Introduction

On 23 June 2016, a majority of the UK electorate who voted in the EU in-out referendum voted to leave the EU. This was a defining moment in the constitutional law and politics of the UK. Undoubtedly, exiting the EU has had legal, economic, and social effects within the UK, as well as in remaining EU States. But Brexit is as much about the British Constitution as it is about economics and relations with continental Europe. This book investigates the impact of Brexit on the British Constitution, but also locates Brexit in the broader context of historically significant British acts of union or disunion, drawing lessons from such past experience.

Constitutional Inadequacy

Brexit gave rise to a wide range of constitutional challenges and conundrums, which included: the role of 'advisory' referendums in Britain's Constitution; confusion over the UK's constitutional requirements for starting the EU withdrawal process; the respective roles of the UK Parliament and government in Britain's EU withdrawal; the position of the devolved nations in the Brexit process and the future of the territorial State; the extent and nature of domestic legislative changes necessary to complete Brexit, especially the increase of extensive executive powers; and the extent to which human rights will enjoy domestic protection post-Brexit.

All this has happened at a time of constitutional turbulence and disorder. Brexit has challenged a Constitution that was already 'unsettled'[1] (and it has since been further unsettled by COVID-19 regulations and the death of a long-reigning monarch).

The British Constitution has long been characterized as resting on the sovereignty of Parliament, and as unwritten, flexible, uncodified in nature, with political conventions and ministerial accountability often taking the place of hard law. However, this was a Constitution whose very uncodified and sometimes tacit nature was nonetheless supposed to give rise to a holistic

[1] N Walker, 'Our Constitutional Unsettlement' (2014) Public Law 529.

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constitutional identity. There is no single document comprising the British Constitution, which instead is a blend of primary and secondary legislation, legally unenforceable conventions, arcane and opaque royal prerogatives, and insubstantial usages and understandings.

Much of the blame for the articulation of exceptionalism, flexibility and pride in the uncodified British Constitution must lie with Albert Venn Dicey, whose work, *The Law of the Constitution*, first published in 1885, set out what he perceived to be the main tenets of the Constitution. According to Dicey, the main pillars were parliamentary sovereignty, the rule of law and constitutional conventions – but in Dicey's opinion, 'The[e] secret source of strength is the absolute omnipotence, the sovereignty of Parliament.'[2] The other doyen of Victorian constitutionalism, Walter Bagehot, famously divided the Constitution into two parts – the 'dignified' and 'efficient'. Bagehot maintained that a disguised republic that had 'insinuated itself beneath the folds of monarchy', and that the function of the monarch was to 'disguise' the real working of government. Indeed, he claimed that the 'efficient secret of the English[3] Constitution' lay in the very close union and nearly complete fusion of executive and legislative powers. Both Dicey's and Bagehot's constitutional 'secrets' can prove highly damaging today. Unlimited parliamentary sovereignty acts as a straitjacket, making it impossible to protect key principles by constitutional entrenchment and closing off other constitutional models such as federalism. Bagehot's 'efficient secret' has come close to enabling executive sovereignty.

Dicey and Bagehot drew on earlier constitutional writing which stressed an organic English tradition of gradual evolution, continuity and preservation, traceable back to the 'Glorious' Revolution of 1688. The nineteenth-century historian and legislator, Thomas Babington Macaulay, wrote that, 'We owe this singular happiness, under the blessing of God, to a wise and noble constitution.'[4] To be sure, there was resistance to this celebration of the Constitution, from Tom Paine, for example. Nonetheless, Bagehot and Dicey continue to dominate English constitutional law to this day. And Dicey's work is seen by many as the nearest thing to a codified Constitution in Britain.

However, this organic Constitution underwent a gradual reform process in recent decades. These constitutional developments affected sovereignty and lines of authority. The changes included EU membership; the 1998 Human Rights Act; devolution in Scotland, Wales and Northern Ireland; removal of most hereditary peers from the House of Lords; and the increasing use of referendums as instruments of constitutional change. All this rendered the Constitution (and Britain) less unitary and more heterogeneous, more willing

[2] AV Dicey, *England's Case against Home Rule* (3rd ed., 1887) 168.

[3] Notably, Bagehot entitled his work, first published in 1867, *The English Constitution*. Dicey also referred, throughout *The Law of the Constitution*, to the *English* Constitution. Both works, however, cover the whole UK.

[4] Lord Macaulay and Lady Trevelyan (eds.), *Speeches: The Complete Writings of Lord Macaulay* (New York, 2004) II, 219.

to recognize centres of power elsewhere, without however bringing any cohesion or consolidation of constitutional form. Indeed, it was questionable whether all of this constitutional activity amounted to a major disruption likely to transform the nature of Britain's Constitution, or was simply a further evolution of Britain's flexible Constitution. For this activity had an ad hoc, disorderly feel to it.

EU membership undoubtedly played a crucial role in this constitutional transformation. This went hand in hand with developments undermining law's connection with the State. Post-sovereign approaches argue that States now share their powers with supra-State, sub-State, and trans-State systems. Neil MacCormick famously contended that 'sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means regrettable …'[5]

However, Brexit challenges this recent vision of post-sovereignty. Perhaps, the most common constitutional idea to feature in Brexit debates was a reassertion of national sovereignty, of 'taking back control'. Yet, this is an anachronistic notion of sovereignty, and too simplistic. It fails to capture the way in which pooling sovereignty in one area may actually empower a State. Indeed, Brexit could imperil the very national sovereignty its advocates believe it will bring about. This is because, as well as threatening Britain's economic security, it risks empowering the executive at the expense of Parliament, and shattering the stability of the UK by threatening the peace settlement in Northern Ireland and provoking a further independence referendum in Scotland.

The 2016 EU referendum placed Britain's constitutional system under great strain, as well as providing it with uncommon public attention (including high-profile lawsuits such as *Miller*). Indeed, Peter Hennessey stated, shortly after the EU Referendum: 'The referendum was like a lightening flash illuminating a political and social landscape long in the changing … we need to look at our internal constitutional arrangements – the relationships between the nations, regions and localities of the United Kingdom.'[6] Most strikingly, the Brexit process has shed light on the inadequacies of the Constitution. As Blick and Hennessey comment, 'A key characteristic of the British constitution is the degree to which the good governance of the UK has relied on the self-restraint of those who carry it out.' But they concluded that the self-restraint is now missing, and those in charge are 'Good Chaps no more'.[7]

[5] N MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1.

