production toward general moral, intellectual, and economic development’ Mazzini, G., ‘Nationalism and Nationality’, in Recchia, S., and Urbinati, N., (eds.) *A Cosmopolitanism of Nations: Giuseppe Mazzini’s Writings On Democracy, Nation Building and International Relations*, (Oxford: Princeton University Press, 2009), pp. 62-65 at 64

<sup>260</sup> *Ibid.*, at 65

<sup>261</sup> *Ibid.*, at 65

<sup>262</sup> *Ibid.*, at 63

However, in framing this idealist account of the *aims* of the nation, we also find that Mazzini maintained an understanding of the wider geopolitical factors influencing the construction of the nation and, in particular, the basis of this construction in relation to the state.<sup>263</sup>

Perhaps the best demonstration of this underlying functionality in Mazzini's political thought on nations and nationalism came through his predictions on the geopolitical map of Europe. For Mazzini, the number of states in Europe during the 19<sup>th</sup> century was, due to reasons of political economy, not capable of exceeding thirteen or fourteen, whereas the number of potential *national* units in Europe over the same period numbered fifty or more.<sup>264</sup>

In this regard, we may deduce a significant similarity with the later writing of Gellner who, as already mentioned, identified that the number of nations far exceeded that of formable states.<sup>265</sup>

In answering this seeming imbalance between the number of nations and states, Mazzini saw the need for the fusion of cultural groups sharing *common goals*, under the umbrella of a state hierarchy. For example, in regards to the United Kingdom, Mazzini identified the following; 'the fusion of its three races, Scandinavian, Germanic and Celtic, as yet imperfect, is only a matter of slow, internal administrative progress'.<sup>266</sup>

In reflection, therefore, we find that while holding an overarching position of liberal idealism, Mazzini's writing on the nation also exhibited a distinct vein of functionalist critique. In essence, Mazzini's view was broadly comparable to the later writings of Gellner and Hobsbawm, seeing the nation as a relatively unnatural and functionalist construct, conditioned by the wider political economic necessity of the global sphere – but also to be symbolically mobilised through the pursuit of *common goals*.

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<sup>263</sup> Alesina A., and Spolaore, E., *The Size of Nations*, (Cambridge, MA: Massachusetts Institute of Technology, 2003), p. 184

<sup>264</sup> Smith, D. M., *Mazzini*, (London: Yale University Press, 1994), p. 155

<sup>265</sup> Gellner, E., *Nations and Nationalism*, (Oxford: Blackwell Publishing, 2006), p. 2, 49

<sup>266</sup> Salvemini, G., *Mazzini*, trans. I. M. Rawson, (London: Jonathan Cape, 1957), p. 74

*Carl Schmitt and the Distinction Between Friend and Enemy*

We now move to consider the political theory of Carl Schmitt. In contrast to Mazzini, we find that Schmitt's political philosophy was primarily motivated from a conservative perspective of the state and its relationship as conditioned by a state of conflict.

For Schmitt, the necessary condition of the state rested upon the identification of the *political*; 'The concept of the state presupposes the concept of the political.'<sup>267</sup> In defining the political, we find that Schmitt distinguished its construction as based upon the necessary fear of hostilities between two groups. Schmitt defined this through the paradigm distinction between 'friend and enemy.'<sup>268</sup> In interpreting this distinction, we find the enemy as not necessarily a hostile foe but, rather, a political group which holds the potential for hostile conflict:

'The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.'<sup>269</sup>

Perhaps the key identifier to Schmitt's distinction of the political is the notion of conflict as a *possible* condition; this alludes to the fact that conflict may not be a necessary condition for the definition of the political group but, rather, must stand as a possible scenario arising in the future. In this regard, Schmitt defined his construction of identity as connected in response to the definition of a *public* enemy. Through the definition of the public enemy – being the enemy of the political group – Schmitt concluded that it is not a necessary condition whereby the

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<sup>267</sup> Schmitt, C., *The Concept of the Political*, (London: University of Chicago Press, 2007), p. 19

<sup>268</sup> *Ibid.*, p. 26

<sup>269</sup> *Ibid.*, p. 27

*individual* feels threatened by the *public enemy*, but that the group as a whole identifies the public enemy as one which holds the potential to be a hostile foe in the future:

‘The enemy is not merely any competitor or just a partner of a conflict in general. He is also not the private adversary whom one hates. An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity. The enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship.’<sup>270</sup>

The identification of the public enemy was, therefore, the primary condition upon which Schmitt based his definition of the political. However, as already identified, we find that the boundaries of this idea were essentially constructed by the outlining of the political as *any group* which enters the political sphere. For example, in order for a specific group – be it religious, moral, economic, ethical or other – to form a political group, it must be conditioned by the existence of conflict between that group and a defined enemy; a religious group declaring war upon another religious group ceases to be a solely religious group, and instead transfers to becoming a political group through the distinction between friend and enemy.<sup>271</sup>

Thus, in translating this definition to the nation, or the political group best associated with the definition of a nation, we find its corpus as becoming a defined political group when the possibility of conflict exists with another political group, thus enforcing the distinction between friend and enemy. In this regard, we find the following useful definition of Schmitt’s concept of the political nation as provided by Ulrich Preuss:

“‘The political’ delineates the character of a social conflict in that it refers to its potentially highest intensity an escalation to the existential antagonism of “friend” and “enemy”. The paradigmatic constellation is a group’s contention of its “sameness” based on race, ethnicity, common history, culture or language, which for Schmitt forges the members of the group into the “oneness” of a “people” – that constitutes the political quality of a group. As a consequence, the notion of “the political” antecedes the notion of the state, because the common feeling of a group’s oneness is the determining state-

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<sup>270</sup> *Ibid.*, p. 28

<sup>271</sup> *Ibid.*, p. 37

building social energy; the state – the institutional order of the political quality of a people – rests on “the political” as its preceding condition.’<sup>272</sup>

Thus, for Schmitt, the construction of a sense of ‘oneness’ or ‘belonging’ was the condition that formed the foundation for the constitution of the political group; a condition which he argued was strengthened internally through the identification of the possibility of conflict with a hostile other.

In this regard, we find Schmitt’s definition of the political nation as referring to the idea of a sense of collective identity. As argued by Balakrishnan, the theory at the heart of this aspect of Schmitt’s design of the political stemmed from Schmitt’s primordial understanding of the foundation of the political group; a group which for Schmitt gained an ordered structure through the development of the state.<sup>273</sup> Upon the point at which the possibility of war is diminished, Schmitt concluded that the distinction between friend and enemy comes to an end, as does the existence of politics as a frame for identity.<sup>274</sup>

However, through Schmitt’s identification of the political group as the precondition for the existence of the state, we may rightly presume that Schmitt saw the state as a static construct, conditioned by the boundaries of the political group. It is upon this issue, however, that we find the second tenet of Schmitt’s concept of the state; the recognition of geopolitical factors in the construction and reconfiguration of the state and its boundaries:

‘The development of military techniques appears to move in a direction which will perhaps permit only a few states to survive, i.e., those whose industrial potential would allow them to wage a promising war. Should smaller and weaker states be unable to maintain their independence by virtue of an appropriate alliance, they may then be forced, voluntarily or by necessity, to abdicate the *jus belli*.’<sup>275</sup>

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<sup>272</sup> Preuss, U. K., ‘Political Order and Democracy: Carl Schmitt and His Influence’, in Mouffe, C. (ed.) *The Challenge of Carl Schmitt*, (London: Verso, 1999), pp. 155-179 at 156-157

<sup>273</sup> Balakrishnan, G., *The Enemy: An Intellectual Portrait of Carl Schmitt*, (London: Verso, 2000), p. 102-103

<sup>274</sup> ‘A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction of friend and enemy and hence a world without politics.’ Schmitt, C., *The Concept of the Political*, (London: University of Chicago Press, 2007), p. 35

<sup>275</sup> *Ibid.*, p.46

Following this account, we find that Schmitt recognised the definition of the state as evolving in correlation with wider shifts in the geopolitical landscape. Thus, if we consider that Schmitt found the existence of the political as a precondition for the existence of the state, we may presume that the changes in statal boundaries are in themselves a recognition of the shifting boundaries of the political group. Under this construction, we find two conceptions of the role of the state in the formation of the political group. First, Schmitt identified the role of the state in safeguarding the condition of total peace within its territorial boundaries:

‘The endeavour of a normal state consists above all in assuring total peace within the state and its territory. To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid.’<sup>276</sup>

Therefore, in instances where the political group coincides with the boundaries of the state, we find that the role of the state is reduced to maintaining the tranquillity of the political group, and in defending its interests in relation to the external enemy. However, we find that Schmitt also identified a second condition whereby, in instances where the internal conditions of the state are lacking in peaceful settlement, the role of the state is to rectify such conditions through the identification of an internal domestic enemy:

‘As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon the domestic enemy.’<sup>277</sup>

In this regard, we see Schmitt’s definition of the state as, on the one hand, the vessel for the identity of the political group, which exists prior to the creation of the total political state. On the other hand, we find that Schmitt also saw the state as dictating the boundaries of the political group by defining the internal membership of that group through the identification of an *internal* enemy.

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<sup>276</sup> *Ibid.*, p. 46

<sup>277</sup> *Ibid.*, p. 46

In this regard, we may conclude that Schmitt saw the creation of identity, attached to the state, as a condition arising both from the external definition of a defined *Other*, as well as the internal condition of a defined domestic enemy. While relying on a primordial foundation in the definition of the political group, Schmitt left open the interpretation of the fact that the political boundaries of the state are open to shift and change in regards to the territorial boundaries of the state; this was a primarily functionalist account of the nation, but conditioned by an overarching sense of wider political economic competition.

### *Summary and Synthesis*

Through this account of Schmitt's philosophy on the state, we find a number of parallels to the previously considered position of Mazzini. Initially, we see that both thinkers saw the role of the state as conditioned, first, by the need to safeguard the rights of its internal populace, and second, as defining its boundaries against the geopolitical conditions of the time. Thus, both thinkers seem to have displayed a vision of the state as a token of power, conditioned against the backdrop of geopolitical thresholds of size and scale.

Yet, in making these initial connections, we also find that the two thinkers differ considerably in their vision of the construction of identity within the state. Whilst both Schmitt and Mazzini saw markers of identity such as language, religion or ethnicity as necessary conditions to the foundation of the national community, they differ in the means of the final construction of the national group. For Mazzini, as has been explained, the nation formed through the identification of a *common goal* which served to bind the collective interests of the national group, and to provide it with a mission. Thus, Mazzini's idea may be summarised as the construction of the nation against the domestically constructed mission of the state.

Schmitt, however, differed by constructing the identity of the nation – as connected to the state – against the primordial requirement of the formation of a collective group within an environment of hostile *Others*. Thus, Schmitt saw the construction of the nation as conditioned by the fear of conflict with an external enemy, a fear which transforms the national group into a political group, whose best means of protection is through the creation of the state. Schmitt's idea may be summarised, then, as the construction of the nation against a common external enemy.

In reflecting upon these arguments, let us now cast a useful synthesis between these two theoretical approaches, and form a theoretical approach with which to define the existence of a sense of 'Britishness' as attached to the state. In achieving this task, we may raise the provision that the definition of the nation-state, or rather the 'state-nation', is constructed via the dualism of a need for collective defence against an identifiable political *Other* – a factor that is easily framed through the boundaries of the state.

However, in recognising this element, this thesis also argues that certain internal factors of cohesive mobilisation are required, in order to confer a distinct character and purpose upon the national group. In this regard, this thesis relies upon Mazzini's idea of the nation-state of *common goals*, arguing that through the prosecution of common projects, a degree of national cohesion emerges which, if congruent to the boundaries of the political community, instils a sense of national cohesion.

#### **2.4. Locating Britishness**

So far, this thesis has provided us with two themes that are useful in considering the facilitation of a sense of 'Britishness' in the United Kingdom, and its relationship to the dynamics of the



territorial constitution.<sup>278</sup> The first, as recognised in Chapter One, relates to the relatively inorganic processes which incorporated Wales, Scotland and Ireland into political union with a predominantly English-led centre.<sup>279</sup> In 1536, 1707 and 1801, we find Unions that were not the conclusion of an inevitable process, but rather the reaction to critical junctures in English politics.<sup>280</sup> Moreover, each of the Unions, while concentrating the locus of sovereignty at Westminster, failed to create a unitary state in the broader political sense of the term; instead forming a ‘State of Unions’ which allowed for certain peripheral institutions to continue, largely unaltered.<sup>281</sup> As a result, there is considerable argument that there never emerged a single definition for the political structure of the UK, and the dynamics of the territorial constitution continued to be influenced by the realisation of the UK as a State of Unions.

The second theme draws reference to the absence of a single source of identity emerging after each of the three unions. In contrast to the relatively mono-cultural, state-sponsored brands of civic nationalism employed in states such as France, we find that the UK (and its various precursory forms) maintained a distinctly multi-national character after the incorporation of each of its peripheral parts. Indeed, as noted by Nairn, the development of a sense of ‘Britishness’ attached to the UK-state emerged via a system of complex layered loyalties, whereby Britishness was ‘superimposed’ on top of – as opposed to unilaterally replacing – the older peripheral loyalties in each of its four component parts.<sup>282</sup>

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<sup>278</sup> As has been commented upon previously, the use of the term ‘United Kingdom’ must be read in its broadest application; including the Anglo-Welsh Union (1536) and the Anglo-Scottish Union (1707), each of which were precursors to the United Kingdom, but whose historical grounding laid the foundations for its eventual foundation. Reference to the United Kingdom, therefore, is used to capture the results of each of the three unions, both individually and collectively.

<sup>279</sup> See: Chapter One

<sup>280</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester: ECPR Press, 2008), p. 94

<sup>281</sup> ‘The English... were much more tolerant to their peripheries: they allowed the Scots to retain a wide range of distinctive institutions within the Union of 1707, and for long pursued a policy of benign neglect towards the Welsh and Irish. The peripheries tended to be ignored rather than actively integrated.’ Rokkan, S. and Urwin, D. W., *Economy, Territory, Identity: The Politics of West European Peripheries*, (London: Sage Publications, 1983), p. 74

<sup>282</sup> Nairn, T., *The Break-up of Britain: Crisis in Neo Nationalism*, (London: New Left Books, 1977), p. 12; Colley, L., *Britons: Forging the Nation 1707-1837*, (London: Yale University Press, 2012), p. 6

As a result, it is argued that the construction of individual identities in the UK assumed a distinctly pluralised character, with individuals maintaining a distinction in being, for example, Scottish *and* British. More broadly, David McCrone comments on how the layering of identity within the UK followed a pattern of concentric circles, ranging from local and peripheral forms of identity, whereby the individual recognised themselves as being from a particular town, shire or *nation*, through to the broader state-based and imperial context of Britishness.<sup>283</sup>

Perhaps as a result of this multi-national construction, the ability to reach a scientific definition of what constitutes ‘Britishness’ has proven relatively unachievable. Instead, we find that abstract symbols such as the monarchy, liberal democracy and the rule of law, have historically been used to define a sense of Britishness,<sup>284</sup> while also recognising its relatively undefinable character. Perhaps framed most cogently by George Orwell, Britishness is ‘a species of instinct, really a code of conduct which is understood by almost everyone, though never formulated.’<sup>285</sup>

In recent years, a number of commentators have come to recognise this abstract and flexible character as constitutive of one of the relative strengths of Britishness – and of the dynamics of the territorial constitution. Indeed, for Keating, the greatest weakness of contemporary British ‘unionism’, in response to the rise of sub-state nationalism, has been its attempts to try and reach a coherent definition on what constitutes ‘Britishness’.<sup>286</sup>

However, despite what appears to be a relative consensus against any scientific definition, this thesis argues that from an historical perspective, certain factors, events and conducive forces are able to be located, which influence individuals to place their primary political identity in

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<sup>283</sup> McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998), p. 139

<sup>284</sup> Bechhofer, F., and McCrone, D., ‘Imagining the nation: Symbols of national culture in England and Scotland’, *Ethnicities*, Vol. 13, No. 5, (2012), pp. 544-564 at 550

<sup>285</sup> Orwell, G., *England Your England*, (London: Penguin, 2017), p. 7

<sup>286</sup> Keating, M., ‘One year on from Scotland’s independence referendum: how to save the union from the unionists’, 01 October 2015, <<http://www.democraticaudit.com/2015/10/01/one-year-on-from-scotlands-independence-referendum-how-to-save-the-union-from-the-unionists/>> (Accessed: 13/07/18)

the UK state. This section of the chapter seeks to understand the tenets of Britishness as a state-based identity, as well as understanding its wider unionist dynamics, and its effects upon the territorial constitution. In developing this approach, the following argument will be separated into four frames of analysis, each of which draws on a particular tenet in the conducive form of political identity in the UK.

## **Warfare**

Perhaps the first, and by far most long sustaining understanding of the primacy of Britishness is conceived through the idea of identity as defined against an identifiable *Other*. As already noted in this thesis, the threat – and reality – of conflict with France held a distinctive symbolism in the mobilisation of unionising forces within the British Isles. Indeed, as was concluded in Chapter One, the Unions which came to form the UK had a foundation and motivation in the threat of military conflict, and the possible emergence of a hostile player within the British Isles – a largely English-led anxiety.<sup>287</sup>

In this section of the chapter, it is argued that this functional process also played a defining role in the symbolism of embodying a sense of identity and attachment to the state. In Part One of this chapter, the argument was presented that states largely emerged as the result of changes in the wider political economic environment; condensing the previous mosaic of small-scale political units into weighted Leviathans of unprecedented size and scale. Moreover, as noted in Part Two of this chapter, the functionalist arguments of Gellner and Hobsbawm, as well as the reflections of Mazzini and Schmitt, all demonstrate the idea of the nation and state as becoming yoked together as a response to wider alterations in the geopolitical landscape.

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<sup>287</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester: ECPR Press, 2008)

In the UK, we find the definition of the boundaries of the political community were well provided by the natural boundaries of the British Isles; invoking a distinct sense of unity and defiance, as well as a natural barrier against the definition of the hostile *Other*.<sup>288</sup> Indeed, it was the pre-made geographical boundaries of the British Isles that held such significance for Mazzini when he defined it as a natural theatre, requiring a unity of those peoples within its borders.<sup>289</sup>

Moreover, we find that the existence of – or threat of – conflict played a significant role in the construction of identity. From the early-modern conflicts with Spain and the United Provinces, through to the wars with France, Germany and the looming threat of war with the Soviet Union, a condition emerged which placed a premium on the importance of British *national* cohesion and action.<sup>290</sup> As noted by Colley:

‘Time and time again, war with France brought Britons, whether they hailed from Wales or Scotland or England, into confrontation with an obviously hostile Other, and encouraged them to define themselves against it.’<sup>291</sup>

Indeed, as noted by Mann, the significance of conflict during the Napoleonic Wars was such that it not only presented an obviously hostile *Other* against which to frame the need for British cohesion, but also had the practical effect of directly impacting the life of the individual; Mann estimates the Napoleonic Wars consumed between 31-43% of GNP, as well as recruiting more than 5% of the population into direct military service.<sup>292</sup> The significance of the *Other*, therefore, was not only psycho-symbolic, but also significant in the everyday lives of the

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<sup>288</sup> Colley, L., *Acts of Union and Disunion*, (London: Profile Books, 2014) p. 11-20

<sup>289</sup> Salvemini, G., *Mazzini*, trans. I. M. Rawson, (London: Jonathan Cape, 1957)

<sup>290</sup> Colley, L., ‘Does Britishness Still Matter in the Twenty-First Century – and How Much and How Well Do the Politicians Care?’, in Gamble, A., and Wright, T., (eds.) *Britishness: Perspectives on the British Question*, (Chichester: Wiley-Blackwell, 2009), pp. 21-31 at 22

<sup>291</sup> Colley, L., *Britons: Forging the Nation 1707-1837*, (London: Yale University Press, 2012), p. 6

<sup>292</sup> Mann, M., ‘The emergence of modern European nationalism’, in Hall, J. A., and Jarvie, I. C., (eds.) *Transition to Modernity*, (Cambridge: Cambridge University Press, 1992), pp. 137-166 at 153

individual, which we may presume had a significant effect in influencing the individuals construction of identity and allegiance in connection to the state.

Thus, as our first theme, we may conclude that the essence of Britishness was constructed against the weight of a common enemy, characterised by the distinction between ‘friend and enemy’ – and generally directed towards the hostile *statal Others* of continental Europe. Yet, while significant, we also find the essence of this point as distinctly lacking in substance in facilitation of a *common goal* with which to unite the national populace outside of times of conflict. In this regard, we may now turn to the additional characterisation of the political group through the identification of a common Protestantism.

### **Protestantism**

It is argued that the second tenet of Britishness relates to the personalisation of the *Other* through the boundaries of religious communion. Essentially, this thesis casts this web of identity through reference to a sense of common Protestantism, arguing that throughout the modern history of ‘Britain’ – from the 17<sup>th</sup> century onwards – a sense of common Protestantism came to form a defining characteristic of identity.

Indeed, at the time of the Anglo-Scottish Union, we find that the focus of a sense of common Protestantism was a key factor that influenced many Scots, and in particularly the Presbyterian Church in Scotland, to support political union.<sup>293</sup> As argued by Bowie, a central element to this process was the ability to define a sense of common Protestantism against an obviously hostile

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<sup>293</sup> As noted in Chapter One, it is important to recognise that while receptive of the idea of a common Protestantism, the Presbyterian Church in Scotland was only receptive of political union after its of independence as the established church in Scotland were guaranteed in the Act of Security 1706.

French (and Spanish) Catholic *Other*<sup>294</sup> – thus creating, in Schmittian terms, a clearly identifiable political community.

However, while it is important to recognise the force of Protestantism as a unionising mechanism, defined against an external threat, it is also useful to see the boundaries of this political community as being influential in creating an internal enemy or *Other*, within the territorial boundaries of the state. This thesis argues that no more so was this the case than in Ireland, whereby the disenfranchised Catholic majority became a distinct *Other* following the Reformation.

Indeed, as noted in Chapter One, we find that the effects of the Protestant Reformation in Ireland had a significant effect in alienating the Catholic majority, and in creating a sense of distinctive ‘Otherness’ between the *British* and the *Irish* – a factor which Ignatieff argues assumed a condition of ‘ethnic superiority’ following the Battle of the Boyne in 1690.<sup>295</sup>

In this regard, it may be argued that the strength of a common Protestantism held a distinct dualism in its effecting of the individual’s loyalty to the state. On the one hand, we find the idea of a common Protestantism as a unionising mechanism, defined against a common *Other*, and fostering a sense of collective identity against the potentially hostile Catholic *Others* of continental Europe (and Ireland). On the other hand, we find the wider sense of a *common goal* attached to the image of Protestantism, and broadly associated with the imagined ‘superiority’ of Protestant liberal democracy – particularly when framed in comparison with the perceived illiberalism of continental Catholic absolutism.<sup>296</sup>

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<sup>294</sup> Bowie, K., *Scottish Public Opinion and the Anglo-Scottish Union, 1699-1707*, (Woodbridge: The Boydell Press, 2007), p. 82

<sup>295</sup> ‘In Ulster, William’s triumph became a founding myth of ethnic superiority... Ulstermen’s reward, as they saw it, was permanent ascendancy over the Catholic Irish, whom they now conceived, once and for ever, as potential rebels against the British Crown.’ Ignatieff, M., *Blood and Belonging*, (London: Vintage, 2001), p. 169

<sup>296</sup> Black, J., ‘Great Britain: The confected nation state’, in Furtado, P., (ed.) *Histories of Nations*, (London: Thames & Hudson, 2017), pp. 166-173 at 167

Thus, it may be argued that through the emergence of a common Protestantism, the relatively sterile political boundaries of Britishness, as defined against the actions of warfare, became embodied with a distinct *national* cause – characterising a national project, as opposed to a simple means of collective defence.

## **Empire**

The third tenet of Britishness is to be found in the Empire. As has been touched upon in earlier sections of this thesis, the English – and later British – Empire emerged onto the world stage during the 16<sup>th</sup> century. In regards to the translatability of the Empire into fostering a system of identity attached to the state, we find its significance as falling under two headings – the functional and psychological influence of Empire on the minds of the individual in the UK, these will now be discussed below:

### *Functional Advantage of Empire*

As we have already seen illustrated at several points in this thesis, the significance of Empire was a primary factor in securing the Anglo-Scottish Union of 1707. Following the failings of the Darien expedition, and the subsequent mercantile politics employed by both sides, the economic consequences required a new form of politics. For many Scots, the subsequent Union with England was seen as a ‘marriage of convenience’, having as its *raison d’etre* the benefit of access to English markets at home and abroad, while also guaranteeing the continued administrative independence of Scotland<sup>297</sup> – an argument that similarly influenced many in Ireland to be receptive to the idea of Anglo-Irish Union in 1801.

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<sup>297</sup> McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998), p. 141

As argued by Tom Nairn, the urban centres of Wales, Scotland and Ulster all assumed roles as ‘sub-centres of the Victorian capitalist economy.’<sup>298</sup> Indeed, the ports of Glasgow, Belfast and Cardiff, amassed an equal share of Imperial trade than did the English cities of Liverpool, Bristol or London. However, while this created a weighted sense of allegiance to the state in these areas, the comparison with rural areas, dominated by a largely agrarian economy, as was particularly the case in Ireland, was such that a sense of Britishness failed to develop the same attachment to the *common goal*.

Moreover, as already noted, the failure of the Reformation to take hold in Ireland also created a situation whereby the majority Catholic population were unable to take their place under the umbrella of Britishness on account of both cultural incompatibility and state-based hostility.<sup>299</sup> These two issues may broadly be framed as the ‘industrial-agrarian divide’, itself largely following a pattern of religious distinction, with the Protestant areas of Ulster and around the Pale developing prosperous industrial areas, whereas the remainder of Ireland – being majority Catholic – remaining underdeveloped and agrarian.<sup>300</sup>

As argued by Keating, this created the condition whereby a significant proportion of the population of Ireland, outside of Ulster and the Pale, were forced to emigrate, either inside the United Kingdom, or more commonly overseas. However, despite the failure of industry to take hold in Ireland, and the subsequent weakness in a sense of Britishness being received, the

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<sup>298</sup> ‘important sub-centres of the Victorian capitalist economy, and around their great urban centres – Belfast, Cardiff and Glasgow – had evolved middle and working classes who, consciously and indisputably, gave their primary political allegiance to the imperial state.’; Nairn, T., *The Break-up of Britain: Crisis in Neo Nationalism*, (London: New Left Books, 1977), p. 12

<sup>299</sup> Nairn, T., *The Break-Up of Britain: Crisis in Neo Nationalism*, (London: New Left Books, 1977), p. 11

<sup>300</sup> ‘In Ireland, industry was largely concentrated in the north-east, which was also the area of greatest Protestant settlement, giving the dominant groups within Ulster and a section of the working class a material interest in the British link. The effect was to increase the division within Ireland while not, however, reducing the political impact of religious differences within the north.’; Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988), p. 64



effects of industry in the remainder of the periphery had an equally significant effect in helping to foster a sense of identity attached to a system of *common goals*.

More importantly, we find that the effects of Empire, and the existence of a distinct *common goal* between the component parts of the United Kingdom – Ireland of course being the exception – had a significant effect on allaying the rise of peripheral nationalism. As Paterson directs us to understand in relation to Scotland:

‘autonomy in domestic matters, and access through free trade and migration to the biggest empire the world had ever seen. For an economy based on trade, and for a middle class that had developed an excellent system of meritocratic education, these opportunities could hardly be rivalled by any alternative constitutional arrangements.’<sup>301</sup>

Thus, from a broad perspective, it is possible to frame the functional advantages of Empire as instilling a sense of national cohesion, based on the direct benefits it conferred to the individual. Under the second tenet of Empire, we will also see how the broad functional advantage of Empire was also conditioned by a perceived set of psychological benefits in the minds of the individual, linked to the wider conditioning of the global sphere.

### *Psychological and Symbolic Significance of Empire*

The second aspect of Empire in the facilitation of a sense of Britishness, relates to the psychological and symbolic significance of Empire. It is argued that through the size, scale and opportunity provided by the Empire, the individual was induced, in a relatively holistic manner, to place their primary political allegiance in the UK-state. In arguing this position, we may separate the psychological significance of Empire into two parts.

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<sup>301</sup> Paterson, L., ‘Scottish home rule: Radical break or pragmatic adjustment?’, *Regional and Federal Studies*, Vol. 8, No. 1, (1998), pp. 53-67 at 55

First, we find the definition of the territorial limits, as well as the geopolitical strength, of Empire as influencing its construction as a distinctive political community within the minds of the individual. Fundamental to this principle, it is argued that the territorial limits, and clearly defined borders of the Empire helped to define its internal ordering as a defined political community, embodying a distinct distinction between ‘friend and enemy’ on a geopolitical scale.<sup>302</sup>

Indeed, as already acknowledged in Part One of this chapter, the pursuit of overseas Empires by European states was primarily an act of geopolitical high politics, designed to ensure the strength and success of the parent state; a measure of geopolitical significance that it is argued instilled a distinct cultural affinity to the vessels of Empire within the minds of the individual.

Second, we find that the system of Empire also offered a web of psychological possibilities for the individual in framing a sense of identity through its *common goals*. Fundamental to this understanding is the reading of Empire as a positive endeavour, as well as an outlet valve on the essence of Britishness as a purely state-based identity. Indeed, as already mentioned, the essence of Empire helped to transform Britishness into an international – or rather, Imperial – context, being a further layer of identity above the state, but synonymous to the fundamental principles of the state.

‘More generally, imperialism encouraged the masses, and especially the potentially disconnected, to identify themselves with the imperial state and nation, and thus unconsciously to endow the social and political system represented by the state with justification and legitimacy.’<sup>303</sup>

Within the context of Britishness, we find this view as conditioned, on the one hand, by the pursuit of common liberal projects, for example in the British missionary efforts in Africa from

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<sup>302</sup> Mann, M., ‘The emergence of modern European nationalism’, in Hall, J. A., and Jarvie, I. C., (eds.) *Transition to Modernity*, (Cambridge: Cambridge University Press, 1992), pp. 137-166 at 151

<sup>303</sup> Hobsbawm, E., *The Age of Empire 1875-1914*, (London: Weidenfeld & Nicolson, 1987), p. 70

the mid-19<sup>th</sup> century.<sup>304</sup> On the other hand, however, we also see the wider significance of Empire as a geopolitical mechanism as embodying a sense of ‘patriotic flag waving’ within the national community – furthering the sense of collective identity and common pursuit of the imagined community.<sup>305</sup>

Fundamental to this aspect of Empire, we find that the strength of Britishness in this context was inherently connected to the strength of the Imperial sphere. On the one hand, when faced with a hostile *Other*, we find a notable increase in the identification of Britishness – defined by an allegiance to the state as the vessel best suited for collective defence against a hostile *Other*.

On the other hand, however, several historians account for the fact that the essence of Britishness was also connected to the strength of its economic markets. In explaining this account of the strength – or weakness – of Britishness, we find considerable evidence of the fact that, during periods of international peace, but of relative slow economic growth within the Imperial sphere, the salience of Britishness began to, at least marginally, decline. Indeed, as noted by Tom Devine, the salience of a sense of collective identity tied to the benefits of Imperialism began to decline in Scotland during the economic instability of the inter-war years; over a decade before the British Empire reached the height of its territorial size.<sup>306</sup>

## **Welfare**

It is now argued that the fourth tenet of Britishness relates to the emergence of the ‘Welfare State’ after 1945. As noted by McCrone, the essence of this tenet had a particular salience in the periphery, whereby the continuing economic underperformance in comparison to England

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<sup>304</sup> Hobsbawm, E., *The Age of Empire 1875-1914*, (London: Weidenfeld & Nicolson, 1987), p. 70

<sup>305</sup> Hobsbawm, E., *The Age of Empire 1875-1914*, (London: Weidenfeld & Nicolson, 1987), p. 67

<sup>306</sup> Devine, T. M., ‘The Break-Up of Britain? Scotland and the End of Empire’, *Transactions of the Royal Historical Society*, Vol. 16, (2006), pp. 163-180

meant that membership of the Union and of the Welfare State were viewed as ‘common sense’ rather than a cumbersome ‘commitment’.<sup>307</sup>

More significantly, however, is the fact of the Welfare State emerging in tandem with the decline of the British Empire; replacing the existing system of *common goals*, albeit reframed within a newly internalised perspective.<sup>308</sup> In this regard, as has already been framed in the identification of the other tenets of Britishness, the role of Welfare was not to facilitate a direct nation-building strategy but, rather, to condition an indirect source or benefit between the state and the prosperity of the individual.<sup>309</sup> It was, in essence, to give the individual a *common goal*, and the perceived understanding of that goal as facilitated by the institutional architecture of the state.

Moreover, we find any rush in the decline of Britishness after the 1960s as being mitigated by the continuing *memory* of Britain’s imperial past, as well as its place as the victorious power in the Second World War.<sup>310</sup> Moreover, the *common goals* of the Welfare State, as well as the relative weakness of economic performance, meant that from a sense of collective identity, Britishness continued to be seen as the most salient form of national allegiance, well into the second half of the 20<sup>th</sup> century. In the modern era, however, the ability for such symbols to endure is distinctly in doubt – the essence of this debate will be carried form in Chapter Three.

## Summary

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<sup>307</sup> McCrone, D., ‘Scotland Out of the Union? The Rise and Rise of the Nationalist Agenda’, *The Political Quarterly*, Vol. 83, No. 1, (January-March 2012), pp. 69-76 at 73

<sup>308</sup> Williams, F., *Social Policy, A Critical Introduction*, (Cambridge: Polity Press, 1989), p. 162

<sup>309</sup> McEwen, N., ‘State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland’, *Regional and Federal Studies*, Vol. 12, No. 1, (2002), pp. 66-90 at 86

<sup>310</sup> Nairn, T., *The Break-up of Britain: Crisis in Neo Nationalism*, (London: New Left Books, 1977), p. 13

Reflecting upon the above arguments, we find that Britishness emerged not as a constructed identity, grounded on the belief of an historical past, but rather as a constitutional or state-based identity, embodying a system of values which related directly to the actions and ideals of the state. To some extent, it is argued that this has been both its blessing and its curse. On the one hand, we find that the flexibility and relatively abstract frames of Britishness have allowed it to rest on top of the culturally defined identities of the peripheral parts of the UK – as well as the wider multiculturalism of the Empire.

On the other hand, however, its lack of concrete definition has also served as its biggest weakness, for in the contemporary age of struggles over identity, Britishness, and its predominant reliance on state-based frames of identity, has fallen fowl to the decline in the significance of the state - subsequently being matched, and to a significant extent exceeded, by the *national* identity mechanisms of the periphery.<sup>311</sup> These changes will be explored in more depth in Chapter Three, however, at this point, it is useful to translate the argument that Britishness was, and is, a system of identity and imagined communion linked inextricably to the power and common goals of the state.

## **2.5. Concluding Remarks**

In conclusion, we find that the argument in this chapter has laid forth a functionalist account of the modern state and its relationship with the political identity of its citizens. In Part One of the chapter, it was argued that the state emerged as a result of wider changes in the global political sphere which, in turn, necessitated the increase in the size and scale of the state as a means of political organisation. Part Two of the chapter extended the debate to consider as to how the political unit of the state became associated with the essence of identity of the

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<sup>311</sup> Black, J., 'Great Britain: The confected nation state', in Furtado, P., (ed.) *Histories of Nations*, (London: Thames & Hudson, 2017), pp. 166-173 at 168

individual. In this part of the chapter, a debate was undertaken on the current theories on nations and nationalism, and a synthesis drawn in favour of the nation as an imagined political community, albeit reconditioned in the British context through reference to the system of *Othering* and *common goals*, as identified in the theoretical ideas of Carl Schmitt and Giuseppe Mazzini.

More importantly, however, this chapter has demonstrated that the fundamental tenets of Britishness, being the essence of identity associated with the political unit of the United Kingdom, has been sustained through a complex system of *Others* and *common goals*, unreservedly tied to the fortunes of the state. Moreover, this chapter has also shown how the tenets of Britishness have had a significant impact upon the dynamics of the territorial constitution; helping to foster a sense of unionism and shared belonging between the component parts of the UK.

Carrying this debate forward, the next two chapters of this thesis will deal with the effects of the recent decline of Britishness as a form of state-based identity. Chapter Three will frame this through reference to the declining salience of the state within the new world order – highlighting how when framed against the new multi-level challenge to the authority of the state, the essence of Britishness has lost a degree of salience within the minds of the citizens of the UK. Chapter Four will then reframe this debate into an analysis of the effects of this rise in peripheral nationalism upon the territorial constitution itself; analysing the devolution process.

## Chapter 3

### The New World Order and Challenges to the State

The previous chapter of this thesis argued that the facilitation of a sense of ‘Britishness’ took place within a distinct geopolitical environment, in which the state was conditioned as the primary vessel for the identity and allegiance of its citizens. The debate in this chapter will reframe this analysis, drawing consideration to the recent shift in the global order, framed under the abstract rubric of ‘globalisation’. In undertaking this analysis, the debate in this chapter will focus on the substantive constitutional challenges the new world order poses to the state.

#### 3.1. Introduction

In Chapter Two of this thesis, the argument was posed that since the 16<sup>th</sup> century, the state has been ‘the alpha and omega of personal identity’.<sup>312</sup> As was demonstrated, the essence of this argument was framed against the wider geopolitical realities of the time, specifically the need for *size* and *scale* in defining the political unit in a world of closed market economics and global competition. The argument in this chapter seeks to unpick this tradition of state-based identity by drawing on the recent changes in the global sphere, and the rise of new sites of authority above and below the state. It will be argued that, as a result of these challenges, the state’s ability to continuously frame itself as the principle vessel for the political identity of its citizens has been significantly reduced.

By pursuing this line of enquiry, this chapter contributes to the central research question of this thesis by examining the wider themes that influence the devolution process in the UK. In this

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<sup>312</sup> Franck, T. M., ‘Clan and Superclan: Loyalty, Identity and Community in Law and Practice’, *The American Journal of International Law*, Vol. 90, No. 3, (July, 1996), pp. 359-383 at 360

regard, the analysis in this chapter will fall primarily upon outlining the normative changes taking place within the global sphere, and the challenges they pose to the traditional structure of the nation-state. Important for the central research question of this thesis, this chapter will also consider the direct impact of these challenges in the UK; how they have influenced the political demands of sub-state nationalist groups; and the challenges these demands pose to the structure and dynamics of the territorial constitution. In achieving these aims, this chapter will be divided into three parts.

In Part One, the essence of the debate will seek to clarify what is meant by the all-encompassing rubric of ‘globalisation’ and, more specifically, how its associated forces have come to impede upon the traditional hegemony of the state-based global order. Part Two will build upon this theme by identifying the specific constitutional challenges associated with the rising arc of globalisation; specifically, the substantive, theoretical and normative challenges to the state. In this part of the chapter, a particular premium will be placed on understanding the essence of the sub-state challenge, and its reliance on the processes and institutions associated with ‘globalisation’ in the formation of its constitutional objectives. Part Three of this chapter will then conclude with an analysis of the constitutional aims of sub-state nationalist groups in the UK and, in particular, how they have come to rely upon the structure and opportunities presented by the new world order in framing their constitutional objectives.

### **3.2. Globalisation and the New World Order**

Globalisation has become a danger word for the nation-state. Through its abstract framing, many commentators attribute the contemporary challenges to the authority of the nation-state, both functional and normative, to its processional march in the years after 1945.<sup>313</sup> Yet, while

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<sup>313</sup> Habermas, J., ‘The European Nation-State and the Pressures of Globalization’, *New Left Review*, No. 235, (May/June 1999), pp. 46-59 at 48



continually relying on its all-encompassing rubric in framing certain of the contemporary challenges to the state, few writers in the area of constitutional enquiry afford much ink to considering what globalisation amounts *to*, or indeed *how* ‘globalisation’ came to challenge the once monopolistic authority of the nation-state. Therefore, in this first part of the chapter we will pause to ask two questions. First, what *is* globalisation? And second, *how* has it assumed a normative personality which has come to challenge the operative authority of the nation-state?

Beginning with the first question, we find an initial definition of globalisation as provided by Holm and Sorensen; ‘the intensification of economic, political, social and cultural relations across borders.’<sup>314</sup> Through consultation of the wider literature, we find the corpus of this definition as reflective of the general idea of globalisation as a descriptive term, relating to a distinct change in the ordering of the global sphere.<sup>315</sup> Framed another way, we find globalisation to be a term describing not an isolated *event*, but rather a *process* of distinct events spanning an extended chronology.

For Keohane and Nye, this understanding of globalisation as a *process* was able to be explained through the ‘thickening’ of the various strands – economic, political, cultural, etc. – of globalism.<sup>316</sup> Under this reading, the multi-speed intensification of globalism is one whereby its influence comes to gradually spread across the operative and normative strands of global society; both vertically and horizontally. Yet, in order to apply this understanding to the

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<sup>314</sup> Holm, H-H., and Sorensen, G., (eds.) *Whose World Order? Uneven Globalization and the End of the Cold War*, (Oxford: Oxford University Press, 1995), p. 1

<sup>315</sup> ‘The trends that are today attracting general attention under the catch all rubric “globalization” are transforming a historical constellation characterised by the fact that the state, society, and economy are, as it were, co-executive within the same national boundaries’ Habermas, J., ‘The European Nation-State and the Pressures of Globalization’, *New Left Review*, No. 235, (May/June 1999), pp. 46-59 at 48; ‘Globalisation is understood here in a broad sense of rapidly expanding trade, investments, financial flows, travel, information and other forms of worldwide communication.’ Tonnesson, S., ‘Globalising national states’, in Guibernau, M., and Hutchinson, J., (eds.) *History and National Destiny: Ethnosymbolism and its Critics*, (Oxford: Blackwell, 2004), pp. 179-198 at 179

<sup>316</sup> Keohane, R. O., and Nye, J. S., ‘Globalization: What’s New? What’s Not? (And So What?)’, *Foreign Policy*, No. 118, (Spring 2000), pp. 104-119 at 108

concept of the state, and the challenges it faces in the new global sphere, this thesis argues that we must include a distinction of globalisation as operating in two parts:

First, we must see globalisation as a *functional* process, being the transfer of the operative capacity for effective action away from the state, and its relocation to a new global sphere of operation. Initially, we find this demonstrated in the development of certain functionalist strands within a new global sphere. For example, the first mercantile expeditions of the Spanish, Portuguese, Dutch or the British in the 16<sup>th</sup> century, and the opening up of global sea-based trade routes created a transitional and interconnected quality of globalism, whereby the actions of state geopolitics were expanded onto a global canvas.<sup>317</sup>

At this early stage, it is recognised that the control of globalism rested primarily with the state; driven within the confines of state-based Imperial expansion, as opposed to multi-lateral globalism that transcends political borders. Indeed, it is only at the point whereby this latter process occurs, and the functional element of globalism comes to evolve from the *national* market to the *global* market, that we find the functional aspect of globalisation as posing a distinct challenge to the capacity of the state to act with unfettered flexibility.<sup>318</sup>

Briefly summarised, it is argued that the initial casting of the global strands occurred within the nexus of the expansion of *national* economies and Imperial markets, which then gradually thickened to assume a cross-border relational quality, exporting its operation to outside of the *national* economy and onto the *global* sphere. Under this transition, the ability of the state to control the development of each of globalism's strands was reduced, transcending the dynamics of globalisation into an extraterritorial and international sphere.<sup>319</sup>

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<sup>317</sup> Ferguson, N., *Empire: How Britain Made the Modern World*, (London: Penguin, 2004), p. 17

<sup>318</sup> Horsman, M., and Marshall, A., *After the Nation-State: Citizens, Tribalism and the New World Disorder*, (London: Harper Collins, 1995), p. 23

<sup>319</sup> Habermas, J., 'The European Nation-State and the Pressures of Globalization', *New Left Review*, No. 235, (May/June 1999), pp. 46-59 at 48

The second aspect of globalisation is *institutional*, and concerns the reconfiguration of functional globalisation into new sites of normative authority – designed primarily for the regulation or administration of the various strands of globalism.<sup>320</sup> It is argued that these new sites of authority can take two forms. The first are bilateral or multilateral agreements between states to set up regulatory organs, or agree certain regulatory practices concerning one or more globalised strand. Under this construction, states retain the ability to dictate the reach of administrative capacity through a series of agreements. Although, the conferring of power to new sites of authority holds the possibility of – albeit voluntarily – diminishing the functional capacity of the state.<sup>321</sup>

The second, are the creation of supranational organisations to administer strands of previously state-based action, through the creation of new institutional sites of regulation, which have the ability to regulate the actions of the state – at times without the necessary consent of the state itself. Fundamentally, it is this challenge which will form the basis of the later discussion in this chapter. However, before we begin an investigation into the normative changes these challenges pose to the nation-state, we must first chart a brief chronology of the emergence of functional and institutional globalisation and its relationship to the state.

Beginning in 1815, we will chart how the ‘thickening’ of the above discussed modes of globalisation have come to interact – and interfere – with traditionally state-based practices. This part of the chapter will be composed of three chronological sub-divisions. The first, charts the emergence of bilateral forms of institutional globalisation during the 19<sup>th</sup> century. The second, looks at the expansive forms of state-based administration during ‘inter-war years’

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<sup>320</sup> The institutionalisation of the functional progression of globalisation has a distinctive lag time which, in certain circumstances, can impede upon the ability to regulate certain processes, this phenomenon is known as ‘uneven globalisation’; see, Zurn, M., ‘The Challenge of Globalization and Individualization: A View from Europe’, in Holm, H-H., and Sorensen, G., (eds.) *Whose World Order? Uneven Globalization and the End of the Cold War*, (Oxford: Oxford University Press, 1995), pp. 137-164 at 156

<sup>321</sup> Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004), p. 83

from 1918 to 1939. The third, then focusses on the rapid thickening of institutional globalisation in the post-war era, after 1945. The essential aim of this analysis is to provide the contextual bedrock for the later theoretical discussions which will consider the changes in the normative construction of the state in response to globalisation.