[6] House of Lords, Hansard 05 July 2016, Volume 773, at column 1963.

[7] A Blick and P Hennessy 'Good Chaps No More? Safeguarding the Constitution in Stressful Times' (2019): https://consoc.org.uk/wp-content/uploads/2019/11/FINAL- Blick-Hennessy-Good-Chaps-No-More.pdf. Maybe they somewhere include 'chapesses'. See also, P Hennessey, 'Our Sense of Decency Survived the War. It Won't Survive This', *The Times*, 8 September 2019, www.thetimes.co.uk/article/our-sense-of-decency-survived-the-war-it-wont-survive-this-3m9skzd79

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And yet, there is little evidence that Brexit will provide a 'constitutional moment' in which a common solution will be found to these constitutional conundrums. It is doubtful whether a federal UK or codified Constitution will emerge, however much new constitutional arrangements are needed to deal with Brexit. Advocates of Scottish independence, or a united Ireland, are unlikely to have enthusiasm for an arrangement that would entrench them in the UK, even if it provided entrenched legal procedures to protect devolved nations within the State. And those satisfied with Brexit are unlikely to desire a codified Constitution or federal option, given that a desire for strong parliamentary sovereignty motivated their euroscepticism in the first place. Such distinct political identities militate against a comprehensive approach that could enable the British Constitution to deal with issues of disputed authority and the legacy of Brexit. In these circumstances, the outcome of the Brexit referendum provides a severe constitutional challenge for Britain.

Constitutional Amnesia

And yet, this is not the first time that Britain has encountered challenges to its very constitutional identity. Past 'acts of union and disunion',[8] such as the loss of British colonies in North America and British Empire; the admission of Scotland and Ireland into the union and then departure, or possible departure (Scotland); and the UK's EU membership since 1973, all provide precedents which help us understand how a British constitutional identity has been shaped or dismantled by law, and how law has determined issues of union, sovereignty and devolution of power. There are lessons to be learned from surprisingly similar past situations, although past examples of constitutional transformations are all too rarely invoked. Such constitutional amnesia may be a useful shield for obfuscating an unsettling imperial past involving violence, dark acts and an ugly history of colonialism. Nonetheless, there are surely ways to retrieve and re-examine the constitutional legacies of empire without falling into an unrealistic and unwholesome nostalgia.

About 75–100 years ago, many of the most noted British constitutional theorists examined the structures of the British Empire and Commonwealth (i.e. A Berriedale-Keith, Ivor Jennings, KC Wheare). More recently, those interested in transnational constitutionalism and legal pluralism have looked at the structures of the EU. But comparisons are rarely made (except perhaps by historians such as Linda Colley). And in not doing so, British legal scholars have missed something interesting. Arguments over the nature of constitutional arrangements – such as whether the British East India Company had sovereignty over parts of India, or whether the British Parliament could legislate for the entirety of the empire, raise interesting comparisons with contemporary discussions over where sovereignty lies in the EU.

[8] L Colley, *Acts of Union and Disunion* (Profile Books, 2014).

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Furthermore, debates in the late nineteenth/early twentieth centuries over Irish Home Rule prefigured contemporary debates about Scottish independence. England, Scotland, Wales, and Ireland have a long history together. Questions over the union and how to manage UK unity are hardly new. However, past considerations, such as the early twentieth century exploration of 'Home Rule All Round', are infrequently revisited. The British seem ignorant of their constitutional history.

Britain's past abounds with acts of a constitutional nature across the globe, including constitution-making and managing constitutional transitions. All sorts of relationships between Britain and its overseas territories existed, and many of those territories, such as Australia and Canada, applied federalism while still within the British Empire. In contrast, there was little enthusiasm for federalism within the UK. Indeed, there existed a curiously bifurcated approach to Britain's Constitution. This indicates that the constitutional law applying within Britain was understood as differing from that which applied in Britain's then colonies and overseas territories, although this was never made explicit, and indeed, such a bifurcated approach conflicted with many of Britain's actions in the past. And, although many scholars in those overseas territories have analysed those constitutional relationships in great detail, there has been far less consideration from British theorists as to the impact of Britain's empire on the British Constitution as it applied in the UK.

Instead, commentaries on the British Constitution have often employed an 'exceptionalist' narrative, one that views Britain's uncodified Constitution, and its historical evolution, as unique and unparalleled, but nonetheless a blessing and infinitely preferable to 'foreign' Constitutions. Such a characterization is, however, unfortunate, because it hinders the ability to capture contemporary developments with constitutional language. As Bell noted, the nature of our devolutionary arrangements differs from the UK's 'dominant narrative of constitutional reform as a process that has involved continuity rather than rupture.'[9]

And once we look a little more closely, we see that a dominant narrative of peaceful continuity and exceptionalism is an *English* account that fits less happily with arrangements in other parts of the UK. Northern Ireland has certainly not enjoyed a long, peaceful history of gradually evolving constitutional affairs. Scotland possesses its distinct legal system, a different understanding of unionism, and frequently evokes a distinct constitutional tradition – as expressed in the 1989 Claim of Right and Constitutional Convention, and more recent independence initiatives. In these circumstances, the traditional narrative of unlimited parliamentary sovereignty appears less as a shared constitutional doctrine, and more as a device to manage and suppress other peoples – such as Scots, Irish, Welsh, and in the past, colonists.

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[9] C Bell, 'Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison' (2014) PL 458.

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Therefore, this book has two main leitmotifs: *constitutional inadequacy* and *constitutional amnesia*. They come together in the phenomenon of Brexit. The remaining ten chapters of this book are divided into two parts. The first part examines five specific case studies, or 'acts of union and disunion'. The second concentrates on five themes of particular relevance to Brexit, alert to the relevance of the historical case studies to these themes. This 'Introduction' provides a summary of some of the main ideas and conclusions explored in these chapters.