### **3.2.1. The Concert of Europe**

By the time of Napoleon's defeat at Waterloo in 1815, the world was on the cusp of a new age of globalisation. The international spread of European Empires had brought economic, political, cultural and indeed military interactions into a new global sphere of relations. State actors now interacted on a global canvas, from Curacao to Calcutta; New Orleans to Nagasaki; Boston to Bloemfontein. Moreover, at the deliberations to the Congress of Vienna, Europe's leaders began crafting, in its embryonic form, a new world order to govern in the wake of the Napoleonic conflict.

The resulting system, commonly known as the 'Concert of Europe', came to establish a system of state-based mediation, designed to counter the threats of future conflict. As already indicated, this new system was based largely on the operative authority of European nation-state, with the composition of the Concert system being comprised, first and foremost, of the so called 'Great Powers',<sup>322</sup> whose collective action was designed to reduce the threat of conflict; replacing the language of war with that of diplomacy.<sup>323</sup>

For the majority of the 19<sup>th</sup> century, this new system delivered on its aims. Both Europe and the wider world entered a new age of rapid expansion in the progress of functional

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<sup>322</sup> Its initial composition was made up of the victorious powers of the United Kingdom, Prussia, the Austrian Empire and Russia, although France was later allowed to enter.

<sup>323</sup> Evans, M. D., (ed.) *International Law*, (Oxford: Oxford University Press, 2010), p. 13

globalisation. Free trade – at least in part<sup>324</sup> – replaced state centred protectionism, and the threats of another major conflict were largely averted by the collective interests of the Great Powers to retain a ‘balanced equilibrium’ in the ordering of Europe.<sup>325</sup> Yet, despite the rapid thickening of functional globalisation during this period through the expansion of global capital flows, we find little progress was made in the configuring of a distinctive strand of institutional globalisation; at least in a supranational context.<sup>326</sup>

Rather, as noted by Droz, the composition of the global sphere of international relations, while questioned by some from a moral or theoretical<sup>327</sup> perspective, remained relatively unaffected in its framing of state sovereignty as its central condition.<sup>328</sup> However, in framing this view, this is not to suggest that the period of the Concert of Europe did not play a role in providing a context for the later emergence of institutional globalisation. Indeed, in the period after the Congress of Vienna, we find that the nation-states of Europe began to enter into what we may refer to as early-institutionalisation.

In 1815, a Central Commission was established to administer the free navigation of the Rhine, and another followed for the Danube in 1856. The International Telegraph Convention of 1865 established common regulations for the operation of a system of international communication,

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<sup>324</sup> The emphasis of free-trade during this period was still decidedly governed by the geopolitical interests of the states themselves; while the UK pursued a system of free trade during the mid-19<sup>th</sup> century, much of continental Europe maintained at least a degree of economic protectionism. Droz, J., *Europe Between Revolutions, 1815-1848*, (London: Fontana, 1967), p. 27

<sup>325</sup> This view is well evidenced through the geopolitical actions of states during this period, both unilaterally and multi-laterally, whereby the central emphasis was on the definition of state borders as a result of domestic political economic concerns – framed against the conditions of the global sphere – rather than as a genuine commitment to a broader doctrine of normative libertarian supranationalism. See: Alcock, A., *A Short History of Europe*, (Basingstoke: Palgrave MacMillan, 2002), p. 182-183

<sup>326</sup> Ravenhill, J., *Global Political Economy*, (Oxford: Oxford University Press, 2011), p. 9

<sup>327</sup> In this area we find a notable challenge in the liberal idealist writing of thinkers such as Henri de St. Simon, or, as identified in Chapter Two, Giuseppe Mazzini.

<sup>328</sup> Droz, J., *Europe Between Revolutions, 1815-1848*, (London: Fontana, 1967), p. 216; For a number of useful examples of the pervasive state-centric nature of international relations during this period, see: Simms, B., *Europe: The Struggle for Supremacy, 1453 to the Present*, (London: Penguin, 2014), p. 179

and the 1860 Cobden-Chevalier Treaty began a process of tariff reductions on the operation of trade between states.

Indeed, throughout this period, we find a number of emerging regional and international regulatory mechanisms, designed to transfer the traditional capacity of state-based regulation to a new regional or transnational theatre of functional regulation. Yet, as already noted, the efficacy of this shift was essentially still tied to the political reality of the state as the primary actor within the global sphere. Thus, the ultimate success of the Concert system rested upon the reactional space between states, and the need for this space to remain committed to the ideology of democratic relations – a factor that distinctly began to decline in the second half of the 19<sup>th</sup> century.

Indeed, by the time of the establishment of the Permanent Court of Arbitration in 1899, the balance of power in Europe had already assumed a path towards a future major conflict; the end point of which would be the First World War. In this regard, we find that the essential success or failure of this system was still very much in the hands of the nation-states of Europe. Ultimately, as the course of history shows us, this led to the demise of the Concert of Europe. With the formation of the German Empire in 1871, the Great Powers began to react with increasing economic protectionism and rearmament. Geo-political rivalries reemerged, as grand military alliances came to fragment the possibilities of transnational state cooperation, as states pulled up their drawbridges and took shelter behind the parapets of sovereignty and tariff barriers.

Whilst the age of the Concert of Europe may have shown rapid expansion in the facilitation of functional globalisation, the continuing practice of state-based political economy meant that the chances of functional globalisation transferring to a new global sphere of institutional

regulation was restricted.<sup>329</sup> Yet, we must not necessarily look at this age as purely negative, for a number of the institutional organs its delivered – such as the Commissions on the Navigation of the Rhine and Danube – still exist to this day. However, any further advancements in institutional globalisation had to wait for the aftermath of the First World War in order to be achieved.

### **3.2.2. Inter-War Globalisation**

The events of the First World War shocked states into an era of transition. With the creation of the League of Nations in 1920, the operation of global diplomacy attained a distinct institutional personality. While still largely dictated by the politics of the Great Powers – a legacy itself inherited from the Concert of Europe<sup>330</sup> – it is argued that the League of Nations marked a new phase in the ‘thickening’ of institutional globalisation.

Indeed, the early years of the League had a number of success stories, from the creation of the League sponsored free territories of Danzig and the Saarland, to the settlement of the territorial ownership of the Aaland Islands between Sweden and Finland. However, the legacy of state-based political economy continued through into this period, and when this began to translate into a renewed era of economic protectionism following the Great Depression of the 1930’s, the League began to founder.

The introduction of the American Smoot-Hawley Tariff in 1930 charted the way for a renewed round of economic protectionism. Moreover, the rise of reactionary nationalism in the mobilisation of fascist dictatorships in Italy and Germany, meant that the problems facing the

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<sup>329</sup> It could be argued that this new system provided an early example of institutional globalization – albeit limited to the capacity of the Great Powers and the scope of their extra-territorial projection of power.

<sup>330</sup> Armstrong, D., Farrell, T., Lambert, H., *International Law and International Relations*, (Cambridge: Cambridge University Press, 2012), p. 62

League began to stack up.<sup>331</sup> Indicatively, the Italian refusal to withdraw from Abyssinia in 1933, as well as the Japanese ignoring of League of Nations policy in relation to Manchuria, meant that the operative authority of the League was left at the mercy of its members. Perhaps the most useful understanding of the failure of the League was delivered by Winston Churchill:

‘The League did not fail because of its principles or conceptions. It failed because those principles were deserted by those states which brought it into being, because the governments of those states feared to face the facts and act while time remained.’<sup>332</sup>

Ultimately, its decline was sealed by the events of the Second World War. However, the legacy of the League of Nations was essentially a product of the times. Under intense economic and political conditions, the chance of success of the League of Nations was always a limited possibility. Though, more importantly, the failure of the League, and the triumph of the state-based system, and in particular the modernist interpretation of nation-state congruence and state sovereignty, shows that at this point, as was the case in the Concert era, the march of globalisation was still an *option*, ruled over and dictated by the state.

The enduring legacy of inter-war globalisation, therefore, was not necessarily its recasting of the global sphere, or the emergence of new sites of authority to challenge the previously monopolistic position of the state, but to lay the groundwork for its eventual emergence after the Second World War. While the legacy of the League of Nations is a fragile one, its success was one of charting untried waters in the facilitation of institutional globalisation.

### **3.2.3. Post-War Globalisation and the New World Order**

The end of the Second World War in 1945 marked a turning point in the operation of institutional globalisation. For the first time, new regulatory mechanisms emerged which

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<sup>331</sup> See: Alter, P., *Nationalism*, (London: Edward Arnold, 1989)

<sup>332</sup> Winston Churchill, ‘Something to astonish you!’, Speech delivered in Zurich, 19 September 1946, <<http://www.churchill-society-london.org.uk/astonish.html>> (Accessed: 27/10/2016)



actively sought to bind states and, more importantly, had significant repercussions for states acting contrary to the new rules-based system. The so-called Bretton Woods era in economic integration saw the creation of a World Bank, and the International Monetary Fund. Global diplomacy was enshrined in the United Nations, the matured predecessor of the League of Nations. In military matters, new international alliances and transnational security systems emerged, guaranteeing collective action for the defence of its members, and sustained under a new geopolitical reality of global hyperpowers.<sup>333</sup>

In Europe, the effects of two major World Wars also inspired a new era of integrative imaginings. In a speech delivered at in Zurich in 1946, Winston Churchill famously resurrected the liberal idealism of the previous century, declaring his support for the idea of a ‘United States of Europe’, in order to combat the effects of states acting on their own self-interests.<sup>334</sup> The establishment of the Council of Europe in 1949 was seen as the first step on the road towards European integration. Two years later, six European states established the European Coal and Steel Community (ECSC) in an attempt to collectively pool their resources in order to reduce the salience of nationalism motivated by political-economic ends.<sup>335</sup> By the 1960s, the fledgling economic agreement of the ECSC has matured into the European Community – the antecedent of the European Union.

Moreover, in the international sphere, the traditional hegemony of the European Empires began to rapidly defragment, leading to the emergence of new nation-states in Africa, Asia and the

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<sup>333</sup> The term ‘hyperpowers’ is used to describe the reality that, from the late-1940s, the ordering of the global sphere transferred from a system of ‘Great Powers’, comprising several European nation-states and their overseas empires, to a new system of ‘Hyperpowers’; reduced in number, the hyperpowers during this era are generally agreed as being the two main protagonists in the Cold War, the United States of America and the Soviet Union. See: Keating, M., and Harvey, M., ‘The Political Economy of Small European States: And Lessons For Scotland’, *National Institute Economic Review*, No. 227, (February 2014), pp. 54-66 at 55

<sup>334</sup> Winston Churchill, ‘Something to astonish you!’, Speech delivered in Zurich, 19 September 1946, <<http://www.churchill-society-london.org.uk/astonish.html>> (Accessed: 27/10/2016)

<sup>335</sup> Effectively, the logic underpinning the European Coal and Steel Community was to create a mechanism for reducing the significance of economic markets associated with *national* units; in essence, this was an attempt to divert from the original salience of political-economic factors in the formation of the state – as was identified in Chapter Two of this thesis.

Caribbean. Accompanied by the development of functional globalisation in the mobilisation of transnational economic markets and global communications media, the once hegemonic ideals of state sovereignty, at least in the European context, came to be significantly reduced; both practically and symbolically.<sup>336</sup> Globalisation had now arrived as a significant element in workings of the state system – it was no longer an *option*, but a *reality*.

In conclusion, the argument presented in this first part of the chapter has been to frame globalisation as a process. As the above arguments have shown, the essence of this process was to take place over a long chronology, characterised by a gradual ‘thickening’ of the strands of globalism, but interspaced by episodes of intense global conflict. The conclusion of this argument has been to show that the current ‘stage’ of globalisation is characterised by the emergence of new sites of authority and regulation above the state. In the next part of the chapter, we will discuss the effects of these new sites of authority on the state.

### **3.3. Challenges to the Authority of the Nation-State**

The first part of this chapter argued that the once largely functional challenge of globalisation has, in the post-war era, been joined by a new institutional challenge to the operative authority of the nation-state. Through the growth of economic, legal and political spaces at the supranational and international levels, it was argued that a number of new institutional actors and regulatory regimes have emerged which place limits on, and challenge, the operative range and capacity of the state’s functional and normative authority.

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<sup>336</sup> Walker, N., ‘Independence in an Interdependent World’, in Hassan, G., and Mitchell, J., (eds.) *After Independence*, (Edinburgh: Luath Press, 2013), pp. 21-34 at 23; Alesina, A., and Spolaore, E., *The Size of Nations*, (London: MIT Press, 2003), p. 201

The second part of this chapter will now focus on further identifying these challenges. In achieving this end, the debate in this part of the chapter will be divided into three sections, each of which relating to a specific ‘challenge’. Section One will analyse the effects of the new multi-level ordering of the global sphere through the creation of new sites of normative and regulatory authority above the state. Section Two, in building upon the substantive factors raised in Section One, will analyse the new theoretical understandings of the construction of sovereignty that have emerged in association with the multi-level challenge. Section Three will conclude this analysis by focussing on the effects of those challenges highlighted in the first two sections, and how they have come to affect the constitutional objectives pursued by sub-state nationalist groups, reframing the traditional modernist construction of nationalism into a decidedly more nuanced and globalised context.

### **3.3.1. Multi-Level**

The first challenge to the state comes by way of the structural reconfiguration of the global sphere, and the emergence of new sites of power and authority above the state. In unpacking this observation, we find that the academic literature relating to the reconfiguration of the global sphere points to three new ‘levels’ of institutionalised action which have come to challenge both the functional capacity and normative authority of the state.<sup>337</sup> These levels may be summarised as follows:

First, it is argued that the growth of supranational organisations above the state, has come to place significant restrictions on the state’s position as the primary actor within the legal and political sphere. While posing significant functional challenges to the ability of the state to act

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<sup>337</sup> Keating, M., *Nations Against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland*, (London: Routledge, 2001), p. 45-46; Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004), p. 83

independent of external interference, the central tenet of the supranational challenge must be seen as relating to its legal restructuring of the regional sphere by creating new sites of normative legal authority above the state.

In the context of this thesis, the essence of this challenge is perhaps best referenced in the example of the European Union which, through an increasingly voluminous catalogue of conferred member-state authority, has come to challenge the normative position of the state as the final and undisputable source of legal authority. In the UK, we find useful evidence of this fact through the principled case of *Factortame*, as well as the wider obligations ratified in the Maastricht and Lisbon Treaties – each of which reconfirmed the supremacy of ‘European Union Law’ in areas of transferred competence.<sup>338</sup> Perhaps the best illustration of the general nature of this challenge comes through the text of the landmark European Court of Justice case of *Costa v ENEL*:

‘By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nations and themselves.’<sup>339</sup>

In unpacking this quote, we may conclude the essence of the challenge placed by supranational regimes as significant for two reasons. First, are the direct normative repercussions of the transfer of legal authority to the supranational level; challenging the traditional Westphalian construction of sovereignty as a mutually exclusive and indivisible doctrine, exercisable between states. Second, and perhaps more significantly, is the fact that this transfer of competences to the supranational level has taken place – at least initially – as a voluntary action,

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<sup>338</sup> Craig, P., ‘Britain in the European Union’, in Jowell, J., and Oliver, D., (eds.) *The Changing Constitution*, 7<sup>th</sup> Ed. (Oxford: Oxford University Press, 2011), pp. 102-131

<sup>339</sup> *Flaminio Costa v ENEL* [1964] Case 6/64, ECR 585

instigated by the state.<sup>340</sup> Indeed, while we find that the thickening of functional globalisation has emerged as a largely involuntary – and relatively uncontrollable – action, the thickening of institutional globalisation, in particular at the supranational level, has been a voluntary action, whereby states transfer measures of previously exercisable legal competence to the new supranational level.

Second, in addition to the new supranational level, we also find the emergence of new global regulatory regimes within a number of areas of previously state-based functionality. While it is recognised that this challenge does not necessarily pose the same legal restrictions on the state as acknowledged in the emergence of supranational regimes, it is argued that the new organisations operating within the transnational sphere have had an equally significant effect on the political capacity of the state.<sup>341</sup>

Perhaps the most telling example of this phenomenon can be found in the globalisation of economic markets. As argued by Habermas, through the acceleration of world-wide capital flows and the increasingly interlinked nature of economic markets, the once monopolistic position of the state has been reserved; ‘Today, it is rather states which are embedded within markets than national economies which are embedded within the boundaries of states.’<sup>342</sup>

On this point, we find the essence of this challenge as assuming an additional significance, for as well as challenging the functional capacity of the state, the globalisation of economic markets has also come to remove the state’s ability to frame itself as the most viable vessel for the facilitation and protection of ‘national’ economic interests.<sup>343</sup>

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<sup>340</sup> Grinin, L., ‘Toward a New World Order? New Foundations of International System or Why do States lose their sovereignty in the age of globalization?’, *Journal of Globalization Studies*, Vol. 3, No. 1, (May 2012), pp. 3-38

<sup>341</sup> Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004), p. 83

<sup>342</sup> Habermas, J., ‘The European Nation-State and the Pressures of Globalization’, *New Left Review*, No. 235, (May/June 1999), pp. 46-59 at 48

<sup>343</sup> Strange, S., *The Retreat of the State*, (Cambridge: Cambridge University Press, 1996), p. 13-14

Rather, in a world whereby the facilitation of economic markets and security systems is increasingly transferred – at least in part – to new international organisations such as the World Trade Organisation, NATO, or the United Nations, we find that the *viable*<sup>344</sup> size of the state has subsequently decreased.<sup>345</sup> When read in connection with the supranational challenge, we now find that the previous economic, military or political barriers to the independence of many *stateless nations*<sup>346</sup> has been removed by a protective umbrella of size and scale offered by the new supranational and international organisations such as the EU, UN, WTO or NATO. Thomas Franck summarised this position as follows;

‘New regional or global economies of scale, unlimited access to capital and consumer markets, and similar objectives have become attainable through modern international systematic innovations... By-passing states, these deliver the *blessings of scale*, and thereby inadvertently make it far less risky for Quebec to secede from Canada, or Scotland from Britain. Similarly, the benefits of military scale in many places now are seen as conferred quite adequately by the Security Council or NATO, making a continued reliance on the nineteenth-century state unnecessary.’<sup>347</sup>

In reflecting upon Franck’s statement, we are now led to consider the third element of the multi-level challenge to the state – the sub-state. Fundamentally, this challenge is one motivated by the rise of peripheral nationalisms in a number of Western multi-national states.<sup>348</sup> The central principle of this challenge can essentially be seen as residing in the groundwork of globalisation. Through the declining salience of the state, the reduced importance of *national*

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<sup>344</sup> As argued in Chapter Two, the essence of the imagined ‘viability’ of the size of the state relates more to the external geopolitical environment in which the state finds itself, as opposed to the functional reality that size and scale has a necessary positive impact upon the economic prosperity of the state. Thus, the current trend in the declining emphasis of size and scale in dictating the ‘viability’ of smaller states is essentially motivated by a change in the geopolitical environment, as opposed to a sudden realisation of a system of *Kleinstaaterei* as suddenly being a positive condition. This emphasises the distinct reactionary element with the wider geopolitical community in dictating the size of the state.

<sup>345</sup> Keating, M., and Harvey, M., ‘The Political Economy of Small European States: And Lessons For Scotland’ *National Institute Economic Review*, No. 227, (February 2014), pp. 54-66 at 55

<sup>346</sup> David McCrone uses this title to describe politically conscious national communities within multi-national states seeking autonomy or independence from the parent state. McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998)

<sup>347</sup> Franck, T. M., *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995), p.143 (Italicisation added)

<sup>348</sup> The term ‘multi-national state’ is used to describe traditional nation-states such as the UK or Spain, whereby the construction of identity is divided between a single ‘state-based’ identity, and two or more sub-state ‘national’ identities (e.g. Scottish, Welsh, Basque, Catalan).

borders, the increasing diffusion of national economic markets, and the creation of military protection systems above the state, the ability of the state to command the political allegiance of its citizens has declined.

Benedict Anderson described this process as the impending ‘crisis of the hyphen’, whereby the traditional modernist understanding of nationalism, as a method seeking congruency between nation and state, has been reworked by the emergence of portable identities framed against the continuously evolving tapestry of globalisation.<sup>349</sup> Explanatively, this new convex nationalism may be viewed as a systematic response to the new multi-level configuration of the global sphere of authority and action. Through what Michael Lynch has termed the ‘external support systems’<sup>350</sup> offered by the new supranational and translational regimes, sub-state nationalist groups have been remobilised to think of independence beneath the umbrella of multi-level institutional protection systems.<sup>351</sup>

Yet, pausing to reflect upon this argument, we find that this identification of the opportunistic nature of sub-state nationalism as relying on external support systems is not a new phenomenon. Indeed, as shown in Chapter One, during the early-20<sup>th</sup> century, sub-state nationalist groups in Scotland, Wales and Ireland each held aspirations for independence and autonomy under the politico-economic umbrella of the British Empire.<sup>352</sup>

In this regard, the correct identification of this new challenge must be understood not on the basis of ‘external support systems’ per se, but on basis that the new locus of authority in contemporary external support systems is detached from the traditional authority of the state – inhabiting the new ‘third layer’ in the multi-level order, as provided by the new supranational

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<sup>349</sup> Anderson, B., ‘Introduction’, in Balakrishnan, G., (ed.) *Mapping the Nation*, (London: Verso, 2012), p. 8-9

<sup>350</sup> Lynch, M., *Minority Nationalism and European Integration*, (Cardiff: University of Wales Press, 1996), p. 15

<sup>351</sup> Keating, M., and McGarry, J., (eds.) *Minority Nationalism and the Changing International Order*, (Oxford: Oxford University Press, 2001), p. 4

<sup>352</sup> This will be discussed in more detail in the final part of this chapter.

and transnational regimes. Reflectively, we may attribute the essence of this multi-level challenge as having two distinct effects upon the state:

First, under the distinct transactional and interconnected construction of the multi-level challenge, the state is now sandwiched between new sites of normative authority, both above and below its traditional position. While David McCrone reminds us that it is facile to associate this phenomenon with the relative death of the state,<sup>353</sup> it is necessary to see the position of the state as having at least been reworked. Indeed, under the multi-level challenge, we find that many states have lost the ability to monopolise power within a distinctive unitary territorial frame<sup>354</sup> – playing now only a *part* as opposed to a *leading role* in the lives of its citizens.<sup>355</sup>

Second, we find that through the essence of this sandwiching of the state between new levels of functional and normative authority, its traditional ability to frame itself as the vessel best suited to catch the political identity of its citizens has declined.<sup>356</sup> Rather, under the new multi-level ordering, the state is now seen as ‘first amongst equals’, and is no longer automatically assumed as the primary vessel for the political allegiance of its citizens.<sup>357</sup>

Correspondingly, in reference back to the argument presented in Chapter Two, we find that under this new umbrella of transnational security organisations, and free-trading economic markets, the traditional symbols of *Othering* and *common goals* that sustained state-based identities have declined. Indeed, taking Britishness as our example, we find that under the reconfigured composition of the European sphere, as well as the institutional reality of

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<sup>353</sup> McCrone, D., ‘Neo-Nationalism in Stateless Nations’, *Scottish Affairs*, Vol. 37, No. 1, (2001), pp. 3-13 at 11

<sup>354</sup> Wright, A., *Who Governs Scotland?*, (London: Routledge, 2005), p. 131

<sup>355</sup> Jeffery, C., ‘Devolution, Britishness and the Future of the Union’, in Gamble, A., and Wright, T., (eds.) *Britishness: Perspectives on the British Question*, (Oxford: Wiley, 2009), pp. 112-121 at 114

<sup>356</sup> Nagel, K-J., ‘Transcending the National/Asserting the National: How Stateless Nations like Scotland, Wales and Catalonia React to European Integration’, *Australian Journal of Politics and History*, Vol. 50, No. 1, (2004), pp. 57-74 at 72

<sup>357</sup> ‘It [European integration] undermines the traditional identity among sovereignty, territory, nationality, and function that is the essence of the traditional nation-state and opens the way to other conceptions of political authority and public action’, see; Keating, M., ‘European Integration and the Nationalities Question’, *Politics and Society*, Vol. 32, No. 3, (September 2004), pp. 367-388 at 368



devolution *within* the UK, the traditional symbols of Britishness, embodied through systems of *common goals*, have been diluted – leaving a distinct ‘hole’ in the psyche of Britishness.<sup>358</sup>

In this regard, we find that under the rubric of globalisation, it is no longer the case that the ordering of authority and identity are held as conterminous with the boundaries of the state, but are now increasingly spread across new horizontal and vertical axis of reconfigured power and authority. Reflective of this, the next section of this chapter will now consult the theoretical and normative effects that this change has had on the locus of sovereignty, and its connection with the state.

### 3.3.2. New Theoretical Understandings of Sovereignty

The second challenge to the state relates to the theoretical reinterpretations of the construction of sovereignty. The Westphalian idea of sovereignty assumes the unitary, absolute, supreme and indivisible concentration of power within the state.<sup>359</sup> From the writings of Jean Bodin and Thomas Hobbes in the 17<sup>th</sup> century, the construction of this doctrine became associated with the idea of a *common power*, able to exercise authority on behalf of the nation as a whole; being the undisputed and final source of authority within the territorial structure of the state.<sup>360</sup>

As outlined in Chapter One, in the context of the UK, the reality of this doctrine had by the late-18<sup>th</sup> century, become vested in the idea of the legislative supremacy of the Crown in Parliament, having: ‘[the] right to make or unmake any law’, with ‘no person or body... having

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<sup>358</sup> Gamble, A., ‘The Constitutional Revolution in the United Kingdom’, *Publius*, Vol. 36, No. 1, (2006), pp. 19-35 at 26

<sup>359</sup> Hoffman, J., *Sovereignty*, (Buckingham: Open University Press, 1998), p. 32; Bellamy, R., ‘Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU’, in Walker, N., (ed.) *Sovereignty in Transition*, (Oxford: Hart, 2003), pp.167-189 at 175

<sup>360</sup> See; Hobbes, T., *Leviathan*, (Oxford: Oxford University Press, 2008), p. 90, 112; Bodin, J., *On Sovereignty*, (Cambridge: Cambridge University Press, 1992), p. 1-4

a right to override or set aside the legislation of Parliament.’<sup>361</sup> Moreover, while considerable administrative independence continued in certain parts of the UK, it was conditioned by the overarching legal interpretation of the UK as a unitary state – with the UK Parliament as the final and indivisible source of legislative authority.

The endurance of this doctrine remained relatively unchallenged into the first half of the 20<sup>th</sup> century. However, following the broad changes within the international system after the Second World War, as documented above, and in particular as a result of the distinct normative challenges posed by new sites of legal authority above the traditional level of the state, a number of reappraisals began to emerge, challenging the traditional concept of the state as the single and indivisible source of power and authority. Primarily, such reappraisals were the pursuit of political scientists,<sup>362</sup> although after the realities of the *Factortame* case, and the UK’s ratification of the Maastricht Treaty in 1993, a similar branch of theoretical legal enquiry emerged, challenging the traditional Westphalian relationship between sovereignty and the state.<sup>363</sup>

Significant in these new appraisals is their identification of sovereignty as both a political and legal concept; respectively framed by a distinction between the functional capacity to act, and the competent authority to demand obedience.<sup>364</sup> To some extent, this new approach is reflective of the realities of constitutional theory as inhabiting an interdisciplinary nexus between law and political science. Although, more significantly, it may also be explained by

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<sup>361</sup> Dicey, A. V., *Introduction to the Study of the Law of the Constitution*, 8<sup>th</sup>., (Indianapolis: Liberty Press, 1982), p. 3-4

<sup>362</sup> ‘Legal scholars will often insist that sovereignty is a normative legal concept and that it is not made redundant by the fact that sovereign entities may not actually have any power. Political scientists, on the other hand, would argue that, if sovereignty and power are completely dissociated, then the former becomes an empty concept of little use in constitution-making.’ Keating, M., ‘Rethinking Sovereignty: Independence-Lite, Devolution-Max and National Accommodation’, *REAF*, No. 16, (October, 2012), pp. 9-29 at 12

<sup>363</sup> For a useful overview of the legal challenges posed by membership of the European Union, see: Craig, P., ‘Britain in the European Union’, in Jowell, J., and Oliver, D., (eds.) *The Changing Constitution*, 7<sup>th</sup> Ed., (Oxford: Oxford University Press, 2011), pp. 102-131

<sup>364</sup> Loughlin, M., *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), p. 84; Jaklic, K., *Constitutional Pluralism in the EU*, (Oxford: Oxford University Press, 2014), p. 17

the increased understanding of sovereignty as having a distinct *relational* quality; illustrative of a balance between practical reality and normative theory.<sup>365</sup>

In documenting the essence of these new challenges to the theoretical understanding of sovereignty, we find a fruitful vein of discussion through the contributions made by two writers in the field of constitutional theory; Neil MacCormick and Neil Walker.

### *Post-Sovereignty*

The first theoretical reappraisal of sovereignty came by way of Neil MacCormick's design of 'post-sovereignty'. Before beginning our analysis of this theory, it is beneficial to first outline two points of contextual information. First, is the political undertone of MacCormick's theoretical reappraisal of sovereignty; motivated both by MacCormick's own politics, being a former member and MEP for the Scottish National Party, but also a wider recognition of the arguments in Scottish constitutional history that reject a purely unitary interpretation of sovereignty.<sup>366</sup> Second, and perhaps as a reflection of the first point, is the character of MacCormick's theory as a *proposed* direction, as opposed to a theoretical reflection of a constitutional reality.<sup>367</sup>

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<sup>365</sup> Interestingly, while a legal interpretation of devolution sees normative authority remain at Westminster, many have now come to consider the fact that the devolved legislatures may have a constitutional veto on the amendment of their legislative authority, due to the relocation of political capacity – itself transferred in large measure through the referendums that led to the 1998 devolution settlements. However, in making this connection, it is important to see the distinct 'territorial' frames of these arguments, separated between the perspectives of the UK Government and the Devolved Administrations. See; Gamble, A., 'The Constitutional Revolution in the United Kingdom', *Publius*, Vol. 36, No. 1, (2006), pp. 19-35; Elliott, M., 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective', in Jowell, J., Oliver, D., O'Conneide, C., (eds.) *The Changing Constitution*, 8<sup>th</sup> Ed., (Oxford: Oxford University Press, 2015), pp. 38-66 at 43-44

<sup>366</sup> MacCormick, N., 'Is There a Constitutional Path to Scottish Independence?', *Parliamentary Affairs*, Vol. 53, (2000), pp. 721-736

<sup>367</sup> Jaklic, K., *Constitutional Pluralism in the EU*, (Oxford: Oxford University Press, 2014), p. 25

Indeed, we find the essence of MacCormick's approach, while recognising the distinct challenges posed by the multi-level system, as also pursuing the political agenda of illustrating a path towards Scottish independence, disassociated from the traditional modernist identification of independence as conterminous with the attainment of sovereignty.<sup>368</sup>

In constructing this view, MacCormick began by recognising sovereignty as being at a crossroads within the new multi-level order of the European sphere. Initially, MacCormick addressed this by analysing the possibilities of sovereignty as transitioning within its existing bonds, as a unitary and indivisible source of legal authority: 'Either we are fated to go forward to a situation in which there is a massively centralised European Community which takes over the dominant place in legal imagination.'<sup>369</sup> Or '[we] go back to a European order of fully sovereign states, with no links stronger than those of treaties which bind only *rebus sic stantibus*.'<sup>370</sup>

Through his recognition of the nature of sovereignty as being at a crossroads, we find that MacCormick had already greeted the fact that the global order had moved 'beyond the sovereign state.'<sup>371</sup> Indeed, writing in 1999, MacCormick declared his perspective on the status of the sovereign state within the European Community to be as follows:

'... it is clear that absolute or unitary sovereign is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any member state in possession of ultimate power over its own internal affairs. Politically, the Community affects vital interests, and hence exercises political power on some matters over member states. Legally, Community legislation binds member states and overrides internal state-law within the respective criteria of validity. So the states are no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty.'<sup>372</sup>

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<sup>368</sup> MacCormick, N., *Questioning Sovereignty*, (Oxford: Oxford University Press, 2008), p. 134-135

<sup>369</sup> MacCormick, N., 'Beyond the Sovereign State', *Modern Law Review*, Vol. 56, No. 1, (January 1993), pp. 1-18 at 17

<sup>370</sup> *Ibid.*, at 17

<sup>371</sup> *Ibid.*, at 18

<sup>372</sup> MacCormick, N., *Questioning Sovereignty*, (Oxford: Oxford University Press, 2008), p. 132

In unpacking this critique, we find that MacCormick acknowledged the new multi-level nature of the globalising world – witnessed particularly in Europe – as having created a new space for political thought and action, based on the rhetoric of ‘divided sovereignty’.<sup>373</sup> On this basis, the essence of MacCormick’s political argument advocated for the theoretical proposition of a departure from the vertical framing of sovereignty, advocating instead for a move towards a new horizontal or *lateral* frame:

‘So what about a sideways move? Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which for most purposes, can operate without serious mutual conflict in areas of overlap?’<sup>374</sup>

In explaining MacCormick’s approach to advocating for a final move beyond the sovereign state, we can identify two points of contextual clarification. First, was MacCormick’s political position, that in order to be effective Scottish nationalism must pursue a constitutional path associated more with a pluralised design of independence within the broader European sphere, and relying upon the external support systems offered by the supranational level.

Second, was the practical reality of the events taking place within the sphere of the European Community. Most notably, this was associated with the doctrine of subsidiarity which emerged following the Maastricht Treaty, and which gained considerable traction in the 1990’s through the creation of the European Committee of the Regions – the idea of a transformative Europe of the Regions, based on a move beyond state-based intergovernmentalism – a scenario that was, for a time, distinctly welcomed by the Scottish National Party.<sup>375</sup> MacCormick framed what he saw as the benefits of this approach as follows:

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<sup>373</sup> *Ibid.*, p. 133; For a broader discussion on this topic, see: Keating, M., ‘Plurinational Democracy in a Post-Sovereign Order’, *Northern Ireland Legal Quarterly*, Vol. 53, No. 4, (2002), pp. 351-365

<sup>374</sup> MacCormick, N., ‘Beyond the Sovereign State’, *Modern Law Review*, Vol. 56, No. 1, (January 1993), pp. 1-18 at 17

<sup>375</sup> See Part Three of this chapter for more detail on the substance of the SNP’s constitutional objectives.

‘The doctrine of subsidiarity requires decision-making to be distributed to the most appropriate level. In that context, the best democracy – and the best interpretation of popular sovereignty is one that insists on levels of democracy appropriate to levels of decision-making. And the tendency to over-centralize at the level of member states is as much to be countered as is any over-centralization towards Brussels. The demise of sovereignty in its classical sense truly opens opportunities for subsidiarity and democracy as essential mutual complements. It suggests a radical hostility to any merely monolithic democracy.’<sup>376</sup>

Thus, in summarising MacCormick’s argument for post-sovereignty, we see its operation as advocating not for the destruction of sovereignty as a principle, but rather, the reinterpretation of sovereignty as reconfigured from the traditional understanding of absolute, unitary and supreme authority. MacCormick saw the possibilities for a new institutionalised dynamic to emerge in which authority – and *sovereignty* – was divided between a collection of mutually exclusive actors, framed on a horizontal axis, and upon which the exercise of power is dictated not by allegiance to a single ultimate authority but, rather, by the overlapping and interconnected dynamic of shared competence.

As already noted, MacCormick’s theory was essentially a reflection of political ambition as opposed to a practical reality. However, the overarching essence of MacCormick’s approach, and its ability to rely upon the active mechanisms of the European Community, was nonetheless indicative of the reality of the influence of the new multi-level system on the design of sovereignty.

### *Late Sovereignty*

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<sup>376</sup> MacCormick, N., *Questioning Sovereignty*, (Oxford: Oxford University Press, 2008), p. 135

A counter prefixal interpretation for the recalibrated framing of sovereignty is provided by MacCormick's successor as Regius Professor of Public Law and the Law of Nature and Nations at Edinburgh, Neil Walker.<sup>377</sup>

For Walker, the processes of globalisation and constitutional pluralism have led to a transition into what he terms a 'post-Westphalian' age.<sup>378</sup> However, unlike MacCormick, Walker stops short of any proposals for a move *beyond* sovereignty as a doctrine of ultimate and final authority but, rather, focusses his theory on the continuing transformative nature of debates surrounding sovereignty. In this regard, Walker uses the term *late-sovereignty* to both recognise the new multi-level political order, as well as the continued validity of sovereignty in the language of constitutional action.<sup>379</sup>

On this point, Walker identified three fundamental tenets of *late-sovereignty*. First, there is the *continuity* of sovereignty within the language of European integration.<sup>380</sup> Through the creation of a new European legal order, a system of norms continue which rely on the operation of 'sovereignty' as a doctrine of ultimate authority.<sup>381</sup> Second, Walker defined the *distinctive* phase of sovereignty within the European Union.<sup>382</sup> Essentially, this acknowledges the new multi-level framing of the term, and its nature as being transferred to a number of new sites of authority. Third, Walker goes against MacCormick's understanding of the possibility for a reversion back to the polycentric sovereign state by suggesting the *irreversibility* of the current

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<sup>377</sup> A notable similarity to Walker's approach can be found in the work of Michael Keating – although, rather confusingly, while agreeing with Walker's late-sovereignty, Keating frames his theory under the title 'post-sovereignty'; 'In my usage, post-sovereignty does not mean the end of all principles of authority. Rather it means that sovereignty is dispersed and divided. Walker's term "late-sovereignty" captures much the same idea, referred to the existence of multiple sources of legal order, without hierarchy and not reducible to a single principle.' Keating, M. 'Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era' (Oxford: Oxford University Press, 2001) p. 27

<sup>378</sup> Walker, N. 'Late Sovereignty in the European Union', in Walker, N., (ed.) *Sovereignty in Transition: Essays in European Law*, (Oxford: Hart, 2006), pp. 3-32  
at 10

<sup>379</sup> *Ibid.*, at 19

<sup>380</sup> *Ibid.*, at 19

<sup>381</sup> *Ibid.*, at 21

<sup>382</sup> *Ibid.*, at 19

phase of transition in the operative application of the term<sup>383</sup> – essentially, this was a reference to the acknowledgement of globalisation as an expansive phenomenon, and the presumption of its continued ‘thickening’ within the global sphere.

On this point, Walker identified that under the contemporary forces of globalisation, there is little scope for a return to the world of ‘early-sovereignty’, associated with the construction of Westphalian absolutism:

‘The dynamic of globalisation, and of the response to globalisation through the formation of non-state polities, continues inexorably to unfold. The challenge of multinational capital, of global communications and of free movement of goods, services, persons and capital is beyond the regulatory grasp of the state, and the grant of regulatory authority to non-state polities cannot, except through the most obtusely state-reassertive perspective, be seen as a holding measure until states reassert their hegemony, but rather as a process of reallocation of regulatory authority which guarantees that states will never re-establish their hegemony.’<sup>384</sup>

Such an approach coincides with the work of Leonid Grinin, who outlines that the presumptive effects of the ‘new world order’, marked under the rubric of ‘globalisation’, has the implied effect of breaking the traditional world order, and with it the association of sovereignty as vested within a purely unitary and indivisible form.<sup>385</sup> Translating this effect into a theoretical equation with regards to sovereignty, we may say that in response to the increasing interconnectedness of globalisation, states are no longer either required to be – or are capable of being – the sole masters of their sovereign destiny; in at least political if not strict legal terms.

Illustrative of this account, we find that the process of the United Kingdom’s departure from the European Union shows that even in the event of a ‘hard Brexit’, the UK would continue to dictate its international trading policies in line with those dictated by the World Trade

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<sup>383</sup> *Ibid.*, at 19

<sup>384</sup> *Ibid.*, at 24

<sup>385</sup> Grinin, L., ‘Toward a New World Order? New Foundations of International System or Why do States lose their sovereignty in the age of globalization?’, *Journal of Globalization Studies*, Vol. 3, No. 1, (May 2012), pp. 3-38 at 8



Organisation, as well as implementing the majority of European legislation into UK law in order to facilitate continued relations with the supranational bloc.<sup>386</sup> Thus, we find that the road back to the Westphalian construction of sovereignty is – despite the political rhetoric<sup>387</sup> – highly unlikely, at least in a practical sense of the term as separate from the theoretical construction of final authority.

Indeed, in refocussing the debate back to Walker’s late-sovereignty, we find that as a fourth point, Walker marks the *transformative potential* of sovereignty as it enters its final stage.<sup>388</sup> For Walker, the transformative potential is at present, still inconclusive as to the future direction of sovereignty. As observed by Jaklic, Walker bases his theory on the continued understanding of foundational sovereignty – essentially the construction of epistemic pluralism through procedural concessions which, in theory, are able to be repealed by states.<sup>389</sup> Thus, Walker sees the continued validity of sovereignty as a construction of final authority within a field of identifiable legal norms. Explanatively, the claims to ‘sovereignty’ made by the European Union have the transformative effect of creating a new legal order which is bound by its own legal norms – separate from those made by the member states.

Yet, we must understand this as a bilateral system of norms. On the one hand, the new European legal system has the capacity to claim authority over its member states, and to create a new system of legal norms, constituting a new legal order. On the other hand, however, the territorial remit of the legal order is dependent upon the pooled sovereignty of its member

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<sup>386</sup> This reality has been framed by some commentators as a ‘Hotel California’ scenario; whereby you can necessarily formally ‘check-out’ of membership of the supranational order, but you can never fully ‘leave’ from the perspective of functional interdependence. Princeton Alumni Weekly, ‘Brexit: Welcome, Britain, to the Hotel California’, 14 September 2016, <<https://paw.princeton.edu/article/brexit-welcome-britain-hotel-california>> (Accessed: 17/01/18)

<sup>387</sup> Ichijo, A., ‘Sovereignty and Nationalism in the Twenty-first Century: The Scottish Case’, *Ethnopolitics*, Vol. 8, No. 2, (2009), pp. 155-172

<sup>388</sup> Walker, N., ‘Late Sovereignty in the European Union’, in Walker, N., (ed.) *Sovereignty in Transition: Essays in European Law*, (Oxford: Hart, 2006), pp. 3-32 at 19

<sup>389</sup> Jaklic, K., *Constitutional Pluralism in the EU*, (Oxford: Oxford University Press, 2014), p. 24

states, and so is capable of varying in size and scope should a member state leave the European Union – as is likely to be the case under the UKs withdrawal from the EU.

Thus, Walker’s claim is essentially one of defining the new supranational legal systems as having received actionable sovereignty from their member states, but which hold such authority on trust, remaining dependent upon the foundational sovereignty of its member states. Speculatively, therefore, it may be presumed that Walker could foresee a return to the Westphalian system of ultimate authority, but only under the practical reality of the new globalised system – or rather the reversal of globalisation – the chances of which are highly unlikely.

Therefore, we find late-sovereignty as claiming sovereignty as being reworked into a partially divided context, although its theoretical basis remains anchored in the overarching claim to state-based foundational sovereignty. In this regard, we find sound deviation from the possibility of post-sovereignty in which the state would no longer be the sole possessor of foundational sovereignty, but would rather be one of several units on a new horizontal construction of divided authority.

Thus, in conclusion on this debate, we find that despite the fundamental division in the *reach* of the transformative potential of sovereignty, MacCormick and Walker both agree that sovereignty – at least in its aspect of functional capacity – has moved beyond the solely unitary construction of the nation-state. However, they disagree on the basis of its future development; Walker holds that sovereignty is likely to remain on an – albeit reworked – vertical construction, whereas MacCormick saw the possibility for sovereignty to move to a new horizontal ordering of divided ultimate authority.

This thesis tends to agree with the former view, arguing that while the new world order has distinctly called sovereignty into question the locus of sovereignty as a unitary, supreme and

indivisible concept, there remains little evidence to suggest that it has moved *beyond* its construction as a doctrine of ultimate authority. Indeed, while reduced in salience, we find that the concept of the sovereign state still forms the benchmark, both of political allegiance, but also political and legal action.

### **3.3.3. The Challenge of Neo-Nationalism**

The third challenge to the state relates to the reconfigured constitutional objectives of sub-state nationalism groups. Framed by some as ‘neo-nationalism’,<sup>390</sup> the essence of this challenge relates to the junctures of contemporary sub-state nationalism in rejecting the traditional modernist ambition of nationalism as seeking congruency between nation and state. Rather, under the refurbished brand of neo-nationalism, we find the constitutional ambitions of sub-state nationalist groups as being distinctly more nuanced and, as highlighted previously in this chapter, influenced by the new multi-level construction of the global sphere.

Central to this reconfigured character, we find the new understandings of sovereignty, and in particular the ideas that under the reduced salience of the state within the multi-level sphere, the ability – or need – to seek full sovereign independence is no longer required. Instead, we find sub-state nationalist groups as seeking distinct and qualified forms of autonomy *within* the state, or independence *under* the supranational level.

Indeed, for Rokkan and Urwin, by translating the aims of sub-state nationalist groups onto a seven tier ‘pyramid of peripheral aims’ – only the upper most stratum pertains to the desire for the ‘full independence’ of the nationalist group.<sup>391</sup> Moreover, when sub-state nationalist groups

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<sup>390</sup> Nairn, T., *The Break-up of Britain: Crisis in Neo-Nationalism*, (London: New Left Books, 1977); McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998)

<sup>391</sup> Rokkan, S., and Urwin, D. W., *Economy, Territory, Identity: Politics of West European Peripheries*, (London: Sage, 1983), p. 141

do in fact pursue policies of *independence*, an examination of their wider political manifesto highlights agendas which are often far from *separatist* – at least in the traditional Westphalian sense of the term.<sup>392</sup>

With this in mind, many observers of contemporary sub-state nationalism have come to recognise and reframe its aims as interconnected to the wider shifts in the global order – as documented in the previous two challenges. Fundamental in this distinction have been two key elements in the reframed ambitions of sub-state nationalist groups:

First, we find that sub-state nationalist groups place an increased reliance upon the new third level in the global sphere when framing demands for self-government. Termed by David McCrone as the ‘variable geometry of power’, we find the essential characteristics of such neo-nationalist demands are connected to the new context of the global frame. Understandings of unitary sovereignty have been reinterpreted into new diverse conditions of independence ‘*in*’ the supra-state.<sup>393</sup> On this note, David McCrone provides a range of characteristics of the neo-nationalist sub-state group, three of which deserve direct quotation:

- ‘*Multiple national identities are a feature of political identity*, rather than a monocultural one. Hence, Scots are also British, Catalans are also Spanish, and Quebecois are also Canadian, when it suits them. This plurality is a political resource which can be played in appropriate circumstances rather than a fixed characteristic.
- There is *ambiguity about their aims*. Are they seeking independence or autonomy? Ambivalent terms are used in political debate such as ‘*Home Rule*’, ‘*Autonomisme*’, ‘*Souverainete-Association*’ or ‘*Consociation*’.

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<sup>392</sup> Tierney, S., ‘Sub-State Nations and Strong States: The Accommodation Impasse?’, in Tierney, S., (ed.) *Nationalism and Globalisation*, (Oxford: Hart, 2015), pp. 55-72 at 57

<sup>393</sup> Elias, A., *Minority Nationalist Parties and European Integration: A Comparative Study*, (London: Routledge, 2009)

- The *variable geometry of power*: political debates take place within three dimensions not simply two dimensions: the nation, state and supra-state such as the European Union and NAFTA.<sup>394</sup>

In light of these characteristics, nationalism must now be read as reflecting a form of functionalism which disregards any necessity for a distinction between, for example, Scottish *or* British; Catalan *or* Spanish, but rather sees them both as compatible political loyalties set against the wider functionalist screen of globalisation.<sup>395</sup> In this regard, sub-state nationalist groups in the context of the European Union can be found as playing the ‘European card’ in developing notions of self-government within the European polity which best fit their constructions of national identity.<sup>396</sup>

The result of this effect is a smorgasbord of new constitutional aims which fit between the traditional understandings of sovereignty or separation; from ‘Home Rule’ to ‘Independence in Europe’; ‘Devolution-Max’ to ‘Dominion Status’. These so called ‘third way’ or ‘middle ground’ strategies often seek to reconfigure the traditional organisation of the state polity by seeking accommodation within the state.<sup>397</sup>

Second, in instances where nationalist groups do seek to frame their demands within an understanding of ‘independence’, their aims are usually distinctly qualified and seek both to retain a number of key relationships with the parent state, as well as use the mechanics of supranational and international organisations as an important ‘external support system’.<sup>398</sup>

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<sup>394</sup> McCrone, D., *The Sociology of Nationalism*, (London: Routledge, 1998), p. 129

<sup>395</sup> Tierney, S., ‘Sub-State Nations and Strong States: The Accommodation Impasse’, in Tierney, S., (ed.) *Nationalism and Globalisation*, (Oxford: Hart, 2015), pp. 55-72 at 64

<sup>396</sup> Hoppe, M., ‘Sub-State Nationalism and European Integration: Constructing Identity in the Multi-Level Political Space of Europe’, *Journal of Contemporary European Research*, Vol. 1, No. 2, (2007), pp. 13-28 at 23

<sup>397</sup> Keating, M., ‘Rethinking Sovereignty: Independence-Lite, Devolution-Max and National Accommodation’, *REAF*, No. 16, (October, 2012), pp. 9-29 at 11; Tierney, S., ‘Sub-State Nations and Strong States: The Accommodation Impasse’, in Tierney, S., (ed.) *Nationalism and Globalisation*, (Oxford: Hart, 2015), pp. 55-72 at 64

<sup>398</sup> Lynch, M., *Minority Nationalism and European Integration*, (Cardiff: University of Wales Press, 1996), p. 15

As Stephen Tierney points out, these new forms of qualified independence can sometimes be more burdensome to the parent state than would be the case under the simple Westphalian-style secession of the sub-state group.<sup>399</sup> Indeed, this is particularly true when sub-state nationalist groups seek increased constitutional autonomy within the territory of the parent state; creating periods of prolonged constitutional unsettlement, as well as diminishing the operative capacity of the central government over their region. Moreover, in the external sense of pursued paths to independence, they create a new complex relationship of interconnected authority with the supra-state, which impedes both upon the operation of the newly independent sub-state, and the parent state.

However, despite neo-nationalist groups' continued reliance of the European Union as an 'external support system', the realities of the situation are rather paradoxical, in that the attitudes of the EU have largely placed market integration over the protection or recognition of cultural diversity or national identity.<sup>400</sup> If we consult the 2014 Scottish independence referendum, or the more recent referendum on the independence of Catalonia, the EU has shown little support for the sub-state national groups. Indeed, in the former case, the then President of the European Commission in 2014, Jose Manuel Barroso, stated 'any territory of a member state becoming independent would automatically leave the EU.'<sup>401</sup>

In this regard, we find what is the veritable paradox of European integration, and indeed the reframed multi-level order as a whole; creating forces that limit the significance of national

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<sup>399</sup> Tierney, S., 'Reframing Sovereignty? Sub-State Nationalist Societies and Contemporary Challenges to the Nation-State', *International and Comparative Law Quarterly*, Vol. 54, No. 1, (January 2005), pp. 161-183 at 181

<sup>400</sup> Nagel, K-J. 'Transcending the National/Asserting the National: How Stateless Nations like Scotland, Wales and Catalonia React to European Integration' *Australian Journal of Politics and History*, Vol. 50, No. 1 (2004), pp. 57-74 at 73-74

<sup>401</sup> Keating, M., 'The European Dimension to Scottish Constitutional Change', *The Political Quarterly*, Vol. 86, No. 2, (April-June 2015), pp. 201-208 at 203

borders, and foster the dynamics of political defragmentation, and the designs for independence of stateless nations, in certain areas.<sup>402</sup>

Yet, the lack of support from the supranational level seems not to have deterred sub-state nationalisms groups in the UK or in other Western European liberal democracies. Indeed, in the wake of the recent Brexit referendum, sub-state nationalist demands have taken on a new vitality in their drive for constitutional autonomy within the European polity.<sup>403</sup> With this in mind, the debate in the last part of this chapter will now focus on the history and varying constitutional aims of sub-state nationalist groups within the UK.

### **3.4. The Constitutionalism of Sub-State Nationalist Groups in the United Kingdom**

So far, this chapter has argued that the reconfiguration of the global sphere has had a transformative effect on the wider environment of the state. It has been argued that through the diluted functional capacity and normative authority of the state within the new multi-level global sphere, the currency of statehood had lost some of its presumptive salience in securing the allegiance of its citizens.

The resulting theoretical reinterpretations of sovereignty as a ‘pooled’ or ‘pluralised’ concept has meant that the traditional nationalist demands of congruency between nation and state have been reframed within the more nuanced concepts of ‘third way’ or ‘middle ground’ aims. The very ambiguity and the aims of neo-nationalist groups has meant that the traditional typology of statehood has become reframed within a new tapestry of constitutional pluralism.

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<sup>402</sup> Dardanelli, P., ‘Independence in Europe? EU Integration and ‘Stateless Nations’’, *Political Insight*, (December 2017), pp. 33-35

<sup>403</sup> See: Chapter Five of this thesis for more detail on the constitutional demands of sub-state nationalist groups in relation to Brexit.

In this final part of the chapter, we will explore the varying aims of sub-state nationalist groups in the United Kingdom, identifying their unique interpretations of sovereignty, autonomy and self-government, and outlining their visions for the future of the UK-state. In pursuing this approach, the debate in this section of the chapter will engage directly with the central research question of this thesis by examining the challenges that such demands have raised for the dynamics of the territorial constitution. In addition, this section of the chapter will also provide a useful footing for the discussions to be undertaken in Chapter Four, which consider the significance of these aims in influencing the introduction and evolution of devolution in the UK.

### 3.4.1. Scotland

Focussing on the mobilisation of sub-state nationalism in Scotland, we find our primary source of analysis linked to the Scottish National Party (SNP). Formed in 1934 out of a union between the Scottish Home Rule Association (pro-home rule) and the National Party in Scotland (pro-independence), the initial constitutional aims of the party were conflicted in attaining a balance between its *gradualist* and *fundamentalist* wings.<sup>404</sup>

In its early years, the desire for balance between these two ‘wings’ in the Party led to it pursuing the nuanced constitutional ambition of self-governing dominion status within the British Empire; a factor in itself partly influenced by events in Ireland, as well as the contemporary development of dominion status after 1931.<sup>405</sup> Yet, by the 1940’s we find the triumph of the

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<sup>404</sup> The legacy of the Scottish Home Rule association largely constitutes the *gradualist* wing of the SNP, believing that independence will be achieved as a gradual process of emerging self-government; the *fundamentalist*, on the other hand, reflect the aims of the National Party in Scotland for independence as a ‘zero-sum game’, of which devolution only acts as a distraction to the momentum towards independence; see, Hepburn, E., ‘Scottish autonomy and European integration: The response of Scotland’s political parties’, in McGarry, J., and Keating, M., (eds.) *European Integration and the Nationalities Question*, (London: Routledge, 2006), pp. 225-238 at 232

<sup>405</sup> Keating, M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, (Oxford: Oxford University Press, 2001), p. 57-58



fundamentalist wing of the Party, and the initial commitments to ‘independence’ as its main constitutional objective.

By seeking independence, many observers attribute the SNP’s aims as inherently modernist in their construction, understanding independence as the desire for congruency between nation and state.<sup>406</sup> The essential reasoning behind this position is one of political voice; the SNP held – and continues to hold – the position that Scotland needs a political voice of its own, a view of which it has attributed to the attainment of political sovereignty through independence. Yet, upon reflection, we find that while relying upon a modernist frame in justifying its advocacy in favour of independence, the fundamental constitutional aims of the SNP were not wholly reflective of the traditional Westphalian design of independence as congruent with the receipt of indivisible sovereignty.<sup>407</sup>

In explaining this distinction, we are drawn to consider the recent objectives of the SNP in relation to the process of European integration. While the SNP, like many other sub-state nationalist groups, has a long history of advocating for varying *degrees* of independence,<sup>408</sup> it is argued that this achieved a new salience in response to European integration. As an initial point of observation, it is interesting to note that the initial response of the SNP to the European Community (EC) in the 1960s was one of suspicion. This was motivated largely by the view of the EC as an elitist ‘rich man’s club’ of sovereign states, ruled by intergovernmentalism, and providing little space or opportunity for a distinctive Scottish voice or Scottish ‘sovereignty’ – a factor which, as already identified, forms a crucial aspect of the SNP’s demands.<sup>409</sup>

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<sup>406</sup> Mycock, A., ‘SNP, identity and citizenship: Re-imagining state and nation’, *National Identities*, Vol. 14, No. 1, (2012), pp. 53-69 at 55; Leith, M. S., ‘Scottish National Party representations of Scottishness and Scotland’, *Politics*, Vol. 28, No. 2 (2008), pp. 83-92 at 83

<sup>407</sup> Ichijo, A., ‘Sovereignty and Nationalism in the Twenty-first Century: The Scottish Case’, *Ethnopolitics*, Vol. 8, No. 2, (2009), pp. 155-172 at 163

<sup>408</sup> See; Hepburn, E., ‘Degrees of Independence: SNP Thinking in an International Context’, in Hassan, G., (ed.) *The Modern SNP: From Protest to Power*, (Edinburgh: Edinburgh University Press, 2009), pp. 190-203

<sup>409</sup> Liable, J., *Separatism and Sovereignty in the New Europe: Party Politics and the Meanings of Statehood in a Supranational Context*, (Basingstoke: Palgrave MacMillan, 2008), p. 84-85; This is well referenced in the

Indeed, it was not until the early 1980s that we find the SNP began to consider Europe as a viable environment against which to frame its desires for independence. In explaining the reasoning behind this change in policy, we may rely upon three factors of explanation: First, was the election of Winnie Ewing (SNP) as Member of the European Parliament in 1979, helping to convince many in Scotland that there existed avenues for projecting a political voice for Scotland in the European theatre.<sup>410</sup> Second, was the move of the Scottish Labour leader Jim Sillars to the SNP in 1980, which brought with it Sillars' earlier devised idea of 'independence in Europe'.<sup>411</sup> Third, and perhaps the most persuasive, was the wider revolution taking hold in the European Community, led by Jacques Delors, and the idea of a 'social Europe' and a 'Europe of the Regions'.<sup>412</sup>

Under this new Europe, we find that the SNP mobilised its political goals to capitalise on the window of opportunity provided by the external support system of the EC.<sup>413</sup> Consequently, in 1988 the SNP officially adopted the constitutional objective of 'independence in Europe' –

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campaign slogan of the SNP at the 1975 referendum on the UK's continuing membership of the EC – 'no voice, no entry', Hepburn, E., *Using Europe: Territorial party strategies in a multi-level system*, (Manchester: Manchester University Press, 2010), p. 72

<sup>410</sup> *Ibid.*, p. 72; Further to this was the fact that the opposition of many in Scotland to the Eurosceptic Conservative Government at Westminster led to a degree of influence in changing Scottish opinion towards the European project. Nagel, K-J. 'Transcending the National/Asserting the National: How Stateless Nations live Scotland, Wales and Catalonia React to European Integration', *Australian Journal of Politics and History*, Vol. 50, No. 1, (2004), pp. 57-74 at 70

<sup>411</sup> Keating, M., 'The European Dimension to Scottish Constitutional Change', *The Political Quarterly*, Vol. 86, No. 2, (April-June 2015), pp. 201-208 at 201

<sup>412</sup> Hepburn, E., and McLoughlin, P. J., 'Celtic Nationalism and Supranationalism: Comparing Scottish and Northern Ireland Party Responses to Europe', *The British Journal of Politics and International Relations*, Vol. 13, (2011), pp. 383-399 at 388; See also, Keating, M., 'The European Dimension to Scottish Constitutional Change', *The Political Quarterly*, Vol. 86, No. 2, (April-June 2015), pp. 201-208 at 201

<sup>413</sup> Hoppe, M., 'Sub-State Nationalism and European Integration: Constructing Identity in the Multi-Level Political Space of Europe', *Journal of Contemporary European Research*, Vol.1, No. 2, (2007), pp. 13-28 at 21

interspaced by a brief period of consideration of Scotland in a new European Committee of the Regions<sup>414</sup> – which has endured as its central commitment to this day.<sup>415</sup>

Yet, whereas many in the SNP have now assumed the idea of Scottish independence *within* the wider umbrella of a supranational EU, how does this translate into constitutional terms? In answering this question, we will now consult the literature which has emerged around the recent 2014 referendum on Scottish independence.

In the political rhetoric surrounding the referendum, the SNP's idea of independence was distinctly qualified by a number of continuing horizontal relationships with the remainder of the United Kingdom. The then leader of the SNP, Alex Salmond, articulated the SNP's demands for *independence* as the severing of one of the six unions Scotland has with the United Kingdom – the political union – with the retention of the other five.<sup>416</sup>

Essentially, this wider frame of Scottish independence seems to have been one articulated by the design of independence as providing Scotland with the sovereignty to act independently and of its own accord. But, then, immediately qualifying this independence through continued membership of the European Union and other international organisations, as well as retaining

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<sup>414</sup> This was largely in response to the *gradualist* wing of the Party, however, the idea collapsed when the politics of the European sphere reverted back to one focused on an intergovernmental model of states in the late 1990s. Interestingly, the Scottish Labour Party also advocated for Scottish membership of a 'Europe of the Regions' during this period – qualified by the principle of subsidiarity advocated under the Maastricht Treaty. See; Hepburn, E., 'Scottish autonomy and European integration: The response of Scotland's political parties', in McGarry, J., and Keating, M., (eds.) *European Integration and the Nationalities Question*, (London: Routledge, 2006), pp. 225-238 at 231-232

<sup>415</sup> After the Maastricht Treaty, we find that Scot's were increasingly aware of the reversion of the politics of the EU back to a state orientated system. However, unlike its previous aversion on this ground, the SNP continued to maintain a commitment to 'independence in Europe' after the Maastricht Treaty, motivated by a balance of a post-sovereign ideology and a fundamentalist ambition for independence. Liable, J., *Separatism and Sovereignty in the New Europe: Party Politics and the Meanings of Statehood in a Supranational Context*, (Basingstoke: Palgrave MacMillan, 2008), p. 119

<sup>416</sup> The European Union, the defence union, the currency union, the Union of the Crowns, and the social union; Scottish Government, 'The Six Unions – Introduction' First Minister Alex Salmond speaking at Nigg Fabrication Yard', 12 July 2013, <<https://news.gov.scot/speeches-and-briefings/the-six-unions-introduction>> (Accessed: 26/10/17)

a number of relationships with the United Kingdom – presumably through a form of confederal arrangement<sup>417</sup> – in areas of substantial high politics, namely currency and defence.<sup>418</sup>

It is argued that this heavily qualified frame of independence, defined by Keating as ‘independence-lite’,<sup>419</sup> is indicative of the nature of the new world order outlined above. Indeed, under the protective economic and security umbrellas of the new supra- and transnational regimes, as well as the reworked theories of sovereignty and subsidiarity, we find that sub-state groups have a myriad of new support systems within which to frame their constitutional demands.

In this regard, we are able to conclude that the constitutional ambitions of the SNP are distinctly opportunistic and reactive in their construction. Having as their central ambition the idea of Scottish *independence*, but at all times relying on external frames within which to legitimise this cause – and to frame it as a viable objective. Indeed, to a significant extent, the essence of the constitutional ambitions of the SNP are as much a reflection of the shifts within the global sphere, as opposed to a reflection of a central defining *will* of the SNP; a nuanced argument, but one that aims to demonstrate the extent to which the shifts within nationalism theory are equally symbolic of a switch in the global world order. In considering this point, we find no better confirmation of its argument than in the next sub-state nationalist group to be considered, Plaid Cymru.

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<sup>417</sup> See, for example: MacCormick, N., *Questioning Sovereignty*, (Oxford: Oxford University Press, 2008), p. 196

<sup>418</sup> McLean, I., Gallagher, J., and Lodge, G., *Scotland's Choices: The Referendum and What Happens Afterwards*, (Edinburgh: Edinburgh University Press, 2013), p. 44; Mycock, A., ‘SNP, identity and citizenship: Re-imagining state and nation’, *National Identities*, Vol. 14, No. 1, (2012), pp. 53-69 at 59; Scottish Government, ‘Your Scotland, Your Referendum: A Consultation Document’ (Edinburgh: Scottish Government White Paper, 2012), p. 8

<sup>419</sup> Keating, M., ‘Rethinking Sovereignty: Independence-Lite, Devolution-Max and National Accommodation’, *REAF*, No. 16, (October, 2012), pp. 9-29

### 3.4.2. Wales

While the case of sub-state nationalism in Scotland shows a clear example of independence as a readily relied upon totem, albeit qualified within a wider supranational frame, the case of sub-state nationalism in Wales outlines a noticeable departure from the idea of independence as the central ambition of the nationalist group.

In Wales, we find that the operation of the Welsh nationalist party, *Plaid Cymru* (The Party of Wales) as holding an historic aversion to the constitutional objective of ‘independence’. Indeed, unlike the SNP, the political rhetoric associated with *Plaid Cymru* has consistently come to frame its ambitions within the more ambiguous context of *post-sovereignty*, characterised by a preference for ‘freedom’ as opposed to outright ‘independence’.<sup>420</sup>

In beginning to analyse these constitutional objectives, let us begin by focussing on the early years of *Plaid Cymru*, from its formation in 1925, at which point its goal was dominion status within the British Empire. Similar to the case of the SNP in Scotland, this early constitutional objective must to a large extent be seen as a child of its surroundings; both in recognition of the still powerful position of the British Empire as an ‘external support system’, as well as the precedent set by the Irish Free State and the other dominions in securing autonomy while still maintaining political and economic links with the UK.

Comparatively, however, whereas the SNP’s objective for dominion status were largely designed on the functionalist argument of economic prosperity within the wider support system of the British Empire, we find that *Plaid*’s road to framing dominion status as its constitutional objective was decidedly more nuanced. To a large extent, this may be explained through the ideology of the then chairman of *Plaid*, Saunders Lewis.

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<sup>420</sup> Keating, M., ‘European Integration and the Nationalities Question’, *Politics and Society*, Vol. 32, No. 3, (September 2004), pp. 367-388 at 370

A dramatist and poet in the Welsh language, Lewis' primary political ambition for Plaid was seeking the defence of the Welsh civilization through whatever means necessary, rather than pursuing a ready path towards a specific type of constitutional model:

'We must have self-government. Not independence. Not even unconditional freedom. But just as much freedom as may be necessary to establish and safeguard civilization in Wales.'<sup>421</sup>

To some extent, Lewis' aversion to advocating in favour of any particular type of constitutional design, particularly independence, was motivated by his wider philosophical and theological opinions on the detrimental effects of the doctrine of nationalism upon Welsh civilization. Himself a convert to Catholicism, Lewis believed that the essence of a Welsh civilization prospered best under the moral unity of the Catholic church during the medieval period; a period that Lewis attributed as having ended following the introduction of nationalism, and its association with a single unitary source of authority:

'In the sixteenth century, the age of Luther of Germany, Machiavelli in Italy and the Tudors in Britain, the moral unity of Christendom was destroyed, and instead of Christianity another principle came to rule, i.e. nationalism'<sup>422</sup>

Yet, despite relating the practices of the unitary sovereign state – i.e. the UK state – to the demise of Welsh civilization,<sup>423</sup> Lewis never advocated for Welsh independence as a means of reversing this trend. Indeed, as Hywel D. Davies reminds us, despite his strong sense of Welsh national identity, Lewis was a monarchist and supporter of the idea of Wales as retaining a constitutional position under the British crown and empire.<sup>424</sup>

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<sup>421</sup> Lewis, S., *Principles of Nationalism*, (Cardiff: Plaid Cymru, 1975), p. 15

<sup>422</sup> *Ibid.*, p. 7

<sup>423</sup> Following the exercise of English nationalism over Wales, 'Every difference between Wales and England was obliterated. In the two countries there was one government, one language, one State law, one culture, one system of education, one religion, that is government religion, government language, government education, government culture. *Ibid.*, p. 8-9

<sup>424</sup> Davies, H. D. 'The Welsh Nationalist Party, 1925-1945' (Cardiff: University of Wales Press, 1983) p. 84

In this regard, we find that Lewis' constitutional ambition for Wales was decidedly nuanced; advocating for just enough power to safeguard the Welsh civilization, but continually opposed to the terminology of 'independence'. Instead, and perhaps as a reflection of Lewis' primary objective as being the defence of Welsh culture, we find that his constitutional aims failed to crystallise beyond the philosophical idea of Welsh 'freedom', conditioned by the wider commitment to Wales within a post-sovereign European constellation; rejecting the modernist interpretation of nationalism, but being similarly vague in providing a definite alternative to the concept of the nation-state:

'let us not ask for independence for Wales. Not because it is impractical, but because it is not worth having: I have already shown that it is materialistic and cruel, leading to violence, oppression and ideas already proved to be bad. The age of empires is fast passing, and afterwards there will be no meaning or value in independence.'<sup>425</sup>

Indeed, it was not until the former Labour Party member, D. J. Davies rose in the ranks of Plaid during the mid-1920s that the Party's constitutional position became crystallised beyond Lewis' abstract ambitions. For Davies, the constitutional argument for Plaid was split between the pursuit of two constitutional options; dominion status or devolution. Davies advocated for the former on the grounds that 'nationalism, to be effective, must have sovereignty, that is, the active expression of the multiple will of a particular society.'<sup>426</sup>

In effect, such a commitment was in part motivated by the recent conferral of Dominion Status upon the Irish Free State under the Anglo-Irish Treaty of 1922. Yet, similar to Lewis, Davies framed such aspirations within a more nuanced context; recommending for both dominion

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<sup>425</sup> Lewis, S., *Principles of Nationalism*, (Cardiff: Plaid Cymru, 1975), p. 9

<sup>426</sup> Davies, D. J., 'The Economic Aspects of Welsh Self-Government', in Davies D. J., *Towards Welsh Freedom*, edited by Ceinwen Thomas (Cardiff: Plaid Cymru, 1958), pp. 30-38 at 31; It is also important to note that during this period, the development of Dominion Status had assumed a new-found significance in moving towards the defence – and prosecution – of Dominion autonomy. In 1926, the Balfour Declaration guaranteed the Dominions as 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs', and a steady trend was continuing to emerge of Dominion 'sovereignty', classified five years later in the Statute of Westminster 1931. See: Oliver, P. C., *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand*, (Oxford: Oxford University Press, 2005), p. 47

status within the British Commonwealth, but also under the ‘supreme sovereignty of the League of Nations.’<sup>427</sup> This was met with further qualification in the expression of Wales retaining close economic ties with the remainder of the United Kingdom, as well as continuing to be part of the currency union and financial regulation of London<sup>428</sup> – a move of departure away from Lewis’ ambitions for post-sovereignty, but remaining distinctly different from advocacy for single Westphalian independence.

By the general election of October 1931, Plaid Cymru’s official constitutional position was for Wales as an ‘equal, free and self-governing member of the British Commonwealth of Nations’.<sup>429</sup> However, owing to the changing nature of the global environment in the post-war years after 1945, and the decreasing salience of dominion status within the British Commonwealth during this period, we find that Plaid was, by the 1950s, once again forced to redesign its constitutional ambitions.

The Party’s initial response, and indeed its long running commitment from the mid-1950s through to the 1980s, was for the idea of autonomy within a ‘Britannic confederation’.<sup>430</sup> This was given character in 1971 by Gwynfor Evans, who declared Wales’ future as a ‘commonwealth realm’,<sup>431</sup> joining the Common Market and Travel Area of the British Isles; itself a further indication of the influence of the Irish example in influencing the Party’s constitutional policy.

Over this period, we find that Plaid’s reference to Europe in its constitutional objectives maintained a balanced approach of opposition and ambiguity. At the 1975 referendum on

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<sup>427</sup> Davies, D. J., ‘The Economic Aspects of Welsh Self-Government’, in Davies D. J., *Towards Welsh Freedom*, edited by Ceinwen Thomas (Cardiff: Plaid Cymru, 1958), pp. 30-38 at 31

<sup>428</sup> *Ibid.*, at 31-33

<sup>429</sup> Davies, H. D., *The Welsh Nationalist Party, 1925-1945*, (Cardiff: University of Wales Press, 1983), p. 83

<sup>430</sup> Elias, A., *Minority Nationalist Parties and European Integration: A Comparative Study*, (London: Routledge, 2009), p. 49

<sup>431</sup> Evans, G., *Commonwealth Status for Wales*, (Bangor: Plaid Cymru, 1971), p. 14-16



continued membership of the EC, Plaid campaigned under the banner ‘Europe: Yes, EEC: No’; an ambiguous aim, reflective both of the Party’s historic commitment to the *idea* of Wales in Europe but, similarly to the SNP, a rejection of the largely state-orientated and intergovernmental nature of the EEC during the 1970s.<sup>432</sup>

However, in further similarity to the SNP, we find that Plaid’s attitude towards Europe shifted following the report of Delors Commission advocating for a Europe of the Regions.<sup>433</sup> Indeed, it was no coincidence that at the 1988 Party conference, in the same year as the SNP adopted its commitment to ‘independence in Europe’, Plaid began to move towards a position advocating for self-government in Europe.<sup>434</sup> Although, unlike the SNP, Plaid initially came to frame its demands not for ‘independence’ in Europe, but ‘full national status’ within a Europe of the Regions.

In explaining Plaid’s position, we find its justification as a mixture of historic party attitudes and wider politico-economic influences. On the one hand, it was a direct reflection of the Party’s historical aversion to *independence*, and for its preference for post-sovereigntist strategies of self-government within the wider, and to a large extent ambiguous design of ‘Europe’. On the other hand, however, it was also a reflection of the reality in Europe at the time, and of the distinctly pluralist doctrine of Delors’ Europe of the Regions<sup>435</sup> – a constitutional design that held a far higher salience with Plaid’s wider post-sovereigntist ambitions.

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<sup>432</sup> Elias, A., ‘From “full national status” to “independence” in Europe: The case of Plaid Cymru – the Party of Wales’, in McGarry, J., and Keating, M., (eds.) *European Integration and the Nationalities Question*, (Abingdon: Routledge, 2006), p. 193-215 at 197

<sup>433</sup> Additionally, the incongruity of Plaid’s attitudes to Europe with the result of the 1975 referendum in Wales, highlighted to many in the Party that a reconfigured idea on Europe was required. Hoppe, M., ‘Sub-State Nationalism and European Integration: Constructing Identity in the Multi-Level Political Space of Europe’, *Journal of Contemporary European Research*, Vol.1, No. 2, (2007), pp. 13-28 at 21

<sup>434</sup> Elias, A., ‘From “full national status” to “independence” in Europe: The case of Plaid Cymru – the Party of Wales’, in McGarry, J., and Keating, M., (eds.) *European Integration and the Nationalities Question*, (Abingdon: Routledge, 2006), p. 193-215 at 201

<sup>435</sup> *Ibid.*, at 202

However, it was the wedding of Plaid's aims in response to the political nature of the European sphere that would eventually lead to it further reframing its constitutional objectives in 2001. In that year, and largely in response to the shift of the European Union away from a commitment to regionalism, we find that Plaid altered its position to 'independence in Europe'.<sup>436</sup> However, while this commitment brought Plaid's constitutional objectives into terminological congruency with those of the SNP, we find a continuing commitment to a much broader interpretation of *independence* than that of the SNP. Most cogently, we find this position summarised by the recent remarks of the former Plaid Cymru Chairman, Lord Dafydd Wigley:

'Since the United Kingdom became a member of the European Community in 1973 and now – at least for the time being – of the European Union, I must admit that I had tended to look at Wales's future in European terms more than in terms of the Commonwealth... That was not in any sense a separatist argument. If England, Scotland, Northern Ireland, and indeed, the Irish Republic, were also member states, we could co-operate within a new relationship covering Britain and Ireland. We would have our own presence in Europe. It was indeed the converse of a separatist approach. I regarded a pooling of sovereignty on a European level, subject to the principle of subsidiarity, where decisions are taken as closely as possible to the community on which they impact, as being most appropriate to the modern world, in which the physical barriers between nations should be regarded as a thing of the past.'<sup>437</sup>

In this regard we may now draw two conclusions on the essence of Plaid Cymru's constitutional ambitions. First, in comparison to the SNP, we find the history of Plaid Cymru as pursuing a far more post-sovereigntist agenda in the construction of its constitutional aims. Whereas we find that the SNP maintained a consistent, albeit nuanced, commitment to 'independence' from the 1950s, we find that Plaid's usage of the title in the framing of its constitutional aims did not emerge until 2001, and even then, maintained a far more pluralist interpretation than that advocated by the SNP.

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<sup>436</sup> Elias, A., *Minority Nationalist Parties and European Integration: A Comparative Study*, (London: Routledge, 2009), p. 70

<sup>437</sup> Lord Dafydd Wigley, Hansard, HL Deb, 07 November 2016, Vol. 776, Col. 1002

Second, in addition to the ambiguity of its aims, we also find a distinctly adaptive character in Plaid's constitutional objectives, designed to suit its wider political surroundings. Indeed, more so than the SNP, we find a distinct chameleonic tendency in the construction of Plaid's constitutional ambitions, maintaining a distinctly neo-nationalist agenda, and continuously adapting to the nature of the external support systems; whether that be the UK or the EU.

In both points, we find Plaid's aims as distinctly disjointed from the traditional Westphalian idea of independence, itself a recognition not only of the distinctly post-sovereigntist interpretations employed by sub-state nationalist groups, but also of the new normative understanding they bring in challenging the traditional modernist interpretation of nation-state congruency.

### **3.4.3. Northern Ireland**

As has become apparent over the course of this thesis, the political status of Northern Ireland is distinctly detached from that of Scotland and Wales. Whereas in these two parts of the UK, the basis of the constitutional challenge has generally emerged from a single source of sub-state nationalist aggravation, the political environment in Northern Ireland comprises a divide between two sectarian groups, Unionists and Nationalists, each of which can be subdivided into a number of different political manifestations.

For ease of analysis, this thesis will broadly define this divide through reference to the four most popular political groups in Northern Ireland, two from each side of the sectarian divide; Unionist – Democratic Unionist Party (DUP), Ulster Unionist Party (UUP); Nationalist – Sinn Fein, the Social Democratic and Labour Party (SDLP). In each group, we find distinctly different attitudes towards the European Union, as well as to globalisation and the normative reinterpretations of the makeup of constitutional authority. However, before we begin to

analyse the substantive elements of each of these groups, it is first important to note an observation on the effects of the supranational sphere in Northern Ireland in general.

Indeed, we find that the United Kingdom's membership of the European Union has assumed a unique significance in the context of Northern Irish politics. Under membership of the EU, the salience of the border with the Republic of Ireland has been significantly reduced – although has not disappeared.<sup>438</sup> Moreover, through the supranational operation of the EU, a number of avenues for cross-border cooperation have emerged, which have significantly reduced the symbolism of the political divide between Northern Ireland and the Republic of Ireland.<sup>439</sup>

Indeed, whereas the role of Europe – as well as the wider nature of the new 'third level' of the global sphere – has come to assume a role in facilitating arguments for autonomy in Scotland and Wales, its significance in Northern Ireland has been equally balanced in securing the security of the territory, and the *relative* decline in desires for independence (Irish reunification) within the territory.<sup>440</sup> In explaining this point, let us now move to consider the politics of the respective groups within Northern Ireland.

Beginning with the Nationalists, we find that attitudes within this group are largely divided in their reception of the European Union, and in the level of reliance they place upon the new multi-level order in framing their constitutional objectives. For Sinn Fein, while recognising the importance of EU membership in assisting in the peace process in Northern Ireland, the overarching view of the Party is largely anti-EU, and receptive only of a European Union based on loose intergovernmentalism rather than subsidiarity and post-sovereignty. To a significant

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<sup>438</sup> Hepburn, E., and McLoughlin, P. J., 'Celtic Nationalism and Supranationalism: Comparing Scottish and Northern Ireland Party Responses to Europe', *The British Journal of Politics and International Relations*, Vol. 13, No. 3, (2011), pp. 383-399 at 392; Tonge, J., 'The Impact of Withdrawal from the European Union upon Northern Ireland', *The Political Quarterly*, Vol. 87, No. 3, (2016), pp. 338-342 at 340

<sup>439</sup> Gamble, A., 'The Constitutional Revolution in the United Kingdom', *Publius*, Vol. 36, No. 1, (2006), pp. 19-35 at 21

<sup>440</sup> This is not to argue that arguments for Irish reunification have disappeared, but rather have been reduced or 'mellowed' by the decreased salience of the border.

extent, this reflects Sinn Fein's overarching commitment to a modernist view of nationalism, as well as the constitutional ambition of a reunified Ireland and of Irish membership of the EU as a single cohesive block – a goal which it sees as impeded by the horizontal transfer of Northern Ireland into the status of a European Region.<sup>441</sup>

Conversely, whereas Sinn Fein continue to attach a significant degree of political salience to the 'border', the more moderate SDLP frame the EU as a way to transcend the border, and to frame the Northern Ireland issue within a wider international frame. Indeed, by the late-1990s, we find that the SDLP were, similar to the SNP and Plaid Cymru, promoting the idea of a Europe of the Regions. However, unlike in Scotland and Wales, the underlying salience of the regional dimension for the SDLP was not for 'independence', but was conditioned on the grounds of its ability to transform the Northern Irish issue into a distinctly *international* – or *European* – context.<sup>442</sup>

To a significant extent, this was a direct reflection of the SDLP as the more gradualist element of the Nationalist group in Northern Ireland but, more importantly, was also a reflection of its largely post-sovereigntist vision of the future of the EU, and of Northern Ireland's place within it – a perspective cogently framed in the following quote from the former leader of the SDLP, John Hume:

'Sovereignty and independence, the issues at the heart of the British-Irish quarrel, have changed their meaning. The basic needs of all countries have led to shared sovereignty and interdependence as we move inevitably towards the United States of Europe... Common membership in a new Europe moving toward unity has provided a new and positive context for the discussion and exercise of sovereignty in these islands.'<sup>443</sup>

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<sup>441</sup> Keating, M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, (Oxford: Oxford University Press, 2001), p. 67

<sup>442</sup> *Ibid.*, p. 67

<sup>443</sup> Hume, J., 'A new Ireland in a new Europe', in Keogh, D., and Haltzel, M. H., (eds.) *Northern Ireland and the Politics of Reconciliation*, (Cambridge: Cambridge University Press, 1993), pp. 226-233 at 229

However, as was the case in the SNP and Plaid Cymru, the salience of the post-sovereigntist concept of a Europe of the Regions advocated by the SDLP, largely fell down after the EU's turn back to a state-based system in the late-1990s. Correspondingly, as additional evidence of the relational and adaptive character of sub-state nationalism, the SDLP's vision of Northern Ireland's transition to the status of a European Region was similarly transformed back to the overall idea of a direct move to Irish reunification; however, we find that this commitment still recognising the distinct benefits of the EU in facilitating this transition, significantly more so than Sinn Fein.<sup>444</sup>

Moving now to consult the attitudes of Unionist groups in Northern Ireland to the new multi-level sphere, we find a similar catalogue of diverse objectives as was identified in regards to the Nationalist. While it is important to recognise that both Unionist groups recognise and support the EU's role in the peace process, and are broadly committed to the maintenance of an open border on the island of Ireland, we find a pervasive rejection of the idea of any regional element in European integration.

Inherently, the reasoning behind this idea relates to the construction of political identity within the Unionist groups and, in particular, the significance of the border as a mark of British identity, separating Northern Ireland from the rest of Ireland. Most coherently, we see this argument framed in the recent Brexit process, whereby the DUP has maintained a consistent position of rejecting any settlement that differentiates Northern Ireland from the rest of the UK. Indeed, while recognising the uses of the supranational theatre of the EU in providing for the stability in Northern Ireland, we find that Unionists also maintain that Northern Ireland will not be diluted into a post-sovereign polity, with a reduced sense of attachment to the UK.

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<sup>444</sup> Hepburn, E., and McLoughlin, P. J., 'Celtic Nationalism and Supranationalism: Comparing Scottish and Northern Ireland Party responses to Europe', *The British Journal of Politics and International Relations*, Vol. 13, No. 3, (2011), pp. 383-399 at 392

Conclusively, therefore, we find that attitudes towards the EU in Northern Ireland are incapable of a single definition. Rather, the construction of attitudes towards the European sphere are a matter of political allegiance – over and above any theoretical debate on the status of Northern Ireland within a European polity.

#### **3.4.4. England**

As a final frame of analysis, we now move to discuss the position of England, and its reception of the new institutional and normative ordering of the global sphere. In undertaking this analysis, we immediately find the position of England as unique to that of the rest of the UK. Unlike Scotland or Wales, and decidedly different to Northern Ireland, England has failed to develop a significant sense of sub-state nationalism.

Indeed, as noted by McCrone, rather than developing a distinctly *national* agenda of its own, the history of Englishness has largely developed in mutual exclusivity with the idea of Britishness.<sup>445</sup> British institutions doubled up as English institutions, a factor which has, to a significant extent, been reflected by the tendency in the institutions of the UK constitution to show correlation with a uniquely English interpretation of the constitutional order.<sup>446</sup>

To some extent, such synonymy between Englishness and Britishness is the product of the political reality of England's dominant position within the UK-state; constituting 57 per cent of the UK's total land area, as well as 86 per cent of its total population, and 81 per cent of those MPs sitting in the House of Commons – England has historically been the dominant force within the UK. Indeed, as argued by Anthony Smith, the lack of a 'significant other'<sup>447</sup> facing

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<sup>445</sup> McCrone, D., 'Scotland Out the Union? The Rise and Rise of the Nationalist Agenda', *The Political Quarterly*, Vol. 83, No. 1, (January-March 2012), pp. 69-76 at 73

<sup>446</sup> See: MacCormick, N., 'Is There a Constitutional Path to Scottish Independence?', *Parliamentary Affairs*, Vol. 53, (2000), pp. 721-736

<sup>447</sup> Smith, A. D., *Myths and Memories of the Nation*, (Oxford: Oxford University Press, 1999), p. 73

England within the British Isles, meant that its sense of national identity became distinctly muted – or decidedly redundant within the British Isles<sup>448</sup> – and, as noted by Michael Kenny, capable only of expression through ‘entities larger than itself.’<sup>449</sup>

As outlined in Chapter Two, for much of the modern period, this sense of externalised expression was facilitated through the tenets of Britishness; most significantly Empire. Throughout this period, Englishness, or rather Britishness, developed through its pursuit of common goals within the external sphere, as well as defining itself against notable territorial and political *Others* – one of which being Europe. Indeed, whereas we find notable traditions in Scottish and Welsh nationalism in relying upon the idea of a European past, England’s historical development traditionally framed Europe as the *Other* and something to define itself against, as opposed to actively rely on.<sup>450</sup>

Yet, to conclude the history of England’s political attitude towards Europe as being purely negative would be unrepresentative of the more recent shifts in political Englishness during the ‘post-war’ period. Indeed, during the eclipse of the British Empire during the 1960s, and the distinct sense of loss that ensued in the exercise of a *common goal*, we find that attitudes in England significantly altered towards Europe – becoming distinctly receptive to the *idea* of Europe. As argued by Simms, this characterised itself most accurately in the movement in support of membership of the EEC during the 1960s; motivated by a desire for a reframed sense

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<sup>448</sup> This point is based on the position that the essential strength of national identity is measured against the weaker cultural unit seeking self-expression over the larger cultural unit; due to England’s dominant position within the territorial constitution, it is argued that it had no real need to mobilise its sense of national identity, unless confronted with notable threats. For a similar argument, see: Smith, A. D., *Myths and Memories of the Nation*, (Oxford: Oxford University Press, 1999), p. 73

<sup>449</sup> Kenny, M., ‘The Genesis of English Nationalism’, *Political Insight*, (September 2016), pp. 8-11 at 10

<sup>450</sup> Hoppe, M., ‘Sub-State Nationalism and European Integration: Constructing Identity in the Multi-Level Political Space of Europe’, *Journal of Contemporary European Research*, Vol.1, No. 2, (2007), pp. 13-28 at 22; Simms, B., *Britain’s Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016), p. 5



of national pride, and an attempt to ‘regain the nation’s historic pivotal role in Europe by concentrating her main political and military attention there.’<sup>451</sup>

Illustrative of this point in relation to England, we find that in the 1975 referendum on the UK’s continuing membership of the European Community (EC), England, as a region, delivered the highest percentage in favour of remaining in the EC at 68 per cent, a share of the vote that far exceeding that seen in the rest of the country; Wales (64 per cent), Scotland (58 per cent), Northern Ireland (52 per cent). To a significant extent, this higher level of support for the European project in England can be explained through comparison with the already analysed rejection of the EC during this same period by the SNP and Plaid Cymru.

As evidenced above, in Scotland and Wales, the utility of the European theatre was only viewed as useful when demonstrating a heightened viability for independence from the UK-state. In England, however, it is argued that attitudes towards Europe were arranged as a contrary reality. Indeed, unlike the periphery, we find the central motivation in support for ‘Europe’ in England was in seeking to use the supra-state not as a means of achieving national independence, but of finding national expression within the external sphere; seeking hegemony over the processes of globalisation, rather than using them to facilitate the defragmentation of the UK-state.

Indeed, at all points, we find the general commitment to the European project in England as more reflective of a desire for loose-intergovernmentalism between sovereign states, as opposed to a commitment to any post-sovereign restructuring of the European sphere; a move that would challenge one of the central tenets of the English ‘official mind’ – the indivisible

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<sup>451</sup> Simms, B., *Britain’s Europe: A Thousand Years of Conflict and Cooperation*, (London: Penguin, 2016), p. 189

sovereignty of Parliament. Thus, following the shift in the politics of the EU towards closer integration in the 1990s, we find English attitudes towards Europe began to reverse.

Moreover, when framed against the introduction of devolution in 1998, we find that the gradual contracting of the multi-level system around England created a system whereby England felt left behind.<sup>452</sup> In a 2013 survey on the most salient constitutional issues in England, anxiety over the loss of sovereignty to the European Union came top, followed a close second by the sense of anxiety over the effects of devolution in reducing the English political voice within the United Kingdom.<sup>453</sup>

Thus, unlike the periphery, we find that England initially hitched its political support on the new supranational level in an attempt to regain its national superiority. Indeed, we find the ‘external support system’ of the supranational level was, for England, designed more to replace the traditional *common goal* of Empire, rather than seeking a path towards independence. In this regard, we find that attitudes in England towards the new multi-level system run contrary to those in the periphery.

### 3.5. Concluding Remarks

In conclusion, we find that the aim of this chapter has been to frame the constitutional challenges to the nation-state within a wider external context. In reflection, we find the concluding arguments of this chapter are able to be summarised under three headings:

First, this chapter has argued that the boundaries of the international order, within which the state traditionally found itself, have been distinctly redrawn. Under the all-encompassing rubric of ‘globalisation’, it has been argued that the traditional unitary and absolute understandings

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<sup>452</sup> Kenny, M., ‘The Genesis of English Nationalism’, *Political Insight*, (September 2016), pp. 8-11 at 10

<sup>453</sup> Wyn Jones, R. et al., ‘England and its Two Unions: An Anatomy of a Nation and its Discontents’, *Institute for Public Policy Research*, (July 2013), p. 12

of state power and authority have been diluted within an ever-expanding system of transnational and supranational systems. While it has been recognised that this does not necessarily amount to the ‘death’ of the state as a political unit, it has been argued that under this new system, the state’s ability to continually frame itself as the primary vessel for political loyalty and competent authority has been significantly reduced.

Second, in addition to directly challenging the functional capacity and legal competence of the state, we find that the nature of these challenges has increasingly stacked pressure on the state in its ability to continually frame itself as the primary vessel for the political identity and allegiance of its citizens. Indeed, in a converse interpretation to the arguments presented in Chapter Two, we find that under the new world order, the state is no longer able to rely upon the wider geopolitical environment in order to facilitate a sense of *Otherness* and *common goals*, as was possible during the ‘modern’ age. Rather, in an age of ‘late-sovereignty’, it has been argued that the state now has to compete with a number of new levels of functional organisation, and that in having to do so, has lost its premium on being the vessel best suited for the political allegiance of its citizens.

Third, this chapter has demonstrated how, under the new multi-level construction of the global order, sub-state nationalist strategies have increasingly come to rely upon external, non-state organisations in the framing of their constitutional objectives. Moreover, it has been identified that in making claims for ‘independence’, many sub-state nationalist groups now rely on a distinctly different interpretation of independence than was traditionally framed under the modernist reading of nationalism. Indeed, we find that the constitutional objective of independence is no longer conterminous with the designs of separatism, but is far more nuanced in seeking increased self-government *within* the state, or a significant degree of continuing relationships as an independent political unit.