This is not a book about Brexit as such, but a book about how the British Constitution has been affected by Brexit, and about how Britain's constitutional past is of relevance to Britain's latest act of disunion, Brexit. There are of course already many works which deal with legal aspects of Brexit, and this book certainly aims to capture the legal, political and constitutional changes of Brexit. However, this book also seeks to derive historical comparisons from Britain's constitutional past and earlier challenges regarding Statehood, sovereignty and territorial boundaries. Academic and disciplinary boundaries within law have been sufficiently solid that there has been little crossover between those working on EU law and those studying the law of the Commonwealth, Empire, Scottish devolution or Irish independence. Yet the challenge of Brexit is that it raises so many questions pertinent to all of these situations. One notable conclusion is that the British were never clear (perhaps deliberately, perhaps not so) as to what they meant by sovereignty. But they have been too willing to enforce this inchoate idea of sovereignty by force and/or unprincipled activity – a response often both damaging to those on the receiving end, and to Britain itself.

PART I: FIVE CASE STUDIES OF ACTS OF UNION AND DISUNION

I examine five case studies which reveal Britain's constitutional contingencies and complexities. Each of these studies examines Britain's role in relation to a wider community (Colonial and Revolutionary North America, Empire, Commonwealth, EU, ECHR) or a smaller one (Scotland, Ireland) in the context of a historically significant act of union or disunion. The point of this exercise is to map and analyse change at critical moments in British constitutional history. A legal-historical excursus enriches our understanding of concepts, compelling us to reconsider the meaning not only of union, sovereignty and differentiation within a broader polity, but also how law can facilitate these.

I often use the term 'Britain' loosely as a collective term for the four disparate nations of Scotland, England, Wales, and (Northern) Ireland, while recognizing that the 'UK', while being the official State in international law, is a more recent designation.

1. Scotland: The union of Scotland and England was the founding act of the UK in 1707, and consensually agreed between two sovereign parties. Scotland was never a colony of England and post-union retained considerable autonomy, including its distinct and separate legal and education systems and Church. As a result of the 1707 union, the UK Parliament (which was not simply the

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English Parliament enlarged) came into being. The doctrine of unlimited parliamentary sovereignty is not accepted by everyone in Scotland, where there exists an alternative Scottish tradition of popular sovereignty, and the belief that Scotland's place in the UK union rests on its consent.

Since devolution in 1998, Scotland has developed some progressive constitutional forms, as well as more pro-European inclinations that challenge the unitary constitutional approaches of London. Brexit, however, has placed the UK union under strain, and there have been demands for a second Scottish Independence referendum. Surprisingly, despite the threat of Scottish independence, there has been little debate about what the 'Union' or 'Britain' is or should be.

2. Ireland: The legal and constitutional relationship between Ireland and England (and latterly Britain) was unclear for many centuries. Although Ireland enjoyed a good deal of legislative sovereignty under Grattan's Parliament from 1782, the Acts of Union in 1801 set up direct rule from Westminster. During the nineteenth century, there was a campaign and draft legislation for Irish Home Rule (which Dicey, an ardent unionist, vehemently opposed). This campaign is worth reconsidering in the Brexit/Scottish independence context, given the varied legal and constitutional arrangements that were explored and vigorously debated. However, Home Rule never came about, rendered pointless by subsequent events. Since the Belfast/Good Friday Agreement and devolution in 1998, Northern Ireland has a had a variegated but pragmatic settlement of consociation and compromise quite different from the traditional British constitutional settlement. The EU has played its role in the peace process, providing structures for its continuation. Brexit now presents considerable challenges for Northern Ireland and the Republic.

(The situation for Scotland, Northern Ireland, and Wales, especially post-devolution, and with regard to Brexit, is also considered further below in this Introduction).

3. The US – The Loss of Britain's First Empire: From 1764 to 1776, the British Empire confronted a political crisis for which there was no constitutional precedent. The issue was parliamentary sovereignty – the authority of the British Parliament over America. The Declaratory Act of 1766 asserted the right of the UK Parliament to legislate for the colonies 'in all cases whatsoever'. Yet, the British case for parliamentary sovereignty was not particularly clear, and eminent English politicians and lawyers, such William Pitt the Elder and Lord Camden, argued that Parliament had no ability to tax the American colonies. By 1774, most American spokesmen argued that Parliament exercised no authority over internal affairs in America. In 1776, the American colonies declared their independence and a war of independence ensued, that Britain lost.

But what could explain this disagreement over sovereignty between Britain and America? Both parties were British subjects, generally reading the same provisions of law. This chapter looks to several factors for explanation. These include the fact of Britain's uncodified Constitution, which ensured that it would be unclear which laws were in any case 'constitutional'. There was also

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the issue of how the British Constitution applied in the colonies. Did it apply in the same way as in mainland Britain, or was there a separate set of constitutional principles for the British Empire? The dominant view in Britain was that the colonies were a subordinate extension of the British State. In this way, the British Empire was understood as a single State – composed of single people, one Constitution, and one king – and British authority was conflated with parliamentary authority, national sovereignty with parliamentary sovereignty. This view, however, was contested in the colonies, which asserted that only the existence of a shared monarch connected American colonies legally to Britain and to each other. This suggested that colonial assemblies were comparable to Parliament. The 1603 union of the Crowns of Scotland and England was used to support this argument – that a monarch could reign over two countries, each with autonomy and separate parliaments. Indeed, the American constitutional theorist, McIlwain, went so far as to argued that, 'The true constitution of Britain was not unitary, but federal.'[10] There was, however, no acceptance of this in Britain, where the doctrine of undivided and unlimited sovereignty was increasingly employed by those in power.

4. British Empire/Commonwealth[11]*:* Britain at one time ruled over virtually a quarter of the globe's territory and population. Many late nineteenth-century textbooks asserted that Parliament's supreme law-making power applied throughout the empire.

However, the reality of empire undermined that. As Disraeli stated of the empire, 'No Caesar or Charlemagne ever presided over a domain so peculiar.' There was no legal definition of the British Empire and it possessed no explicit constitutional meaning. The constitutional law of the British Empire really was no clearer than it had been for the American colonies in the eighteenth century. For the empire was diverse and incoherent. Terminology was not very clear. The terms 'colony', 'dominion', 'possession' 'plantation', and other expressions were used in different ways at different times. Indeed, an anti-formalist attitude tended to prevail – often eschewing formal law in favour of informal assurances, customs and conventions. There was no attempt to establish a uniform legal code. The empire included 'an extraordinary range of constitutional, diplomatic, political, commercial and cultural relationships'[12] with at least eleven diverse species of government: Crown colonies of rule (including the huge 'sub-empire' of India); settlement colonies (mostly self-governing by the late nineteenth century); protectorates; condominia (like the Sudan); mandates (after 1920); naval and military fortresses (like Gibraltar and Malta);

[10] C McIlwain, 'The Historical Background of Federal Government', in R Pound, *Federalism as a Democratic Process* (1942).

[11] 'Commonwealth' here is used to denote later configurations of the British Empire as applying to self-governing Dominions from the nineteenth century, and not to 'The Commonwealth of Nations' as it now exists.

[12] J Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830–1970* (Cambridge University Press, 2009) at 1.

'occupations' (like Egypt and Cyprus); treaty-ports and 'concessions' (such as Shanghai, which was the most famous); 'informal' colonies of commercial pre-eminence (like Argentina); 'spheres of interference' like Iran, Afghanistan, and the Persian Gulf; and private trading companies – that is, the East India Company, whose claim to sovereignty over swathes of India was not defeated until well into the nineteenth century. Indeed, as one reviewer noted, 'There is scarcely a constitutional experiment known to modern practice (except, perhaps, the Russian Soviet) which is not to be found in one or other of the Constitutions of the Empire.'[13]

Indeed, it was impossible for Westminster to bind nearly a quarter of the globe with its legislation. The colonies and overseas territories were not represented in Westminster. The situation was not akin to the EU Parliament, in which British citizens had directly elected MEPs, in a Parliament with a co-decision or veto on legislation. The colonies' own legislatures, their own people on the ground, really determined what was going on, except in a few cases. And the sovereignty of the Parliament in London was only one of many types of sovereignty that existed. Much of the British Empire lent itself to a more pluralistic type of sovereignty – one that was divided, shared and indeterminate. Benton and Ford identified a 'middle power' at work in British colonies, which included the judges, magistrates, and commissioners who applied a form of legal governance of the colonies, often very much of their own, creating a vernacular Constitution.[14] What this definitely was not, was the reach of some imperial parliamentary sovereignty. And this meant that the empire lacked unity, and pluralistic tendencies flourished.

Indeed, it was likely that *power* was the only unifying factor underlying the empire, aided no doubt by British naval supremacy, and the fact that, in the nineteenth century, global communications were predominantly in British hands. However, that power could not be derived from a unified, coherent account of legal and political sovereignty. And power by itself lacks legitimacy – it must be validated by something else – which is where sovereignty becomes relevant, in providing that grounding. Yet, the claims of sovereignty made by the empire were often mutually self-contradictory.

5. The EU and ECHR: Dislike of 'eurolegalism' arguably defined a certain type of euroscepticism. In contrast, Britain, with its uncodified Constitution, has sometimes appeared to disdain law. British nonchalance, or indifference to legal rules, is sometimes displayed by those considering Britain's future post-Brexit – that is, expressing the view that trade deals and new arrangements can be made without cumbersome and legally binding treaties. However, this nonchalant stance rests on dangerously inaccurate assumptions and is not backed up by facts. Both the UK's membership of the EU and Brexit were accomplished by law. Furthermore, treaties are essential elements of the international

[13] E Jenks (1938) 20(4) Journal of Comparative Legislation and International Law 304.
[14] L Benton and L Ford, *Rage for Order* (Harvard University Press, 2016).

legal order and if ignored, Britain risks its reputation and future ability to benefit from international agreements.

Some decades ago, Lord Bingham noted that the Common Law was not an isolated island, and that English law had always shown a receptiveness to 'the experience and learning of others', citing as historic examples Pollock, Maitland, and the famous 1772 *Somersett's case* (which held that slavery could not be legally permitted in Britain) in which not only the work of Justinian, Grotius, Puffendorf, and Stair was cited, but also practice in innumerable countries. Lord Bingham expressed the hope that 'the 1990s will be remembered as the time when England – and I emphasise England – ceased to be a legal island, bounded to the north by the Tweed, and joined, or more accurately rejoined, the mainstream of European legal tradition …'[15]

Brexit might appear to have set back that optimism. However, British relations with continental Europe are deep and historical. British lawyers played a very strong role in the creation and founding of the European Convention on Human Rights (ECHR), so the rights of the ECHR (now incorporated in the Human Rights Act) are not alien, foreign devices. Furthermore, Britain was not forced into EEC membership, but joined voluntarily, persisting after its first two applications were rejected by General de Gaulle, because it perceived that it would be socially and economically enriched by such membership – a perception that turned out to be accurate. EU membership also provided an external support system for UK devolution, facilitating common approaches within the UK and conciliation between the UK and Ireland. The EU and ECHR provided external guarantees and entrenchment of human rights, many of which are now at risk post-Brexit.

Seeley suggested that the British built up an empire and then decolonized in a 'fit of absence of mind'.[16] The same may be true of Brexit, where Britain has risked leaving the EU in a state of insouciance as to the consequences.

PART II: FIVE THEMES

These five themes have been selected as of particular salience in Brexit debates. They are also analysed in light of the arguments and conclusions of the five case studies.

6. Sovereignty: Sovereignty is obviously key in the Brexit context, and in many ways lies at the core of this book's argument – a main part of which is that Britain has never been able to justify its assertion of unlimited parliamentary sovereignty. This book endorses the view that the doctrine of parliamentary sovereignty no longer carries the weight that Dicey accorded it, nor should

[15] T Bingham, '"There Is a World Elsewhere": The Changing Perspectives of English Law', in *The Business of Judging* (Oxford University Press, 2000) 87.

[16] J Seeley 'We Seem, as It Were, to Have Conquered and Peopled Half the World in a Fit of Absence of Mind', in *The Expansion of England* (Cambridge University Press, 1883).