In conclusion, therefore, it is argued that the age within which the state now finds itself has been – and is still being – redrawn. The traditional modernist construction of the Westphalian state is, while not dying, significantly pale-faced, particularly in the theatre of Europe. Moreover, in the United Kingdom, we have seen that the ability for a system of state-based identity – *Britishness* – to endure has met with significant challenges, a factor which, when viewed more broadly, has significant consequences for the legitimisation of constitutional authority within the UK. In the next chapter, we will discuss the essence of this challenge to the constitutional authority of the UK state by consulting the logic, themes and challenges raised by the devolution process.

The next chapter of this thesis will reframe this external analysis of the challenges to the authority of the state by focussing on the substantive strategy of constitutional accommodation of sub-state nationalist groups undertaken in the UK – the next chapter will consider the constitutional strategy of devolution.

## Chapter 4

### Devolution in the United Kingdom

Chapter Three of this thesis highlighted how the new world order has created several challenges for the state, both functional and normative, and has reduced the state's ability to capture the primarily political loyalty of its citizens. Central to this theme was the rise of sub-state nationalism. This chapter will now deal with the substantive constitutional challenges posed by sub-state nationalism in the United Kingdom, as well as the constitutional strategies employed to counter the rise of sub-state nationalism. This chapter is about devolution, its logic, its themes and the challenges it raises for the dynamics of the territorial constitution.

#### 4.1. Introduction

There is at times a tendency in academic literature to frame discussions on devolution in the UK within a distinctly Scottish and/or Welsh context. Indeed, devolution in Northern Ireland has often been treated as the unrelatable 'place apart'<sup>454</sup> or 'special case',<sup>455</sup> a factor which to some extent has been aided by the lack of a comparable devolution settlement in England. This thesis takes a different approach, arguing that in order to effectively understand the effects of devolution on the UK constitution, analysis must be conducted on a UK-wide canvas. In achieving this aim, this chapter is split into two parts:

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<sup>454</sup> 'Northern Ireland is a part of the United Kingdom but it is also a place apart', Hadfield, B., (ed.) *Northern Ireland: Politics and the Constitution*, (Buckingham: Open University Press, 1992), p. 1

<sup>455</sup> For a differing perspective that frames the situation in Northern Ireland as more reflective of the weaknesses in the UK constitution, than of Northern Ireland as a 'special case', see: Morison, J., and Livingstone, S., *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis*, (London: Sweet & Maxwell, 1995)

Part One will address the processes that led to the devolution settlements of 1998 – and the absence of a system of *devolved*<sup>456</sup> government in England. The analysis in this part of the chapter will be divided into two sections. The first section will discuss the road to devolution, looking at the substantive political factors which motivated attitudes towards devolution in each of the four component parts of the UK. The second section will then adopt a theoretical analysis to investigate as to whether or not an overarching ‘logic’ exists in explaining the move towards devolved government in the second half of the 20<sup>th</sup> century.

In Part Two, the focus will turn to analysing the substantive elements of the devolution settlements. This structure of this part of the chapter will also be divided into two sections. The first section will explore the substantive constitutional provisions of the devolution settlements, and will identify four themes as indicative of the resulting personality of devolved government. The second section will then transfer the substantive analysis into a theoretical consideration of the challenge’s devolution has raised for the arrangement of power and authority within the territorial constitution.

By undertaking this approach in analysing the devolution process in the UK, this chapter will engage directly with the central research question of this thesis by providing a frame of analysis which directly measures the normative and substantive impacts of devolution upon the dynamics of the territorial constitution.

## **Part 1 – Introducing Devolution**

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<sup>456</sup> This thesis recognises that England has received a system of enhanced local government in tandem with the creation of Assemblies and a Parliament in Northern Ireland, Wales and Scotland. However, the system of enhanced local government in England does not fit within the definition of devolution employed in this thesis – namely a system of substantive executive and legislative autonomy separate from, though subordinate to, the UK Parliament. In acknowledgment of the wider effects of devolution on England, however, there will be passing discussion throughout this chapter on the form of enhanced government rolled out in parts of England, its place within the territorial constitution, and relationship with the devolved parts of the UK.

## 4.2. The Road to Devolution

This section of the chapter will investigate the political processes that led to the introduction – or lack thereof – of devolution in 1998. In achieving this aim, the structure of this section is divided under three headings: Northern Ireland, Scotland and Wales, and England.

### 4.2.1. Northern Ireland

Devolution was not new to Northern Ireland in 1998. As outlined in Chapter One, the province had experienced a system of devolved government for much of the mid-20<sup>th</sup> century following the passage of the Government of Ireland Act in 1920.<sup>457</sup> Under the terms of the Act, it was intended that devolved Parliaments would be created in Dublin and Belfast, as well as the provision for a Council of Ireland holding functional competence over all-Ireland matters.<sup>458</sup> Owing to the wider political situation, however, the Parliament in Dublin failed to take hold and the south of Ireland seceded from the Union in 1922, forming the independent Dominion of the Irish Free State.<sup>459</sup>

This left the constitutional situation of Northern Ireland remaining part of the United Kingdom and, under the terms of the Government of Ireland Act, enjoying a significant measure of self-government; an institutional reality which was initially questioned if still necessary following the independence of the Irish Free State.<sup>460</sup> Nevertheless, despite initial protests, we find that after 1922 the Northern Ireland Parliament assumed a relatively settled position within the newly reconfigured state of the United Kingdom of Great Britain and Northern Ireland.

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<sup>457</sup> See: Chapter 1 (Section 1.4)

<sup>458</sup> Wallace, M., *British Government in Northern Ireland*, (Newton Abbot: David & Charles, 1982)

<sup>459</sup> *Ibid.*, p. 16-17

<sup>460</sup> The initial provision for a Northern Ireland Parliament was largely only seen as a concession to Protestant Unionists in Ulster, opposed to the idea of a single all-Ireland Parliament – a threat which seemingly passed after the independence of the Irish Free State. Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 69

As noted by Keating, the relative stability of the transition to self-government in Northern Ireland, and the autonomy conferred to it under the 1920 Act, meant that for much of the first half of the 20<sup>th</sup> century, successive UK Governments held an attitude of benign neglect towards the province; ‘as long as Ulster posed no threat to the stability of British politics, Whitehall and Westminster were content to leave it alone’.<sup>461</sup>

Indeed, such was the extent of the practical separation of Northern Ireland in domestic policy from the rest of the UK, a convention put in place by the Speaker of the UK House of Commons in 1923 ruled that ‘transferred matters’ of Northern Irish competence – as provided under the 1920 Act – would not be eligible for scrutiny in the UK Parliament.<sup>462</sup> For much of the mid-20<sup>th</sup> century, therefore, Northern Ireland was a self-governing, and to some extent a quasi-independent,<sup>463</sup> part of the UK, and it was not until the late-1960s that political issues on the island of Ireland would once again come to pose serious concern for UK Government.

The reasoning for the UK Government’s renewed interest in the province during the 1960s was predominantly down to a shift in the delicate balance of sectarian politics – between Unionists and Nationalists. For the majority of the devolution period after 1920, the politics of the Stormont Parliament had been ruled by a Unionist majority which, on several occasions, passed legislation that discriminated Nationalist elements of the community. The effect of this was to lead to the Nationalists’ formation of the Northern Irish Civil Rights Association in 1967, a factor which played a significant part in effecting an escalation of the sectarian divide into a violent conflict.

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<sup>461</sup> Keating, M., *State and Regional Nationalism: Territorial Politics and the European State*, (London: Harvester Wheatsheaf, 1988), p. 131

<sup>462</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 73

<sup>463</sup> Brigid Hadfield refers to Northern Ireland during this period as, in practical terms if not legally, something of a ‘mini-state’, whereby the Unionist government was ‘master of its own house’, encountering little in the way of criticism or scrutiny from the UK Government for its increasingly discriminatory actions towards the Catholic and Nationalist communities. Hadfield, B., (ed.) *Northern Ireland: Politics and the Constitution*, (Buckingham: Open University Press, 1992), p. 3



By 1969, the increasingly violent nature of political events in Northern Ireland moved to convince the UK Government that it could no longer rely on the Northern Irish Executive at Stormont to keep order and, in that year, British Troops set foot on the streets of Northern Ireland for the first time in nearly a half a century.

The corresponding escalation of the sectarian conflict subsequently led to the eventual collapse of the Stormont Executive and, by 1972, the UK Government was called on to install direct rule over the province. In that year, Harold Wilson's Labour Government passed the Northern Ireland (Temporary Provisions) Act. As its title suggests, the UK Government's intervention was designed only to be temporary; to reinstall peace and order, and to provide for the reintroduction of devolved self-government. Indeed, as noted by Ward, the UK Government was reluctant to become too involved in Northern Irish politics, seeing the province as 'an exceptional place requiring exceptional measures'.<sup>464</sup>

During the almost continual period of direct rule from 1972 to 1998, several attempts were made to secure a political compromise and to reinstall devolution in the province.<sup>465</sup> In 1973, tripartite talks between the British and Irish Governments and political groups in Northern Ireland led to the publication of the Sunningdale Agreement. Under the terms of the Agreement it was proposed that Northern Ireland should receive a new power-sharing executive, designed to replace the old hegemonic Unionist regime with a new body grounded on a consociational model, intended to foster a politics of accommodation, cooperation and consensus between the

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<sup>464</sup> Ward, A. J., 'A constitutional background to the Northern Ireland crisis', in Keogh, D., and Haltzel, M. H., (eds.) *Northern Ireland and the Politics of Reconciliation*, (Cambridge: Cambridge University Press, 1993), pp. 33-51 at 47

<sup>465</sup> In 1973, the UK Government was required to pass the Northern Ireland Constitution Act 1973, specifying that Northern Ireland would remain a part of the UK unless voted for by a majority of the people of Northern Ireland. This was required as a reassertion of the commitment made under the Ireland Act 1949 that stated that Northern Ireland would remain part of the UK unless contested by a majority in the Northern Ireland Parliament – a matter that was unachievable after the installation of direct rule in 1969. Northern Ireland Constitution Act, s.1

two groups in the territory.<sup>466</sup> More significantly, the new Northern Ireland Assembly would send delegates to sit alongside counterparts from the Republic of Ireland in a resurrected Council of Ireland.

Reflective of the delicate balance in Northern Irish politics, the terms of the Agreement, while treated favourably by Nationalists, were seen as a threat by Unionists. The Unionists' rejection of the terms of the Agreement were essentially aimed at opposition to the Council of Ireland and of what they saw as a weaker measure of protection under the new 'consent principle'.<sup>467</sup> Moreover, criticism from the Ulster Unionist Council directed its attention at the failure of the Agreement to amend the irredentist commitments in Articles 2 and 3 of the Constitution of the Republic of Ireland, which continued to claim Northern Ireland as a rightful part of the Republic's national territory.<sup>468</sup>

Such was the extent of the Unionist's opposition to the terms of the Agreement, in May 1974 the Ulster Worker's Council called a general strike. By the end of the month, the Unionist leader, Brian Faulkner, who had staked his political career on the Sunningdale Agreement, resigned, subsequently collapsing the not even five months old power-sharing executive. That same month, the UK Government passed the Northern Ireland Act 1974, which reinstated direct rule over the province, a reality which would remain – largely<sup>469</sup> – until the enactment

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<sup>466</sup> Wilford, R., 'Designing the Northern Ireland Assembly', *Parliamentary Affairs*, Vol. 53, No. 3, (2000), pp. 577-590 at 578

<sup>467</sup> Under the new principle of 'consent' on the reunification of Ireland, the central source of criticism from Unionists was directed at the perceived incongruity between the Irish Government's acceptance that the constitutional status of Northern Ireland would only change via a decision made by the people of Northern Ireland, while at the same time maintaining its irredentist commitments over the territory of Northern Ireland. Tonge, J., 'From Sunningdale to the Good Friday Agreement: Creating devolved government in Northern Ireland', *Contemporary British History*, Vol. 14, No. 3, (2000), pp. 39-60 at 42

<sup>468</sup> *Ibid.*, at 42

<sup>469</sup> Several attempts were made between 1974 and 1998 to reinstall a power-sharing executive in the province. In 1976, a Northern Ireland Convention was set up but received little support from either side and subsequently collapsed. Later, in 1982, a further Northern Ireland Act made provision for another Assembly, designed on the principle of 'rolling devolution' and the gradual repatriation of competences to the province. Despite initial good intentions, the abstention of the nationalists made the functioning of the Assembly impossible and it was dissolved and direct rule reinstated in June 1986. See: Wallace, M., *British Government in Northern Ireland*, (Newton Abbot: David & Charles, 1981); Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 1999), p. 104-105

of the Belfast Agreement 1998 (also known as the Good Friday Agreement).<sup>470</sup> The main terms of the Agreement can be summarised as follows:

First, the Agreement had the significant effect of providing for a reconfigured alternative to the traditional politics in Northern Ireland – itself, in part, a legacy of the earlier attempts made under the Sunningdale Agreement.<sup>471</sup> Instead of framing political loyalties in the traditional binary manner of *either/or* (British *or* Irish), the Agreement mediated a new pluralised approach, whereby citizens could be both British *and* Irish.<sup>472</sup>

Second, the Agreement provided two constitutional statements as to the overarching future of Northern Ireland as part of the United Kingdom. The first, designed mainly as a concession to the Unionist community, guaranteed that: ‘Northern Ireland in its entirety remains part of the United Kingdom’.<sup>473</sup> However, this was accompanied by a second (re)commitment to the consent principle; that Northern Ireland may join the Republic of Ireland, should a majority of the citizens of Northern Ireland vote in favour of it in a referendum<sup>474</sup>:

‘...the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.’<sup>475</sup>

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<sup>470</sup> *The Agreement reached in multi-party negotiations*, Cm 4292 (HMSO, 1998); For further discussion on the context of the Agreement, see: Burrows, N., *Devolution*, (London: Sweet & Maxwell, 2000), p. 12-15

<sup>471</sup> Tonge, J., ‘From Sunningdale to the Good Friday Agreement: Creating devolved government in Northern Ireland’, *Contemporary British History*, Vol. 14, No. 3, (2000), pp. 39-60

<sup>472</sup> ‘[The two governments] recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland’, *The Agreement reached in multi-party negotiations, Cm 4292 (HMSO, 1998)*, Constitutional Issues, s. 1(vi); For commentary on this provision, see; Aughey, A., *Nationalism, Devolution and Constitutional Change and the Challenge to the United Kingdom State*, (London: Pluto Press, 2001), p. 31

<sup>473</sup> Northern Ireland Act 1998, s.1(1)

<sup>474</sup> Northern Ireland Act 1998, s.1

<sup>475</sup> Northern Ireland Act 1998, Sch. 1 (2); This is qualified by the provision laid out in Schedule 1 paragraph 3, whereby it is indicated that a seven-year interval must exist between the holding of a previous referendum, and the action of a new referendum.

Additionally, this was also followed by the commitment in the Republic of Ireland to amend Articles 2 and 3 of the Constitution, which previously provided the irredentist claims to the territory of Northern Ireland. This was amended – following a referendum in the Republic of Ireland – to include an acknowledgement that a united island of Ireland will only be achieved ‘by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island’.<sup>476</sup>

Third, the emphasis on consociation embodied in the commitments providing for the possible future reunification of the island of Ireland was further enhanced by the provisions made under Strands 2 and 3 of the Agreement. Under Strand 2, provision was made for enhanced north-south relations on the island of Ireland. This is constructed in two ways, first by the establishment of the intergovernmental mechanism of the North-South Ministerial Council and, second, by the North-South Implementation Bodies.<sup>477</sup>

Under Strand 3, commitments were also made for enhanced relations on an east-west axis through the formation of a British-Irish Council and the British-Irish Intergovernmental Conference. The aims of this provision may be seen as significant in that they exported the issue of Northern Ireland into the wider context of ‘these islands’<sup>478</sup> – whereby the rest of the UK, the Republic of Ireland, as well as the Channel Islands and the Isle of Man, all take part.

By 1998, we find the political situation in Northern Ireland had been transformed, moving from a hegemonic style of Unionist rule, itself a reflection of Ireland’s long colonial past – see Chapter One – to a new form of consociational politics, grounded on equality and consent between the two groups in the territory. While the formal legal status of Northern Ireland saw it remain as a part of the United Kingdom, the wider externalisation of the Northern Ireland

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<sup>476</sup> The Constitution of Ireland [1937], Art. 3(1)

<sup>477</sup> *The Agreement reached in multi-party negotiations*, Cm 4292 (HMSO, 1998), Strand Two

<sup>478</sup> *The Agreement reached in multi-party negotiations*, Cm 4292 (HMSO, 1998), Strand Three, s. 1

issue, both in the British Isles and Europe, meant that the province's future was also to be distinctly tied to events within the external sphere.

#### **4.2.2. Scotland and Wales**

This chapter will now deal with the road to devolution in Scotland and Wales. In justifying the decision to analyse these two parts of the UK under one heading, it is recognised that while they both experienced very different conceptions of Union prior to the late 19<sup>th</sup> century – as identified in Chapter One – their experiences after this point, most notably in the rise of sub-state nationalism, administrative devolution and, finally, calls for full legislative devolution, occurred within an interdependent and cross-cutting frame of political enquiry.

As established in Chapter One, Scotland led the way in the early re-emergence of a distinct national consciousness during the 19<sup>th</sup> century. Since the Union of 1707, it had experienced a significant measure of administrative independence and, in 1885, received direct representation in central government through the reintroduction of the office of Secretary for Scotland, and the establishment of the Scottish Office.

In Wales, the emergence of *Plaid Cymru* (The Party of Wales) as a political force in 1925 had a significant effect in recalibrating politics in Wales. As identified in Chapters One and Three, the rise of Plaid Cymru ushered in a new era of political thought which sought to break free of the Westminster hegemony, and to defend Welsh interests through Welsh institutions<sup>479</sup> – providing a significant watershed moment in the move away from the traditional 'unionist nationalism' of the Liberals and Labour in Wales.

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<sup>479</sup> Davies, D. H., *The Welsh Nationalist Party, 1925-1945*, (Cardiff: University of Wales Press, 1983), p. 67

As argued in Chapter Three, from 1925 onwards Plaid relied on relatively abstract labels in regard to their constitutional aims, focussing initially on the philosophically framed aspirations of Saunders Lewis for the ‘freedom’ of the Welsh civilization – what D. J. Davies later came to construct under the similarly obtuse rubric of ‘sovereignty’. However, despite their relatively abstract construction, the movement of Plaid Cymru, particularly in the years immediately after the Second World War, proved more significant than events in Scotland in alerting political minds at Westminster to the rise of sub-state nationalism in the periphery.

In explaining the transition towards an emerging sense of sub-state nationalism in Wales, the historian John Davies identified three factors in the post-war years which conspired to bolster support for Plaid Cymru, and for Welsh devolution in general. First, as the sun began to set with relative pace on the British Empire in the post-war years, the myth of belonging to the world’s greatest Empire began to diminish, and with it the bonds of attachment which had previously gelled Welsh interests into a British frame; diluting the *common goals* and sense of collective defence against the *Other* that had formed the bedrock of ‘Britishness’, as identified in Chapter Two.

Second, what would transpire to be over a decade of Conservative government after 1951 raised significant questions of the ability of the Labour Party to retake power and to defend Welsh interests. Moreover, when read in tandem with the further decline of the Liberals in the periphery, opinions began to shift in favour of the establishment of a distinctively Welsh political movement, and of a Welsh parliament which could, it was claimed, return a political class that was far more reflective of the political will in Wales; at this point, as it is today, the majority of the centres of population in Wales voted primarily more left leaning than the UK average.<sup>480</sup>

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<sup>480</sup> Morgan, K. O., *Rebirth of a Nation: A History of Modern Wales*, (Oxford: Oxford University Press, 2002)

Third, and perhaps most significantly, was the decision of the UK Parliament in 1957 – despite opposition from every Welsh MP at Westminster – to vote in favour of allowing the Liverpool Corporation to drown the Tryweryn Valley and the village of Capel Celyn in Merionydd, to create a reservoir to supply Liverpool with water. The so called ‘Tryweryn incident’ marked a significant political moment in Wales, and a spike in membership for Plaid Cymru; not only did it highlight the powerlessness of Welsh MPs in the House of Commons, but it also provided a lasting symbolism and a political totem from which Plaid Cymru could campaign for the need for institutional representation to defend Welsh interests.<sup>481</sup>

Accompanying the rise of a distinctive Welsh political movement, and to a large extent as a response to the steady rise of Plaid Cymru, the response of post-war governments at Westminster was to embark on a programme of piecemeal, though nevertheless significant, administrative devolution for Wales. In 1949 Clement Atlee’s Labour government created the Council for Wales and Monmouthshire as an advisory body to the UK Government on issues concerning Wales.<sup>482</sup>

Two years later, in 1951, Winston Churchill’s Conservative government founded the office of Minister of Welsh Affairs, administration for which fell initially upon the Home Secretary, and later in 1957 transferred to the Minister for Housing and Local Government.<sup>483</sup> As well as this, the years of Conservative rule at Westminster during the 1950s were also accompanied by a number of concessions to the recognition of Welsh civil society; Government financial support

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<sup>481</sup> Davies, J., *A History of Wales*, (London: Penguin, 2007), p. 639-640

<sup>482</sup> This was predominantly an advisory body, with no legislative or executive functions, but was designed to provide a voice for Wales at central government. Under the chairmanship of Huw T. Davies, the Council continually laid forth the proposals for the establishment of a Welsh Office and Secretary of State for Wales; motivated largely by the argument of Welsh equality with Scotland’s position in central government. Jones, M., *Wales since 1939*, (Manchester: Manchester University Press, 2012), p. 217

<sup>483</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 159

for Welsh books (1954); Cardiff made the official capital of Wales (1955); the Welsh dragon banner made the official flag of Wales (1959); the Eisteddfod Act (1959).<sup>484</sup>

Additionally, under the newly returned Labour Government of Harold Wilson in 1964, the office of Minister of Welsh Affairs was elevated to a full Secretary of State for Wales, a move which was followed a year later by the establishment of a Welsh Office; in terms of its institutional nomenclature, Wales was now on a par with Scotland. However, despite its terminological parity, the initial powers transferred to the Welsh Office were significantly less than those enjoyed by the Scottish Office, having no control over education or healthcare in Wales, and largely only enjoying authority over the matters transferred from the Ministry for Local Government and the Ministry for Transport – a factor that would remain a reality until the 1970s.<sup>485</sup>

Perhaps as a result of this continuing inferiority of Wales in comparison to Scotland, and catalysed by the memory of Tryweryn, as well as Plaid's ability to pose a distinct alternative to Labour, we find the continual rise of political feeling in Wales during the 1960s. In 1966, simmering discontent reached political fruition through election of Plaid Cymru candidate and chairman, Gwynfor Evans, at the Carmarthen by-election; Wales was now firmly back on the political agenda at Westminster.

However, it was the events that transpired the year after Evans' historic victory in Carmarthen that were to truly shake the foundations of the political order at Westminster. In 1967, in the by-election at Hamilton, Scottish voters returned the SNP candidate Winnie Ewing; sending a shock to the heart of central government and, for the first time, producing a situation whereby MPs from sub-state nationalist parties in both Scotland and Wales sat at Westminster.

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<sup>484</sup> 'These Conservative concessions were the result of external pressure on the Party but they also show how the existence of a Minister for Wales and the sensitivity over Treweryn increased the influence of Welsh interests in government'. Johnes, M., *Wales since 1939*, (Manchester: Manchester University Press, 2012), p. 219

<sup>485</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 55-61



Moreover, the significance of Winnie Ewing's electoral success was also to shift the focus of anxiety over the periphery at Westminster from Wales to Scotland.

In the years after its success at Hamilton, the SNP rose to take six seats at the general election in February 1974, and a further five in October 1974, whereas over this same period the number of Plaid Cymru seats remained consistent at one. Scotland had leapfrogged Wales to become the leading protagonist in the devolution debate.<sup>486</sup> Moreover, devolution had now re-emerged as a serious political issue for the first time since the silencing of the Irish Question in 1922.

'The more than doubling of the SNP vote between the 1970 and February 1974 elections confirmed Wilson's opinion that "something has to be done" about the Nats. The "something has to be done factor" in fact pervades the entire devolution saga. But, time and time again, the Labour and Conservative leaderships were far from clear about exactly what had to be done'.<sup>487</sup>

The lack of clarity in framing a response to the rise of nationalism in Scotland and Wales is perhaps one of the central characteristic tenets of the devolution debate in the 1970s. On the one hand, the rise in electoral support for the SNP, and to a lesser extent Plaid Cymru, necessitated a response as the majority of the seats threatened by the nationalists fell in Labour constituencies.<sup>488</sup> This was given a double significance at the time due to the reality that the Labour government enjoyed only a slim majority in the House of Commons, and was reliant on Scotland and Wales for a significant proportion of those seats.

On the other hand, however, and despite the increasingly apparent threat that the nationalists posed to the Labour government, attitudes in the party were divided. To a significant proportion of party members, including several 'big beasts' such as Neil Kinnock, John Smith and Tam Dalyell, the threats posed by the nationalists were not a credible enough reason to divert from the wider socialist commitment to UK-wide solidarity, and the institutions and economic

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<sup>486</sup> Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: Cardiff University Press, 2012), p. 8

<sup>487</sup> Dalyell, T., *The Question of Scotland*, (Edinburgh: Birlinn, 2016), p. 34

<sup>488</sup> Oliver, D., *Constitutional Reform in the UK*, (Oxford: Oxford University Press, 2003), p. 4

resources of the UK as a whole.<sup>489</sup> Moreover, and in hindsight perhaps correctly, a number of party members saw devolution not as a means of silencing the nationalist threat, but of arming it against central government, posing the threat of creating an uncontrollable dynamic of the gradual moving of the periphery towards independence.<sup>490</sup>

In addition, the ability for a smooth transition towards a commitment for devolution was further compounded by the inability of the party's pro-devolution lobby to agree as to what *type* of devolved government should be created. This factor was perhaps best reflected through the report issued by the Kilbrandon Commission<sup>491</sup> in 1973 – the Commission had been set up by Wilson in 1969 to investigate the possible options for devolution in the United Kingdom. However, its report, in similarity to the attitudes in the Labour Party at the time, was decidedly inconclusive and marked by several competing visions of devolved government, as well as an accompanying Memorandum of Dissent signed by two of its Commissioners.<sup>492</sup>

Of the eleven Commissioners who signed the main report, eight favoured legislative devolution for Scotland, with six of those also favouring a similar system for Wales. The two commissioners who differed in respect to Wales framed their opinion more in line with the view that Wales should receive an Assembly with delegated and advisory functions. Of the remaining three Commissioners, two were of the opinion that both Wales and Scotland should receive non-legislative Assemblies with delegated and advisory functions, with the remaining

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<sup>489</sup> Mitchell, J., 'The Creation of the Scottish Parliament: Journey without End', *Parliamentary Affairs*, Vol. 52, No. 4, (1999), pp. 649-665 at 649-650; McEwen, N., 'State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland', *Regional and Federal Studies*, Vol. 12, No. 1, (2002), pp. 66-90 at 73

<sup>490</sup> Dalyell, T., *The Question of Scotland*, (Edinburgh: Birlinn, 2016), p. 70-71

<sup>491</sup> The Commission was initially under the chairmanship of Lord Crowther, however, following his death in 1972 the chairmanship passed to Lord Kilbrandon

<sup>492</sup> Lord Crowther-Hunt and Professor Peacock did not sign the main report due to significant disagreements with its conclusions, and instead produced a separate Memorandum of Dissent which was published in accompaniment to the main report.

Commissioner favouring a system of executive devolution for all parts of the UK, excluding Northern Ireland.<sup>493</sup>

Under the majority proposals for legislative devolution to Scotland and Wales, this was accompanied by a commitment to Assemblies elected by proportional representation; a reduction of Scottish and Welsh MPs at Westminster; and the dismissal of the Secretaries of State for both nations, and their replacement with a general Secretary of State for Regional Affairs in central government<sup>494</sup> – an argument indicative of the pervasive ideology in central government that peripheral representation must be accompanied by a balance of reduced influence of the periphery at central government.<sup>495</sup>

The Memorandum of Dissent (MoD), recommended a contrary mechanism for devolution to that articulated in the main report. The main area of differentiation in the MoD was its support for the creation of a system of elected assemblies in each of the three national units comprising Great Britain<sup>496</sup> – ‘one for Scotland, one for Wales and one for each of, say, five English regions’.<sup>497</sup> These assemblies were intended to enjoy identical powers and have broadly similar structures, being schemes of executive instead of legislative devolution.<sup>498</sup>

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<sup>493</sup> Kilbrandon, Lord. ‘Report of the Royal Commission on the Constitution’ (London: HMSO, 1973) Cmnd. 5460, p. 336-337, para. 1123

<sup>494</sup> *Ibid.*, p. 347-348, para. 1169-1173

<sup>495</sup> Keating, M., *The Independence of Scotland*, (Oxford: Oxford University Press, 2009), p. 171

<sup>496</sup> The Report made no specific recommendations for Northern Ireland – though acknowledged that the scheme proposed for Scotland, Wales and England could be extended to Northern Ireland – due to the already progressing talks on the UK Governments provision in the Northern Ireland Bill. Crowther-Hunt, Lord., and Peacock, A. T., ‘Royal Commission on the Constitution’, Vol II: Memorandum of Dissent, (London: HMSO, 1973) Cmnd. 5460-I, p. 107, para. 277

<sup>497</sup> Crowther-Hunt, Lord., and Peacock, A. T., ‘Royal Commission on the Constitution’, Vol II: Memorandum of Dissent, (London: HMSO, 1973) Cmnd. 5460-I, p. 84, para. 210

<sup>498</sup> The Report defined six main areas of functional responsibility for the Regional Governments and Assemblies; ‘(a) policy making function; (b) Executive and Administrative functions including the control of the non-industrial, non-commercial *ad hoc* authorities; (c) “Agency functions” on behalf of central government; (d) Responsibilities for the *ad hoc* authorities; (e) Making appropriate ordinances to carry out the duties at (a) to (c); (f) Inspectoral and default functions’. Crowther-Hunt, Lord., and Peacock, A. T., ‘Royal Commission on the Constitution’, Vol II: Memorandum of Dissent, (London: HMSO, 1973) Cmnd. 5460-I, p. 87-88, para. 216

Perhaps the most significant element in the deviation of the MoD was its recognition that devolution, in order to be effective for the interest of the UK as a whole, must be symmetrical in its application, both in the powers that it conferred, but also in its territorial reach to also include England. This position was to a significant extent of a similar logic to that advocated by the Liberal Party at the time; that asymmetrical devolution to only certain parts of the UK would significantly reduce the future chance of devolution on a UK-wide scale. Indeed, under this understanding, we find perhaps the most enduring legacy of the majority report of the Kilbrandon Commission is its advocacy for asymmetrical over symmetrical devolution; a factor that we will see in the later analysis of this chapter as having proved crucial to inducing one of the central tenets of UK devolution.

In the 1970s, the Labour Party initially attempted to deal with devolution in Scotland and Wales under one Bill – the Scotland and Wales Bill 1976. In critiquing this approach, we find a central tenet of its decision to deal with both parts of the UK under one Bill was so as to disarm – or rather raise – the low levels of support for devolution in Wales.<sup>499</sup> However, the terms of the Bill were confusing, proposing separate devolution deals, but dealt with under the confusing rubric of a single legislative commitment. Understandably, it was poorly received by the Labour government, and failed to pass through a guillotine motion in February 1977. The Government then attempted to deal with devolution through separate Bills for Scotland and Wales. However, support was still divided within the Party, and most notably within a number of members directly opposed to its construction.

The first obstacle put into the governments path was the strong support for a referendum by the back-bench anti-devolutionist lobby.<sup>500</sup> The motivations for a referendum in this instance were

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<sup>499</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 180-181

<sup>500</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 123

decidedly aimed at an attempt to defeat devolution by way of a popular vote, and to hopefully silence the nationalist cause:

‘the referendum was not valued for its own sake – as a means of popular participation or legitimisation – but rather as a last line of defence for the territorial status quo if parliamentary opposition failed’.<sup>501</sup>

Of additional significance, was the anti-devolutionist Labour MP, George Cunningham’s successful amendment to the Bills, requiring 40 per cent of the registered electorate in Scotland and Wales, respectively, to vote in favour of devolution. The terms of the so called ‘Cunningham amendment’ were included into the text of the Scotland and Wales Acts and made specific provision for their repeal should the 40 per cent mark not be achieved.<sup>502</sup>

In explaining the argument underpinning the Cunningham amendment, we find its logic as framed by the unreserved scepticism in the Labour party to the potential risk devolution posed to the future stability of the Union. Indeed, the Cunningham amendment was, in essence, an anti-devolutionary mechanism, designed to test the reality of support for devolution, and intended to hopefully counter what was viewed as the misguided approach of the Wilson-Callaghan administrations.<sup>503</sup> From an early stage, therefore, it is apparent that the leap towards devolution in Scotland and Wales was facing an uphill struggle before it had even really begun. Thus, by the time of the referendums in March 1979, the success of devolution seemed in the balance.

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<sup>501</sup> Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: Cardiff University Press, 2012), p. 10

<sup>502</sup> Scotland Act 1978, s.85(2); Wales Act 1978, s.80(2)

<sup>503</sup> Cunningham provided the following two-part justification for the amendment: ‘I do not think that that can be called a wrecking amendment for devolution, first because it is not a figure which was not met in the EEC referendum. The EEC figure for the whole of the United Kingdom was that just under 43 per cent. voted "Yes". That is, 43 per cent. of the electorate in the United Kingdom as a whole voted "Yes". Therefore, my test, if imposed in the referendum, would have been very comfortably met. Secondly, if the Government are right, if the SNP is right and if the hon. Member for South Ayrshire (Mr. Sillars) for the SLP is right—that the people of Scotland overwhelmingly want devolution—there is no problem. If they overwhelmingly want devolution, far more than 40 per cent. will presumably vote for it. I am not asking that the overwhelming majority, or even that the majority, should vote for it, but only that 40 per cent. should be prepared to go out and vote for it.’ George Cunningham, Hansard, HC Deb 25 January 1978 vol. 942 col. 1468-1469

This was particularly the case in Wales, where attitudes in support of devolution were relatively low to begin with, and were related distinctly to a linguistic divide which corresponded to a significant extent to the territorial divergence in support for devolution.<sup>504</sup> In 1979, support for Welsh devolution was confined primarily to those Welsh identifying areas with a distinctive Welsh linguistic majority in the north and west.<sup>505</sup> In the remainder of Wales, outside of those areas with a distinct linguistically Welsh majority, even in areas with a strong sense of Welshness as a primary political identity, such as the south Wales valleys, support for devolution remained low.

In explaining this, we may distinguish two factors as significant in explaining the low support for devolution in Wales, outside of the linguistic, Plaid Cymru identifying hinterland. First, there is the issue of the referendum's translatability into a second-order vote, being a vote influenced more by attitudes towards central government than to the question being asked at the ballot.<sup>506</sup> Second, the presence of prominent Labour figureheads such as Kinnock and Abse in the 'No' campaign provided something of a reassuring safety net whereby rejecting devolution would not necessarily mean rejecting Welsh interests.<sup>507</sup>

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<sup>504</sup> The political scientist Denis Balsom devised a model to describe the varying conceptions of identity in Wales and their correspondence to political allegiance. The so called 'Three-Wales Model' divides Wales into the Welsh speaking, Welsh identifying regions of the north and west of Wales – *Y Fro Gymraeg* – which enjoys the highest support for devolution and voter tendency towards Plaid Cymru; the second region comprises that of the industrial heartlands of the South Wales Valleys – *Welsh Wales* – being Welsh identifying but not Welsh speaking; the third and final region is that of the remainder of Wales, comprising the south coast, Cardiff, Pembrokeshire and those areas to the east along the border with Wales. Balsom defined this final region as *British Wales*, being neither linguistically Welsh by majority or primarily Welsh in identity. See, Balsom, D., 'The Three-Wales Model', in Osmond, J., (ed.) *The National Question Again: Welsh Political Identity in the 1980s*, (Llandysul: Gomer Press, 1985), pp. 1-17 at 6

<sup>505</sup> Jones, R., and Trystan, D., 'The 1997 Welsh referendum vote', in Taylor, B., and Thomas, K., (eds.) *Scotland and Wales: Nations Again?*, (Cardiff: University of Wales Press, 1999), pp. 65-94

<sup>506</sup> Evans, G., and Trystan, D., 'Why was 1997 different? A comparative analysis of voting behaviours in the 1979 and 1997 Welsh referendums', in Taylor, B., and Thomson, K., (eds.) *Scotland and Wales: Nations Again?* (Cardiff: University of Wales Press, 1999), pp. 95-118 at 102-105

<sup>507</sup> 'The devolution referendum provided discontented voters with the perfect opportunity to display their discontent with the government; the presence in the No camp of prominent Labour stalwarts reassured voters that they could do so without endowing a wholly Conservative cause'. Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: Cardiff University Press, 2012), p. 13

Therefore, the referendum in Wales was, to an extent, in those marginal areas outside of the linguistic hinterland, equally translatable to a ballot on the government at Westminster as well as a measured reading of support for Welsh devolution. It was unsurprising, therefore, when on the 1<sup>st</sup> March 1979, only 20.3 per cent (turnout: 59.0 per cent) voted in favour of devolution in Wales. Even without the insertion of the Cunningham amendment, devolution in Wales had received a strong rejection from the Welsh electorate.

Comparatively, in Scotland, despite the significantly higher percentage of the population in support of devolution, Cunningham's hurdle still ultimately proved too high. Whereas a vote of 51.6 per cent was recorded in favour of devolution in Scotland, Cunningham's victory was assured when a turnout of 63.7 per cent of the registered electorate translated the result into a significantly lower 32.9 per cent in favour of devolution. Devolution had failed to materialise in both nations.

Aside from the issue of the linguistic divide, and the undoubted influence of the Cunningham amendment, the reasoning of the result in Scotland is seen as broadly similar to that in Wales; a weak and divided Labour party, several of whose Scottish figureheads campaigned effectively against devolution in Scotland, and the translatability of the result into a second order referendum on the weak performance of the Wilson-Callaghan government emerging out of the Winter of Discontent.<sup>508</sup> The subsequent failure of the referendums also signalled the collapse of Callaghan's Labour Government and in May 1979, Margaret Thatcher secured a landslide election victory at the general election, returning a Conservative Government to power in the UK.

The beginning of eighteen years of Conservative government from the 1979 general election added salt to the wounds of pro-devolution supporters in Scotland and Wales. As the Welsh

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<sup>508</sup> Devine, T., *The Scottish Nation: A Modern History*, (London: Penguin, 2012), p. 589

historian Gwyn A. Williams proclaimed in 1985; ‘a Welsh people, are now nothing but a naked people under an acid rain’.<sup>509</sup> In hindsight, we find that to some extent, Williams’ pessimistic predications did indeed come true, with both Wales and Scotland experiencing severe socio-economic transformations under the Conservative Government’s economic reforms of the 1980s. To see 1979 as the end of the road in devolution, however, was to prove false.

Through the increasing reality of the negative effect of Conservative economic policy on heavy industry, the apparent democratic deficit of the Labour vote in Scotland and Wales failing to prevent the return of Conservative governments at Westminster, and the recentralising efforts of the UK Government over these years helped to build popular support for devolution – uniting the communities against the obvious ‘threat’ posed by the Conservative spectre at Westminster.<sup>510</sup>

Moreover, as well as serving to unite popular support for devolution in Scotland and Wales, the ‘wilderness years’<sup>511</sup> of Labour also helped to refocus the party strategy, and to build support for devolution within the Party. As Ron Davies reminds us, this was to a large extent the result of a shift in the Party ideology during these years, with the watering down of the old socialist commitment to centralised provision, to a new diffused understanding based on a commitment to more pluralised values:

‘Modern socialism must empower people; we must give them the tools to improve their own lives. Devolution is central to this vision and it represents a key part of the modern Labour Party’s philosophy’.<sup>512</sup>

Underpinning this reframed ideology was the wider realisation within the Labour Party that devolving power to Scotland and Wales would provide a political safeguard that could help

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<sup>509</sup> Williams, G. A., *When Was Wales? A History of the Welsh*, (London: Black Raven Press, 1985), p. 305

<sup>510</sup> Keating, M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, (Oxford: Oxford University Press, 2001), p. 59

<sup>511</sup> Term used to describe the 18 years of consistent Conservative Government from 1979 to 1997.

<sup>512</sup> Davies, R., ‘Devolution: A Process Not An Event’, Institute of Welsh Affairs, *The Gregynog Papers*, Vol. 2, No. 2 (1999), p. 6



protect against the policies of a Conservative Government at Westminster.<sup>513</sup> Such a shift was – at least in Scotland – matched by the popular expectation that a devolved government would likely enhance welfare provision (schools, healthcare and social security), providing the opportunity for a Scottish response to Scottish issues, and an expectation of the reversal of the democratic deficit that Scotland had received under the last two decades of the Union.<sup>514</sup>

In addition to the strong social and economic arguments for devolution, there was also a significant rise in political posturing during the ‘wilderness years’, with the formation of several political groups – generally aligned to the Labour Party – fostering support for devolution. In Wales, the foundation of the Campaign for a Welsh Parliament in 1987 built on the pre-existing roots of Labour Party support for an elected Regional Assembly in Northern England, and more significantly the Campaign for a Scottish Parliament set up in 1980.<sup>515</sup>

More significantly, events in Scotland came to be dominated by the Scottish Constitutional Convention (SCC). Founded in 1988 following the signing of the Claim of Right,<sup>516</sup> the aims of the group were to reinvigorate the debate on a Scottish Parliament, and to build upon the evidenced popular support for a Scottish Parliament.<sup>517</sup> The Convention was formally launched in 30<sup>th</sup> March 1989 and comprised of members from the Labour Party, the Liberal Democrats,

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<sup>513</sup> Mitchell, J., ‘The Creation of the Scottish Parliament: A Journey without End’, *Parliamentary Affairs*, Vol. 52, No. 4, (1999), pp. 649-665 at 653

<sup>514</sup> ‘As Scots in general increasingly came to believe that Thatcherism was being imposed on Scotland, a growing number of Labour politicians came to conclude that a Scottish Assembly, even one as weak as that on offer in 1979, would have had responsibility for policies in areas in which the Conservatives were passing legislation to which they were deeply opposed. Labour’s hostility to the Conservatives and Margaret Thatcher made a Scottish Parliament look increasingly attractive to party activists, despite their suspicions of the SNP’ Denver, D., Mitchell, J., Pattie, C., Bochel, H., *Scotland Decides: The Devolution Issue and the Scottish Referendum*, (London: Frank Cass, 2000), p. 30; See also, McEwen, N., ‘State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland’, *Regional and Federal Studies*, Vol. 12, No. 1 (2002) pp. 66-90 at 81; Brown, A., McCrone, D., and Paterson, L., *Politics and Society in Scotland*, 2<sup>nd</sup> Ed. (London: MacMillan, 1998) p. 163

<sup>515</sup> Andrews, L., *Wales Says Yes: The Inside Story of the Yes for Wales Referendum Campaign*, (Bridgend: Seren, 1999) p. 53-54

<sup>516</sup> Campaign for a Scottish Assembly, *‘A Claim of Right for Scotland’*, (Edinburgh: Polygon, 1988)

<sup>517</sup> *Ibid.*, para. 4.6

the Green Party, trade unions, local authorities, churches and other civic bodies – but no SNP presence.<sup>518</sup>

The proposals put forward by the SCC were for an elected Scottish Parliament, holding primary legislative powers on a range of domestic competences. More significant, however, was the SCC's ability to frame these demands within the overarching claim of Scottish popular sovereignty. Indeed, by the time of the 1992 general election, the political members of the Convention (Labour and Liberal Democrat) had been successful in securing 58 of the 72 Scottish seats in the UK House of Commons. When coupled with its broad representation, we find that the SCC significantly questioned the ability of the UK Government to act with legitimacy in regards to Scotland but, more importantly, raised the significant argument of Scotland's right to renegotiate the terms of its membership of the Union.<sup>519</sup>

The response of the Conservative Government during this period was to offer a similarly piecemeal catalogue of administrative concessions to the representation of Scotland as had been offered to Wales in the 1950s. The Scottish Secretary, Michael Forsyth, offered the return of the Stone of Destiny, the creation of a Scottish Economic Council, and more frequent meetings of the Scottish Grand Committee – meeting in Scotland itself. However, as noted by Denver and others, these concessions came too late in the day to affect any meaningful turn away from devolution; by the time of the New Labour Government's landslide victory at the 1997 general election, the chance of successfully appeasing the nationalists through symbolic gestures and administrative concessions has passed, devolution was now all but inevitable.<sup>520</sup>

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<sup>518</sup> The SNP initially took part, but were subsequently withdrawn from the SCC owing to its unwillingness to discuss independence as an option for the constitutional future of Scotland. Denver, D., Mitchell, J., Pattie, C., Bochel, H., *Scotland Decides: The Devolution Issue and the Scottish Referendum*, (London: Frank Cass, 2000), p. 33

<sup>519</sup> Keating, M., 'Managing the Multinational State: Constitutional Settlement in the United Kingdom', in Salmon, T. C., and Keating, M., (eds.) *The Dynamics of Decentralization*, (London: McGill-Queen's University Press, 1999), pp. 21-46 at 27

<sup>520</sup> Denver, D., Mitchell, J., Pattie, C., Bochel, H., *Scotland Decides: The Devolution Issue and the Scottish Referendum*, (London: Frank Cass, 2000), p. 39-41

Following the election of the New Labour Government in 1997, its first public Bill was the Referendum (Scotland and Wales) Bill, which successfully passed through Parliament on the 31<sup>st</sup> July 1997. Provision was then made for referendums to be held in the autumn.