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it. Indeed, Dicey was himself inconsistent, and, in his energetic opposition to Irish Home Rule, was prepared to depart from the application of parliamentary sovereignty. In 1913, Dicey contended that if Asquith's Home Rule Bill for Ireland were enacted, it 'it would be justifiable to oppose it if necessary by armed rebellion'. If the doctrine of parliamentary sovereignty was compromised even by its greatest exponent, there is all the more reason to recognize its inconsistencies and the folly of adhering to it in all circumstances.

And in any case, Dicey's theory is not watertight historically. Unlimited parliamentary sovereignty does not have such a long pedigree. Although it has some roots in the 1688 Revolution, it became widely accepted only in the eighteenth or even nineteenth century. In 1610, Sir Edward Coke declared the right of common law courts to adjudge an Act of Parliament void, if 'against common right and reason, or repugnant'.

Westminster sovereignty is also territorially challenged. The union between Scotland and England of 1706/7 was actually founded on a treaty and based on consent. It was a union of two Parliaments, and it has been unclear to many Scots why the 'English' doctrine of parliamentary sovereignty should reign supreme. Many Scots of various political persuasions adhere to an indigenous Scottish tradition of popular sovereignty claimed to date back to the 1320 Declaration of Arbroath. Furthermore, Irish legal history reveals that Parliament's authority over Ireland was for centuries unclear. In 1720, the UK Parliament passed a Declaratory Act, asserting complete authority over Ireland, but this was repealed by Grattan's Parliament in 1782, a time when Ireland had considerable legislative freedom and sovereignty. Although Ireland was joined in parliamentary union with Britain (from 1801 to 1922), sovereignty continued to be discussed during debates over three (attempted) Home Rule Bills for Ireland, and when the bulk of Ireland gained independence as the Irish Free State in 1922, vestiges of sovereignty, such as allegiance to the British Crown, and appeals to the judicial Privy Council, were over time eradicated. And of course, as already mentioned, sovereignty in the British Empire was diffuse and indeterminate.

However, it might be argued that EU membership posed the greatest challenge to UK parliamentary sovereignty. Under the European Communities Act (ECA) 1972, the UK Parliament gave effect to the UK's EEC obligations in national law. Section 2(4) ECA required all UK statutes to be read and given effect consistently with EU law, a provision later confirmed as providing national courts with the power to disapply statutory provisions – which challenges the traditional notion of parliamentary sovereignty. Therefore, Britain did not retain *absolute* parliamentary sovereignty during its EU membership, given the ECA. However, it never lost its *external* sovereignty (i.e. what is frequently described as 'national' sovereignty, whereby a country is sovereign and recognized as independent by the international community) as Britain voluntarily joined the EEC, and also voluntarily exited, with Brexit. But Parliament did constrain its own sovereignty through the ECA, and although that Act has

now been repealed by Brexit, there is no reason why Parliament should not place further constraints on its own sovereignty in future.

Lastly, parliamentary sovereignty, understood in its absolutist form, enables constitutional abuses, often translating into an application of executive sovereignty. There is, it seems, nothing that a government with a parliamentary majority may not do: abolish human rights legislation, reduce civil liberties, constrict the opportunities for judicial review, even abolish the Scottish and Welsh Parliaments, notwithstanding recent Westminster legislation, which claims for them a 'permanent' status (because, if we take the doctrine of unconstrained Westminster sovereignty at face value, then Parliament could always pass another law, repealing earlier legislation). Dicey himself acknowledged that, 'Parliamentary sovereignty … was an instrument well adapted for the establishment of democratic despotism.' It is time that Britain dispensed with the doctrine of absolute parliamentary sovereignty.

7. Union and Disunion: What impact has the UK's status as a union had on its stance on sovereignty and its approach to acts of union and disunion? What can we learn by comparing the UK to other unions such as the EU, USA or Austria-Hungary? How do unions differ from empires, given that all can be multicultural, multi-ethnic and diverse?

Unions take a variety of forms and it is not always clear what species of legal entity one is dealing with. They need not require a unitary State and may exist along a spectrum of State connectivity, from an affiliation of separate States, through to their complete fusion.

Neither the union of the EU nor of the UK are ancient unions, although the EU is obviously more recent. But the UK itself only dates from 1707. The UK union is voluntary in nature, and (unlike in the case of some Constitutions) there is no legislation prohibiting secession by one part of the UK, nor any constitutional provision asserting and mandating constitutional integrity. This chapter argues that it is preferable to understand the UK as a 'Union State' – that is, a State where the centre does not directly control every part of the territory – rather than unitary in nature, because there are different constitutional arrangements in different parts of the UK. The UK union has been characterized in terms of 'family resemblance', in that it cannot be reduced to one thing which all its parts have in common.[17] Indeed, strictly speaking, the union is not singular but plural – three separate unions, or a 'State of unions'. Whereas the England & Wales union is an incorporating one, constitutionally at least, with Welsh identity taking shape through Welsh culture and language rather than a separate Welsh legal system; the Anglo-Scottish union left key areas within a sphere of Scottish autonomy: and the union with Northern Ireland is different again, having most recently incorporated a form of governance – consociationalism – not

[17] M Keating, 'Written Evidence, House of Lords Constitution Committee', *The Union and Devolution* (2015–2016, HL Paper 149).

to be found elsewhere in the UK. So, an understanding of the union in one part of the UK may not work for its other nations.

What are the factors that tend to prompt disunion? First, disunion very often occurs as the result of war, or serious economic shock. Second, imbalanced unions tend to be weak. This is often so where one territory is much larger than other parts of the union, and/or when there is asymmetry between different parts. Third, a further propulsion towards breakup may be the behaviour of the central government, if it insists on concentrating power in the centre, refusing greater self-government for some of its nations or territories, or favouring one nation over another. Unions tend to do better if they are more elastic and less constraining. But current understandings of UK parliamentary sovereignty make such elasticity very difficult for the UK union. The doctrine of unlimited sovereignty places an almost insurmountable barrier to resolution of issues threatening the union today, particularly those of devolution. It renders federalism challenging, and any recasting of the House of Lords as an effective Chamber of the nations and regions highly problematic.

8. Federalism, Devolution, and Differentiation: Although Britain acknowledges its four 'nations', sub-state autonomy is limited by devolution, which supposedly leaves Westminster parliamentary sovereignty unaffected, constrained only by the ambiguous Sewel convention.

Does devolution permit differentiation? A survey of differentiation in the EU, including partial secession in the case of Greenland, illustrates that differentiated relationships between the EU and parts of States, although rare, are possible. The Scottish Government published its proposals for a differentiated solution for Scotland post Brexit, in *Scotland's Place in Europe*. Nonetheless, the UK Government rejected this approach, instead embracing a unitary and top-down approach. However, the Northern Ireland Brexit Protocol maintains a different regime for Northern Ireland, effectively keeping it in the EU, so there is some inconsistency.

The word 'federal' is not unheard of in the UK. In the late nineteenth/early twentieth century, British Imperial federalists argued the empire must 'federate or disintegrate'. But the imperial federation movement did not succeed. Nor did its close relation, the 'Home Rule All Round' movement for the UK in the early twentieth century. However, the UK faces similar dilemmas today in coping with competing centripetal and centrifugal forces. Devolution transfers power from the centre without relinquishing sovereignty. This distinguishes it from federalism, in which sovereignty is usually divided between a federal centre and various state territories. Post-Brexit, some of those troubled by the UK's constitutional future, who fear the union will shatter, but do not favour independence for the devolveds, have suggested a federal UK.

The main obstacles to federalism in the UK appear to be the 'England problem' and parliamentary sovereignty. It has long been recognized that the disproportionate size of one federal unit can destabilize federalism because it can affect the capacity of other territorial units to influence central government.

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However, the main obstacle lies with an insistence on preserving absolute parliamentary sovereignty in the UK. Dicey insisted that 'limited sovereignty' was a 'contradiction in terms' and that federalism was 'absolutely foreign to the historical and, so to speak, instinctive policy of English constitutionalists.'[18] But there is no reason why sovereignty must be understood only as unlimited and indivisible. Dicey was, of course, a thoroughgoing unionist, who argued vigorously against all three Home Rule Bills for Ireland. But we also know that Dicey was willing to compromise his principles on parliamentary sovereignty by proposing a referendum, or even rebellion, to ensure that Home Rule did not become law.

However, post-Brexit, another problem for federalism arises. Even if federalism were somehow to prove practically possible in the UK, it would not address specific post-Brexit challenges, such as the fact that Scotland might wish EU membership. Hard borders separate EU from non-EU members, and a hard border between England and Scotland, for example, could prove difficult to manage in a federal system.

9. Democracy and the rise of the referendum in the UK: The enduring legacy of nineteenth-century constitutionalism hampers the effective realization of democracy in the UK. Bagehot's eulogizing of the fusion of the executive and legislature now appears to grant far too much power to the government, given the context of parliamentary sovereignty and a 'first past the post system' (FPTP) electoral system. There also seems to be a misconception – especially among certain tabloids – that democracy is safeguarded by the government (termed by the Johnson leadership 'The People's Government') which, because it locates its authority in a majority in Parliament, somehow represents the people. Thus, a challenge to government policy can be represented as a challenge to democracy, and those who find the government's conduct unlawful, such as the High Court in *Miller I*, can be represented as 'enemies of the people'.

This is a false and misleading interpretation of democracy, which is a far richer and more complex notion than one which requires merely that power should be exercised by a majority of elected representatives. Democracy also requires that individuals and minorities have certain fundamental protections from majoritarian interests. This is especially so with Britain's FPTP, where legislation prejudicing minority groups (especially groups lacking electoral rights) can be passed by parliamentary votes not even representing a majority of the electorate. The threats to EU citizens after Brexit, or to the Windrush generation, come to mind.

These perversions of democracy have been exacerbated by vagueness as to the role of direct democracy (and how it relates to popular sovereignty) and more specifically, referendums in the UK. The UK Cabinet Manual (which in the absence of a codified Constitution, is the closest the UK comes to a statement of its constitutional principles) does not specify the role of referendums

[18] AV Dicey, *The Law of the Constitution* (Macmillan, 8th ed., 1915) xv.

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in British governance, nor suggest that a referendum vote might override other constitutional principles.[19] However, the Brexit referendum, although advisory in status, was nonetheless perceived as binding and implemented. If referendums are to become a more frequent feature of British constitutional practice, there is an urgent need for clear principles regarding their use to be articulated.

Neither popular sovereignty, nor referendums are axiomatic elements of the British Constitution. Yet, referendums have increasingly become popular tools of constitutional management in the UK. It is notable that States that do employ referendums circumscribe them with strict requirements. However, in Britain, belief in unlimited parliamentary sovereignty prevents entrenching such requirements, rendering the British Constitution vulnerable to unprincipled, major constitutional change.

10. Human Rights: Human rights have had a fragile status in Britain, given the overpowering doctrine of parliamentary sovereignty, which has enabled a parliamentary majority to achieve any policy in the absence of entrenched constitutional protections. Plans to repeal the 1998 Human Rights Act are evidence of this. Dicey wrote that parliamentary sovereignty was tempered by the rule of law in the UK, but it is unclear from his work how the rule of law could operate to override the will of a despotic parliamentary majority.

Brexit adds to this precarity, by removing EU human rights protection from UK law (which had something close to an entrenched status, while the UK was an EU member), and that of the EU Charter in particular. This calculated deletion of fundamental rights – involved in the deliberate exclusion of the EU Charter of Fundamental Rights from UK law post-Brexit – is almost unparalleled in the Western world (although perhaps the US Supreme Court's *Dobbs* decision, which removed the protected status of the right to abortion from US constitutional law, comes close, at least for that right).

Much of this book concerns Britain's constitutional history, and its resonances for the issues of UK union, devolution and Britain's relations with Europe. It may be helpful for some readers to briefly summarize this history and development here.

EVOLUTION OF THE UK

The UK introduced devolution in 1998 as a means of according greater autonomy to its constituent nations.[20] Before 1998, the UK was a fairly centralized State, but with some diversity due to its different historical relationships with Scotland, Wales and (Northern) Ireland. Wales had been absorbed into the English legal and administrative system by the sixteenth century (starting with

[19] *The Cabinet Manual: A Guide to the Laws, Conventions and Rules on the Operation of Government* (Cabinet Office, London, 2011).