Indeed, in 1997, several aspects in relation to the devolution referendums had changed fundamentally. Perhaps the most notable, from a functional perspective, were the removal of the controversial Cunningham Amendment from the referendum criteria and the reliance on a simple majority in order for the referendum to pass. Also, the referendums were now pre-legislative, and based on the UK Government's general outline of Scottish and Welsh devolution, laid out in the white papers, rather than an already enacted statute.<sup>521</sup>

Alongside these alterations to the substance of the referendum process were two further important changes in the context of the referendums. First, they were held within the first year of the New Labour Government's term in office. Following the landslide electoral victory in 1997, the Party was still very much in its honeymoon period, enjoying a high level of public support and a united parliamentary group. Unlike in 1979, the 'big beasts', for the most part, towed the pro-devolution party line. What was of further significance in Wales was the context of the referendum in being held a week after that of Scotland. As noted by Wyn Jones and Scully, the intention of this was for the 'Scottish bounce' to impact the result in Wales.<sup>522</sup>

When these factors joined together, therefore – a rise in popular support for devolution; a New Labour Government commanding a high majority and still in its honeymoon period; a strong 'Yes' campaign and a weak 'No' camp; the removal of the Cunningham Amendment; the effect

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<sup>521</sup> The white papers presented a far broader proposals for devolution than had initially be laid forth in the legislation of 1978. For Scotland, it was advocated for a legislative assembly with tax-varying powers, and for Wales, an Assembly with executive functions. See; Scottish Office, *'Scotland's Parliament'*, Cm. 3658 (HMSO, 1997); Welsh Office, *'A Voice for Wales: The Government's Proposals for a Welsh Assembly'*, Cm. 3718 (HMSO, 1997)

<sup>522</sup> Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: Cardiff University Press, 2012), p. 16-17

of the Scottish bounce in Wales – the result of the referendum in 1997 was, rather predictably, very different from that of 1979.

On the 11<sup>th</sup> September, 74.3 per cent of voters in Scotland voted in favour of devolution, and 63.5 per cent in favour of tax varying powers. A week later on the 18<sup>th</sup> September, the narrow but significant result in Wales saw 50.3 per cent of voters back devolution. Three months later, the New Labour Government introduced the Scotland Bill and the Government of Wales Bill into Parliament. Both were passed within a matter of months in 1998. After more than half a century of political rhetoric, devolution had finally become a reality in Scotland and Wales.

#### **4.2.3. England**

As an initial observation, it may appear ill-fitting to conclude our analysis of the ‘road to devolution’ with a discussion on England. As has already been identified, England failed to receive a system of devolution<sup>523</sup> in 1998, and has since shown a ready reluctance for any mechanisms for self-rule – at least of a form comparable to that exercised in Wales or Scotland. This thesis argues, however, that this does not necessarily justify a bar on discussion of England within the architecture of the territorial constitution.

Indeed, the significance of England within the territorial constitution, both demographically and politically, is such that its role is equal to that of the other component parts of the UK. Indeed, as noted by Bogdanor: ‘The success of devolution will depend in large part upon whether English opinion believes it to be a fair and equitable settlement’.<sup>524</sup> Yet, in making this assumption, we find that while significant, the traditional attitudes of the political elite in the

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<sup>523</sup> As highlighted previously, the primary research scope of this thesis is concerned with the provision for legislative devolution. The resulting changes in local administration and executive devolution in England, whilst necessary for consultation and comparison, do not fall within the research aims of this thesis and so will not be analysed in as greater depth as the legislative Assemblies and Parliament in Wales, Northern Ireland and Scotland.

<sup>524</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 264

UK – as well as the English themselves – have been relatively unreceptive of devolution. In framing this opinion, we find a useful guide through the following consideration made in the Kilbrandon Report:

‘We are unanimously of the opinion that legislative devolution, even if it is applied to Scotland and Wales, as in each case a majority of us suggest, should not be applied to England or to the regions of England. The English people would generally regard it as inappropriate to have a separate legislature for England; and there is no public demand for English regional assemblies with legislative powers, whether under a federal system or otherwise’.<sup>525</sup>

In moving forward, however, the views expressed in the majority report of the Commission lacked the unanimity present in the rejection of legislative devolution for England. Instead, the inability of the commissioners to form a consensus resulted in three separate options being presented for England. Under the majority view, backed by eight of the Commissioners, Lord Kilbrandon included, England would receive a system of ‘non-executive co-ordinating and advisory councils’, comprising indirectly elected representatives, nominated by both local and central government.<sup>526</sup> One commissioner, Mrs Nancy Trenaman, advocated for a separate system of two tier regional government, consisting of the ‘maximum devolution to local authorities, together with a system of regional committees’, the composition of the latter being made up of representatives from the local authorities concerned.<sup>527</sup> The view of the remaining two commissioners in the majority report was for the establishment of a system of ‘executive devolution to directly elected regional assemblies’.<sup>528</sup>

This final view, being the recognition of the need for regional devolution in England – albeit while still supporting legislative devolution to Scotland and Wales – was supported by the separate report of the Memorandum of Dissent (MoD), which advocated for the establishment

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<sup>525</sup> Kilbrandon, Lord. ‘Report of the Royal Commission on the Constitution’ (London: HMSO, 1973) Cmnd. 5460, p. 353, para. 1188

<sup>526</sup> *Ibid.*, p. 353, para. 1189

<sup>527</sup> *Ibid.*, p. 353, para. 1189

<sup>528</sup> *Ibid.*, p. 353, para. 1189

of executive councils across the UK – with no legislative devolution – provisionally divided between five English regions.<sup>529</sup> To a significant extent, the calls for symmetrical devolution contained in the MoD bore comparison with the longstanding commitment of the Liberal Party for ‘Home Rule All Round’ – by the 1970s, this had evolved into a commitment for a series of directly elected Regional Assemblies across the entirety of Great Britain.<sup>530</sup>

Indeed, in 1976, the leader of the Liberal Party, Jeremy Thorpe, highlighted the importance that any scheme of devolution in Scotland or Wales must also be accompanied by a similar, symmetrical provision for devolved government in the English regions.<sup>531</sup> Thorpe framed these demands under the wider rubric of *federalism*, itself a pervasive commitment for many in the Liberal Party since the Gladstonian era, however, at its core, it bore all the hallmarks and logic of the MoU’s calls for executive devolution all round:

‘Federalism must come. If it does not, the United Kingdom will break up. We must first realise that there is an important English dimension. We ignore that at our peril. We must go further than the White Paper’.<sup>532</sup>

As Bogdanor explains, the overarching concern that Thorpe had identified in the Wilsonian commitment to partial devolution, extending only to Scotland and Wales, was that the resulting asymmetry held the potential to both exacerbate the existing imbalance in the territorial constitution, but more significantly, reduce the likelihood of devolution later being created in

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<sup>529</sup> Crowther-Hunt, Lord and Peacock, A. T., ‘Royal Commission on the Constitution’, Vol II: Memorandum of Dissent, (London: HMSO, 1973) Cmnd. 5460-I, p. 84, para. 210

<sup>530</sup> For political reasons, in particular relating to the rise of sectarian violence, Northern Ireland was generally treated as a ‘special case’ for much of the 1970s and was not included in the majority of discussions on regional devolution; at least from a perspective of comparison with Great Britain.

<sup>531</sup> ‘It is vital that we take seriously the demand for England to have a greater say in the running of its affairs. The hon. Member for Aylesbury (Mr. Raison) asked how this can be done. I can tell him that I have no doubt about this whatever. I gave evidence to the Kilbrandon Commission and set out precisely the proposals we have for 12 elected regional Assemblies, which would take away the grave doubts the hon. Member has about the disparities between regions. This can be done’. Jeremy Thorpe, Hansard, HC Deb 16 December 1976 vol. 922 col. 1850. As an interesting point of comparison, the Federal Government Bill 1968, introduced by Thorpe a little under a decade before his commitment to symmetrical executive devolution, contained no reference to a system of English regions: ‘That leave be given to bring in a Bill to establish Parliaments for Scotland, Wales and Northern Ireland; to amend the Government of Ireland Act; and for purposes connected thereto’. Jeremy Thorpe, Hansard, HC Deb 21 February 1968 vol. 759 col. 432

<sup>532</sup> Jeremy Thorpe, Hansard, HC Deb 16 December 1976 vol. 922 col. 1850

England.<sup>533</sup> The realisation that devolution in Scotland and Wales would leave England distinctly unrepresented, and to a lesser extent the neglected spectre at the feast, led to the fuelling of two political issues:

First, was Tam Dalyell's recognising of the 'West Lothian Question',<sup>534</sup> arguing that the proposed double asymmetry of the devolution settlements would create a condition whereby MPs from the devolved parts of the UK are entitled to vote on English-only matters – a category created by default due to the devolution of competences to Scotland, Wales and Northern Ireland – while English MPs would not enjoy reciprocal rights in regards to the devolved parts of the UK.<sup>535</sup>

Second, was the reflex of English *regionalism*, particularly in the North of England, in response to the designs for Scottish and Welsh elected Assemblies. Despite emerging movements in the North East and Yorkshire, however, a system of English regionalism failed to secure widespread support. Rather, its essence was characterised more by infighting within the political elite, framed between anti-devolutionists and *quid pro quo* regionalists, the latter of whom saw English regional assemblies as an act of reciprocity to accompany devolution in Scotland and Wales.<sup>536</sup>

Moreover, following the defeat of the Scottish and Welsh devolution at the ballot box in 1979, the idea of English regional assemblies receded back into the political shadows. Under the recentralising practices of the Thatcher government, the regional tier of metropolitan councils in England was abolished. Indeed, it was not until 1994, under the Major administration, and

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<sup>533</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 1999), p. 184

<sup>534</sup> Named after Dalyell's constituency of West Lothian after he outlined the potential anomaly in the mechanics of asymmetrical devolution when discussing the Scotland Bill in 1977: 'Under the new Bill, shall I be able to vote on may matters in relation to West Bromwich but not West Lothian, as I was under the last Bill, and will be right hon. Friend be able to vote on matters in relation to Carlisle but not Cardiff?', Tam Dalyell, Hansard, HC Deb 3 November 1977 vol. 938 col. 31

<sup>535</sup> Hadfield, B., 'Devolution, Westminster and the English Question', *Public Law*, (2005), pp. 286-305 at 286-287

<sup>536</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 201-202

in large part as a response to the need to formulate a regional tier for the competition of EU Structural Grants, that a regional tier of administration was reintroduced in England by way of the ‘Government Offices for the Regions’. By all accounts, these were comparatively weak bodies, remaining in central government, and having no direct representation from the citizens in the regions.

Indeed, by 1998 the only form of directly elected decentralisation in England was the reintroduction of the old Greater London Council, now rebranded as the Greater London Authority, and responsible for a number of functional matters in relation to the Greater London area. In the years after 1998, New Labour maintained a commitment to elected regional assemblies, led primarily by the efforts of the deputy prime minister John Prescott, who in 2004 published the White Paper ‘*Your Region, Your Choice*’, which laid out the basis for elected regional assemblies in England.

The proposed structure of these bodies was as executive organs with the powers to influence regional development.<sup>537</sup> By the time of action, however, only the North-East of England received a referendum, the result of which would go down in history as a significant rejection of regional policy, and would largely banish regionalism from the political agenda in England, a reality which, to some extent, continues to this day.

### **4.3. The Logic of Devolution**

In summary, the first part of this chapter has identified that the devolution settlements of 1998 came about as the result of a heterogeneous process. As has been identified, in each of the component parts of the United Kingdom, a complex mix of different historical experiences and

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<sup>537</sup> Office of the Deputy Prime Minister, *Your Region, Your Choice: Revitalising the English Regions*, Cm. 5511 (London: HMSO, 2003), p. 37



a unique set of more recent political pressures, transpired to create a system of devolved government which was characterised by a strong measure of asymmetry and region-specific thinking.

Inherent to this logic is the idea of devolution as a response; a response to particular political pressures as and when they arise, as opposed to a principled holistic development of the territorial constitution towards the vision of UK-wide subsidiarity. Indeed, as argued by Burrows, had the latter been the case it could rightly be assumed that a moral interpretation of subsidiarity would have delivered a far more symmetrical system of devolved government, both in terms of the powers it transferred and the reach of its territorial application.<sup>538</sup> The fact that this was not the case goes a long way in suggesting that devolution was, to a significant extent, a responsive mechanism.

However, in drawing this conclusion, we must be cautious not to frame devolution as completely disassociated from any wider moral commitment to decentralised government. Indeed, as identified in the Kilbrandon Report, as well as providing a useful safety valve to the rise of national feeling in Scotland and Wales, devolution also offered an appropriate response to other ‘defects’ in the constitutional order, namely over-centralisation and weakened democracy.<sup>539</sup> As argued by Bogdanor, in the post-war years leading up to 1998, there was certainly a strong functional case for devolution in the UK; during this period the UK was, with the exception of Japan, the largest of the worlds stable democracies to operate a centralised and unitary form of government.<sup>540</sup>

With this in mind, the merits of democracy promotion seem, to some extent, to have influenced New Labour’s commitment to ‘rolling devolution’ after 1997. In illustrating this point, we find

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<sup>538</sup> Burrows, N., *Devolution*, (London: Sweet and Maxwell, 2000), p. 121

<sup>539</sup> Kilbrandon, Lord. ‘Report of the Royal Commission on the Constitution’ (London: HMSO, 1973) Cmnd. 5460, p. 329-330, para. 1096-1101

<sup>540</sup> Bogdanor, V., *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 2013), p. 1

the following quote by Dr John Reid, Secretary of State for Scotland in 1999, to be significant in demonstrating the idea of devolution as part of a wider scheme of democracy promotion:

‘Devolution is a process of empowerment that should be spread geographically to all areas of the United Kingdom. It is not a one-size-fits-all solution; it is a policy that has been tailored to suit the various parts of the United Kingdom and the Union as a whole’.<sup>541</sup>

In unpacking this quote, we are drawn to identify what is to some extent a juxtaposition. Initially, we see clear reference to the idea of devolution as a strategy of democratic *empowerment*, on a UK-wide basis. However, at the same time, this is qualified in its possibility for symmetrical application by a recognition of the need to *tailor* regional governance in order to meet the different needs of the component parts concerned.<sup>542</sup> Under this second perspective, we find the logic of devolution to be far more nuanced in its construction; fostering support for democracy promotion, but at the same time, exercising a caveat in recognition that this will not be applied symmetrically.

In furthering this point, we find that the factor primarily influencing the *tailored* nature of the devolution settlements was the perceived *strength* or *will* of political feeling in support of devolution in the different parts of the UK. In exploring this point, we find a useful demonstration of this juxtaposed position through the wording of the UK Government’s 1997 white paper on Scottish devolution:

‘The Government want a United Kingdom which everyone feels part of, can contribute to, and whose future all have a stake. The Union will be strengthened by recognising the claims of Scotland, Wales and the regions with strong identities of their own. The Government’s devolution proposals, by meeting these aspirations, will not only safeguard but also enhance the Union’.<sup>543</sup>

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<sup>541</sup> Dr John Reid, Hansard, HC Deb 21 October 1999, col. 336 col. 671

<sup>542</sup> ‘Needs’ both of devolution as a process for facilitating a gradual shift towards independence, but also of devolution as a means of countering the shift towards independence by way of constitutional concessions.

<sup>543</sup> Scottish Office, ‘*Scotland’s Parliament*’, Cm. 3658 (HMSO, 1997), p. 10, para. 3.1

From this statement, we find a perspective on devolution which seems inherently detached from an understanding of it as a means of symmetrically applied democracy promotion. More significantly, we find what we may term an ‘identity threshold’ in the facilitation of devolved government. Through the wording used in the white paper, we find the logic of devolution as meeting peripheral *aspirations*, as opposed to UK-wide democratic *values*. In explaining this dynamic, we are drawn to consider devolution as balancing on a ‘threshold principle’, with each settlement *reflecting* the strength of the peripheral movement to which it has been designed to address.<sup>544</sup>

For example, the strong measure of devolution installed in Northern Ireland was a reflection of its aim at balancing the competing constitutional claims in the *contested region*.<sup>545</sup> Comparatively, in Scotland and Wales, devolution has been a measured response to sub-state nationalism, where strong cultural identities and a high degree of functional viability legitimised peripheral movements in demanding autonomy from central government.<sup>546</sup> Finally, in the regions of England, the most of which – with perhaps the exception of Cornwall – have relatively low levels of unique cultural identity, but who have a significant case for regional autonomy based on a perceived functional advantage, we find the provision for devolution to be much lower in the competences it is prepared to transfer.<sup>547</sup>

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<sup>544</sup> Elliott, M., ‘United Kingdom: Parliamentary sovereignty under pressure’, *International Journal of Constitutional Law*, Vol. 2, No. 3, (2004), pp. 545-554 at 553; Leyland, P., *The Constitution of the United Kingdom: A Contextual Analysis*, (Oxford: Hart, 2012), p. 247

<sup>545</sup> Parks and Elcock recognise Northern Ireland as a ‘contested region’ on account of the fact that its status as a territorial entity is viewed differently from both sides of the sectarian divide. Autonomising strategies in this region are, as differentiated from Scotland or Wales, designed to seek a compromise between *two* sub-state cultural identities, as opposed to merely providing the concession of autonomy to a singularly framed of sub-state nationalism. Parks, J., and Elcock, H., ‘Why do regions demand autonomy?’, *Regional and Federal Studies*, Vol. 10, No. 3, (2000), pp. 87-106

<sup>546</sup> Parks, J., and Elcock, H., ‘Why do regions demand autonomy?’, *Regional and Federal Studies*, Vol. 10, No. 3, (2000), pp. 87-106 at 88

<sup>547</sup> *Ibid.*, at 89

In conclusion, therefore, it is argued that the logic underpinning the introduction of devolution in 1998 – and its future development<sup>548</sup> – was constructed by way of a nuanced answer to two political issues.

First, we find the recognised practical need of devolution as a means of, on the one hand, enhancing the democratic process and widening the scope of governmental activity while, on the other hand, providing for the efficiency of the UK Parliament by reducing its scope in domestic matters. To some extent, we find this argument as coming full circle to the previously mentioned Gladstonian idea of Home Rule All Round<sup>549</sup> as being a means of freeing up space in Parliament.

However, as was recognised by Gladstone in 1879, the element of democratising efficiency is continually conditioned by the second political issue in the devolution debate, the rise of autonomy seeking units in the periphery. To some extent, this is comparable to what Alfred Stepan identified in federal systems as a ‘holding together’ logic; the concession of decentralised power in response to peripheral calls for autonomy, in an attempt to ultimately *hold together* the state.<sup>550</sup> Clearly, in each of the devolution settlements – and more notably the lack of devolution in England – there is an identification of the different political pressures they are seeking to address; devolving power to *appease* or *disarm* the nationalist threat, rather than pursuing a genuine commitment to democracy promotion.<sup>551</sup>

Thus, in conclusion, we may see devolution as a reflective strategy, designed and implemented in response to the political pressures in the periphery. Similar to the theme identified in Chapter

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<sup>548</sup> This will be discussed in more detail in Part 2 of this chapter.

<sup>549</sup> See: Chapter One (1.4)

<sup>550</sup> Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-323

<sup>551</sup> Bogdanor, V., ‘Devolution: Decentralisation or Disintegration’, *The Political Quarterly*, Vol. 70, No. 2, (April 1999), pp. 185-194 at 194

One in relation to the formation of the UK, the emergence of devolution was *strategic* as opposed to *inevitable*.

In the second part of this chapter, we will analyse the substantive themes and challenges of devolution in the UK, and in particular we will focus on what extent the logic identified in Part One has influenced these processes.

## **Part Two – The Themes and Challenges of Devolution**

The focus in Part Two of this this chapter will turn to analysing the substantive elements of the devolution settlements. In achieving this, this Part of the chapter is divided into two sections. The first section will explore the substantive constitutional provision of the devolution settlements, in order to seek to identify common themes in the devolution process. The debate in the second section will then move to consider the theoretical aspects of devolution and the challenges the new theoretical approaches pose to the territorial constitution.

### **4.4. Themes in the Devolution Process**

The aim of this section of the chapter is to analyse the themes that have emerged in relation to the substantive structure of the devolution settlements. These will be identified under four headings.

#### **4.4.1. Asymmetrical**

It is argued that the first, and perhaps most significant, theme of the devolution process relates to the asymmetry of competences between the devolved administrations. In highlighting the significance of this theme, this section of the chapter will deal with the specific asymmetries

that existed as a result of the original 1998 devolution settlements. The logic underpinning this approach may be explained in two ways. First, it is recognised that the asymmetry between the devolution settlements themselves was most pronounced in 1998. Second, it is argued that by recognising the asymmetry of the devolution settlements at their inception, we gain a useful base for the later analysis on the evolution of devolution – the facilitation of which will take place in the later sections of this chapter.

In keeping with the structure of Part One of this chapter, let us begin our analysis of the substantive elements of the devolution settlements by consulting the (re)introduction<sup>552</sup> of devolution in Northern Ireland. As recognised in Part One of the chapter, devolution in this part of the UK was attached to the wider reconciliatory provision of the ‘peace process’. Correspondingly, the scheme of devolution introduced in Northern Ireland was, similar to the road towards its inception, distinct in its aims and objectives when compared to the settlements in Scotland and Wales. Evidence of the unique corpus of devolution in Northern Ireland can be understood through an analysis of the substantive provisions made in the Northern Ireland Act 1998.

Under the Act, Northern Ireland received a new devolved *Assembly*<sup>553</sup> at Stormont, comprising of 90 elected Members of the Legislative Assembly (MLAs), elected by way of a proportional Single Transferable Vote.<sup>554</sup> Under this system, Northern Ireland was divided into 18 electoral

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<sup>552</sup> The advent of devolution in Northern Ireland in 1998 must be seen as distinctly separated from the devolution settlements which had existed prior to 1973; the settlement resulting from the Good Friday Agreement advocated for the introduction of a new Northern Ireland Assembly, and not for an introduction of the old pre-1973 Stormont regime.

<sup>553</sup> The nomenclature underpinning the use of *Assembly* rather than *Parliament* for the new Northern Irish legislature was based on a desire to disassociate the reintroduction of devolution in Northern Ireland from the events that had occurred during ‘the troubles’ after 1969. This was to acknowledge the underlying theme in the Belfast Agreement of the need to acknowledge the past, but to start afresh with the aim of securing a peace settlement in the Province. See: *The Agreement reached in multi-party negotiations*, Cm 4292 (HMSO, 1998),

<sup>554</sup> Northern Ireland Act 1998, s. 34

constituencies, each returning 6<sup>555</sup> MLAs to the Assembly.<sup>556</sup> After such election, the formation of the Northern Ireland Executive comprised of the First Minister and Deputy First Minister, themselves nominated by the Assembly,<sup>557</sup> as well as Northern Ireland Ministers.<sup>558</sup>

In explaining the reasoning behind the highly proportional procedure in the voting system in Northern Ireland, we find its logic as primarily a reflection of the need to ensure broad representation of both communities in Northern Ireland.<sup>559</sup> Under section 4(5) of the Northern Ireland Act, all MLA's and candidates for election are required to register their community affinity – Nationalist, Unionist or Other – and the electorate rank the candidates in order of preference; as opposed to the single vote, first past the post system used in UK Parliamentary elections.

Moreover, the filling of the offices of Northern Ireland Ministers is conducted not by way of the largest party in the Assembly – as is the tradition under the Westminster system – but by the proportional representation of ministers from the elected parties in the Assembly, as specified under the formula in section 18(5) of the Act.<sup>560</sup> Thus, at all points, there is provision for the broad representation of the desperate parts of the political divide in Northern Ireland.

Additionally, as a further demonstration of the reconciliatory logic of Northern Irish devolution, and the design of devolution as linked to the gradual reestablishment of devolved

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<sup>555</sup> This number was reduced from 6 to 5 in 2016 following the Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016, s. 1(1)

<sup>556</sup> Northern Ireland Act 1998, s. 33; s.33(1) defined the boundaries of the Northern Ireland constituencies as those used in elections for the UK Parliament. s.33(2) outlines the number of MLA's to be elected per constituency.

<sup>557</sup> Northern Ireland Act 1998, s.26; Note that the election procedure for the Northern Ireland Executive was altered by s.8 of the Northern Ireland (St Andrews Agreement) Act 2006 – becoming s.16A of the Northern Ireland Act 1998. Under the new procedure, the election of the First Minister and Deputy First Minister is conducted via a vote in the Assembly on the nominees from the largest political party and largest political designation in the Assembly.

<sup>558</sup> The Northern Ireland Ministers are to be selected by the First Minister and Deputy First Minister, with the total number of Northern Ireland Ministers not exceeding ten, unless duly authorised by the Secretary of State for Northern Ireland. Northern Ireland Act 1998, s.17

<sup>559</sup> Burrows, N., *Devolution*, (London: Sweet & Maxwell, 2000), p. 37

<sup>560</sup> Northern Ireland Act 1998, s.18(5)

government, we find that the definition of the competences of the Assembly are divided into three distinct categories: excepted, reserved and transferred matters.<sup>561</sup> Most important of these categories is that of ‘reserved’ competences, which relate to those matters that were not expressly devolved to Northern Ireland in 1998, but are capable of being devolved should sufficient progress be deemed to have been made in the facilitation of the peace process.<sup>562</sup>

Bearing some similarity to the system in Northern Ireland, the division of competences to the Scottish Parliament is provided under a similar frame of negative distinction, whereby devolved competences are construed as those that are not expressly ‘reserved’ by the UK Parliament. However, unlike in Northern Ireland, the Scotland Act 1998 deals with these under one heading: ‘reserved matters’.<sup>563</sup> Moreover, direct provision was included into the 1998 Act declaring that the scope of reserved powers in Scotland were capable of being amended on the request of the Scottish Parliament by way of a Section 30 Order, whereby the list of reserved powers may be enhanced, upon the agreement of the UK Government.<sup>564</sup>

In an additional move, we also find that membership and election of the Scottish Parliament also differs from that in Northern Ireland, being arranged by the Additional Member System. Under this system, Scotland is divided into 73 constituencies, elected via a simple majority ‘first past the post’ system, as well as 8 regions, each returning 7 Members of the Scottish Parliament (MSP’s).<sup>565</sup>

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<sup>561</sup> Excepted competences relate to those areas defined under Schedule 2 of the Act which are expressly withheld for operation by the UK Parliament. Reserved matters are laid out under Schedule 3 of the Act and relate to those matters which, in 1998, were maintained by the UK Parliament but which may be devolved in future should experience show the ability of the power-sharing executive to work together. The final category relates to Transferred Powers. These are the powers which are not specified as either expected or reserved and so are, by result, devolved.

<sup>562</sup> Northern Ireland Act 1998, Sch. 3

<sup>563</sup> Scotland Act 1998, Sch. 5; The scope of reserved matters is capable of being amended by the request of the Scottish Parliament, making a Section 30 Order to the UK Government, provision of which is specified under the Scotland Act 1998, s.30(2)

<sup>564</sup> Scotland Act 1998, s.30(2)

<sup>565</sup> Scotland Act 1998, Sch. 1



Furthermore, we also find that the system of devolution employed in Scotland in 1998 was further distinguished by two additional provisions. First, alongside a substantial transfer of general legislative competence, we find that the Scottish Parliament received a narrow, but nonetheless significant, degree of competence in fiscal matters; being able to alter the basic rate of income tax by 3p in the pound.<sup>566</sup> Second, in correlation to the strength of Scottish devolution, the nomenclature of the devolution settlement conferred responsibility to an elected Scottish *Parliament*, as opposed to an *Assembly* – a symbolic recognition of Scottish nationhood, and of the independence of the Scottish Parliament prior to the Anglo-Scottish Union of 1707.<sup>567</sup>

In this regard, we may argue that to a significant extent, the construction of the devolution settlement in Scotland reflected a measured response to the political strength of Scottish nationalism. Indeed, as outlined in Part One of this chapter, the essential logic of devolution was constructed on the basis of a measured response to the weight of culturally mobilised political movements in the periphery – offering a range of devolved competences based on the strength of the peripheral movement. Thus, as argued, the significant electoral successes of the SNP, and the anxieties over this in the Labour Party, led to the system of devolution being introduced in Scotland in 1998 as being significant in the competences that it conferred.

Correspondingly, the lower political capital of sub-state nationalism in Wales – and the questionable reception of devolution by the Welsh public – meant that the proposals for devolution in Wales were, by 1997, distinctly lesser in value than the scheme advocated in Scotland. While Wales received an Assembly of 60 Assembly Members (AM's), elected by way of the Additional Member System<sup>568</sup> – an identical system to that used in Scotland – the

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<sup>566</sup> Scotland Act 1998, Part IV

<sup>567</sup> Tierney, S., 'Giving with one hand: Scottish devolution within a unitary state', *International Journal of Constitutional Law*, Vol. 5, No 4, (2007), pp. 730-753 at 742

<sup>568</sup> Under the Additional Member System, as in Scotland, Wales was divided into 'constituencies' and 'regions'; the former providing 40 AM's and conforming to the existing constituency boundaries for Westminster

powers exercisable by Members of the new National Assembly for Wales were distinctly behind that of their counterparts in Edinburgh.

Indeed, far from emulating the implied authority of the Scottish *Parliament*, the reduced nomenclature of the Welsh *Assembly* in 1998 received only the transferred functions of the Secretary of State for Wales and the Wales Office; having no direct legislative responsibility and being a mere ‘body corporate’<sup>569</sup> as opposed to a Parliament with primary legislative powers, as was the case in Scotland. Moreover, unlike Scotland, Wales received no revenue raising powers in 1998, and was solely reliant upon the block grant from central government, known commonly as the Barnett Formula.<sup>570</sup>

The distinct lagging behind of competences for the Welsh Assembly in comparison to the system in Scotland was further muddled by the peculiarities of the separation of powers within the new Welsh Assembly. Unlike the Scottish Parliament, which employed the traditional UK Parliamentary system of an executive comprised of members from the majority party in the legislative house, the Welsh system made no distinction between the executive and the legislature – a system that in itself was almost immediately recognised as ill-fitting and unsustainable.<sup>571</sup>

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elections, with the latter providing 20 AM’s and reflecting the regions used in the elections for the European Parliament. Government of Wales Act 1998, s.2(1), Sch. 1 ss.1-3

<sup>569</sup> Government of Wales Act 1998, s.1(2)

<sup>570</sup> Government of Wales Act 1998, s.80(1)

<sup>571</sup> Wyn Jones and Scully reference the comments of the Australian academic, Rufus Davies, who in 1977 remarked that the provisions under the Scotland and Wales Bill made provision for something of a unique and alien form of devolved government in Wales, a *platypus*; ‘The Welsh model of so-called “executive devolution” was a particular weird and unlikely combination: a body with its own democratic mandate exercising executive (and related, limited legislation) authority within the context of powers granted through the actions of another legislature and executive based on a wholly separate electoral mandate; a body exercising powers that had been established and defined without any thought that they might eventually be transferred to such an entity; a body whose internal structure and organization was certainly alien to Westminster and the many political institutions in that tradition’. Wyn Jones, R., and Scully, R., *Wales Says Yes: Devolution and the 2011 Welsh Referendum*, (Cardiff: University of Wales Press, 2013), p. 27

Correspondingly, therefore, we find the asymmetry between the devolution settlements as a confirmation of the already established logic of devolution as a *reactive* and *measured* mechanism of constitutional change. Moreover, however, we find that this assumed a heightened significance in respect of the fact that England, aside from the creation of the Greater London Authority,<sup>572</sup> received no measure of devolution<sup>573</sup> in 1998.<sup>573</sup> Thus, on a territorial basis, devolution was not a UK-wide project, but rather a project effecting only three of the four component parts of the UK; a reality which in itself further suggests a correlation between devolution and culturally defined nationalism.<sup>574</sup>

In focussing specifically upon this point, we find that the essence of the ‘double asymmetry’<sup>575</sup> embodied in the devolution settlements had a significant effect upon England. This may be summarised in two parts:

First, as a result of the creation of devolved administrations in the other three parts of the UK, England became a territorialised entity in itself, receiving, by default, its own set of competences, but without a specifically English institutional personality. Rather, the exercise of legislative competence on English-only matters continued to be exercised by the UK Parliament; becoming the *de facto* Parliament for England.<sup>576</sup>

Second, owing to the unique circumstances of England-only matters continuing to be dealt with under the legislative process of the UK Parliament, there emerged significant questions in

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<sup>572</sup> Greater London Authority Act 1999

<sup>573</sup> Hopkins, J., *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, (London: Cavendish, 2002), p. 170

<sup>574</sup> It must be noted that in this debate, Northern Ireland is to be treated as unique – reflecting a logic not of the accommodation of one sub-state nationalist group, but of a balance between two groups. It is argued that this is in essence a reflection of the need for devolution to accommodate the existence of nationalism, but its logic is distinctly opposed to that applied in the creation of the Scottish Parliament or National Assembly for Wales.

<sup>575</sup> Tierney, S., ‘Giving with one hand: Scottish devolution within a unitary state’, in Choudhry, S., (ed.) *Constitutional Design for Divided Societies: Integration or Accommodation*, (Oxford: Oxford University Press, 2008) pp. 438-460

<sup>576</sup> Jeffrey, C., ‘Dis-United Kingdom’, *Juncture*, Vol. 19, No. 1, (2012), pp. 14-16; Kenny, M., ‘English Politicised?: Unpicking the Normative Implications of the McKay Commission’, *The British Journal of Politics and International Relations*, Vol. 17, (2015), pp. 152-170 at 154

relation to democratic accountability and representation in England. As noted in Part One of this chapter, the essence of this challenge was initially hypothesised in 1970s, coming to be known as the ‘West Lothian Question’; recognising the double asymmetry of the devolution settlements as creating a condition whereby MPs from the devolved parts of the UK are entitled to vote on England-only matters, such as healthcare or education, while MPs sitting in English constituencies do not enjoy the reciprocal right to vote on matters inside the competence of the devolved administrations.<sup>577</sup>

Yet, while delivering a distinct sense of political imbalance following its introduction in 1998, we find that in relative terms, the introduction of devolution failed to amount to a significant moment of instability in the territorial constitution. Instead, the introduction of devolution in 1998, despite its heavily asymmetrical character, assumed a relatively smooth path. The reasoning for this may be summarised in three parts:

First, was the relative fact that while creating new sites of political authority, the political composition of the new devolved executives in Scotland and Wales – Northern Ireland being the unique case – was congruent with that of the UK Government. Indeed, it would take just under a decade, with the election of the SNP in Scotland in 2007, for a notable incongruity to emerge between the devolved administrations and the UK Government.

Second, while the respective devolution settlements largely transferred the powers of the respective territorial offices of central government to the new devolved administrations,<sup>578</sup> the administrative architecture remained relatively unchanged, with the administrative staff in each

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<sup>577</sup> Hadfield, B., ‘Devolution, Westminster and the English Question’, *Public Law*, (2005), pp. 286-305 at 286-287

<sup>578</sup> Northern Ireland Act 1998, s.23; Scotland Act 1998, s.53; Government of Wales Act 1998, s.22

of the devolved administrations being primarily comprised of civil servants from central government.<sup>579</sup>

Third, while creating a new multi-level polity, the devolution settlements did not transform the normative legal reality of the UK as a unitary state; each of the devolution settlements making express recognition of the continuing legal authority of the UK Parliament to legislate on behalf of the devolved administrations. However, this was qualified in 1999 through the introduction of the Sewel Convention.

Under the Convention, as embodied in the Memorandum of Understanding, it was acknowledged that the UK Parliament would not normally legislate on devolved matters without first seeking the authority of the devolved administrations concerned. The provision for the Convention was in itself a recognition of the longer acknowledgement that any measure of devolution would similarly require a political mechanism designed to curtail the exercise of the legislative supremacy of the UK Parliament.<sup>580</sup> Its significance, however, was to provide a degree of stability in the acknowledgement that, while still legally sovereign, the actions of the UK Parliament would remain respectful of the limits of devolved competence.

#### **4.4.2. A Process, Not an Event**

The first theme identified the double asymmetry which existed between the devolution settlements – and England – at their inception in 1998. The second theme seeks to build upon

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<sup>579</sup> Gallagher, J., 'Intergovernmental Relations in the UK: Co-operation, Competition and Constitutional Change', *The British Journal of Politics and International Relations*, Vol. 14, No. 2, (2012), pp. 198-213 at 198-199

<sup>580</sup> 'Parliament would retain ultimate legislative authority in all matters, but it would be a convention that in the ordinary course this power would not be used to legislate for Scotland or Wales on a transferred matter without the agreement of the Scottish or Welsh Government'. Kilbrandon, Lord., 'Report of the Royal Commission on the Constitution', (London: HMSO, 1973), Cmnd. 5460, p. 337, para. 1126; 'We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament'. Lord John Sewel, Hansard, HL Deb 21 July 1998, vol. 592, col. 791

this recognition of the asymmetrical construction of the devolution settlements by recognising that the evolution of devolution after 1998 developed along distinctly bilateral tracks, which saw increasing powers transfer from central government to the periphery, while at the same time sustaining the overarching asymmetry between the settlements.

The essential personality of this theme is able to be summarised through the now often cited phrase of the Secretary of State for Wales in 1998, Ron Davies; ‘Devolution is a process. It is not an event and neither is it a journey with a fixed end-point’.<sup>581</sup> A more illustrative account of Davies’ observation is provided through the earlier, pre-devolutionary remarks of the Labour MP for Swansea East, Donald Anderson, who likened devolution to a ‘mystery tour’:

‘Any new constitutional advance can be a sort of mystery tour... I recall the fine story of a Welsh mystery tour by bus from Cwmrhydyceirw in my constituency. There was a sweep about where the tour would end, and it is said that the driver won. The people of Wales are driving the mystery tour. They will decide the pace and the direction, and I have confidence in our people’.<sup>582</sup>

It is perhaps significant that these two well-known commentaries on the dynamics and future of devolution came from politicians in Wales. Indeed, in Wales, more than any other part of the UK, it was acknowledged from an early point that the devolution settlement created in 1998 would not be a lasting solution; telling of this point, we find that early devolution in Wales was more indicative of the beginning of a train of momentum, as opposed to a defined destination. However, before focussing on the specifics and complexities of the devolution process in Wales, let us first address the evolution of devolution in the rest of the UK:

In Northern Ireland, devolution after 1998 has largely taken form through the gradual transfer of powers *back*<sup>583</sup> to Stormont, interspaced by periods of direct rule (or no executive rule at

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<sup>581</sup> Davies, R., ‘Devolution: A Process Not An Event’ Institute of Welsh Affairs: *The Gregynog Papers*, Vol. 2, No. 2, (1999), p. 15

<sup>582</sup> Donald Anderson, Hansard, HC Deb 25 July 1997, vol. 298, col. 1164

<sup>583</sup> This is to argue that the situation in Northern Ireland is ultimately inclined for a return to the level of competences held in the pre-1972 era, albeit under a reformed system of consociational governance.

all).<sup>584</sup> The most significant enhancement of powers came in 2006 after the provisions agreed in the St Andrews Agreement, and embodied in the Northern Ireland (St Andrews Agreement) Act 2006. Under the Act, provision was made for the devolution of policing powers, as well as other functional matters such as renewable energy provision.

More importantly, however, were the provisions made under the Act for the reform of the power-sharing system in Northern Ireland, leading to the amendment of the electoral procedure of the Northern Ireland Executive<sup>585</sup> – a further reflection of the logic of devolution in Northern Ireland as being primarily a response to its status as a *contested region*, as opposed to embodying a response to the aims of one particular group.

In Scotland, as already identified, the system of devolution provided through the 1998 Act amounted to a considerable transfer of legislative competences and, in particular, the provision for minor tax-varying powers. The subsequent evolution of devolution in Scotland has largely taken place through the provision for further devolution of fiscal power, accompanied by a broader thickening of the overall legislative competence of the Scottish Parliament.

Under the Scotland Act 2012, based largely on the recommendations made by the Calman Commission,<sup>586</sup> a package of enhanced financial provision was transferred to the Scottish Parliament; stamp duty, landfill tax, as well as the increased threshold for the varying of income tax.<sup>587</sup> This was further enhanced by the Scotland Act 2016, which devolved income tax in its entirety, as well as certain other taxes in areas such as Air Passenger Duty.<sup>588</sup>

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<sup>584</sup> As is currently the case in Northern Ireland, there remains neither a Northern Ireland Executive or a system of Direct Rule.

<sup>585</sup> Northern Ireland Act, s.16A

<sup>586</sup> Calman, Kenneth, 'Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century' (Edinburgh: Commission on Scottish Devolution, 2009), Executive Summary, p. 9-11, para. 41

<sup>587</sup> Scotland Act 2012, Part 3

<sup>588</sup> Scotland Act 2016, Part 2

However, in addition to the direct increase in devolved competences, we also find a distinct culture of symbolic enhancement of the devolution settlement in Scotland. First, under the 2012 Act, the nomenclature of the ‘Scottish Executive’ was transformed to the ‘Scottish Government’.<sup>589</sup> More significantly, under the Scotland Act 2016, following the recommendation of the Smith Commission, the permanence of the Scottish Parliament was guaranteed in statute,<sup>590</sup> as was the operation of the Sewel Convention.<sup>591</sup> While both changes amounted to little more than statutory recognition of an already existing political reality, their implementation points to the fact that as well as thickening the legislative competence of the Scottish Parliament, the understanding of devolution as a *process* is also significant in explaining the symbolic enhancement of devolution within the territorial constitution.

In Wales, devolution has taken place through a number of clearly identifiable ‘stages’. As already identified, the initial 1998 settlement delivered a weak model of devolution to Wales, and one that was, from the start, recognised as needing reform. While the initial elements of this reform came by way of minor changes in the procedural workings of the National Assembly, and its relationship with the UK Parliament, the first substantive change to the devolution settlement in Wales came in the Government of Wales Act 2006, itself a response to the report of the Richard Commission.

Under the report of the Richard Commission, reporting in 2004, it was recommended that Wales should receive an enhanced system of government. Most notable in this process were two aspects. First, it was recognised that the peculiarities and inefficiencies of the 1998

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<sup>589</sup> Scotland Act 2012, s.12

<sup>590</sup> ‘The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements’ Scotland Act 2016, s.1

<sup>591</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, (September 2014), para. 22



settlement would need to be amended, and for direct provision to be made for the separation of powers in the Assembly.

Second, it was recognised that the National Assembly should also receive a system of enhanced legislative competence. Under the Commission's proposals, it was recommended that Wales should move directly to a primary legislative powers model, however, the realities put in place under the Government of Wales Act 2006 were distinctly qualified in their conferral of primary legislative powers to the Assembly.

Under this scheme, Wales was able to pass Assembly 'measures',<sup>592</sup> thus removing its reliance upon the Secretary of State for Wales to push legislation through the UK Parliament – but was still necessarily reliant on seeking the broader consent of the UK Parliament before exercising such powers.<sup>593</sup> More significantly, under s.103-104 of the 2006 Act, provision was made that a referendum could be held – no earlier than 2011 – on the further adaptation of the legislative process in Wales.

Under this scheme, provision was made that in the event of a positive vote, Part 4 of the Act would be made effective, which would confer powers upon the National Assembly to pass 'Acts of the Assembly', not requiring of consent from the UK Parliament if legislated within the respected competences of the Assembly.<sup>594</sup> A referendum was held on this issue on the 3<sup>rd</sup> March 2011, and delivered a strong vote of 63.5 per cent in favour of the further enhancement of devolution in Wales.

This was further enhanced through the Wales Act 2012, which significantly enhanced the financial provision of the Assembly, reflecting the recommendations made under Part I of the Silk Commission report. In March 2014, Part II of the Silk Commission Report made the

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<sup>592</sup> Government of Wales Act 2006, s.93-109

<sup>593</sup> Government of Wales Act 2006, Part 3

<sup>594</sup> Government of Wales Act 2006, Part 4

recommendation that the model of devolution in Wales should be reconfigured from a conferred to a reserved powers model.<sup>595</sup> The basis for this argument was based largely on the fact that a reserved powers model would reverse the uncertain boundaries of devolved competence existing under a conferred powers model, thus reducing the change of litigation and increasing the stability of the devolution settlement in Wales.<sup>596</sup> However, it rests beneath the wider arc of devolution in Wales as a symmetrising action mirroring, to an extent, of the path already channelled by Scotland.

In regards to England, the continuing lack of support for a meaningful system of devolution comparable to that of the rest of the UK has led to a unique formation of scattered *devolution* to ‘combined authorities’ – holding only executive functions, with no legislative authority. To some extent, as in the Cornish sense, which enjoys the peculiar status of a unitary authority holding the powers of a combined authority, the introduction of this system is indicative of a reflection of the unique cultural identity of the region. However, framed more broadly, the essence of the introduction of the combined authorities is more a top-down than a bottom-up initiative, and bears little systematic comparison with devolution in Scotland or Wales, and is decidedly removed from the situation in Northern Ireland.

In delivering a summary of this theme, we are drawn to consider its character as arranged in two parts. First, in line with its logic as a pragmatic or tailored response to peripheral pressures, devolution has emerged not as a single constitutional fix, but as a process, with no specific end point. Second, we find that devolution, as a process, is driven by popular will and the political rhetoric of the devolved administrations, as opposed to any proactive policy by the UK Government. Paradoxically, it appears that this second element has come to gain rather than

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<sup>595</sup> Commission on Devolution in Wales (Silk Commission Part II) ‘*Empowerment and Responsibility: Legislative Powers to Strengthen Wales*’, (March 2014), para. R.1

<sup>596</sup> Commission on Devolution in Wales (Silk Commission Part II) ‘*Empowerment and Responsibility: Legislative Powers to Strengthen Wales*’, (March 2014), para. 4.4

lose traction after 1998 – particularly in Wales, which was initially reluctant towards devolution.

In this regard, we see that devolution as a process also reflects another underlying theme: that of the failure of devolution to deliver on its aims to ‘kill nationalism stone dead’. Indeed, on this issue, we find that devolution has served more to arm as opposed to disarm nationalism in Scotland and Wales, whereas the process in Northern Ireland remains united to the delicacies of the sectarian divide and is ruled more by pragmatism, than on catering for a single dissatisfied group.

#### **4.4.3. Bilateral**

Thus far, the argument in this chapter has come to recognise devolution as an asymmetrical and open-ended process. Building upon these themes, it is now argued that the third theme of devolution relates to its bilateral character. In framing this theme, we are able to divide its construction between two parts.

First, through the logic of devolution as a *process*, tailored to meet the needs of the component parts of the UK, we find that the relationship that emerged between the UK Government and the devolved administrations has been one of a series of isolated lines of communication. For Trench, this system is indicative of a series of ‘bi-lateral bargains’,<sup>597</sup> framed by the already identified asymmetry between the devolution settlements.

As argued by Swenden and McEwen, the essence of this asymmetrical system has, in itself, created a condition whereby bilateralism is the necessary reality for intergovernmental relations in the UK:

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<sup>597</sup> Trench, A., ‘Scotland and Wales: The Evolution of Devolution’, in Hazell, R., (ed.) *Constitutional Futures Revisited: Britain’s Constitution to 2020*, (Basingstoke: Palgrave MacMillan, 2008), pp. 29-42 at 32

‘asymmetry ensures that there remain few issues around which the devolved administrations can find common cause, and bilateral intergovernmental relationships remain the order of the day’.<sup>598</sup>

Through consideration of these remarks, we are now directed to the second aspect of the bilateral character of the devolution settlements; the reduced possibility for multi-lateral relations between the new sites of governmental authority. Indeed, through consideration of the history of the devolution settlements, we are drawn to realise the distinct lack of joined-up thinking which governed their construction. This is perhaps best demonstrated through the fact that the facilitation of intergovernmental relations (IGR) came largely as an afterthought, being hastily constructed as an annex to the initial devolution process in 1998, and laid out in the Memorandum of Understanding in 1999.<sup>599</sup>

‘This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. It is intended to be binding in honour only’.<sup>600</sup>

Under this system, the primary<sup>601</sup> system of IGR connected to the devolution process – on a UK-wide basis – falls onto the operation of the Joint Ministerial Committee (JMC), comprising of representatives from the UK Government and the devolved administrations, meeting in either plenary or functional format,<sup>602</sup> and designed to facilitate the coordination of the

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<sup>598</sup> Swenden, W., and McEwen, N., ‘UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics’, *Comparative European Politics*, Vol. 12, No. 4/5, (2014), pp. 488-509 at 501

<sup>599</sup> *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee*, Cm. 5240 (London: HMSO, 2001); For useful commentary, see: Trench, A., ‘Devolution: The withering-away of the Joint Ministerial Committee’, *Public Law*, (2004), pp. 513-517 at 516;

<sup>600</sup> *Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm. 5240 (London: HMSO, 2001), para. 2

<sup>601</sup> It must also be noted that provision for IGR is also provided through the institutionalised system of the British-Irish Council, however, in this instance, we find that the provision for the majority of IGR within the devolution process was designed to fall within the scope of the Joint Ministerial Committee.

<sup>602</sup> *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee*, Cm. 5240 (London: HMSO, 2001), para. 22

relationship between the UK Government and the devolved administrations.<sup>603</sup> Under this provision, we find the operation of the JMC as exhibiting three themes:

First, as noted from the quote of the Memorandum of Understanding, the scope of IGR within the devolution process is decidedly weak; being reliant only upon the *honour* of the parties, and being a statement of political *intent*, as opposed to being legally *binding*. Moreover, the essential scope of the JMC itself is designed for the *consultation* as opposed to the *co-decision* of the devolved administrations – a factor that in recent years has led to it receiving significant criticism as being a ‘talking shop’, over and above a meaningful mechanism for IGR.<sup>604</sup>

Second, through this weak foundation, we find a distinct cultural of hierarchy within the provision of the JMC. Both its facilitation and agenda are the responsibility of central government, and as indicated in the above statement of intent, central government has no legal obligation to call the JMC, or to reach binding agreements. The UK Government has, instead, seemed to prefer to rely on bilateral relations with the devolved regions concerned – a factor which in itself helps to reinforce the hierarchical basis of constitutional relations between the centre and the periphery.<sup>605</sup>

Third, there is the reality that the JMC, in being reliant on the will of the UK Government, has largely been applied only in times of constitutional crisis. Indeed, between 1998 and 2007, we find that the JMC failed to meet, aside from in areas of EU policy.<sup>606</sup> It was not until the election of the SNP government in 2007, marking the beginnings of political incongruence between the UK Government and the devolved administrations, that more regular – though still far from

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<sup>603</sup> *Ibid.*, Part II Supplementary Agreements.

<sup>604</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, (September 2014); Welsh Government, *Securing Wales' Future*, (Cardiff: Welsh Government, 2017)

<sup>605</sup> Hopkins, J., *Devolution in Context: Regional, Federal and Devolved Government in the European Union*, (London: Cavendish, 2002), p. 168

<sup>606</sup> Joint Ministerial Committee (Europe)

consistent – meetings of the JMC have begun to emerge.<sup>607</sup> More recently, after the Scottish independence referendum, and in particular in relation to the negotiations on the UK's withdrawal from the EU, we find a relatively regular calendar of JMC meetings.

This reality of the JMC's use indicates its importance for central government is generally linked to particular *moments* of constitutional unsettlement, as opposed to a lasting commitment to cooperative governance with the devolved administrations.<sup>608</sup> In this regard, the practical realities of the JMC tie in heavily with the overarching logic of devolution identified in Part One; it is ultimately a responsive mechanism to peripheral pressures, as opposed to a coherently framed constitutional instrument.

Indeed, as will become clearer through the argument in Chapter Five, the effects of – or rather the response of – devolution to peripheral pressures has fostered a constitutional environment whereby co-decision or shared rule is lacking.

#### **4.4.4. Reactive Dynamic**

The final theme of the devolution process relates to its ability to foster a reactive dynamic between the component parts of the United Kingdom. In considering this point, we are required to refocus our lens of enquiry from an investigation into the substantive construction of the devolution settlements, to a consideration of the wider systematic quality of devolution as a process. The logic underpinning this new approach is motivated by the recognition that in the space between each part of the territorial constitution, there exists the potential for a reactive dynamic, whereby changes in one part of the UK have follow-up effects in the remaining parts.

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<sup>607</sup> McEwen, N., 'Still better together? Purpose and power in intergovernmental councils in the UK', *Regional and Federal Studies*, Vol. 27, No. 5, (2017), pp. 667-690 at 668

<sup>608</sup> Trench, A., 'Devolution: The withering-away of the Joint Ministerial Committee', *Public Law*, (2004), pp. 513-517 at 516

To some extent, this idea has already been discussed within the earlier corpus of the thesis. For example, it has been recognised that the emergence of the Irish Home Rule movement at the end of the 19<sup>th</sup> century had a significant effect in motivating the rise of home rule movements in Scotland and Wales.<sup>609</sup> Moreover, in Part One of this chapter, it was demonstrated that the rhetoric surrounding devolution to Scotland and Wales in the 1970s, motivated an English response, characterised by a rise in regional feeling, particularly in those areas in the North of England close to Scotland.

This thesis argues that following the introduction of devolution in 1998, these pre-existing fault lines of reactive potential became more pronounced. Through its ‘territorialising’ of UK politics,<sup>610</sup> and the distinctly asymmetrical, bilateral and open-ended nature of its construction, devolution created a constitutional environment that was highly interdependent and, by result, increasingly volatile to changes in other parts of the territory. For Neil Walker, the reality of this underlying dynamic is:

‘apt to produce a ratchet effect, with each national constituency framing its claim [for further autonomy] in terms of its discrete collective interests in response to a constitutional landscape disrupted by a sequence of previous such claims’.<sup>611</sup>

While, in relation to Northern Ireland, specific qualification must be recognised in Walker’s claim, it is nonetheless hypothesised that following the introduction of devolution in 1998, the potential for a reactive dynamic to emerge increased significantly. In translating this hypothesis into a frame of theoretical enquiry, this thesis will now distinguish between two areas of constitutional action which have demonstrated the existence of a reactive dynamic.

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<sup>609</sup> Dicey, A. V., *England’s Case Against Home Rule*, (London: John Murray, 1886), p. 134

<sup>610</sup> Mitchell, J., *Devolution in the UK*, (Manchester: Manchester University Press, 2009), p. 218

<sup>611</sup> Walker, N., ‘The Territorial Constitution and the Future of Scotland’, in McHarg, A., Mullen, T., Page, E., and Walker, N., (eds.) *The Scottish Independence Referendum: Constitutional and Political Implications*, (Oxford: Oxford University Press, 2016), pp. 247-276 at 271

The first area relates to the vertical relationship between central government and the devolved parts of the UK. In identifying the scope of reaction within this challenge, we find its construction located in the challenge of the devolved institutions to the pervasive doctrine of the legislative supremacy of the UK Parliament. As noted previously, in each of the devolution settlements provision is made for the continuing ability of the UK Parliament to exercise its rights of sovereignty over the devolved administrations.

Translated into the potential for a reactive dynamic, we find the central sustaining tenet of this challenge as motivated by fear in the devolved administrations that the exercise of the theoretical right will transpire to become a political reality. For Hadfield, this is illustrative of a fear not necessarily of the *supremacy* of the UK Parliament, but of the *freedom* that such supremacy creates to legislate on behalf of the devolved administrations; a freedom which is ultimately unpredictable and, at least theoretically, unchallengeable.<sup>612</sup>

In evidencing the existence of this dynamic, we find its provision as best characterised in the relationship between Scotland and the UK Parliament, particularly after the election of an SNP government at Holyrood in 2007. More significantly, however, following the UK's decision to leave the EU, the nature of this challenge has transcended to include all three devolved parts of the UK in opposition to the centralised ideology of the UK government<sup>613</sup> – the essence of this challenge will be considered in more depth in Chapter Five.

The second area to foster a reactive dynamic is identified in the horizontal relationship between the devolution settlements themselves. In framing the essence of this challenge, we find its personality as conditioned by the desire within the less autonomous parts of the United

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<sup>612</sup> Hadfield, B., 'Devolution, Westminster and the English Question', *Public Law*, (2005), pp. 286-305 at 294

<sup>613</sup> A discussion of the competing ideological readings of the construction of the territorial constitution will follow in the final section of this chapter. For a general overview of this debate, see: Aughey, A., 'The Future of Britishness', in Hazell, R., (ed.) *Constitutional Futures Revisited: Britain's Constitution to 2020*, (Basingstoke: Palgrave MacMillan, 2008), pp. 90-105 at 91-93



Kingdom to play ‘catch-up’ to the leading autonomous unit – Scotland.<sup>614</sup> In accurately framing this dynamic, we find its potential mode of operation as divisible between two processes.

The first, characterised best in the example of devolution in Wales, is for that unit to seek to emulate the powers of the Scottish Parliament. Thus, the potential for reaction in this regard is motivated not necessarily by *opposition* to devolution in Scotland, but rather by the *reliance* on Scotland as a guide, and a legitimising point of reference for enhanced autonomy in Wales. To some extent, this dynamic may be summarised as having its essence in a desire to foster a re-symmetrising process, motivated by the desire to further the devolution process in Wales through reference to a Scottish precedent<sup>615</sup> – an attempt both to further enhance self-government in Wales, but also to correct the inefficiencies in the devolution settlement, a factor that, as we have seen, was particularly pronounced between 1998 and 2006.

The second process of reaction is exemplified in the lack of devolution in England. It is argued that the essence of this process rests on the response in England to its perceived lack of an effective and independent *voice* in comparison to the other devolved parts of the UK; enjoying a distinct lack of democratic reciprocity in regards to its ability to vote on devolved competences – framed most generally within the title of the ‘West Lothian Question’. For Aughey, the gene of this English grievance emerged directly after the introduction to the rest of the UK in 1998:

‘English national identity had become an urgent matter of dignity. Englishness was now defined in terms of what it *lacked* on the (questionable) assumption that everyone else does possess a dignified and proud national identity... The pitch of English grievance rises once Scotland, Wales and Northern Ireland acquire institutions after New Labour’s election victory in 1997.’<sup>616</sup>

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<sup>614</sup> Sweden, W., and McEwen, N., ‘UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics’, *Comparative European Politics*, Vol. 12, No. 4/5, (2014), pp. 488-509 at 504

<sup>615</sup> Loughlin, J., ‘Political and Administrative Asymmetries in a Devolving United Kingdom’, in Requejo, F., and Nagel, K-J., *Federalism beyond Federations*, (Farnham: Ashgate, 2011), pp. 37-59

<sup>616</sup> Aughey, A., ‘The Challenges to English identity’, in Hazell, R., (ed.) *The English Question*, (Manchester: Manchester University Press, 2006), pp. 45-63 at 51

The strength of this argument is questioned by other writers, such as John Curtice and Anthony Heath who declare that the essence of the English challenge was slower in gathering momentum, and was relatively unpronounced after the initial 1998 settlement.<sup>617</sup> However, regardless of the point of its emergence, we find that the essence of the reaction in England is, unlike Wales, framed by *opposition* to devolution – particularly in Scotland – due to its perceived effect of impeding English representation within the UK. Indeed, in illustrating the reality of this effect, the report of a 2013 public attitudes survey confirmed a strong sense of ‘devo-anxiety’ in England, and a fear of England being ‘overlooked’ within the UK, particularly in response to the leadup to the 2014 referendum on Scottish independence.<sup>618</sup>

Such was the strength of this dissatisfaction with the position of England within the territorial constitution that it ranked second on a list of constitutional issues requiring urgent attention; second only to the desire for a renegotiated settlement with the European Union, and far outweighing other domestic concerns on matters such as electoral reform, reform of the House of Lords, or Scottish independence.<sup>619</sup>

Added to the significance of the reaction in England to devolution elsewhere in the United Kingdom, however, is the curious rejection by the majority in England of a system of devolution to match that of Scotland or Wales. While some political support does exist for the creation of an English Parliament,<sup>620</sup> or a system of English Regions,<sup>621</sup> and with evidence suggesting spikes in support for these institutions after specific constitutional moments, support

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<sup>617</sup> Curtice, J., and Heath, A., ‘England Awakes? Trends in National Identity in England’, in Bechhofer, F., and McCrone, D., (eds.) *National Identity, Nationalism and Constitutional Change*, (London: Palgrave MacMillan, 2009), pp. 41-63

<sup>618</sup> Wyn Jones, R. et al., ‘England and its Two Unions: An Anatomy of a Nation and its Discontents’, *Institute for Public Policy Research*, (July 2013), p. 9

<sup>619</sup> *Ibid.*, p. 12

<sup>620</sup> The Campaign for an English Parliament, <<http://thecep.org.uk/>> (Accessed: 25/04/18)

<sup>621</sup> Proposals for a system of English Regions have been longstanding commitments of several political and independent groups, although the majority of proposals are generally framed within a wider ‘federal’ architecture.

for English devolution remains relatively low. Moreover, following the significant rejection of plans for an elected regional assembly in the North East of England in 2004, devolution in England remains an unconvincing policy for any of the UK-wide political parties, aside from the Liberal Democrats.<sup>622</sup> Indeed, current trends show the UK Government (and public opinion) as only supportive of a piecemeal conferral of powers to ‘combined authorities’, as opposed to a system of devolution comparable to that in the rest of the UK.<sup>623</sup>

Nevertheless, in response to the clear dissatisfaction felt within England following the 2014 Scottish independence referendum, the Prime Minister announced on the morning after the result that a ‘decisive answer’ would be sought to the West Lothian Question in England.<sup>624</sup> Six days later, on the 25<sup>th</sup> September, the Leader of the Commons, William Hague, chaired the first meeting of the Cabinet Committee on Devolution.

In regards to seeking a solution to the English Question, the Cabinet Committee considered four possible solutions, each of which had originated from the earlier findings made by a mixture of Parliamentary commissions or political committees.<sup>625</sup> The overarching consensus within the Cabinet Committee report was to follow the recommendations made a year earlier, in 2013, by the McKay Commission. The aims of the McKay Commission had been set out as follows:

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<sup>622</sup> As was indicative in the earlier identified ideas of Jeremy Thorpe, the Liberal’s support for English regional assemblies is generally framed within a wider commitment to UK-wide federation, as opposed to a specifically tailored policy of English regionalism.

<sup>623</sup> The system of ‘combined authorities’ is found in the Local Democracy, Economic Development and Construction Act 2009, s. 103-113; The scope of administrative action of the new combined authorities is largely functional in nature and, as outlined by Joanie Willett, is misleading to be classified under the broad heading of ‘devolution’, which implies the formal transfer of powers; ‘the widespread use of the word ‘devolution’ by central government is misleading, implying as it does a significant shift in power from the centre to the regions which, in practice, is not on the table’. Willett, J., ‘Cornwall’s Devolution Deal: towards a More Sustainable Governance?’, *The Political Quarterly*, Vol. 87, No. 4, (Oct-Dec 2016), pp. 582-589 at 585

<sup>624</sup> The Guardian, ‘David Cameron raises West Lothian question after Scotland vote: English votes for English laws’, 19 September 2014, <<https://www.theguardian.com/politics/2014/sep/19/david-cameron-devolution-revolution-uk-scotland-vote>> (Accessed: 25/04/18)

<sup>625</sup> Leader of the House of Commons, ‘*Implications of Devolution for England*’, Cm 8969 (December 2014), p. 25-31

‘to consider how the House of Commons might deal with legislation which affects only part of the United Kingdom, following the devolution of certain legislative powers to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales’.<sup>626</sup>

While framed in the context of seeking a UK-wide solution, the implied aims of the Commission were to seek a solution to the West Lothian Question within the UK Parliamentary system. This is perhaps best evidenced in its results, which drew as their primary conclusion the need to rectify the lack of an English *voice* within the constitutional arrangements.<sup>627</sup> The solution advocated by the Commission to rectify this issue was for an amendment to Parliamentary procedure, known most commonly as ‘English Votes for English Laws’ (EVEL):

‘Decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs from constituencies in England (or England-and-Wales)’.<sup>628</sup>

The introduction of EVEL was passed by a Commons vote on the 22<sup>nd</sup> October 2015, and was formally introduced into Parliamentary procedure from January 2016 by way of an amendment to Standing Orders.<sup>629</sup> However, as recognised by Gover and Kenny, it is unlikely that the provision of EVEL is a watertight solution to the reactive dynamic in England and the lack of

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<sup>626</sup> The McKay Commission, ‘Report of the Commission on the Consequences of Devolution for the House of Commons’, (March 2013), para. 1

<sup>627</sup> Kenny, M., ‘Englishness Politicised? Unpicking the Normative Implications of the McKay Commission’, *The British Journal of Politics and International Relations*, Vol. 17, No. 1, (2015), pp. 152-170

<sup>628</sup> The McKay Commission, ‘Report of the Commission on the Consequences of Devolution for the House of Commons’, (March 2013), para. 119

<sup>629</sup> Standing Orders 83J-83X; The scope of EVEL adds three new elements to the traditional parliamentary procedure. First, all new Bills must pass through a new ‘certification’ phase designed to screen for Bills coming before the House of Commons which concern solely English (or English and Welsh, or English, Welsh and Northern Irish) matters. If certification is awarded to a Bill recognised as effecting England-only matters, it then passes through the second element; the ‘committee’ stage, which is inserted within the existing procedure between Second Reading and the Report stage. At the committee stage, England only legislation is scrutinised by English-only MPs (this only applied to England-only matters and does not concern Bills also applying to Wales or Northern Ireland). Following the Report stage, the Bill then undergoes a second Certification test, and should it be deemed to still apply to only England (or England and Wales, or England, Wales and Northern Ireland) it passes to the final new phase, the Legislative Grand Committee (LGC). Under the LGC, MPs from the territorial regions concerned in the Bill scrutinise the Bill. After this stage, the Bill continues through the traditional procedure to the House of Lords. For a more detailed account, see: House of Commons Library Briefing Paper, ‘English voted for English laws’ CBP-7339, (December 2015)

an English *voice*.<sup>630</sup> Indeed, when read in tandem with the other themes identified above, in particular the acknowledgement of devolution as a *process*, it appears that the scope for a further reactive dynamic between the devolved parts of the UK and England is inevitable; particularly if devolution should enter a further phase of enhancement in Scotland.

In summary, therefore, it appears that the identification of the reactive dynamic in the devolution process offers a useful insight into the ideological maelstrom currently existing within the territorial constitution. Riding this theme further, the final section of this chapter will now move to consider the competing ideological conceptions of the territorial constitution that have emerged in tandem to the devolution process.

#### **4.5. Competing Claims of Power and Authority**

In summary, it has thus far been argued that the advent of devolution in 1998 stemmed from a delicate balance of realpolitik concessions and democracy promotion, measured against – and tailored to reflect – the strength of cultural identity across the component parts of the United Kingdom. Moreover, it has also been demonstrated that in the years after 1998, devolution has been significantly enhanced through the staged transfer of further powers from central government to the periphery. This recognition of devolution as a process, and in particular the effects that this process has had in enhancing the devolution settlements in Scotland, Wales and Northern Ireland after 1998, raises the question of its impact upon the balance of power, and the arrangement of sovereignty, within the territorial constitution.

Assisting in the formulation of an answer to this question, we find a useful framework for theoretical investigation provided by Martin Loughlin. For Loughlin, the essential criteria in

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<sup>630</sup> Gover, D., and Kenny, M., 'Finding the good in EVEL: An evaluation of "English Votes for English Laws" in the House of Commons', *Centre on Constitutional Change*, (November 2016), p. 37

understanding the construction of sovereignty within a constitutional system lies in the separation of its corpus into two parts; ‘both an expression of official power and... the product of a political relationship’.<sup>631</sup> In explaining this distinction, Loughlin relies upon two labels; *competence* – the expression of official power – and *capacity* – the product of the political relationship between the citizen and the state.<sup>632</sup> Further explanation of these terms can be provided as follows:

In regards to the identification of *competence* within a constitutional system, Loughlin frames its tenets as primarily legal in nature, and relatable to the institutional and absolute authority of a state to enact a system of laws:

‘In a technical jurisdictional sense, competence reflects both internal coherence (that is, the existence of a viable system of rule) and external independence (the identity of the state as an entity in the international arena)’.<sup>633</sup>

Constructed internally, the identification of competence in the UK in this sense, relates not to the ‘competences’ of the devolved institutions as provided for under the relevant legislation, but to the overarching legal authority of the UK Parliament to legislate on behalf of the devolved parts of the UK without legally having to receive their consent.<sup>634</sup> Framed substantively, therefore, the question of competence is relatable to the reading of sovereignty as the absolute, unitary and supreme authority to act in any situation.<sup>635</sup> In translating this principle to the United Kingdom, we find its articulation best displayed through the pervasive Diceyan tome of the legislative supremacy of Parliament; Parliament has the ‘right to make or

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<sup>631</sup> Loughlin, M., *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), p. 84

<sup>632</sup> *Ibid.*, p. 84

<sup>633</sup> *Ibid.*, p. 84

<sup>634</sup> Significant comment is found on this principle in the recent case of *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; analysis of which is contained in Chapter 5 of this thesis.

<sup>635</sup> Bellamy, R., ‘Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU’, in Walker, N. (ed.) *Sovereignty in Transition*, (Oxford: Hart, 2003), pp.167-189 at 175

unmake any law' with 'no person or body... having a right to override or set aside the legislation of Parliament'.<sup>636</sup>

The relatively straightforward construction of Loughlin's first principle, however, becomes distinctly more nuanced when read in tandem with the identification of the *capacity* to act within constitutional systems. For Loughlin, the efficacy of this second principle seems not to suggest a substantive challenge to the justiciability of legal competence, but rather a more abstract political challenge which calls into question the legitimacy of the locus of sovereign competence to act in accordance with the views of its citizens.<sup>637</sup> Reflectively, the limits of this second principle are translatable to what T. H. Jones cogently described as, 'what is legally possible may not be constitutionally or practically achievable'.<sup>638</sup>

Against the present construction of the devolution process, this thesis argues that it is this second principle which poses the most significant challenge to the established constitutional order. As has already been recognised, the frame of legal competence within the territorial constitution is both theoretically and substantively still reliant upon the Diceyan interpretation. However, through a combination of realpolitik conditions and functional realities, the devolution process has ushered in a new wave of constitutional thought which challenges the Diceyan orthodoxy.

This section of the chapter will now chart these challenges in two parts; the first challenge relates to the reconfigured ideological interpretations of the balance of power within the territorial constitution, and the second relates to the substantive and functional challenges posed by the devolution settlements themselves. This section of the chapter will then conclude with

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<sup>636</sup> Dicey, A. V., *Introduction to the Study of the Law of the Constitution*, (Indianapolis: Liberty Press, 1982), p. 3-4; Loughlin, M., *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), p. 84

<sup>637</sup> Loughlin, M., *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), p. 85

<sup>638</sup> Jones, T. H., 'Devolution and Sovereignty', *Statute Law Review*, Vol. 33, No. 2, (2012), pp. 151-162 at 153

a discussion as to whether or not these challenges have ushered in a new constitutional reality, or have maintained the constitutional orthodoxy of the UK as a unitary state.

#### **4.5.1. The Union State View**

The nature of the first challenge relates to the ideological framing of the United Kingdom as a ‘union state’ or ‘state of unions’. As identified in Chapter One of this thesis, the crux of this interpretation lies in the history of the UK as a gradual coming together of independent political units to form a legal unitary state, but with the continuation of certain rights of peripheral autonomy.<sup>639</sup> Fundamental to this interpretation is the idea of the retained pre-Union legacies of each of the component parts of the UK, which by effect frames the UK as both a multi-national, but also a never fully unified state, both culturally or institutionally. In this regard, it is argued that the ideological basis of this challenge poses two distinct problems to the interpretation and arrangement of power and authority within the territorial constitution.

First, through the historical recognition of the UK as a ‘state of unions’, there is the implied acknowledgement, from the perspective of nationalist groups, that sub-state entities entered the state as ‘national societies’.<sup>640</sup> The significance of this idea can be interpreted from two perspectives. On the one hand, through the recognition of the continued cultural distinctiveness of certain sections of the polity there is, as identified previously, a high degree of democratic legitimacy afforded to arguments for sub-state autonomy.<sup>641</sup> On the other hand, and as evidenced in the case of Scotland, the continuation of certain pre-union rights and infrastructures, as well as the Scottish interpretation of the Union as a coming together of

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<sup>639</sup> Reference to the UK as a ‘unitary state’ in this context applies to the legal reading of sovereignty maintained at the level of central government and does not include the wider political interpretation offered by the ‘state of unions’.

<sup>640</sup> Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004), p. 6-7

<sup>641</sup> Parks, J., and Elcock, H., ‘Why do regions demand autonomy?’, *Regional and Federal Studies*, Vol. 10, No. 3, (2000), pp. 87-106



‘equals’, there is the assumption of a reinterpreted perspective on the balance of power and the political legitimacy to argue separately from the logic of the central state.

The essence of this second perspective was referenced in the case of *MacCormick v Lord Advocate*, in which Lord Cooper produced the following remark in regard to the converse interpretation of the balance of power and authority within the Union;

‘The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law... Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that the Scottish representatives were admitted to the Parliament of England’.<sup>642</sup>

In considering this position, we find that the second part of the ideological challenge relates to its furtherance through the vehicle of institutional recognition in the shape of the devolution settlements. As Keating reminds us, through the institutionalisation of the Scottish Parliament, the pre-devolution arguments of the Scottish National Party became enhanced within an institutional frame:

‘nationalists have been arguing that it is the heir of the old Scots Parliament and thus of an element of original sovereignty’.<sup>643</sup>

Moreover, the settlements underpinning devolution in both Scotland and Wales receive heightened significance through their validation and legitimisation by way of popular referendums. Indeed, it may be argued that through the provision for referendums to justify the creation of – and in Wales further transfer of power to – the devolution settlements, a strong measure of accompanying political capacity is to be seen as also being transferred.

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<sup>642</sup> *MacCormick v Lord Advocate* [1953] SC 396, 411

<sup>643</sup> Keating, M., ‘Plurinational Democracy in a Post-Sovereignty Order’, *Northern Ireland Legal Quarterly*, Vol. 53, No. 4, (2002), pp. 351-365 at 363

Framed from an ideological or theoretical perspective, the institutionalisation of this challenge has the effect of what Aughey describes as a reconditioned understanding of the logic of Britishness. For Aughey, the interpretation of power within the Union was traditionally sustained from the view of the United Kingdom as a solidarity pact, whereby decisions are read from a UK-wide perspective. However, following the introduction of devolution, Aughey notes how the perspective of the Union changed when viewed from the periphery – increasingly being seen as a *contract*, whereby the terms of the Union can be renegotiated at any time, and the ultimate future of the constitution rests on the will of the citizens concerned.<sup>644</sup>

Reflectively, we find a comparative analysis of this new ideological frame with the view of devolution as a *process*. Under the gradual thickening of the legislative competence of the devolved administrations, we find an accompanying rise in the calls for further devolution – a matter which is made more significant by its reliance on the political capacity transferred to the devolved administrations via the initial 1998 referendums.

#### **4.5.2. Functional Division of Power**

So far, we have seen how peripheral reinterpretations of the territorial constitution raise significant political questions as to the locus of sovereign competence. Under this second challenge, we will consider the transformation of the ideological challenge into a functional challenge – whereby the devolution settlements translated the ideological argument into a functional reality. In this regard we may divide this challenge between two frames:

#### *The Permanence of Devolution*

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<sup>644</sup> Aughey, A., ‘The Future of Britishness’, in Hazell, R., (ed.) *Constitutional Futures Revisited: Britain’s Constitution to 2020*, (Basingstoke: Palgrave MacMillan, 2008), pp. 90-105 at 91-93

It is argued that the first aspect of the functional challenge relates to the recent acknowledgement within the devolution settlements that the devolved administrations are permanent elements of the UK's constitutional architecture. As already identified, in Scotland and Wales, this became enshrined through legislative provision in 2016 and 2017 respectively, whereby it was guaranteed that the settlements could not be abolished without the popular support of the devolved nations concerned.<sup>645</sup>

In framing this provision as a distinct challenge, we find its existence as significant for two reasons. First, it is argued that through the inclusion of such provision in the devolution settlements, the UK Government makes the implied recognition that the introduction of devolution has, to an extent, altered the normative understanding – or at least the theoretical structure – of the territorial constitution. Fundamental to this argument is the understanding that devolution has installed an irreversible transfer of political power to the periphery:

‘It is in constitutional theory alone that the supremacy of Parliament is preserved. Power devolved, far from being power retained, as implied by constitutional theory, will be power transferred, as dictated by political reality; and it will not be possible to recover that power except under pathological circumstances, such as those of Northern Ireland after 1968.’<sup>646</sup>

This leads us onto the second aspect of the challenge, being that the Scottish Parliament and Government – with a similar provision being made in Wales<sup>647</sup> – are not to be abolished without the consent of the people of Scotland, voting in a referendum.<sup>648</sup> Thus, while the subtle nuance must be acknowledged between *amend* and *abolish*, it is clear that the overarching existence of the devolved administrations in Scotland and Wales is acknowledged by the UK Government as being protected by a popular veto. Conclusively, therefore, from a theoretical

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<sup>645</sup> Scotland Act 2016, s.63A; Wales Act 2017, s.A1

<sup>646</sup> Bogdanor, V., ‘Devolution: Decentralisation or Disintegration?’, *The Political Quarterly*, Vol. 70, No. 2, (April 1999), pp. 185-194 at 187

<sup>647</sup> Government of Wales Act 2006, s.A1(3)

<sup>648</sup> Scotland Act 1998, s.63A(3)

perspective, devolution has created an environment whereby the construction of the UK's territorial constitution is no longer assumed as unitary from a territorial perspective, and has entered an age whereby the UK has increasingly come to be recognised as a multi-level polity.

### *The Sewel Convention*

The second aspect of the functional challenge relates to the operation of the Sewel Convention within the devolution settlements. As with the provision in relation to the permanence of the devolution settlements, the Sewel Convention received symbolic recognition in 2016 when it was embodied within the text of the Scotland Act (followed a year later by an almost identical provision in the Wales Act 2017<sup>649</sup>):

‘But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’.<sup>650</sup>

Under this construction, we find two crucial elements in the definition of the Convention. The first element relates to the substantive political issue of the convention as providing that the UK Government will not *normally* legislate on behalf of the devolved administrations without their consent. From a matter of pure constitutional analysis, we find this to be a relatively weak element of constitutional provision. For example, when compared against the legislative restriction on the UK Parliament in regards to the Dominions, as framed under the Statute of Westminster, we find the Sewel Convention to be distinctly lacking in certainty and substance:

‘No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof’.<sup>651</sup>

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<sup>649</sup> Wales Act 2017, s.2; becoming: s. 107(6) Government of Wales Act 2006

<sup>650</sup> Scotland Act 2016, s.2; becoming: s.28(8) Scotland Act 1998

<sup>651</sup> Statute of Westminster 1931, s.4

However, while acknowledging the relative weakness of the Sewel Convention from the perspective of it being a substantive element of constitutional practice, it is argued that the true essence of the Convention, as translatable to a constitutional challenge, comes by way of its symbolic significance. Under this second element of the Convention, it must be acknowledged that the essence of this argument will be reflected upon more in Chapter Five, however, at this stage, it is important to note that through its provision in the devolution settlements, the Sewel Convention has assumed a position as a distinctive instrument in defining the limits of UK Parliamentary authority over the devolved administrations.

#### **4.5.3. Quasi-Federal?**

As a summative point, this final section of the chapter will now consider as to what extent the challenges outlined above have resulted in a fundamental shift in the normative understanding of the arrangement of competence and capacity within the territorial constitution. As framed above, the challenges presented by the devolution process have had significant effects upon the territorial constitution; calling into question the legitimacy of the UK Parliament to act in contrivance of the democratic will of the periphery, and the translatability of this challenge into the reality of the functional limitations it places upon the rights of the UK Parliament to exercise its sovereignty authority against the devolved parts of the UK.

In recognition of these challenges, several academic accounts have come to attribute devolution as transforming the traditional unitary interpretation of the territorial constitution of UK into something akin to a ‘quasi-federal’ union.<sup>652</sup> Indeed, as argued by Rick Rawlings, devolution

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<sup>652</sup> Bogdanor, V., ‘Devolution: Decentralisation or Disintegration?’, *The Political Quarterly*, Vol. 70, No. 2, (April 1999), pp. 185-194 at 187; Some, such as Baroness Hale, go further in identifying the UK as a ‘federal state’, Rt. Hon. Baroness Hale of Richmond, ‘*The Supreme Court in the UK Constitution*’, A Lecture Delivered at the Legal Wales Conference, 12 October 2012, <<https://www.supremecourt.uk/docs/speech-121012.pdf>> (Accessed: 09/07/18)

is ‘a slippery concept which is de facto not dissimilar from federalism’.<sup>653</sup> For Ronald Watts, the UK after devolution evolved into a ‘decentralised union with some federal features’.<sup>654</sup>

However, in interpreting the UK as bearing similarity to, or shifting towards a federal system, it is first necessary to recognise that the currents underpinning the last two decades of constitutional change are not, in themselves, new. Indeed, as noted by Livingstone in 1952, the existence of legislative devolution in Northern Ireland; the system of administrative devolution in Scotland; the lack of legal opposition from central government to the possibility of the secession of Northern Ireland or Scotland; and the likely opposition to any action by central government to recentralise power from the periphery, all presumed the existence of a significant degree of federal thought within the United Kingdom.<sup>655</sup>

Revisiting Livingstone’s observations in light of the above discussion on devolution post-1998, we find that the legislative devolution in Northern Ireland has been accompanied by a Scottish Parliament and a Welsh Assembly; the statutory recognition exists of the right for Northern Irish secession from the Union, and reunification with the Republic of Ireland; a referendum on Scottish independence was legally provided for by central government in 2014; the Sewel Convention and the permanence of the devolution settlements are on a statutory footing; and the opposition of the devolved administrations to recentralisation by central government continues.

In summary, therefore, we find that devolution post-1998 has enhanced the shifting tide of the constitutional order towards a distinctly more decentralised system of government. To attribute this to a formal shift towards federalism, however, would be premature. Rather, instead of

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<sup>653</sup> Rawlings, R., *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, (Cardiff: University of Wales Press, 2003), p. 2

<sup>654</sup> Watts, R., ‘Comparing Federal Systems in the 1990s’, (Kingston, Ontario: Queens University, 1996), p. 12

<sup>655</sup> Livingstone, W. S., ‘A Note on the Nature of Federalism’, *Political Science Quarterly*, Vol. 67, No. 1, (1952), pp. 81-95 at 92-93

providing for a distinct shift in the binary framing of the UK's territorial constitution from a unitary to a federal system, devolution provides for a more nuanced recalibration of the ideology underpinning the formal constitutional structure. Indeed, as noted above, the United Kingdom remains, at the very least theoretically, a unitary state, with a sovereign Parliament at Westminster.

The nuance of this observation is that the theoretical distinction is accompanied by the political reality in the underlying currents of the territorial constitution in a move towards a *politically* federal polity, which by sheer weight of the transfer of capacity towards the periphery, calls into question the legitimacy of the theoretical construction of sovereignty competence in central government:

‘As time passes, and as devolution is woven ever more closely into the constitutional fabric of the United Kingdom, the theoretical ability of the U.K. Parliament to interfere unilaterally with devolved matters will be seen increasingly as a vestige of an unreconstructed doctrine of absolute legislative authority’.<sup>656</sup>

The ability of this transfer to lead the UK towards a federal system will be discussed in depth in Chapter Five. At this point, however, it remains necessary to characterise the devolution settlements as ushering in a period of unsettlement into the constitutional order, which while perhaps not indicative of a normative change, raises significant political questions as to the arrangement of power and authority within the Union.

#### **4.6. Concluding Remarks**

This chapter has presented the argument that devolution is a reactive mechanism of constitutional change. Through consideration of the four component parts of the UK, we have found that devolution – and the absence of devolution – emerged as a response to the level of

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<sup>656</sup> Elliott, M., ‘United Kingdom: Parliamentary sovereignty under pressure’, *International Journal of Constitutional Law*, Vol. 2, No 3, (2004), pp. 545-554 at 554

political instability and strength of cultural feeling within these parts of the UK. Correspondingly, under the logic of devolution as a *reactive* and *measured* device of constitutional reform, it has been demonstrated that the system of devolution that emerged out of the 1998 settlements was characterised by four key themes: being *asymmetrical*, *bi-lateral*, a *process* and, as a result of these factors, a mechanism of constitutional change ripe for fostering a *reactive dynamic* between the component parts of the territorial constitution.

Moving forward, the debate in the next chapter will take these themes and analyse the current state of devolution in regards to the Brexit process.



## Chapter 5

### Brexit and the Territorial Constitution

The previous chapter argued that the devolution process has created a number of themes that have served to unbalance and unsettle the territorial constitution of the UK; *asymmetry*, *bilateralism*, *open-ended*, *reactive* and *competing ideologies* on power and authority. This chapter seeks to develop these themes – on a UK-wide basis – and apply them to the recent events associated with the rubric of the ‘Brexit’ process. This chapter will identify the challenges posed to the territorial constitution by the Brexit process, and possible solutions for the future mediation of these challenges in delivering a scenario of constitutional settlement.

#### 5.1. Introduction

On the 23<sup>rd</sup> June 2016, the electorate of the United Kingdom (UK) voted, by a margin of 51.9 to 48.1 per cent, to leave the European Union (EU). While not expressly legally binding, the referendum decision was read in *realpolitik* terms as an irrevocable mandate upon the UK Government to formally declare its intention to withdraw from the EU. Although significant from an external perspective, this chapter argues that the process of the UK’s withdrawal from the EU – hereinafter ‘Brexit’<sup>657</sup> – has raised a number of equally significant challenges within the territorial constitution of the UK.

In addressing these challenges, this chapter takes a UK-wide approach in analysing the political and constitutional issues connected to the Brexit process, and their reception in each of the four component parts of the UK. In pursuing this approach, however, it is also important to

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<sup>657</sup> An abbreviation of ‘British Exit’.

acknowledge the limitations affecting the equal application of a UK-wide analysis in relation to Brexit. This is due to the fact that, like devolution, the organisation of substantive political opinion on the Brexit process is affected by the double asymmetry of the territorial constitution. While a wealth of primary resources remain available in regards to the Scottish and Welsh Governments, the collapse of the Northern Ireland executive in January 2017, and the absence of devolution in England, has limited the range of primary materials available in relation to these parts of the UK. Therefore, elements of the UK-wide analysis in this chapter will, by necessity, be traced through analysis of the rhetoric and policy of the UK Government, representing the interests of Northern Ireland and England.

With these considerations in mind, the structure and analysis of this chapter is divided into two parts. Part One will deal with the substantive political and constitutional challenges that have emerged within the territorial constitution as a result of the Brexit process. Focussing specifically on the constitutional aspects of these challenges, this part of the chapter will begin by analysing two of the key constitutional events that have emerged in response to Brexit – the *Miller* case and the European Union (Withdrawal) Act 2018 – and will then move to consider the wider political challenges associated with the competing constitutional ideologies between the UK Government and the devolved administrations on these issues. This part of the chapter will conclude with the recognition that overarching all three of these issues lies the concern of ensuring the *equality* and *security* of the devolution settlements within the territorial constitution.

In recognition of these two points of concern in relation to the dynamics of the territorial constitution, Part Two of the chapter will then seek to investigate the possible solutions available for rebalancing the territorial constitution by ensuring the *equality* and *security* of the devolution settlements – as well as making allowances for an English political voice. The debate in this part of the chapter will fall upon discussion of the rubric of ‘federalism’ as a

category for constitutional change. The debate on this issue will be divided into two sections, separating analysis between the institutional and normative interpretations of the federal idea.

In pursuing this approach, this chapter seeks to contribute to answering the central research question of this thesis by reframing the normative and theoretical arguments made in the previous four chapters, and applying their findings to the contemporary events of the Brexit process. Through adopting this line of investigation, this chapter will provide an up to date account of the effects of the Brexit process upon the dynamics of devolution and the territorial constitution, as well as providing possible solutions for future reform.

## **5.2. Brexit and Devolution: Three Challenges to the Constitutional Order**

This Part of the chapter argues that the process for the UK's withdrawal from the EU has produced three political events that have come to challenge the settlement of the territorial constitution, across each of the four component parts of the UK.

### **5.2.1. The *Miller* Case**

The first substantive constitutional challenge to arise as a result of the UK's decision to leave the EU came in the form of the *Miller* case. The main question for the Supreme Court in this case – on appeal<sup>658</sup> – was as to whether or not the UK Government could rely on its foreign affairs prerogative to notify the European Council of its intention to withdraw, or whether the formal consent of Parliament was required before such notice could be served.

By way of a brief summary of the main facts of the case, the argument made by the UK Government was that under the well-established position of the foreign affairs prerogative,

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<sup>658</sup> R (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)

notice of withdrawal was able to be sent to the European Council without the formal consent of Parliament.<sup>659</sup> The chief elements of this argument hinged on what some have come to term the ‘May doctrine’<sup>660</sup> – based on the assumption that the responsibility for the ‘implementation, delineation and definition’ of Brexit is the sole responsibility of the UK Government.<sup>661</sup>

The case put forward by the Respondents was that the serving of notice to the EU without the legislative consent of Parliament would override the advisory nature of the referendum, and would begin an ‘irreversible’ course of action.<sup>662</sup> Moreover, as the UK had entered the European Union – then the European Community – by way of parliamentary assent to the European Communities Act 1972, it would require an additional Act of Parliament in order to provide the constitutional prerogative for the UK to withdraw:

‘it would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law.’<sup>663</sup>

On the 24<sup>th</sup> January 2017, by a majority verdict of eight to three, the Supreme Court ruled in favour of the Respondents, thus requiring the UK Government to seek the legislative consent of Parliament before issuing notice upon the European Council of its intention to withdraw from the EU:

‘We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.’<sup>664</sup>

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<sup>659</sup> R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC, para. 34

<sup>660</sup> So-called after the Prime Minister, Theresa May. See: Blick, A., *The EU referendum, devolution and the Union*, The Federal Trust, 2016, <<http://fedtrust.co.uk/our-work-on-europe/the-eu-referendum-devolution-and-the-union/>> (Accessed: 03/09/18)

<sup>661</sup> Fletcher, M., and Zahn, R., ‘Brexit, the UK and Scotland: the story so far. A constitutional drama in four acts’, in Hassan, G., and Gunson, R., (eds.) *Scotland, the UK and Brexit: A Guide to the Future*, (Edinburgh: Luath Press, 2017), pp. 105-111 at 107

<sup>662</sup> [2017] UKSC, para. 36

<sup>663</sup> [2017] UKSC, para. 36

<sup>664</sup> [2017] UKSC, para. 82

In response to the judgement, David Davis, the Secretary of State for Exiting the European Union, introduced the European Union (Intention to Withdrawal) Bill into Parliament on the 26<sup>th</sup> January 2017.<sup>665</sup> The Bill received Royal Assent on the 16<sup>th</sup> March 2017,<sup>666</sup> and notice of the UK's intention to withdraw from the EU was delivered to the European Commission President, Donald Tusk, on the 29<sup>th</sup> March 2017.<sup>667</sup> The 'Brexit' process had now formally begun.

In addition to its ruling on the legislative authority of the UK Parliament, the decision in the *Miller* case also had a significant effect on the territorial constitution. Running parallel to the main question of the requirement of consent from the UK Parliament was the additional question as to whether or not the UK Government would be required to seek the consent of the devolved administrations, via a legislative consent motion. The Supreme Court addressed this question in two parts:

First, in considering the appeal by the Lord Advocate of Northern Ireland from the Belfast High Court case of *McCord v Agnew*,<sup>668</sup> the UK Supreme Court was asked to consider as to whether or not the decision to leave the EU undermined the provision of the Good Friday Agreement. This issue fell upon the scope of section 1(2) of the Northern Ireland Act 1998 whereby, as outlined in Chapter Four,<sup>669</sup> provision is made for the requirement of the 'consent' of the people of Northern Ireland regarding matters pertaining to constitutional change of the future of Northern Ireland as part of the UK.