[20] Namely, Scotland, Wales, and Northern Ireland. But not everyone would agree with the characterization of Northern Ireland as a 'nation'. While many unionists see Northern Ireland

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the campaigns of Edward I in the thirteenth century and achieving a complete political union with England under Tudor legislation from 1536 to 1542). Under the Wales and Berwick-on-Tweed Act 1746, law in England was deemed to include Wales.

Scotland was an independent State until 1707 (although there had been a union of the Crowns of England and Scotland from 1603), when it chose to enter into a union with England. Under that union, Scotland retained its separate legal and education systems and Church, and parliamentary sovereignty was simply not mentioned in the Acts of Union of 1706/7. Ireland was different again, having first been subject to constraints and supervision from London, although Parliament's authority over Ireland was contested and for 20 years from 1782, Ireland had considerable legislative sovereignty. However, from 1801, Ireland was in an Act of Union with the UK, until, following a war of independence, the greater part of Ireland in 1922 acquired Dominion status – a constitutional compromise between the British authorities and Irish nationalist rebels who had demanded a complete break from the UK. In 1937, the 1922 Dominion Constitution was replaced by Ireland's existing Constitution. However, Northern Ireland remained in the UK, operating an early form of devolution, until its Parliament, Stormont, was abolished in 1972, and direct rule by Westminster established.

There are also British islands, including the Channel Islands, and the Isle of Man, which have a peculiar almost semi-federal, constitutional status. Jersey and Guernsey (the major Channel Islands) and the Isle of Man are not part of the UK (but nor are they British colonies) but instead Crown Dependencies (which means that the British Crown has ultimate responsibility for them) and each has its own legislature, executive, courts and system of law. Their constitutional relationship with the Westminster Parliament is uncertain and they possess considerable autonomy. They are not part of the Commonwealth of Nations, nor were EU members, although enjoyed distinct trading relationships with it.

In contrast, Gibraltar is a British Overseas Territory (on the southern tip of Spain), not officially part of the UK, self-governing in all matters but foreign affairs (which included the EU), and unlike the Channel Islands and Isle of Man, formerly a member of the EU. Although Gibraltar voted overwhelmingly to remain in the EU in the 2016 Referendum, it was compelled to leave the EU with the UK. Spain has also claimed sovereignty over Gibraltar, although polling revealed this to be against the wishes of the people of Gibraltar.

A note on terminology may also be useful. The 'United Kingdom' denotes the political union between England and Wales, Scotland, and Northern Ireland, and is the official term for the State in international law. 'Great Britain' applies only to Scotland, England and Wales. The 'British Isles' is a geographic

as part of the UK, and thus deny it status as a 'nation', some nationalists desire it to be part of a united Ireland, and also deny it the status of a 'nation'.

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term, denoting the islands of Great Britain and Ireland, including the Irish Republic. The people of the Irish Republic are, however, not British, a term which today relates only to the UK, although was used in the past in the context of the British Empire. In this book, 'England' is used only to apply to England and not to include other nations of the UK. Many, notably Bagehot and Dicey, have however used it in this sense.

Devolution

By 1973, the *Kilbrandon Report on the Constitution* suggested that representative institutions be set up in Scotland and Wales.[21] But, due to the addition of a last minute threshold requirement, the 1979 devolution referendums in Scotland and Wales were lost. It took almost another 20 years for devolution to come to Scotland, Wales and Northern Ireland. This resulted in the 1998 Devolution Acts, which consisted of the Scotland Act 1998, the Government of Wales Act 1998, and the Northern Ireland Act 1998, which domestically implemented much of the 1998 Belfast/Good Friday Agreement.

Although initially, these devolution settlements differed from each other, subsequent amendments changed this (although devolution has always operated somewhat differently in Northern Ireland). Perhaps (over-simplifying matters) we might summarize the present situation in the following way. First, each devolved nation has a devolved parliament or assembly with legislative powers, elected on a wholly or partial proportional representation basis, and a devolved government. Second, these legislative powers are limited in number, with certain matters reserved to the Westminster Parliament. Devolved funding is provided largely through the Block Grant, which apportions funds from the UK's Consolidated Fund (the aggregate tax revenue from all four nations) and devolved governments can choose how to spend this according to policy priorities. Changes to the allocation of this funding are calculated by the Barnett Formula, which is based on changes to 'comparable' public services in England. Although most taxes are set by the central government in London, devolved governments also have tax raising powers of their own – so, for example, about 31 per cent of total tax revenue is now devolved to Scotland. Third, there exists no completely autonomous sphere of self-rule within the devolved nations, as UK sovereignty has been preserved in all matters to the UK Parliament. In this way, devolution was crafted to protect parliamentary sovereignty. Nonetheless, the Sewel Convention was generally applied, according to which Westminster 'will not normally legislate with regard to devolved matters' without the consent of the devolved parliaments, and indeed, this convention was written into legislation in the Scotland Act 2016 and Wales Act 2017. Yet, since Brexit, the status of the Sewel convention has become questionable,

[21] Royal Commission on the Constitution 1969–1973, vol. 1 Report, HMSO, London 1973 (Cmnd 5460).

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and the lack of devolved parliamentary consent was ignored when major Brexit legislation was passed in Westminster.[22]

However, England, the largest of the four nations, lacks its own Parliament. This was seen as giving rise to the 'West Lothian Question' (named after the West Lothian constituency, whose MP, Tam Dalyell, raised the issue) whereby MPs elected to Westminster from devolved nations could vote on matters in England (such as education) which were devolved competences in Scotland, Wales, and Northern Ireland, and so on which English MPs had no vote for those territories. In 2015, a new procedure for 'English votes for English laws' (EVEL) was introduced by means of changes to the standing orders of the House of Commons. It gave English MPs a veto power over legislation concerning England only and was not a form of devolution to England. It was in any case abandoned in July 2021, and, to date, there has been little demand for English devolution. The problem of how, if at all, England fits within devolution, is sometimes referred to as 'the English question'.