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<sup>665</sup> The Guardian, 'Brexit: government publishes bill to trigger article 50', 26 January 2017, <<https://www.theguardian.com/politics/2017/jan/26/brexit-bill-mps-will-get-five-days-to-debate-article-50-plans>> (Accessed: 28/06/18)

<sup>666</sup> Becoming: European Union (Notification of Withdrawal) Act 2017

<sup>667</sup> The Independent, 'Article 50 letter: Read Theresa May's full message to the EU as Brexit begins', 29 March 2017, <<https://www.independent.co.uk/news/uk/politics/article-50-letter-read-full-brexit-theresa-may-takes-uk-out-of-eu-statement-a7655566.html>> (Accessed: 28/06/18)

<sup>668</sup> *Re McCord and Agnew*, *Judicial Review* [2016] NIQB 85

<sup>669</sup> Chapter 4

The argument put forward by the Lord Advocate of Northern Ireland on this point was two-fold. First, the scope of the provision for the ‘consent’ of the people of Northern Ireland on constitutional change extends to the decision to leave the EU, as membership of the EU forms a key element of the Good Friday Agreement.<sup>670</sup> This leads onto the second point, which related to the provisions made in the devolution settlements that restrict the devolved administrations from legislating contrary to EU Law. It was argued that this provision carried with it the implied requirement that the UK would remain within the EU.<sup>671</sup>

In response to the first question, the Supreme Court summarised its position as follows:

‘In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union.’<sup>672</sup>

The decision of the Supreme Court, therefore, weighed in favour of the UK Government, and pronounced the notice for withdrawal as not amounting to an act of constitutional amendment warranting a referendum under the s.1(2) Northern Ireland Act 1998. In response to the second question, the Supreme Court declared its position as follows:

‘Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union. The EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations. The removal of EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence.’<sup>673</sup>

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<sup>670</sup> [2017] UKSC, para. 126

<sup>671</sup> [2017] UKSC, para. 126

<sup>672</sup> [2017] UKSC, para. 135

<sup>673</sup> [2017] UKSC, para. 130

In identifying that the removal of EU constraints from the devolution settlements would alter the competence of the devolved institutions, the Supreme Court then went on to consider the next part of its question on the role of the devolved administrations in the Brexit process; whether or not the consent of the devolved institutions would be required as specified under the Sewel Convention.

As discussed in Chapter Four, the operative scope of the Sewel Convention was framed so that the UK Parliament will not *normally* legislate in regard to devolved matters without first seeking the consent of the devolved institutions.<sup>674</sup> This was given additional significance in the period immediately before the *Miller* case, whereby the Convention became enshrined in section two of the Scotland Act 2016 – and was, at the time of judgement, undergoing its final Parliamentary phase in the case of clause two of the Wales Bill.

In delivering its judgement on this issue, we find that the Supreme Court failed to provide a definitive answer on the overall scope of the Convention. Rather, it opted instead to declare on the non-justiciability of the Sewel Convention as a political rule, lying outside of the remit of the Courts. The decision was summarised as follows:

‘Judges therefore are neither the parents nor the guardians of constitutional conventions; they are merely the observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question... but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.’<sup>675</sup>

After outlining its position, the Supreme Court then went further into ruling on the significance of the statutory recognition of the Sewel Convention in the Scotland Act 2016 and, as was its status at the time of the ruling, the Wales Bill.<sup>676</sup> The Court concluded that the decision to enshrine the Sewel Convention into statute did not amount to an intention on the part of the

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<sup>674</sup> Chapter 4

<sup>675</sup> [2017] UKSC, para. 146

<sup>676</sup> The Wales Bill received royal assent on the 31<sup>st</sup> January 2017, seven days after the decision was provided in *Miller*.

UK Government to create a legally enforceable rule but, instead, merely enshrined the Convention – in almost identical wording – into statute:

‘the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement.’<sup>677</sup>

The conclusion of the Supreme Court, therefore, was that from a legal perspective, the operation of the Sewel Convention was non-justiciable, and thus lay outside of the discretion of the Courts. To some observers, this amounted to little in the way of a watershed moment, and merely confirmed what was already understood as the legal reality of the Sewel Convention; ‘delaying’ as opposed to ‘settling’ the issue at hand on the nature of the *overall* power of the Convention.<sup>678</sup> This was complicated by the Supreme Court’s decision to leave the question of the political scope of the Convention open to interpretation:

‘In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.’<sup>679</sup>

In summary, therefore, the decision in *Miller* can be viewed as answering only half of the question on the operative scope of the Sewel Convention. Confirming, on the one hand, that the Convention did not affect the legal *competence* of the UK Parliament to legislate on behalf of the devolved administrations. But, on the other hand, leaving open the question as to the scope of its effect on the political *capacity* of the UK Parliament to do so, contrary to the will

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<sup>677</sup> [2017] UKSC, para. 148

<sup>678</sup> Page, A., ‘Brexit, the repatriation of competences and the future of the union’, *Judicial Review*, No. 1 (2017) pp. 39-47 at 41; Mullen, T., ‘The Brexit Case and Constitutional Conventions’, *Edinburgh Law Review*, Vol. 21, (2017), pp. 442-447

<sup>679</sup> [2017] UKSC, para. 151



of the devolved administrations. In this regard, this thesis argues that the decision in *Miller* highlighted two issues in relation to the overall dynamics in the territorial constitution.

First, through its recognition of the pervasive nature of the legislative supremacy of the UK Parliament, the decision in *Miller* limited the implied theoretical understanding of the devolution process as a gradual ‘federalizing’ action, and instead reconfirmed the UK as – in legal terms – a unitary state.<sup>680</sup> In this regard, it is argued that the decision in *Miller* amounted to little in the way of a watershed moment, and merely reconfirmed the legal orthodoxy of the legislative supremacy of the UK Parliament. From a political perspective, however, this thesis argues that the decision delivered a symbolic re-grounding of devolution as a *subordinate* form of territorial governance.

Second, and perhaps more significantly, by ruling against the judicial enforceability of the Sewel Convention, the decision also highlighted the *vulnerability* of the devolution settlements when framed against the legal supremacy of the UK Parliament. The significance of this issue lies in its potential to foster a reactive dynamic on the part of the devolved administrations, whereby through the realisation of their inability to protect themselves in times of constitutional crisis, they may subsequently demand increased autonomy from the centre in an effort to increase the guarantees of their defence in future.<sup>681</sup>

In this regard, as we will see in the later discussion in this chapter, the true significance of the *Miller* case lies more in its legacy than in the corpus of its judgement. In explaining this point, we find that while *Miller* was significant in ruling on the non-legal nature of the Sewel Convention, the overarching effect of the case has been to highlight – or reconfirm – anxieties

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<sup>680</sup> Keating, M., ‘Brexit and Devolution in the United Kingdom’, *Politics and Governance*, Vol. 5, No. 2, (2017), pp. 1-3 at 3

<sup>681</sup> Burrows, N., and Fletcher, M., ‘Brexit as a constitutional “shock” and its threat to the devolution settlement: reform or bust’, *Judicial Review*, No. 1, (2017), pp. 49-57 at 52; For wider commentary on this issue, see: McLean, I., and Peterson, S., ‘Transitional constitutionalism in the United Kingdom’, *Cambridge Journal of International and Comparative Law*, Vol. 3, No. 4, (2014), pp. 1113-1135 at 1118

in the devolved parts of the UK relating to the limited extent of their legal rights when faced with an uncompromising UK Government.

### 5.2.2. The European Union (Withdrawal) Act 2018

The second constitutional challenge to arise as a result of the Brexit process, relates to the formal legislative procedure for the UK's withdrawal from the EU: the European Union (Withdrawal) Act 2018. When first introduced into the House of Commons on the 13<sup>th</sup> July 2017, the preamble to the Bill declared its purpose to be to 'repeal the European Communities Act 1972'<sup>682</sup> – thus ending the supremacy of EU law in the UK.<sup>683</sup>

However, owing to the voluminous catalogue of EU law implemented in the UK, and the desire for a smooth transition in the UK's withdrawal from the EU, the Bill also sought to create a new category of 'retained EU law', converting all existing EU law in the UK into domestic legislation. The logic behind this decision was largely functional:

'As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained... Our guiding principle will be to ensure that no new barriers to living and doing business within our own Union are created as we leave the EU.'<sup>684</sup>

In seeking to prevent the emergence of any new barriers to living and doing business *within* the UK, the Bill outlined that the majority of EU competences would be repatriated back to the UK Government as opposed to the devolved administrations. This was largely designed for the creation of new regulatory mechanisms on a UK-wide level – thus securing the stability of the UK's internal market after Brexit. Its reception by the devolved administrations, however, was

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<sup>682</sup> European Union (Withdrawal) Bill 2017, s.1, (as first introduced 13<sup>th</sup> July 2017) <[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_1.htm](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm)> (Accessed: 28/06/18)

<sup>683</sup> Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', Cm. 9446 (March 2017) para. 2.18

<sup>684</sup> *Ibid.*, para. 4.3

immediately critical, with a joint-statement by the Welsh and Scottish First Ministers,<sup>685</sup> released on the same day as the Bill was introduced into Parliament, declaring it to be a ‘naked power grab’ and ‘an attack on the founding principles of devolution’.<sup>686</sup>

The substantive basis for the devolved administrations criticism of the Bill was primarily aimed at Clauses 10 and 11 (as first introduced). Under Clause 11, the competences of the devolution settlements would be altered, replacing the existing provision restricting legislation contrary to EU Law,<sup>687</sup> with a provision restricting legislation contrary to the new category of ‘retained EU law’.<sup>688</sup>

Under Clause 10, giving effect to Schedule 2, the devolved administrations would assume the power to rectify *deficiencies* in ‘retained EU law’ via subordinate legislation. However, the scope of this ability would be limited to regulations in areas where the devolved administrations enjoy legislative competence in every provision of the matter.<sup>689</sup> In all other instances, the devolved administration would be required to work with, or seek the consent of, a UK Government Minister.<sup>690</sup> Moreover, through the nature of repatriated competences, the UK Government would enjoy legislative competence in those areas overlapping with devolved competence, but are not within the exclusive competence of the devolved administrations.<sup>691</sup>

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<sup>685</sup> The Northern Ireland Executive had, by this point, been dissolved.

<sup>686</sup> Welsh Government, ‘Joint Statement from First Ministers of Wales and Scotland in relation to the EU (Withdrawal) Bill’, 13 July 2017, <<http://gov.wales/newsroom/firstminister/2017/170713-joint-statement-from-first-ministers-of-wales-and-scotland/?lang=en>> (Accessed: 31/01/18)

<sup>687</sup> Scotland Act 1998, s. 29(2)(d); Government of Wales Act 2006, s. 108A(2)(e); Northern Ireland Act 1998, s. 6(2)(d)

<sup>688</sup> European Union (Withdrawal) Bill 2017, clause 11 (as first introduced on 13<sup>th</sup> July 2017) <[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_2.htm#pb4-11g11](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb4-11g11)> (Accessed: 01/07/18)

<sup>689</sup> European Union (Withdrawal) Bill 2017, Schedule 2, para. 2 (as first introduced on 13<sup>th</sup> July 2017) <[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_2.htm#pb4-11g11](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb4-11g11)> (Accessed: 01/07/18)

<sup>690</sup> European Union (Withdrawal) Bill 2017, Schedule 2, para. 8 (as first introduced on 13<sup>th</sup> July 2017) <[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_2.htm#pb4-11g11](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb4-11g11)> (Accessed: 01/07/18)

<sup>691</sup> European Union (Withdrawal) Bill 2017, clauses 7-9 (as first introduced on 13<sup>th</sup> July 2017) <[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill\\_2017-20190005\\_en\\_2.htm#pb4-11g11](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb4-11g11)> (Accessed: 01/07/18); For a useful general commentary on this issue, see: Tierney, S., ‘The European Union (Withdrawal) Bill: legal implications for devolution’, 7 September 2017, <<https://constitution->

On this point, the requirement for the UK Government to seek legislative consent from the devolved administrations on the passage of such subordinate legislation was also unclear. The result was to create significant anxiety – and constitutional reaction – in the devolved administrations as to the ability of the UK Government to unilaterally pass secondary legislation in matters of previously devolved competence, without any effective measure to prevent this from occurring on the part of the devolved administrations.

In addition to the substance of the Bill, the Welsh and Scottish administrations also directed criticism towards the wider negotiation process surrounding the Bill, noting that while reference had earlier been made to the opportunity for *discussion* between the UK Government and the devolved administrations,<sup>692</sup> it largely failed to materialise. On this point, the nature and substantive effects of the issue may be divided into two parts:

First, the provision for cooperation on the terms of the Brexit deal was weak. Indeed, similar to the weak provision of intergovernmental relations highlighted in the previous chapter, the Brexit process further drew reference to the weak position of the Joint Ministerial Council (JMC) in formulating intergovernmental relations between the UK Government and the devolved administrations. While provision was made for the meeting of a new JMC (European Negotiations), its meetings have proven to be dominated by a similar characteristic to the preceding JMC's<sup>693</sup> – meeting only when required by the UK Government, and presenting little in the way of an ethos for cooperation or co-decision.<sup>694</sup>

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[unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/](http://unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/)> (Accessed: 25/01/18)

<sup>692</sup> Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', Cm. 9446 (March 2017), para. 4.4

<sup>693</sup> Ironically, as noted in Chapter Four, the least problematic form of the JMC to date, has been the JMC (Europe) – forming common policy and opinion on European Union policy – which will, presumably, be phased out after the Brexit process is complete.

<sup>694</sup> McEwen, N., 'Still better together? Purpose and power in intergovernmental councils in the UK', *Regional and Federal Studies*, Vol. 27, No. 5, (2017), pp. 667-690 at 682

Second, in instances where the devolved administrations raised significant concerns and disagreement on the terms of the Brexit negotiations – especially in relation to the above discussed Clauses 10 and 11 of the EU (Withdrawal) Bill – there failed to emerge a genuine dialogue with the UK Government. Indeed, we find that it took a decided constitutional *shock* – the threatening to withhold legislative consent – in order to force the hand of the UK Government into a meaningful period of negotiations with the devolved administrations.

While this led to certain concessions being granted – particularly in the reduced scope of the Clauses 10 and 11; implemented under s.12 of the Act<sup>695</sup> – it failed to reach a position on which the Scottish Government was willing to provide legislative consent. Conclusively, on the same day on which the Welsh Assembly granted legislative consent to the Bill,<sup>696</sup> the Scottish Parliament refused its consent<sup>697</sup> - owing to the view that the provisions of the Bill would fail to provide the Scottish Parliament with a meaningful veto over the UK Parliament's ability to act unilaterally in relation to the amendment of 'retained EU law'.<sup>698</sup>

While this amounted to a significant constitutional moment, its significance was exceeded by the UK Government's decision to continue with the legislative process – passing the EU (Withdrawal) Bill into law on the 26<sup>th</sup> June 2018. In the aftermath of this decision, the extent

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<sup>695</sup> Under the terms of section 12 of the Act, the blanket restriction on the devolved administrations ability to amend areas of 'retained EU Law' is lifted, though still subject to the approval of a Minister of the UK Government. The reduced scope is such, however, that a Minister of the UK Government is now required to seek the consent of the devolved administrations before passing subordinate legislation in an area of retained EU law that interferes with devolved competences – though it is important to note that, as confirmed in *Miller*, the UK Government may still act if the decision is made by the devolved administrations to withhold consent. In addition, section 12 also makes provision for the limited timeframe whereby the UK Government can expressly withhold the devolved administrations permission to legislate in areas of retained EU law overlapping devolved competences – limiting the ability of the UK Government to pass restrictions on devolved competences to a two year period after the day of existing the European Union, and cancelling the substance of such restrictions five years after the day of existing the European Union. In effect, these provisions therefore facilitate a timed expansion of devolved competences into areas of retained EU Law. See: European Union (Withdrawal) Act 2017, s. 12

<sup>696</sup> BBC, 'Welsh Assembly backs controversial Brexit bill', 15 May 2018, <<https://www.bbc.co.uk/news/uk-wales-politics-44109489>> (Accessed: 30/06/18)

<sup>697</sup> BBC, 'Holyrood refuses consent for Westminster Brexit bill', 15 May 2018, <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44113864>> (Accessed: 30/06/18)

<sup>698</sup> European Union (Withdrawal) Act 2018, s.12

of application of the Sewel Convention remains a relative empty shell. Moreover, this decision went against the goodwill procedures committed to by the UK Government after the *Miller* case, in promising to continue to seek the legislative consent of the devolved administrations.<sup>699</sup> Reflecting on this point, as well as the wider analysis contained above, we may draw two conclusions as to the impact of the European Union (Withdrawal) Act on the territorial constitution:

First, although weakly provided for, we find evidence of the UK Government's ability to seek a compromise on an issue which the devolved administrations are refusing to provide legislative consent. However, we find the evidence of such compromise to be weak and limited, motivated only by the presence of a distinct environment of constitutional unsettlement – an environment that is by no means indicative of a healthy, coordinate or equal sense of intergovernmental cooperation. In this regard, we find confirmation of the idea of the UK's territorial constitution as operating on a series of constitutional *shocks* – responding only to 'threats' to the stability of the territorial constitution, as opposed to seeking a culture of genuine and long-lasting dialogue and cooperation.

Second, the UK Government's decision to continue with the legislative process and to pass the Act, despite the Scottish Parliament refusing its legislative consent, highlights the continuity of the doctrine of the legislative supremacy of the Crown in Parliament. Indeed, from analysing the political process surrounding the passage of the Act, we find that the devolved administrations have little or no *security* when facing the UK Government. Moreover, it also shows the lack of credibility in the statements made by the UK Government in regards to

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<sup>699</sup> House of Commons Library, 'European Union (Withdrawal) Bill: Explanatory Notes', 13 July 2017, para. 68-69 <<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en11.htm>> (Accessed: 18/06/18)

seeking legislative consent; appearing as hollow promises as opposed to genuine commitments to a form of cooperative constitutionalism.

In this regard, we find that the European Union (Withdrawal) Act provided a definitive answer to the question left open in the *Miller* case: that the overall power of the Sewel Convention is at all points subordinate to the final authority of the UK Government. Indeed, after the Act, we find that the Sewel Convention is, both legally and politically, an empty vessel – signalling a statement of *intent*, but now detached from constitutional *reality*. In the next section, we will discuss the effect that these constitutional realities have had on the devolved administrations, as well as the wider political environment in the devolved parts of the UK.

### **5.2.3. The Response of the Devolved Administrations**

So far, the argument in this chapter has demonstrated how the constitutional events of the *Miller* case and the passage of the European Union (Withdrawal) Act, have highlighting the *subordinate* and *insecure* position of the devolution settlements. It has also noted how the devolved administrations in Scotland and Wales were on the opposing side to the UK Government on both matters, and have consistently held a line of constitutional opinion that counters the ‘solidarity’<sup>700</sup> argument of the UK Government. In this section, we will chart the wider themes of disagreement in the dynamics of the territorial constitution, relating to the more general terms of the Brexit process.

In this analysis, the focus will turn away from the substantive issue connected to the *Miller* case and the EU (Withdrawal) Act, and will instead focus on the political issues associated with Brexit in each of the four component parts of the UK. This analysis will consist of a focus

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<sup>700</sup> Aughey, A., ‘The Future of Britishness’, in Hazell, R., (ed.) *Constitutional Futures Revisited: Britain’s Constitution to 2020*, (Basingstoke: Palgrave MacMillan, 2008), pp. 90-105 at 91-93

on the response of the devolved administrations in Scotland and Wales, as well as consideration of the wider political rhetoric shown in Northern Ireland and England – both of which, due to their territorial circumstances, have come to be represented in Brexit proceeds by the UK Government at Westminster.

In beginning this analysis, it is important to consider what is perhaps the central source of such unsettlement: the referendum vote itself. As already stated, the United Kingdom, taken as a whole, voted to Leave the European Union on the 23<sup>rd</sup> June 2016. The attitude of the UK Government to this vote was to frame it as a simple UK-wide majority, incapable – or underserving – of distinction between its internal parts, and exercisable through the sole authority of the UK Government.<sup>701</sup>

However, in adopting this approach, the UK Government chose not to acknowledge the wider issue of the territorial incongruity in the referendum result; whereas England and Wales had voted by majority to leave the EU,<sup>702</sup> the results in Scotland and Northern Ireland had delivered significant votes in favour of remain.<sup>703</sup> Reflecting this issue, we find that when read from a territorial perspective, only two of the four component parts of the UK voted in congruency with the UK-wide result; a matter that while not influencing the demographic reality of a majority vote in favour of leave – on a UK-wide basis – created a significant symbolism of a divide in the *national* consensus. This may be seen as significant for three reasons:

First, it politicised the territorial divide in the UK, drawing distinction to Scotland and Northern Ireland as voting against the majority UK referendum result; a matter which has raised distinct questions for the presumed UK-wide unity expressed in the etymology of Brexit as a ‘British

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<sup>701</sup> Fletcher, M., and Zahn, R., ‘Brexit, the UK and Scotland: the story so far. A constitutional drama in four acts’, in Hassan, G., and Gunson, R., (eds.) *Scotland, the UK and Brexit: A Guide to the Future*, (Edinburgh: Luath Press, 2017), pp. 105-111 at 107

<sup>702</sup> England (53.4% Leave), Wales (52.5% Leave)

<sup>703</sup> Scotland (62.0% Remain), Northern Ireland (55.8% Remain)



Exit' from the EU. Second, it provided a powerful mandate in Scotland and Northern Ireland for seeking recognition of the fact that only two of the four component parts of the UK voted to leave. Moreover, this has also created a number of issues for the Welsh and UK governments, both of which comprise substantial lobbies of support for remaining in the EU. Third, through there being devolution in three of the four component parts of the UK (and in both of those parts that voted to remain) the territorial incongruity of the result became an issue of constitutionally significance.<sup>704</sup> In analysing the substantive challenges this raises for the territorial constitution, this chapter will now address the response of each of the devolved administrations and the UK government in turn:

In Northern Ireland, the territorial incongruity of the result was initially matched by a joint statement by the First Minister and Deputy First Minister outlining their commitment to finding common ground and practical solutions for Northern Ireland in the Brexit process.<sup>705</sup> Yet, just over a month after the statement, the Deputy First Minister, Martin McGuinness resigned from office, leading to the subsequent dissolution of the Northern Ireland Executive.<sup>706</sup> After this event, political rhetoric in Northern Ireland returned to the familiarity of the divide between Unionists and Nationalists.

On the 26<sup>th</sup> June 2017, the DUP entered into an agreement with the UK Government to support its Brexit programme, on the express provision that Northern Ireland would not receive a differentiated deal to the rest of the UK.<sup>707</sup> Conversely, the Nationalist parties in Northern Ireland began to mobilise in support for the defence of the political congruity of the result. On

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<sup>704</sup> McHarg, A., and Mitchell, J., 'Brexit and Scotland', *The British Journal of Politics and International Relations*, Vol. 19, No. 3, (2017), pp. 512-526 at 513

<sup>705</sup> Foster, A. and McGuinness, M., 'Foster and McGuinness: We're not into gimmicks or grandstanding, just ministers getting on with their work', Belfast Telegraph, 21 November 2016, <<https://www.belfasttelegraph.co.uk/news/politics/foster-and-mcguinness-were-not-into-gimmicks-or-grandstanding-just-ministers-getting-on-with-their-work-35230868.html>> (Accessed, 23/04/2016)

<sup>706</sup> At the time of writing this thesis, the Northern Ireland Executive remains dissolved.

<sup>707</sup> BBC, 'Conservatives agree pact with DUP to support May government', 26 June 2017, <<https://www.bbc.co.uk/news/uk-politics-40403434>> (Accessed: 03/09/18)

the 22<sup>nd</sup> September 2017, the leader of the Sinn Fein, Mary Lou McDonald, called for Northern Ireland's need for 'special status'<sup>708</sup> in the EU, echoing earlier calls made by the SDLP leader, Colum Eastwood.<sup>709</sup> In addition, the territorial incongruity of the Brexit result has also been translated by Sinn Fein as synonymous with a mandate for a referendum on Irish reunification.<sup>710</sup> Although this has been met with consistent opposition from the Secretary of State for Northern Ireland, James Brokenshire, who declared:

'We joined the Common Market in 1973 as one United Kingdom... and we will leave the European Union in 2019 as one United Kingdom.'<sup>711</sup>

In Scotland and Wales, the initial approach taken by the devolved administrations was to foster a rare show of unity, referenceable in three ways. First, that the vote to Leave the EU did not translate to a mandate for leaving the Single Market and Customs Union – thus, arguing that while the UK may leave the EU, it must remain in the EEA.<sup>712</sup> Second, that the repatriation of powers from the EU should be such that the majority of such repatriated powers – with the exception of certain matters of macro-economic policy – should transfer directly to the devolved administrations.<sup>713</sup> Third, that the significance of this process on the rearrangement

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<sup>708</sup> Sinn Fein, 'Brexit, the Good Friday Agreement and designated special status – McDonald', 22 September 2017, <<http://www.sinnfein.ie/contents/46264>> (Accessed: 03/09/18)

<sup>709</sup> 'Whether it is through the Danish model of selective territorial membership or via another creative exemption, every legal and logistical avenue must not be explored in an attempt to retain our status within Europe'. Eastwood, C. 'Northern Ireland voted to remain in the EU and that must be respected', *Irish Times*, 4 July 2016, <<https://www.irishtimes.com/opinion/northern-ireland-voted-to-remain-in-the-eu-and-that-must-be-respected-1.2709004>> (Accessed: 24/04/18)

<sup>710</sup> BBC, 'Michelle O'Neill calls for "urgent" referendum on Irish unity', 13 March 2017, <<http://www.bbc.co.uk/news/uk-northern-ireland-politics-39249929>> (Accessed: 03/02/18)

<sup>711</sup> Rt Hon James Brokenshire MP, 'Secretary of State's Speech to the European Policy Centre', 06 November 2017, <<https://www.gov.uk/government/speeches/secretary-of-states-speech-to-the-european-policy-centre>> (Accessed: 02/06/18)

<sup>712</sup> 'There is no basis whatsoever for the assumption that all those who voted to leave the EU also wanted to exit the European Single Market. Indeed, it is arguable that quite the opposite was the case – that there is simply no majority support for taking the UK out of the European Single Market or EU Customs Union. Membership of the EU and the European Single Market are, after all, quite distinct propositions.' Scottish Government, '*Scotland's Place in Europe*' (Edinburgh: Scottish Government, 2016), para. 97; Welsh Government, '*Securing Wales' Future*' (Cardiff: Welsh Government, 2017), p. 6

<sup>713</sup> Scottish Government, '*Scotland's Place in Europe*' (Edinburgh: Scottish Government, 2016), para. 184

of competences would require a fundamental redrawing of the structure of the territorial constitution.<sup>714</sup>

However, while maintaining similarities in overarching policies, the terms of pursuit in translating these objectives into political realities became significantly pronounced in the subsequent process, with the two administrations going their separate ways.

The approach taken by the Scottish Government may be seen as a distinctive reflection of the political realities underpinning the referendum result; a majority in favour of Remain, and a majority SNP Government consistently at odds with the UK Government. In this regard, the SNP framed its demands in its white paper, *Scotland's Place in Europe*, as follows:

First, it outlined its preference for the UK as a whole to remain in the Single Market and Customs Union.<sup>715</sup> Second, failing this, it presented the argument that provision should be made for Scotland to remain in the Single Market and Customs Union while the rest of the UK left – a ‘differentiated deal’ for Scotland.<sup>716</sup> Third, as contained in the First Minister’s foreword to the white paper, should Scotland not be allowed to remain in the Single Market or Customs Union – either as part of the UK as a whole or as a differentiated deal – consideration should be made for a second referendum on Scottish independence:

‘If the real and substantial risks that Brexit poses to Scotland’s interests cannot be mitigated within the UK, the option of choosing a better future through independence should be open to the Scottish people.’<sup>717</sup>

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<sup>714</sup> Scottish Government, *‘Scotland’s Place in Europe’* (Edinburgh: Scottish Government, 2016), para. 172; Welsh Government, *‘Securing Wales’ Future’* (Cardiff: Welsh Government, 2017), p. 26

<sup>715</sup> *Ibid.*, para. 97-105

<sup>716</sup> Scottish Government, *‘Scotland’s Place in Europe’* (Edinburgh: Scottish Government, 2016), para. 106-107; For a wider discussion on the form of some of the ‘differentiated deals’ discussed in Scotland and Northern Ireland, see: Riddoch, L., and Bort, E., *McSmorgasbord: What post-Brexit Scotland can learn from the Nordics*, (Edinburgh: Luath Press, 2017); O’Leary, B., ‘The Dalriada Document: Towards a Multi-National Compromise That Respects Diversity in the United Kingdom’, 13 July 2016, <<https://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/The%20Dalriada%20Document.pdf>> (Accessed: 02/09/18); Hartmann, J., ‘Scotland’s Relationship with the EU after Brexit: Lessons from the Faroes’, 29 March 2017, <<http://www.europeanfutures.ed.ac.uk/article-4731>> (Accessed: 02/09/18)

<sup>717</sup> Scottish Government, *‘Scotland’s Place in Europe’* (Edinburgh: Scottish Government, 2016), foreword by the First Minister of Scotland, Nicola Sturgeon.

The reality of the UK Government's 'one-nation' response to Scotland's demands, refusing the first and second grounds, made the prospect of an independence referendum a reality. On the 28<sup>th</sup> March 2017, MSPs voted by 69 to 59 to back calls for a second referendum on Scottish independence.<sup>718</sup> The response of the UK government was similar to its later actions in relation to the EU (Withdrawal) Act; the Prime Minister declared that 'now is not the time' for a second referendum, and delayed it until after the Brexit process was formally complete.

While amounting to something of an anti-climax, we find the result of the push for a second independence referendum as indicative of two key points in the dynamics of the territorial constitution. First, it amounted to a further indication of the overarching supremacy of the UK Government in dictating the limits of constitutional action. Second, while disagreeing with the UK Government, the position of the Scottish Government remained within those demarcated lines, reluctantly accepting the UK Government's decision – a matter that may be distinctly compared to the unconstitutional means of action taken by the Catalan Government in Spain.

In now considering the position in Wales, we find that the approach taken by the Welsh Government, in conjunction with Plaid Cymru,<sup>719</sup> was to seek to defend Welsh interests *within* the UK. To some extent, this reflects the realities of the referendum result in Wales: a majority in favour of Leave left the Welsh Government with a weak mandate for seeking a 'differentiated deal' similar to those argued for in Scotland or Northern Ireland. However, in addition to this, we also find the approach in Wales was also reflective of the Welsh Government's longstanding tradition of 'unionist-nationalism': seeking to defend Welsh interests, but at all times advocating for Wales to remain a part of the UK.<sup>720</sup>

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<sup>718</sup> BBC, 'Scottish Parliament backs referendum call' 28 March 2017, <<https://www.bbc.co.uk/news/uk-scotland-39422747>> (Accessed: 29/06/18)

<sup>719</sup> Plaid Cymru aided in the production of the Welsh Government's White Paper on Brexit, *Securing Wales' Future*.

<sup>720</sup> Reflective of this fact, we find that since 2014 the First Minister, Carwyn Jones, has consistently argued for a 'new union mindset' – not only in relation to Wales' relationship with central government, but on also on a UK-wide basis – as opposed to seeking (or *threatening*) Welsh autonomy outside of the UK. Carwyn Jones, 'Our

Illustrative of these facts, the Welsh Government's white paper on Brexit, *Securing Wales' Future*, while arguing for enhanced devolution for Wales, also argued for the internal reform of the UK toward a federal-like system. Central to these proposals were the reconfiguration of the existing system of intergovernmental relations and the operation of the Joint Ministerial Committee.<sup>721</sup> As highlighted in Chapter Four, the current operation of intergovernmental relations between the UK Government and the devolved administrations is characterised by a hierarchical and bilateral approach – in its accompanying white paper, *Brexit and Devolution*, the Welsh Government argued for this to be reformed into a more equal and multi-lateral approach, advocating for the inclusion of an independent secretariat for the JMC, and for a qualified majority system of voting on issues in the JMC.<sup>722</sup>

Where perhaps the essence of this challenge is transformed into an issue of divisive significance, is through the actions of the UK Government in response to each of the calls for differentiation in the Brexit process, as requested by the devolved administrations. As has already been argued, the nature of the devolved administrations responses to events in the *Miller* case and the EU (Withdrawal) Act, were largely motivated by the recognised *inequality* and *lack of security* of the devolution settlements when framed against the hegemony of the UK Government.

In pursuing a political programme which has continually ignored the requests of the devolved administrations, relied upon the doctrine of the legislative supremacy of the UK Parliament to legislate contrary to Sewel convention, and remained synonymous only with the majority of political opinion in England; the UK government has failed to mitigate the negative political dynamics in the territorial constitution, created by the Brexit process. Viewed from a UK-wide

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Future Union: A Perspective From Wales', Institute for Government, 15 October 2014, <<https://www.instituteforgovernment.org.uk/events/keynote-speech-rt-hon-carwyn-jones-am-minister-wales-our-future-union-%E2%80%93-perspective-wales>> (Accessed: 18/04/18)

<sup>721</sup> Welsh Government, *Securing Wales' Future*, (Cardiff: Welsh Government, 2018), p. 28

<sup>722</sup> Welsh Government, *'Brexit and Devolution'*, (Cardiff: Welsh Government, 2018), p. 18

perspective, it is visible that the political rhetoric associated with the Brexit process has increasingly come to be defined by four separate and distinct territorial perspectives – with ever reducing lines of UK-wide solidarity.

#### **5.2.4. Summary**

In summary, it is clear that constitutional relations in the UK are, at present, distinctly unsettled. While this thesis stops short of declaring this to be synonymous with a period of constitutional crisis, it is clearly apparent that a divide exists between the ideologies of the UK Government and the devolved administrations and, more broadly, between the four component parts of the UK. In reference to the Brexit process, this divide may be summarised in three parts:

First, through the ideological practice of the UK Government, we find a clear demonstration of the lack of *equality* between the UK Government and the devolved administrations. Second, through the *Miller* case, and as confirmed in the rhetoric surrounding the EU (Withdrawal) Act, we find that the devolved administrations lack any legal *security* to challenge the actions of the UK Government. Third, in reflection of this lack of *equality* and *security*, we see the devolved administrations have increasingly been forced to rely upon grand constitutional strategies in an attempt to counter the constitutional practice of the UK Government.

In this regard, we find that political relations in the territorial constitution have come to be framed by a series of constitutional *moments* whereby, in the absence of a constructive environment for reform, changes have largely only taken place in response to periods of intense unsettlement. To some extent, this is indicative of the wider theme identified in this thesis –

the historical ambivalence of the centre towards the periphery, an ambivalence that is only periodically reversed as a result of constitutional *shocks*.<sup>723</sup>

However, to a more significant extent, it is also the realisation that while conferring self-government to the periphery, devolution has failed to provide effective mechanisms for the exercise of such self-government outside of the devolved territories themselves. More specifically, we see that the devolved administrations have little or no say in influencing the direction of UK-wide policies and, in that regard, remain subject to the legal and political supremacy of the UK Government – containers on a ship on which they have little say in its destination.

### **5.3. Towards a Rear-guard Defence of the Union**

In reflection upon the previous arguments in this chapter, and more broadly in this thesis, we find a common theme: the UK finds itself in a period of intense and prolonged constitutional unsettlement. In Chapter Four, it was argued that the *unmapped, asymmetrical, bilateral, and reactive dynamics* of the devolution process have created a condition that breeds unsettlement and disunity within the territorial constitution. In this chapter, it has so far been argued that this process is likely to continue for as long as the devolved administrations feel the need to seek *equality* and *security* within the territorial constitution – a process which is further exacerbated by the continuing growth of a distinct reactive dynamic of political disharmony in England, in response to the devolution process in the other three parts of the UK.

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<sup>723</sup> Burrows, N., and Fletcher, M., ‘Brexit as a constitutional “shock” and its threat to the devolution settlement: reform or bust’, *Judicial Review*, No. 1, (2017), pp. 49-57

In tandem with this process, we find that a number of constitutional strategies have emerged which call for the need – and necessity – for a system of UK-wide reform to emerge. The content of these “*Unionising*” strategies vary significantly in their argument and form; from substantive proposals for a new Act of Union<sup>724</sup> recognising the permanency of devolution and safeguarding those powers already devolved, to a ‘Charter of the Union’, designed to capture the *values* of the Union and, more abstractly, of Britishness.<sup>725</sup> However, perhaps the most significant and discussed of these proposals has been the wider idea of directing the UK towards a new and reconditioned constitutional structure, associated with the rubric of ‘federalism’.

As we have seen over the course of this thesis, ideas of federalism have a rich history in the ideology of constitutional reform to the UK. At intermittent stages, dating back to the Anglo-Scottish Union of 1707, the idea of a ‘federal’ solution has formed the counterpoint to ideas of incorporating union or Westminster centralisation. More recently, arguments for federal-style reform have emerged as a token concession to sub-state nationalist groups during periods of political and constitutional unsettlement; first in Ireland at the turn of the 19<sup>th</sup> Century<sup>726</sup> and, more recently, as a strategy in response to the rise of sub-state nationalist movements in Scotland and Wales.<sup>727</sup>

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<sup>724</sup> Constitution Reform Group, ‘Towards a New Act of Union’, Constitution Reform Group Discussion Paper, 01 September 2015, <<http://www.constitutionreformgroup.co.uk/publications/>> (Accessed: 26/06/18); Kezia Dugdale, ‘The UK needs a new Act of Union to prevent it breaking once and for all’, Guardian, 7 December 2016, <<https://www.theguardian.com/commentisfree/2016/dec/07/uk-needs-new-act-union-stop-break-brexit-scotland>> (Accessed: 26/06/18)

<sup>725</sup> Bingham Centre for the Rule of Law, ‘*A Constitutional Crossroads: Ways Forward for the United Kingdom*’, (London: British Institute of International and Comparative Law, May 2015)

<sup>726</sup> Kettle, J., *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, (Kingston: McGill-Queens University Press, 1989), p. 13

<sup>727</sup> Hepburn, E., ‘Degrees of Independence: SNP Thinking in an International Context’, in Hassan, G., (ed.) *The Modern SNP: From Protest to Power*, (Edinburgh: Edinburgh University Press, 2009), pp. 190-203; a reconfigured union along federal lines has also been a longstanding commitment of the Liberal Democrats, which gained reinvigorated form after the Scottish Independence Referendum of 2014 Liberal Democrats, ‘*Power to the People: Policies for Political and Constitutional Reform*’, Policy Paper 117, (Liberal Democrats: March 2014); The provision was amended (amendment F41) by an emergency motion to the Autumn Conference of 2014: [https://www.libdems.org.uk/f41\\_towards\\_a\\_federal\\_uk](https://www.libdems.org.uk/f41_towards_a_federal_uk) (Accessed: 26/01/18)



Traditionally, advocacy in favour of the ‘federal’ idea, or ‘federalism’, has – at least since 1789<sup>728</sup> – been synonymised with a single identifiable constitutional model; the federation. However, this thesis argues that in order to understand *federalism* in its entirety, a wider frame of analysis must be applied to interpret it as a *homonymous*<sup>729</sup> term, referring to a wider genre of normative political practice, capable of application across several types of constitutional models. A distinction between these two interpretations of the federal idea may be summarised as follows:

First, as already mentioned, we find reference to the synonymous character of *federalism* with the institutional idea of the *federation*.<sup>730</sup> Under this distinction, the predominant understanding of federalism is connected to a distinct institutional form, located midway between the absolute constructions of the unitary state (power concentrated at the centre) and the confederation (power held in the peripheral units).<sup>731</sup>

Through this interpretation of federalism as synonymous with federation, power – and sovereignty – is understood as divided between two levels of government: a ‘federal’ centre, and two or more ‘federated’ units.<sup>732</sup> Unlike in the case of confederation, however, the division of power between multiple levels of government in federation does not impede upon the external personality of the state. Rather, the federation forms a unified whole in the external perspective – being ‘sovereign’ – while maintaining a division of sovereignty internally, through its entrenched provisions in the constitution.<sup>733</sup>

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<sup>728</sup> Being the year of the ratification of the US Constitution which is commonly held as being the first mature example of federation.

<sup>729</sup> Burgess, M., ‘Federalism and Federation’, in Cini, N., (ed.) *European Union Politics*, (Oxford: Oxford University Press, 2007), pp. 69-84 at 72

<sup>730</sup> The synonymising of federalism to the idea of the federation is a bi-product of America scholarship, whereby the two terms are used interchangeable. In the European tradition, greater emphasis is placed on the distinction between the two terms as signifying two distinct modes of constitutional identification.

<sup>731</sup> King, P., *Federalism and Federation*, (London: Croom Helm, 1982), p. 140

<sup>732</sup> *Ibid.*, p. 140

<sup>733</sup> In describing the arrangement of sovereignty within the Federation of the United States, Robert Keohane provided the following useful observation of constitutional personality of federation; ‘the constitution upholds

Through the second interpretation, we find federalism as applicable to a wider frame of theoretical and ideological interpretation, associated with ‘a marked degree of regional independence and autonomy.’<sup>734</sup> Under this understanding, federalism is disassociated from any single institutional model and instead pertains to a broader church of theoretical enquiry and normative description, transcending several institutional forms.

Reflecting this second interpretation, Daniel Elazar provided a definition of federalism as ‘constitutionalized power-sharing through systems that combine self-rule and shared rule.’<sup>735</sup> This definition, which is readily understood as the most agreeable and cogent explanation of the theoretical personality of the idea, hones its reliance upon two distinct principles of constitutional action: *self-rule* and *shared rule*. While these principles are relatable to the already identified institutional idea of federation, the nuanced character of their construction also extends their application to a far broader church of systematic distinction. In demonstrating this, Preston King concluded:

‘Although there may be federalism without federation, there can be no federation without some matching variety of federalism.’<sup>736</sup>

Perhaps the key word to be taken from this statement is that of *variety*, reflecting the design of federalism as malleable to a number of institutional forms, and not necessarily synonymous with the required necessity for a strict division of sovereignty, as is characteristic of federation. This understanding of federalism, as a broad normative theory of description, was taken further by Ronald Watts, who identified a ‘spectrum of federal political systems’:

‘a broad category of political systems in which, by contrast to the single central source of authority in unitary states, there are two (or more) levels of government which combine elements of shared-rule through common institutions and regional self-rule for

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the concept of external sovereignty, but rejects the idea of unitary sovereignty.’ See; Keohane, R. O., ‘Ironies of Sovereignty: The European Union and the United States’, *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), pp. 743-765

<sup>734</sup> King, P., *Federalism and Federation*, (London: Croom Helm, 1982), p. 74

<sup>735</sup> Elazar, D., *Federalism: an overview*, (Pretoria: HSRC, 1995), p. 2

<sup>736</sup> King, P., *Federalism and Federation*, (London: Croom Helm, 1982), p. 76

the governments of the constituent units... ranging from “quasi-federations” and “federations” to “confederations” and beyond.’<sup>737</sup>

From this statement, and with consultation of the variety of systems identified within the *spectrum*,<sup>738</sup> we may interpret the normative understanding of federalism as comprising of two parts:

The first, as identified above, is to understand its form as theoretical, and not necessarily conforming to a single institutional model, but rather a pantheon of models, each displaying varying and unique constructions of the central tenets of ‘self-rule and shared rule.’

The second, is to see its form as primarily concerned with a political mode of understanding the arrangement of constitutionalised power within states. While it is true that the division of federal powers between two levels of government, indicative of the normative understanding of federalism, is capable of assuming an institutionalised legal personality – as seen in the example of federation. It is also true to see its substance as applicable to a wider catalogue of institutional systems whereby the division of political power is not expressly guaranteed by a division of legal sovereignty, but is capable of forming a set of constitutional rules that, in political terms, appear *similar*<sup>739</sup> to those seen under formal federation

Following this analysis and distinction between the two interpretations of *federalism*, this chapter will now move to discuss their applicability in the UK. This will begin with a discussion

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<sup>737</sup> Watts, R., *Comparing Federal Systems in the 1990s*, (Kingston, Ontario: Queen’s University, 1996), p. 7

<sup>738</sup> For a tabled distinction of the various constitutional models within the spectrum, see; Watts, R., *Comparing Federal Systems in the 1990s*, (Kingston, Ontario: Queen’s University, 1996), p. 6-15

<sup>739</sup> For Ronald Watts, the United Kingdom historically conformed to a form of federalism through the institutional reality of a ‘decentralized union with some federal features.’ Watts, R., *Comparing Federal Systems in the 1990s*, (Kingston, Ontario: Queen’s University, 1996), p. 12; Under this construction, Watts was referring to the United Kingdom in both its pre- and post-1998 forms – i.e. identifying the United Kingdom as an institutional model sharing some features of federalism before the introduction of the devolution process, at least to Wales and Scotland. Inherently, Watts’ argument hinged on the identification of the United Kingdom as a ‘union state’, which as discussed in previous sections of this chapter, had distinct effects on the constitutional understanding of the United Kingdom as an asymmetrical union, dating back to the retention of certain administrative competences in Scotland following the Union of 1707. See Chapter 1 for a wider discussion as to the historical construction of the United Kingdom as a ‘union state’.

of the possibility of a UK Federation. This will then be followed by a discussion on the malleability of the broader normative idea of federalism.

### **5.3.1. A UK Federation?**

As recognised above, federation has a particular resonance in the UK as the longstanding protagonist to reform of the territorial constitution. Since the debates on the Irish Question in the 19<sup>th</sup> Century, ideas of federation have been a steady commitment of many pro-Union groups, most notably the Liberal Party.<sup>740</sup> Moreover, at intermittent stages up to the 1980s, ideas of federation have also held resonance with sub-state nationalist groups in Wales and Scotland.<sup>741</sup> For example, in 1971, Plaid Cymru chairman, Gwynfor Evans, identified federation as the ‘most practical solution’ to solving the issues of political and representative imbalance in the territorial constitution.<sup>742</sup>

More recently, and in particular in response to the issues connected to the Scottish independence referendum of 2014, and the referendum on EU membership of 2016, federation has once again emerged as a salient political solution to unsettlement in the territorial constitution. In response to these two constitutional events, we find that the emphasis for federation has, once again, come predominantly from unionist groups.