On the one hand, devolution might appear to challenge parliamentary sovereignty. Very generally speaking, a 'reserved powers' model of devolution now operates in Scotland, Wales and Northern Ireland. This means that all legislative power is devolved except those matters expressly reserved to the UK. This resulted in considerable self-rule by devolved institutions. In this respect, UK devolution looked to have given rise to something akin to the 'self-rule' of federalism, with 'quasi sovereign' institutions in its devolved territories.

Yet on the other hand, UK devolution always lacked the 'shared rule' that characterizes federalism. Reserved areas tend to overlap with powers that are often shared under federalism. But, with devolution, all the reserved powers are exercised by London, and relations between the UK government and devolved governments remain almost entirely informal, based on Concordats, memoranda of understanding, and a somewhat dysfunctional Joint Ministerial Committee of executives that rarely met before Brexit. Devolved institutions lack enforceable legal powers in these areas. Even legislative relations between Westminster and the devolved parliaments are regulated by the informal 'Sewel convention' – which, even after its translation into legislation, was nevertheless held by the UK Supreme Court, almost inexplicably, to be nonetheless a mere convention and not legally enforceable.[23] This lack of shared rule means that, for example, devolveds seem to be in a weak situation when it comes to international affairs, including Brexit but also treaties more generally. This absence of shared rule also means that the UK government has over the past few years refused to accept that Scotland might have any power to hold another

[22] The EU Withdrawal Act 2018 was adopted without the legislative consent of Scotland; the EU Withdrawal Agreement Act 2020 adopted without the legislative consent of Scotland, Wales and Northern Ireland. Both the Scottish and Welsh Parliaments refused legislative consent to the Internal Market Act 2020 and EU-UK Future Relationship Act 2020.

[23] *Miller* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5, at [146].

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independence referendum, insisting this falls with reserved powers and is for the UK government alone to determine.

All in all, there is something to be said for the term 'Schrodinger's devolution', namely, 'the idea that, since 1999, Scotland, Wales and Northern Ireland both have and have not experienced fundamental constitutional change, on which claims to territorial autonomy can be founded.'[24]

The Problem of Brexit for Devolution

UK devolution took place after the UK joined the EEC (now EU) in 1973, and EU membership insulated devolved nations from a unitary UK wide approach. Keating neatly summarized the situation:

> The UK was, until 2016, evolving as plurinational union in a characteristically British way. There was an increased understanding that it is not a unitary state. The Sewel Convention, while not binding in law, was observed in practice. The system had survived the challenge of a referendum on independence in Scotland without legal order breaking down. The political agenda in Scotland was moving back to social and economic questions. The divisive issue of sovereignty had been put into suspension in Northern Ireland, although a deep division remained between the two communities. The question of England has not been fully addressed but was not pressing.[25]

However, Brexit shook this up, endangering both devolution and the UK union itself. In the referendum on the UK's EU membership, the UK as a whole voted to leave. In contrast, 62 per cent of Scotland's voting electorate, and 56 per cent of those voting in Northern Ireland, voted to remain. Yet, the devolved nations had no formal role in the Article 50 withdrawal proceedings, and thus no means of ensuring that their constitutional interests were protected. Unlike amendments to federal Constitutions, there was no requirement for devolved participation in or consent to this major constitutional change. The devolveds were similarly unable to play any important part in the Brexit negotiations due to the relations with the EU being treated as a foreign policy matter and thus a reserved power for the UK government.

However, although the UK government declared that the UK would leave the EU as one State, the Northern Ireland Protocol complicated things.[26] The prospect of a post-Brexit external border between an EU State (Ireland) and non-EU territory (Northern Ireland) was a fearful reminder of the role that border played in the violent recent past, during 'the Troubles'. There is also a

[24] M Sandford and C Gormley-Heenan, '"Taking Back Control", the UK's Constitutional Narrative and Schrodinger's Devolution', (2020) 73(1) Parliamentary Affairs 110.

[25] M Keating, 'The UK's Evolving Constitution', in *La Evolución de los Modelos Territoriales* (Paloma Requejo, 2018) 177.

[26] Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement, 17 October 2019, TF50 64 (2019).

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certain irony in this predicament – in the 2016 EU Referendum, the majority in Northern Ireland voted to remain in the EU, but it was the Brexit-supporting DUP (that supported former UK Prime Minister Theresa May in power from 2017 to 2019) that urged a troublesome hard Brexit, and subsequently became incensed by the inescapable result of that approach.

The Northern Ireland predicament was 'solved' by the Protocol attached to the Withdrawal Agreement agreed between the EU and Boris Johnson's government in 2019, (after Theresa May's earlier solution of the 'Backstop'[27] was rejected). UK (then) Prime Minister, Boris Johnson, deliberately opted to put a border between Great Britain and Northern Ireland rather than take an alternative option of keeping the UK in the EU Customs Union. This led to a fragmentation of the UK's Internal Market, with Northern Ireland applying different rules. Unionists in Northern Ireland became very dissatisfied with the Protocol, and this led to violent incidents. For its part, the EU was not satisfied with the UK's enforcement of the Protocol and started legal action. The situation seems precarious and unsettled, although may be ameliorated if the 2023 'Windsor Framework' on the Protocol is implemented. Yet, there appear no palatable outcomes. A hard border across Ireland would be ruinous for the peace process. The only other resolution would appear to be greater unity for Northern Ireland – either with the UK (by placing a hard border across Ireland) or with the Republic – through a unification referendum under the conditions of the Good Friday Agreement.[28] Either course of action would inflame a sizeable proportion of those in Northern Ireland.

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Brexit has revealed many flaws in Britain's aged Constitution. Too many of its uncodified rules and conventions are unclear or ambiguous, including many of serious national importance. This book explores these uncertainties, and also why so many of them should be attributed to constitutional inadequacy. But it also looks at the historical roots for Britain's constitutional transformations, which have often been obscured by constitutional amnesia. The conclusion is that, without some sort of new constitutional settlement, both the Constitution, and the union itself, are at risk.

[27] The 'backstop' was an insurance policy that guaranteed no hard Irish border after Brexit by keeping the UK inside a single EU-UK customs territory until a trade deal could be struck with the EU.

[28] s1 Northern Ireland Act 1998 (implementing Belfast/Good Friday Agreement).