In the Autumn of 2014, the Liberal Democrats reconfirmed their longstanding commitment to federation through an emergency motion at their annual party conference – three weeks after the Scottish independence referendum.<sup>743</sup> Later, in 2016, after the territorial divisions of the

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<sup>740</sup> Chapter 1 (section 1.4)

<sup>741</sup> Chapter 3 (section 3.4)

<sup>742</sup> Evans did, however, qualify this remark by identifying that, in order to be a success, any scheme of federation must first deal with the seemingly unanswerable question of how to accommodate England. Evans, G., *Commonwealth Status for Wales*, (Bangor: Plaid Cymru, 1971) p. 14-15

<sup>743</sup> Liberal Democrats, ‘Power to the People: Policies for Political and Constitutional Reform’ Policy Paper 117 (Liberal Democrats: March 2014); The provision was amended (amendment F41) by an emergency motion to

Brexit process began to sharpen, the Scottish Labour Party leader, Kezia Dugdale, advocated for a reframing of the Union along federal lines<sup>744</sup> – a view supported by a significant majority at the Scottish Labour Party annual conference at Perth in February 2017,<sup>745</sup> and followed later by a more abstract commitment made by the leader of the national Labour Party, Jeremy Corbyn, in the run up to the 2017 general election.<sup>746</sup>

In unpicking the political rhetoric surrounding these more recent commitments, we find their motivations as largely reflecting what Alfred Stepan identified as *holding together* mechanisms: power is decentralised and recast into a federation in an act of political concession to sub-state nationalist groups, intended to ‘hold together’ the state.<sup>747</sup> Stepan identified particular examples of this process as taking place in Belgium, India and Spain – although the latter is questionable from a legal perspective<sup>748</sup> – whereby previously unitary states were transformed into federations, in an attempt to counter political discontent in certain parts of the territory of multi-national states.<sup>749</sup>

Additional to this motivation, however, there are also a number of wider benefits assumed to relate to federation in the UK. First, as argued by Burrows and Denton, federation, when compared to devolution, holds the possibility for a more positive result in the facilitation of a

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the Autumn Conference of 2014: <[https://www.libdems.org.uk/f41\\_towards\\_a\\_federal\\_uk](https://www.libdems.org.uk/f41_towards_a_federal_uk)> (accessed: 26/01/18)

<sup>744</sup> ‘This would mean a radical reshaping of our country along federal lines where every component part of the United Kingdom – Scotland, Wales, Northern Ireland and the English regions – take more responsibility for what happens in their own communities, but where we still maintain the protection of being part of a greater whole as the UK.’ Kezia Dugdale, ‘The UK needs a new Act of Union to prevent it breaking once and for all’, *Guardian*, 7 December 2016, <<https://www.theguardian.com/commentisfree/2016/dec/07/uk-needs-new-act-union-stop-break-brexit-scotland>> (Accessed: 26/06/18)

<sup>745</sup> BBC News, ‘Scottish Labour conference delegates back federal UK motion’, 24 February 2017, <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-39079408>> (Accessed: 28/06/18)

<sup>746</sup> Corbyn promised to put federalism ‘on the table’ if he was elected leader at the 2017 general election; *The Independent*, ‘Jeremy Corbyn puts federal government ‘on the table’ if Labour win power’, 26 August 2017, <<https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-labour-federal-government-kezia-dugdale-devolution-scotland-wales-northern-ireland-stv-a7913876.html>> (Accessed: 26/06/18)

<sup>747</sup> Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-321

<sup>748</sup> Spain remains, in formal legal terms, a unitary state; however, much of the political commentary on Spain identifies it as ‘quasi-federal’ owing to the high degree of regional self-rule. See: Tierney, S., *Constitutional Law and National Pluralism*, (Oxford: Oxford University Press, 2004), p. 242-244

<sup>749</sup> Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-323

coherent, stable, and more straightforward category of constitutional distinction – providing for more equality between its constituent parts.<sup>750</sup> Second, in response to the issue of territorial disparity in the Brexit vote, we find Dugdale’s commitment to federation as to a large extent influenced by the idea of federation as reducing the ‘us vs. them’ thinking across the territorial constitution.<sup>751</sup>

However, despite these implied benefits, we find that federation, while oft discussed as an *option* for reform, has never reached fruition. Indeed, despite its design being advocated for consideration at most periods of constitutional unsettlement, there remains no precedent of federation as having been applied in the UK. In explaining this phenomenon, this chapter will now turn to discuss two issues that have consistently stifled the debate on federation in the UK.

The first issue, relates to the theoretical idea that federation is incompatible with the UK’s constitutional tradition. In explaining this in more detail, we find a useful example of its design in the work of A. V. Dicey who, writing in the mid-19<sup>th</sup> century, gave the following argument against federation as an answer to the Irish Question:

‘Federalism, in short, is in its nature a scheme for bringing together into closer connection a set of states, each of which desires, whilst retaining its individuality, to form together with its neighbours one nation. It is not, at any rate as it has hitherto been applied, a plan for disuniting the parts of a united state... When, therefore, it is suggested that Federalism may establish a satisfactory relation between England and Ireland, a doubt naturally suggests itself whether the United Kingdom presents the conditions necessary for the success of the Federal experiment.’<sup>752</sup>

Moreover, through further analysis, we find that Dicey was by no means an isolated figure in demonstrating reservations to the federation of the UK in the 19<sup>th</sup> century. Indeed, writing at

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<sup>750</sup> Burrows, B. and Denton, G., *Devolution or Federalism? Options for a United Kingdom*, (London: MacMillan, 1980), p. 16-28

<sup>751</sup> Kezia Dugdale, ‘Speech by Kezia Dugdale, Leader of the Scottish Labour Party’ IPPR: London, 7 December 2016 <http://scottishlabour.org.uk/blog/entry/a-new-act-of-union-to-save-the-uk> (accessed: 08/02/18)

<sup>752</sup> Dicey, A. V., *England’s Case Against Home Rule*, (London: John Murray, 1886), p. 161-162

the same time as Dicey, the Oxford academic and Liberal politician, Edward Freeman, provided the following argument against federation:

‘No one could wish to cut up our United Kingdom into a federation, to invest English Counties with the rights of American States, or even to restore Scotland and Ireland to the quasi-Federal position which they held before their respective Unions. A Federal Union, to be of any value, must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto closely united’.<sup>753</sup>

In both instances, we find the arguments against federation as framed on the understanding of it as an action solely reserved to examples of union between previously independent political units. This may be interpreted as simply a reflection of what was, at that time, a political reality – federation, up until the mid-20<sup>th</sup> century, was an action primarily reserved to the formation of *new* states.<sup>754</sup> Indeed, it was not until the second half of the 20<sup>th</sup> century that we find federation additionally becoming a ‘holding together’ mechanism, applied in previously unitary states such as India or Belgium<sup>755</sup> - a factor which possibly informed the decision of the Kilbrandon Commission to conclude on federation as follows:

‘Federalism was designed and is appropriate for states coming together to form a single unit, and not for a state breaking up into smaller units’.<sup>756</sup>

However, despite this contextual explanation, this thesis argues that a more important aspect of this issue is to be found in its political economic redress of federation as weakening the unitary authority of the UK Parliament. Indeed, as John Kendle reminds us, during the 19<sup>th</sup> century debates on federalism, the underlying concern lay not in a theoretical critique of the federal idea, but in the fear that its design would weaken the political authority of the UK

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<sup>753</sup> Freeman, E. A., *History of Federal Government: Volume I*, (London: MacMillan 1863), p. 90-91

<sup>754</sup> Riker, W. H., *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown and Company, 1964), p. 12-13; Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-323

<sup>755</sup> Stepan, A., *Arguing Comparative Politics*, (Oxford: Oxford University Press, 2001), p. 320-321

<sup>756</sup> Kilbrandon, Lord., ‘*Report of the Royal Commission on the Constitution*’, (London: HMSO, 1973) Cmnd. 5460, p. 157, para. 526

Parliament: ‘a weakening of the union would lead to a weakening of both the United Kingdom and the Empire’.<sup>757</sup>

To some extent, we find the corpus of this argument as reflecting the historical anxiety of UK – or more accurately, English<sup>758</sup> - constitutional theory, as reflected in Chapter One; that the ‘official mind’ is distinctly opposed to the idea of divided sovereignty. Thus, as a consequence, we find the primary interpretation of categories of constitutional change designed to reduce the *legal authority* as well as the *political power* of central government as treated with opposition; a reflection more of the historical past, and the traditional relationship between the parts of the territorial constitution, than of a concurrent opposition to the specific category of federation.<sup>759</sup> In this regard, we may conclude the essence of this first challenge as facing an *ideological* as opposed to an *institutional* barrier – needing to convince the official mind of the logic for divided sovereignty, as opposed to necessarily justifying its institutional form.

The second issue of applying federation to the UK relates to its territorial application. Central to this theme, we find the notion of federation as being unable to navigate a suitable solution to the accommodation of the UK’s largest component part, England. In this regard, we must see this issue as constructed in three parts:

First, we find the problem of accommodating England’s size within the makeup of a federal UK. In this regard, it is a fact almost universally acknowledged that a single English federal unit would be so unbalanced that it would be unworkable within the territorial constitution –

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<sup>757</sup> Kendle, J., *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, (Kingston and Montreal: McGill-Queens University Press, 1989), p. 16

<sup>758</sup> Indeed, as noted by David Marquand, the notion of ‘UK’ reluctance, is largely only manifested in the distinction of an English ‘emotional barrier to dividing sovereignty’ – a factor which, as this thesis has shown, has far less resonance in the periphery. Marquand, D., ‘Federalism and the British: Anatomy of a Neurosis’, *The Political Quarterly*, Vol. 77, No. 2, (April-June 2006), pp. 175-183 at 181

<sup>759</sup> For a broader account of the history of this idea, see: Kendle, J., *Federal Britain: A History*, (London: Routledge, 1997), p. 150-169



not only due to its size in relation to the other three component parts of the UK,<sup>760</sup> but also of its size in relation to the UK as a whole.<sup>761</sup>

The alternative option is to divide England into a number of federated ‘regions’<sup>762</sup> – a solution that has a considerable salience in regards to regional devolution, and may be capable of transplantation over to a federal design. However, this thesis argues that such a system, while perhaps proportionally more stable, would fail to rectify one of the central issues in the territorial constitution – *asymmetry*. Under the proposed designs for English Regions put forward by New Labour, the relatively weak executive Assemblies were roundly rejected by the voters of the North-East in 2004. Thus, it remains unlikely that English voters will suddenly accept a system of legislative federation equal to that currently experienced in Wales or, more significantly, Scotland. Indeed, we find that while regionalism has recently regained some traction in certain metropolitan areas in England, the central issue of English constitutional anxiety remains fixed on a solution for England as a whole.<sup>763</sup>

Second, is the problem that a system of English federal regions would not necessarily solve the psychological or symbolic issues associated with the dominant position of England within the territorial constitution. This critique is based primarily on the fact that through dividing the national territory of England, the over weighted position of England – while reduced in the sense of direct political power – would not necessarily be symbolically reduced. In this regard, we find a useful note of guidance provided by Erk and Anderson:

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<sup>760</sup> ‘A federation consisting of four units – England, Scotland, Wales and Northern Ireland – would be so unbalanced as to be unworkable. It would be dominated by the overwhelming political importance and wealth of England.’ Kilbrandon, Lord., *Report of the Royal Commission on the Constitution*, (London: HMSO, 1973), Cmnd. 5460, p. 159, para. 531

<sup>761</sup> Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom*, (London: British Institute of International and Comparative Law, May 2015), para. 3.6

<sup>762</sup> Several constructions exist for the number and boundaries of a system of English Regions, for a useful overview of some of the advocated for configurations, see: Burrows, B., and Denton, G., *Devolution or Federalism: Options for a United Kingdom*, (London: MacMillan Press, 1980)

<sup>763</sup> The McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons*, (March 2013), para. 68

‘The general observation seems to be that federalism tends to be more stable with multiple constitutional units rather than two or three large units or a single dominant one. A federal system defined by multiple units produces more room for shifting alliances and reduces an ‘us vs. them’ mindset. At the same time, when only a handful or one of the subunits is ethno-culturally distinct (Spain, Canada), subunits of the minority culture(s) might feel overpowered by the rest of the subunits representing the majority culture.’<sup>764</sup>

In unpacking this quote, we find the argument that by dividing the territory of the majority culture into a number of subunits, its ability to re-form a cohesive national block is not necessarily reduced. Instead, it is recast within a different form, but continues to carry the same symbolic significance. Moreover, as recognised in the Memorandum of Dissent in 1973, the division of England into a network of *Regions* would unlikely allay the sense of division *within* England itself – creating a demographically and economically unbalanced system whereby London and the South-East would be unquestionably dominant.<sup>765</sup> Thus, federation holds little opportunity for delivering an effective (re)balancing of the onus of political power in the territorial constitution.

The third obstacle, and perhaps the most damning, is that there remains little appetite within England for a system of federal government – either as a whole or regionally. While some evidence suggests that this may be gradually changing,<sup>766</sup> the consensus acknowledged in the recent McKay Commission Report show that the wider concern in England remains with its

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<sup>764</sup> Erk, J., and Anderson, J., ‘The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?’, *Regional and Federal Studies*, Vol. 19, No. 2, (2009), pp. 191-202 at 197

<sup>765</sup> Crowther-Hunt, Lord., and Peacock, A. T., ‘Royal Commission on the Constitution, Vol II: Memorandum of Dissent’, (London: HMSO, 1973), Cmnd. 5460-I, p. 223, Appendix E

<sup>766</sup> Arianna Giovannini suggests that a ‘new regionalism’ is in its embryonic form in certain parts of England, whereby the rise of identity politics in areas such as Yorkshire, as well as the wider economic calls for regionalism in areas such as the North East, indicate a possible growth in support for regional assemblies in parts of England – particularly in the North. Giovannini, A., ‘Towards a “New English Regionalism” in the North? The Case of Yorkshire First’, *The Political Quarterly*, Vol. 87, No. 4, (2016), pp. 590-600. Yet, there remains little evidence that the rise in support for ‘regionalism’ translates to a support for ‘federation’ and the formal division of legal sovereignty within England.

governance as a *whole*, as opposed to anxiety over the essence of government *within* England.<sup>767</sup>

Finally, by way of an additional fourth point, it is also important to recognise that while England creates several issues relating to the applicability of federation in the UK, there is also no evidence of widespread support for federation in the periphery. Indeed, while federation is often framed as beneficial to the periphery in allowing for division of sovereignty and the facilitation of *equality* and *security*, we find that this argument has largely failed to take form with sub-state nationalist groups in the periphery who ultimately seek to *leave* the UK, as opposed to be tied into it in a federal system.<sup>768</sup>

On this note, we find that the provision for federation in the UK faces significant obstacles; in part as a reflection of an historical legacy of ideological opposition to the division of sovereignty, but also by a notable lack of support and inability to effectively accommodate – or more importantly, mitigate – the dominance position of England within the territorial constitution.

### **5.3.2 Federalism in the UK**

The previous section of this chapter identified the proposals for, and possible unworkability of, federation in the UK. The issues identified in this argument were both functional and symbolic in nature, relating to a reluctance towards divided sovereignty and, most notably, the tenuous position of England within a new territorial framework. However, such difficulties are not to be seen as a conclusion to the possible applicability of the federal idea in the UK. In this last

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<sup>767</sup> The McKay Commission, *Report of the Commission on the Consequences of Devolution for the House of Commons*, (March 2013), para. 68

<sup>768</sup> Dalryell, T., *The Question of Scotland*, (Edinburgh: Birlinn, 2016), p. 75

section of the chapter, we will look at the idea of *federalism* as a normative concept, and the possibilities it holds for instilling a system of UK-wide constitutional settlement.

In beginning this discussion, let us first briefly be reminded of what is meant by reference to federalism as a normative idea. In explaining this, we are once again drawn to revisit the work of Daniel Elazar, and the recognition of federalism as comprising of two parts: *self-rule* and *shared rule*.<sup>769</sup> The first (*self-rule*) relates to the provision for peripheral autonomy, the second (*shared rule*) relates to the provision for intergovernmental cooperation and codecision and, when in symbiosis, are indicative of the existence of federalism.

On the basis of this definition, we find that some commentators have already come to identify the UK as having a federalist mentality. As recognised in Chapter Four, William Livingstone saw federalism as evident in the constitutional order in the UK during the mid-20<sup>th</sup> century, prior to the introduction of full-scale devolution in 1998.<sup>770</sup> For Paolo Dardianelli, a federal tradition can be traced back even further to the Anglo-Scottish Union of 1707, which he argues combined ‘union wide unity with regional autonomy.’<sup>771</sup> Moreover, for Jim Bulpitt, the relationship between the centre and periphery in the UK was, from the 17<sup>th</sup> century onwards, effected by an ‘operational federalism’ of administrative independence in the periphery, sustained by a separation between ‘high’ and ‘low’ politics – the former being maintained in central government, while the latter is open to decentralisation to the periphery.<sup>772</sup>

However, in passing critique upon these three observations, we find that in each instance the conclusion on the existence of federalism is largely only framed through recognition of a practice of *self-rule*, connected to an understanding of the UK as a ‘union state’. Indeed, in

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<sup>769</sup> Elazar, D., *Federalism: an overview*, (Pretoria: HSRC, 1995), p. 2

<sup>770</sup> Livingstone, W. S., ‘A Note on the Nature of Federalism’, *Political Science Quarterly*, Vol. 67, No. 1, (1952), pp. 81-95 at 92-93

<sup>771</sup> Dardianelli, P., and Kincaid, J., ‘A New Union? Federalism and the UK’, *Political Insight*, (December 2017), pp. 12-15 at 14

<sup>772</sup> Bulpitt, J., *Territory and Power in the United Kingdom*, (Colchester: ECPR Press, 2008), p. 82

each instance, we find little effort or connection placed on the identification of federalism as an idea synonymous with a sense of *shared rule*. It is such lopsided study and obedience of federal rule in the UK that, arguably, could be seen as one of the central characteristics impeding the effectiveness of devolution.

Indeed, in the process leading up to devolution, it was implied in the Kilbrandon Report that in order to be effective, devolution would require, alongside the provision for self-rule, a reform of the ideology of central government to embody a culture of shared rule.<sup>773</sup> However, through analysis of the devolution settlements, drawing particular reference to the *bilateral* aspect of the devolution process, we find that there has failed to emerge a strong tradition of *shared rule* to accompany the unprecedented march of self-rule.

This can, at least in part, be explained through the already identified logic of devolution which held – and continues to hold – in favour of the appeasement of peripheral groups through self-rule, rather than forming a structured UK-wide attempt at constitutional reform. In practical terms, as identified in Chapter Four, this has resulted in devolution assuming an asymmetrical character, whereby the Scottish, Welsh and Northern Irish settlements each seek to appease specific sub-state demands through a practice of ‘bi-lateral bargains’.<sup>774</sup> As we have seen, this has created an asymmetrical system which reduces the possibility for cooperation and overlap between the devolved administrations and the UK Government on a multi-lateral basis.<sup>775</sup>

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<sup>773</sup> ‘a new style of thinking, positively favourable to devolution and based on co-operation rather than the exercise of central authority.’ Kilbrandon, Lord. ‘Report of the Royal Commission on the Constitution’ (London: HMSO, 1973) Cmnd. 5460, p. 89, para. 282; for a useful commentary on this point, see: Bogdanor, V., ‘Devolution and the British Constitution’, in Butler, D., Bogdanor, V., and Summers, R., (eds.) *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall*, (Oxford: Oxford University Press, 1999), p. 54-77 at 75

<sup>774</sup> Trench, A., ‘Scotland and Wales: The Evolution of Devolution’, in Hazell, R., (ed.) *Constitutional Futures Revisited: Britain’s Constitution to 2020*, (Basingstoke: Palgrave MacMillan, 2008), pp. 29-42

<sup>775</sup> Swenden, W., and McEwen, N., ‘UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics’, *Comparative European Politics*, Vol. 12, No. 4/5, (2014), pp. 488-509 at 501; House of Lords, ‘*Inter-governmental relations in the United Kingdom*’, Select Committee on the Constitution, 11th Report of Session 2014-15, HL Paper 146 (27 March 2015), para. 21

Perhaps as a latent recognition of the failure of an effective mechanism for shared rule to take hold, several academic commentators have come to argue that in moving forward, federalism provides a number of useful precedents on reform of the territorial constitution. In evidence given to the House of Lords Select Committee on the Constitution, Adam Tompkins stressed the possibilities from this ‘the United Kingdom can borrow from and learn from... in terms of improving the governance arrangements of the United Kingdom.’<sup>776</sup> In evidence to the same Committee, Michael Keating went further in advocating in favour of federalism as the ‘ideal solution’ to the current constitutional crisis.<sup>777</sup>

Behind both endorsements, we find a comparable logic – namely that the opportunities offered by *shared rule* present valuable lessons for the rebalancing of constitutional relations between the UK Government and the devolved administrations, and for the ultimate fulfilment of the *equality* and *security* of the devolution settlements. Indeed, this was further recognised by the devolved administrations themselves. In its recent white paper, *Brexit and Devolution*, the Welsh Government described the current operation of the Joint Ministerial Committee (JMC) as a ‘consultative body’ or ‘talking shop’.<sup>778</sup> In its subsequent white paper, *Securing Wales’ Future*, the Welsh Government argued for the enhancement of the JMC to assume the role of a permanent UK Council of Ministers – perhaps made more significant by its acknowledgement as being equally important to the provision for further self-rule.<sup>779</sup>

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<sup>776</sup> House of Lords, ‘*The Union and devolution*’, Select Committee on the Constitution, 10th Report of Session 2015-16, HL Paper 149 (25 May 2016), para. 272

<sup>777</sup> Prof. Michael Keating – Revised transcript of evidence taken before The Select Committee on the Constitution Inquiry on The Union and Devolution, Evidence Session No. 11, Questions 149-159, (Friday 11<sup>th</sup> December 2015)

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/the-union-and-devolution/oral/26656.html>> (Accessed: 23/11/17)

<sup>778</sup> Welsh Government, ‘*Brexit and Devolution*’ (Cardiff: Welsh Government, 2017), p. 17

<sup>779</sup> Welsh Government, ‘*Securing Wales’ Future*’ (Cardiff: Welsh Government, 2017), p. 28

Yet, despite such widespread endorsement on the inclusion of a federalist logic into the existing fabric of the devolution settlements, this thesis highlights that there remain a number of significant obstacles restricting its introduction. It summarises these in two parts:

First, the pervasive nature of the doctrine of the legislative supremacy of Parliament significantly undermines the ability to imagine the successful application of a meaningful system of shared rule in the UK. While this may be countenanced to some extent by the argument that legal theory can be kept in check by statutory recognition<sup>780</sup> or political reality<sup>781</sup> – as argued by Lord Sankey in *British Coal Corp. v The King*<sup>782</sup> – the recent realities of the *Miller* case and the EU (Withdrawal) Act seem to have significantly diminished the ability for a relationship to emerge based solely on political trust.

Indeed, perhaps the only possibility of a lasting solution in this regard, hinges on the ability of the UK Government to alter its constitutional ideology: acknowledging the UK as a multi-national state;<sup>783</sup> abandoning the perspective of the UK as a Union of solidarity; and enhancing a system of intergovernmental relations, conditioned with a genuine commitment to shared rule.<sup>784</sup> This, at present, appears unlikely.

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<sup>780</sup> House of Lords, ‘*Inter-governmental relations in the United Kingdom*’, Select Committee on the Constitution, 11th Report of Session 2014-15, HL Paper 146 (27 March 2015), para. 86

<sup>781</sup> Elliott, M., ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’, in Jowell, J., Oliver, D., and O’Cinneide, C., (eds.) *The Changing Constitution*, 8<sup>th</sup> Ed. (Oxford: Oxford University Press, 2015), pp. 38-66 at 43-44

<sup>782</sup> ‘It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit... remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute [of Westminster]. But that is theory and has no relation to realities.’ *British Coal Corporation v The King* [1935] AC 500 at 520

<sup>783</sup> Tierney, S., ‘Giving with one hand: Scottish devolution within a unitary state’, in Choudhry, S., (ed.) *Constitutional Design for Divided Societies: Integration or Accommodation*, (Oxford: Oxford University Press, 2008), pp. 438-460 at 447; McHarg, A., ‘What does the Union Need to Do to Survive?’, *Scottish Constitutional Futures Blog*, 25 September 2014, <<https://www.scottishconstitutional-futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4325/Aileen-McHarg-What-Does-the-Union-Need-to-Do-to-Survive.aspx>> (Accessed: 26/01/18)

<sup>784</sup> Evans, A., ‘Back to the Future? Warnings from History for a Future UK Constitutional Convention’, *The Political Quarterly*, Vol. 86, No. 1, (January-March 2015), pp. 24-32 at 30; The recent report of the House of Commons Public Administration and Constitutional Affairs Committee noted that the role of the Joint Ministerial Committee requires enhancement in the nature of its purpose, requiring a clear constitutionally defined role, rather than its current function as an organ for the airing of grievances, but with no concrete

Second, even in the instance where an effective alteration is achieved in the constitutional ideology of the UK Government, it is also important to recognise the current structure of the territorial constitution as being ill-suited to fostering a system of shared rule. As identified in Chapter Four, the asymmetrical and bilateral construction of the devolution settlements places several obstacles in the way of a balanced obedience of the two-tenets of federalism.

Through asymmetry, we find that the *scope* for shared rule is diminished due to the lack of overlap in shared competences between the devolved administrations.<sup>785</sup> This is made additionally problematic by the position of England which is at present represented by the UK Government in IGR. As has already been identified, this holds the position not only of creating a noticeable imbalance in the political weight of IGR negotiations, but also in removing the impartiality of the UK Government which currently conducts IGR under ‘two hats’ – representing the interests of both the UK and England.<sup>786</sup>

While the Welsh Government’s proposals sought to rectify this situation through a qualified majority voting system in proceedings of the Joint Ministerial Committee – whereby the UK Government could continue to represent the dual interests of the UK and England<sup>787</sup> – more recent proposals have come to suggest the need for England to be represented separately from the UK Government.<sup>788</sup> This thesis tends to agree with this latter suggestion – however, on the

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mechanisms for *shared* rule. House of Commons, *Devolution and Exiting the EU: reconciling differences and building strong relationships*, Public Administration and Constitutional Affairs Committee, 8th Report of Session 2017-19, HC Paper 1485 (31 July 2018), para. 135

<sup>785</sup> Swenden, W., and McEwen, N., ‘UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics’, *Comparative European Politics*, Vol. 12, No. 4/5, (2014), pp. 488-509 at 501

<sup>786</sup> House of Commons, *Devolution and Exiting the EU: reconciling differences and building strong relationships*, Public Administration and Constitutional Affairs Committee, 8th Report of Session 2017-19, HC Paper 1485 (31 July 2018), para. 86

<sup>787</sup> The Welsh Government’s white paper, *Brexit and Devolution*, advocated that the UK Council of Ministers should comprise of four administrations: Wales, Scotland and Northern Ireland, and the UK Government acting on the dual interests of the UK and England. The voting mechanism between the four administrations would be over and above democratic majority and, instances where consensus could not be achieved, require the vote of the UK and one of the devolved administrations (Wales, Scotland or Northern Ireland). Welsh Government, *Brexit and Devolution*, (Cardiff: Welsh Government, 2017), p. 18

<sup>788</sup> The proposals for England’s representation are primarily in favour of English *Regions* rather than an all-England block. This is to a large extent motivated by the position of the elected mayoralities in England who feel underrepresented by the UK Government. House of Commons, *Devolution and Exiting the EU: reconciling*



tentative recognition that any separate representation of England must also be accompanied by an overarching ideological commitment to multi-lateralism; reversing the current trend for bi-lateral bargains between the UK Government and the devolved administrations.<sup>789</sup>

Upon this note, we may conclude that the current lack of substantive provision for shared rule is, perhaps, the biggest single challenge facing the chances for settlement in the territorial constitution.<sup>790</sup> In light of the factors identified in this final chapter; the hierarchical approach taken by UK Government in the Brexit negotiations, and its seeming failure to answer the calls of the devolved administrations for *equality* and *security*, significantly raises the chances of the current period of constitutional unsettlement continuing into the future.

In advancing this rather pessimistic conclusion, this thesis does not necessarily advocate in favour of federalism as the only solution for settling the fault-lines in the territorial constitution. Rather, as recognised above, it notes that there are considerable obstacles to the ability of federalism – as a balanced commitment to both self-rule and shared rule – to emerge in the UK.

What this thesis does recognise, however, is that the devolution issue has now moved beyond the simple need for *self-rule*. Indeed, it is argued that the time has now passed whereby the provision for self-rule is no longer an effective strategy on its own – and arguably never was<sup>791</sup> – for managing unsettlement in the periphery. In this regard, this thesis recognises that the

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*differences and building strong relationships*’, Public Administration and Constitutional Affairs Committee, 8th Report of Session 2017-19, HC Paper 1485 (31 July 2018), para. 88-89

<sup>789</sup> Hazell notes that the culture of bi-lateral relations is not solely confined to the mentality of the UK Government, but also has notable application in the mind of the devolved administrations who, in certain instances, prefer bilateral arrangements in regard to provision for tailor made deals and enhanced competences. Hazell, R., (ed.) *Devolution and the Future of the Union*, UCL, The Constitution Unit (April 2015) para. 3.3.3; McEwen, N., and Petersohn, B., ‘Between Autonomy and Interdependence: The Challenges of Shared Rule after the Scottish Referendum’, *The Political Quarterly*, Vol. 86, No. 2, (April-June 2015), pp. 192-200 at 200

<sup>790</sup> O’Leary, B., ‘*Detoxifying the UK’s exit from the EU: a multi-national compromise is possible*’, *LSE Brexit*, 27 Jun 2016, <<http://blogs.lse.ac.uk/brexit/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-national-compromise-is-possible/>> (Accessed: 26/04/18)

<sup>791</sup> House of Lords, ‘*The Union and devolution*’, Select Committee on the Constitution, 10th Report of Session 2015-16, HL Paper 149 (25 May 2016), para. 252

debate has now moved onto the need to guarantee the *equality* and *security* of the devolution settlements within the territorial constitution.

In recognising this issue, there are a variety of constitutional strategies open to both the UK and devolved governments; from the revisiting of old principles such as ‘dominion status’,<sup>792</sup> to the more recent doctrines of constitutional pluralism relating to the theoretical ideas of *post- and late-sovereignty*. This thesis does not seek to recommend any particular strategy, but rather recognises that any future reform would find benefit to draw its inspiration from the broad corpus of the federal idea in settling on a strategy that balances any measure of self-rule, with an equal measure of shared rule.

#### **5.4. Concluding Remarks**

The argument in this chapter has highlighted two crucial elements in the contemporary makeup of the territorial constitution: First, as a result of the Brexit process, and in particular the events of the *Miller* case and the EU (Withdrawal) Act, the divides and imbalances in the territorial constitution have grown more pronounced. Second, the pursuit of remedies in answering the current episode of constitutional unsettlement are, while not impossible, significantly restricted by the continuing hierarchical position of the UK Government and the pervasive nature of the legislative supremacy of Parliament.

Central to these two elements has been the identification of the need for *equality* and *security* on the part of the devolved administrations, as well as the increasing calls for an independent

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<sup>792</sup> This idea has recently regained salience in Wales: BBC, ‘Welsh devolution is being betrayed, says Lord Elystan-Morgan’, 06 October 2017, <<https://www.bbc.co.uk/news/uk-wales-politics-41524304>> (Accessed: 29/06/18); and was recommended for inclusion in the Wales Bill 2016, Hansard, HL Deb, 07 November 2016, Vol. 776, Col. 999. For a general discussion on the structure and governing ideology of dominion status, see: Brock, W. R., *Britain and the Dominions*, (Cambridge: Cambridge University Press, 1951); Wheare, K. C., *The Statute of Westminster and Dominion Status* (London: Oxford University Press, 1953); Roberts-Wray, K., *Commonwealth and Colonial Law*, (London: Stevens & Sons, 1966); Oliver, P. C., ‘Dominion Status: History, Framework and Context’, *Ottawa Faculty of Law Working Paper*, No. 13, (July 2013)

political voice for England. It has been argued that through the Brexit process, the ‘solidarity’ approach taken by the UK Government has been significant in highlighting the lack of unity or cooperation in the dynamics of the territorial constitution. In moving forward, this thesis argues that the ability to recapture the essence of UK-wide constitutional settlement is inherently linked to finding a solution to these two issues; a reality that in itself predicts the need for notable reform, but is certainly not impossible to achieve.

## Conclusion

### Summary of Chapters

Chapter One identified the United Kingdom as a ‘State of Unions’. In this chapter, it was concluded that the terms of the Union’s that formed the UK state were far from inevitable, but instead emerged as English-sponsored, pragmatic responses to particular political conditions. Moreover, the argument in this chapter also highlighted the substantive reality that the ‘State of Unions’ did not create a single culturally homogeneous society but, rather, a multi-national state. Reflecting this reality, the final part of this chapter acknowledged that due to the weak provision of nation-building in accompaniment to the substantive constitutional formation of the UK, forces of sub-state nationalism began to emerge within the territorial constitution during the 19<sup>th</sup> century.

The arguments made in Chapter Two sought to deal with the connection between identity and the state. In Part One of the chapter, it was argued that the state emerged as a result of wider changes in the global political economic sphere which, in turn, necessitated the increase in the size and scale of the state as a means of political organisation. Part Two of the chapter extended the debate to consider as to how the political unit of the state became associated with the essence of identity of the individual. In this part of the chapter, a debate was undertaken on the current theories on nations and nationalism, and a synthesis drawn in favour of the nation as an imagined political community, albeit reconditioned in the British context through reference to the system of *Othering* and *common goals*, as identified in the theoretical ideas of Carl Schmitt and Giuseppe Mazzini. Part Three of the chapter demonstrated that the fundamental tenets of Britishness, being the essence of identity associated with the political unit of the United Kingdom, have historically been sustained through a complex system of *Others* and *common goals*, unreservedly tied to the fortunes of the state.

The importance of this chapter in answering the central research question of this thesis was two-fold. First, this chapter sought to highlight the historical significance of state-based political identity in influencing the design of constitutional systems. Second, this chapter also provided context on the fundamental tenets of Britishness; information which provided valuable insights for the debate in Chapters Three and Four, which considered the current impact of the diluting salience of Britishness on the dynamics of the territorial constitution.

Chapter Three refocussed the debate of this thesis by consulting the essence of constitutional change in the UK from an external perspective. Part One of this chapter began by defining the essential elements of the overarching rubric of globalisation; concluding it to be a gradual process of the thickening of the various strands of globalism. Part Two then highlighted the challenges raised by processes connected with globalisation, and their impact upon state power and authority. These were identified in three parts: the new multi-level construction of the global sphere; the normative reinterpretations of the balance of power within the state; and the new pluralised ambitions of sub-state nationalist groups – commonly referred to as ‘neo-nationalism’. Part Three of this chapter then moved to identify the impacts of these changes in the four component parts of the UK.

In this analysis, it was concluded that no single definition exists as to the effects of globalisation upon the different parts of the UK, but that in each of the four component parts – aside from England – new understandings of authority and power have emerged which increasingly seek to influence constitutional objectives outside of the traditional frame of the UK state. This debate was important in understanding the wider normative changes impacting the dynamics of state systems, and the place devolution inhabits within these changes.

Chapter Four dealt directly with the substantive issues associated with devolution in the UK, and presented the argument that devolution is a reactive mechanism of constitutional change.

Through analysing the devolution process on a UK-wide basis, this chapter found that devolution – and the absence of devolution in England – emerged as a response to the level of political instability, and strength of cultural feeling, within the non-English parts of the UK. Correspondingly, under the logic of devolution as a *reactive* and *measured* device of constitutional reform, it was argued that the system of devolution that emerged in 1998 was characterised by four key themes: being *asymmetrical*, *bi-lateral*, a *process* and, as a result of these factors, a mechanism of constitutional change ripe for fostering a *reactive dynamic* between the component parts of the territorial constitution.

In considering the central research question of this thesis, this chapter provided valuable insight into the changing dynamics of the territorial constitution. Yet, while making an original contribution on its own, this chapter also borrowed considerably on the themes raised in the preceding three chapters of this thesis, and highlighted valuable themes in relation to the significance that constitutional history and studies into political identity hold for understanding the wider dynamics of the territorial constitution. In this regard, this chapter concluded that devolution must not be read in isolation, but must be seen as part of a much wider process of normative change within the UK territorial constitution; change which first began more than a century prior to 1998, and has arguably influenced certain parts of the dynamics of the territorial constitution since the respective Acts of Union which formed the UK.

The argument in Chapter Five updated the findings made in the preceding chapters by highlighting two crucial elements in the contemporary dynamics of the territorial constitution. First, as a result of the Brexit process, and in particular the events of the *Miller* case and the EU (Withdrawal) Act, it was argued that the divides and imbalances in the territorial constitution have grown more pronounced. Second, it was recognised that the pursuit of remedies in answering the current episode of constitutional unsettlement are, while not

impossible, significantly restricted by the continuing hierarchical position of the UK Government, and the pervasive nature of the legislative supremacy of Parliament.

It has been argued that central to these two elements of analysis lies the identification of the need for *equality* and *security* on the part of the devolved administrations. It has also been argued that through the Brexit process, the ‘solidarity’ approach taken by the UK Government in facilitating the negotiations with the European Union, has been significant in highlighting the lack of equality or security of the devolved administrations. In moving forward, this thesis has argued that the ability to recapture the essence of constitutional settlement within the territorial constitution is inherently linked to finding a solution to these two issues – a reality that in itself predicts the need for notable reform, but is certainly not impossible to achieve.

## **Conclusion**

The United Kingdom is at a constitutional crossroads. From a legal perspective, devolution has had little impact upon the sustaining doctrine of the UK constitutional order; the legislative supremacy of parliament. From a political perspective, however, it is also recognised that the introduction of devolution has instigated a process which has little or no road back, and an uncertain road ahead. In providing for the institutional recognition of nationalist sentiments – initially proposed as a means of silencing nationalism – this thesis has shown how devolution has territorialised the dynamics of the UK constitutional order, and provided a distinct platform for the political aims of sub-state nationalists groups.

Moreover, this thesis has also charted the declining role of the United Kingdom as the primary totem for individual political identity, and the effects of this phenomenon on reducing the cohesive bonds of unionism in the UK. As we have seen in this thesis, the cohesive institutional and ideological bonds which once guided and sustained a sense of Britishness have become

reduced, both by the thickening of globalism's strands, and the dilution of UK-wide sentiment through devolution. In addition to these factors, however, this thesis has also shown how the introduction of devolution, and the connected territorialisation of the UK-state, has had a considerable impact on fostering a reactive dynamic between the four component parts of the UK. In this regard, this thesis has concluded that devolution, as well as impacting the substantive political structure of the territorial constitution, has also had a significant effect on the symbolism of the UK as a unitary state; fostering disagreement, resentment and 'devo-anxiety' between the four component parts of the UK.

Reflecting upon these points, the central research question of this thesis has been to understand as to 'how far devolution has changed the constitutional dynamics within the territorial constitution?' This conclusion will now deliver an answer to this question through the identification of three thematic points which pervade throughout this thesis:

### *1. A State of Unions, and a Unitary State*

The first point pertains to the reality that, in legal theory, the United Kingdom remains a unitary state. However, in making this assertion, this thesis also argues that while this doctrine continues to rule discussion on the territorial constitution from the perspective of the UK Government, the existence of devolution, and the political capital of the devolved administrations, has increasingly called into question its longevity.

On this point, this thesis contends that, in constitutional terms, the UK is no longer a purely unitary state, but a State of Unions. While this has been recognised as a theoretical certainty by many political sciences for many years, this thesis contends that the idea of the State of Unions has now come – at least in part – to inform the reality of the dynamics of the territorial constitution. In making this argument, this thesis contends that this shift has not instigated a



full normative change, but has created a scenario whereby the arrangement of power and authority in the territorial constitution is continually open to uncertainty and competition between the two levels of government. A scenario which in itself has had a significant impact on the dynamics of the territorial constitution, and perpetuates the continuing era of unsettlement.

## *2. Devolution in Context*

The second thematic conclusion reached in this thesis, has been the recognition that devolution – its causes and effects – does not exist in a vacuum, but within a much broader catalogue of political and normative challenges to the state. Central to this point has been the recognition of two factors; the increasing pluralisation of forms of political identity, and the normative challenges associated with the rubric of ‘globalisation’. In analysing these two points, this thesis has shown devolution to be a valuable window on much broader issues effecting the state.

On the one hand, arguments made across each of the chapters in this thesis have highlighted how the gradually diluting salience of Britishness as the primary political identity for citizens in the UK, has had considerable repercussions on the normative dynamics and balance of power in the territorial constitution. Fundamentally, this thesis has demonstrated how changes in political identity leave a lasting impact upon the territorial constitution, and catalyse arguments for further devolution and the fragmentation of the UK-state.

On the other hand, devolution also serves as an example of the wider trend across liberal democracies on the emergence of multi-level governance structures. Read in tandem with the increasing pluralisation in patterns of political identity, this thesis has demonstrated how the recent changes in the territorial constitution linked to the devolution process have wider

influences, and are motivated in part by the reduced position of the state within the global – and particularly the European – political sphere.

### *3. Pervasive ideologies between Westminster and the Periphery*

As a final thematic conclusion, this thesis has demonstrated that throughout the period(s) of Union, a distinct constitutional ideology has come to dominate territorial relations across the UK. Bulpitt framed this as the English ‘official mind’, whereby autonomy was granted to the periphery in exchange for sovereignty being maintained at the centre – a relationship which Bulpitt argued would endure until the periphery went ‘rogue’.

Over the course of this thesis, an argument has been presented that the essence of this ideology continues to inform the dynamics of the territorial constitution. Indeed, even in relation to the period after devolution, this thesis has demonstrated that the ‘official mind’ has continued to dictate the constitutional strategy adhered to by the UK Government; self-government to the periphery with few accompanying measures for shared rule.

Reflecting on this issue, however, this thesis has also documented the increasing unsustainability of this approach in regards to the devolved *and* non-devolved parts of the UK. Indeed, this thesis has documented that the evolution of devolution, and the extent of powers transferred to the periphery, has reached a level whereby considerable questions are continually posed as to the realities of the UK Government’s ability to unilaterally dictate the substantive terms of the balance of power within the UK.

On this point, this thesis has outlined that the lack of *equality* and *security* now experienced by the devolved administrations – as highlighted by the Brexit process – has created a scenario whereby constitutional shocks and unsettlement have become the norm. To a significant extent, this thesis has contended that the existence of devolution has created a new constitutional

dynamic, whereby the ‘official mind’ is unsustainable as a doctrine of absolute final authority for central government. Instead, this thesis has recognised that within the new post-devolution, multi-level ordering of the UK constitution, the dynamics of the territorial constitution are increasingly influenced by a variety of different sources – a reality which the UK Government must now realise if it is to re-achieve a condition of constitutional settlement between the four component parts of the UK.

### *Concluding Remarks*

By way of a final conclusion, this thesis contends that while devolution has had little effect on the formal legal structure of the territorial constitution, its introduction and evolution since 1998 has had significant effects on the political understanding and operation of the territorial constitution.

This thesis contends that through the introduction of devolution, a distinct shift has occurred in the constitutional dynamics of the UK. The UK can no longer conceive of itself as a purely unitary polity, and the essence of devolution has created a condition of territorialising the UK-state, and setting it on a course of arguably irreversible decentralisation.

Thus, it is argued that the dynamics of the UK’s territorial constitution are now constructed on a multi-level system, conditioned by external as well as internal influences, and open to a distinctly uncertain future. Indeed, moving forward, the essence of division within the territorial constitution is increasingly attached to the ability to find a compromise between the new interpretations of the balance of power within the UK – a conclusion which if not achieved, will continue to perpetuate unsettlement in the four component parts of the UK.

## **The Original Contribution of this Thesis**

As noted in the introduction, the aim of this thesis has not been to provide a definite solution to the current unsettlement in the territorial constitution. Rather, the aim of this thesis has been to assess as to how far devolution has influenced the current changes taking place in the UK's constitutional dynamics, and to greater understand some of the causes, catalysts and effects of these changes.

The original contribution of this thesis has been to assess these changes through a UK-wide frame of analysis. In part, this has been a process of tying together the already voluminous catalogue of nation-specific perspectives on recent constitutional change, and to present their findings on a UK-wide frame. More importantly, in the completion of this task, the original contribution of this thesis has also been to recognise that there exist several similarities in the normative experiences of each of the four component parts of the UK, in response to the introduction of devolution.

Central to this point has been the argument presented on the 'reactive dynamics' of the devolution process; as experienced in all four of component parts of the UK. In making this original contribution to the literature, it is argued that the conclusion of these findings would have been greatly impeded had it not been for the UK-wide approach used in this thesis. Through this reframing of the lens of contemporary enquiry into the territorial constitution, it is hoped that the original contribution of this thesis has been to highlight the value – and need – of a UK-wide approach when addressing the issues associated with the UK's constitutional dynamics.

It has been the conviction of this thesis to strive to answer its central research question through a broad lens of interdisciplinary enquiry. It is hoped that through implementing this approach,

this thesis can serve to influence future investigations into the dynamics of the UK territorial constitution.

### **Limitations of this Thesis**

The first limitation of this thesis relates to the methodology employed in the historical discussion of the UK constitution. As is the case in any research project that seeks to deal with a process of broad historical transition, the breadth of the period that it seeks to investigate places certain limitations upon the ability to acquire the preferred depth in all areas of historical discussion. This project is no exception. While every effort has been made to pay due attention to the key aspects of the constitutional and political history of the British Isles necessary to answer the research question, it must be acknowledged that certain events were not given the scope of debate that perhaps they deserve.

A second limitation relates to the timing and political context of this thesis. By consulting an issue of such contemporary significance, the scope of this thesis is instantly susceptible to changes within the architecture of the territorial constitution. No more so was this seen than in the exercise of the UK's decision to leave the EU, and the subsequent events of the *Miller* case and the EU (Withdrawal) Act. This thesis sought to deal with these issues, and concluded them within the corpus of Chapter Five. However, it must be acknowledged that from a wider perspective, the scope of this research question has been a limitation. In future research, it is recognised that the scope of normative discussion on contemporary issues should be reduced to the extent of mitigating the effects of changes upon the context of the thesis, as potentially influenced by changes in the political sphere.

## **Questions for the Future**

As with any research project, the realisation at its completion is that academic enquiry is a continuous process. While it is hoped that this thesis has provided some valuable insights into the relationship between devolution and the changing dynamics of the territorial constitution, there remain several unanswered questions on these points. Most notably, the Brexit process – a still ongoing event at the time of writing this thesis – has provided several new challenges to the stability of the UK's constitutional order, and provides a smorgasbord for potential new lines of UK-wide analysis. It is hoped that this thesis lends itself as a useful resource for assisting future research projects on these issues.

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