Part V. Transnational Constitutionalism

18 Multi-Layered Constitutions

Roger Masterman*

Introduction

Examination of the state-centric dynamics of constitutions can only partially illuminate the multi-faceted characteristics of constitutional law. A statist focus often obscures both internal and external dimensions of constitutions themselves, and of the broader structures and patterns of governance that exist within and beyond nations. Either explicitly or implicitly, constitutions speak to the sub- as well as to the inter- and supra-national, and provide a lens through which obligations and pressures arising in each differing context might be reflected. Constitutions are, as such, inherently multi-layered.

* Underpinning work on this chapter was carried out while I held a MacCormick Fellowship at the University of Edinburgh. My thanks are due to Stephen Tierney and Elisenda Casanas Adam in Edinburgh, to Nick Kilford and Aoife O'Donoghue in Durham and to Ruth Houghton in Newcastle for discussions and suggestions.

The focus of this chapter is not primarily on the forms taken by multi-level governance structures,[1] but rather on the accommodation and integration of multiple layers of government via national constitutions and the tensions to which multiple layers of constitutional authority give rise. The chapter takes as a point of departure the suggestion that though national constitutions can be accepted and interpreted as monolithic, or standalone, entities, understanding their place as a conduit between sub-national, national and international norms and institutions is vital to a full appreciation of their character and qualities. Constitutions are often explicitly contingent upon sub-national and international sources of authority, others may be centralised to the virtual exclusion of other sources of normative power. But – as Vandenbruwaene has observed – the place of national structures of government is, regardless, increasingly seen as but one source of normative authority among many of varying, potentially intersecting, geographical ranges:

> The 21st century is marked by an increased recognition, both empirical and normative, of a complex world, which is simultaneously fragmented and interdependent. These co-existent trends, one of globalization and one of localization, yield a bifurcated pressure on the unitary nation-state: on the one hand, the circumspection of the relevant polity is subjected to change because of particular claims – the rise of regional authority based on identity politics springs to mind. On the other hand, the necessity of effective governance suffers from interdependencies and mobility, frequently exceeding national borders.[2]

In the United Kingdom the diffusion of power away from Westminster and Whitehall – once seen as bywords for centralised national government – during the last 50 years provides a case in point. Acceptance of the right of individual petition to the European Court of Human Rights in 1966 and accession to the European Community (as was) in 1973 combined to permit extra-jurisdictional institutions a significant role in shaping domestically-applicable norms and policy. The internal devolution of legislative powers to institutions in Northern Ireland, Scotland and Wales saw – from 1999 onwards – the wholesale geographical transfer of powers previously exercisable at Westminster to three sub-national legislatures (and executives).[3] The cumulative effect of these developments was a significant reconfiguration of governmental power posing a series of challenges to the established unitary understanding of the United Kingdom constitution.[4] These decentralising and internationalising initiatives have seen the United Kingdom constitution

1 On which see the chapters by Raffaele Bifulco, Jan Klabbers and Kaarlo Tuori in this volume.

2 W. Vandenbruwaene, 'Multi-Level Governance through a Constitutional Prism' (2014) 21 *Maastricht Journal of European and Comparative Law* 229, 230.

3 The United Kingdom's experience of devolution pre-dates the initiatives of the late twentieth century. Between 1921 and 1972, devolved government had operated in Northern Ireland as a result of the Government of Ireland Act 1920. Political conflict in Northern Ireland saw the reestablishment of direct rule in 1972, and the Parliament of Northern Ireland was abolished by the Northern Ireland Constitution Act 1973. The late 1970s also saw failed efforts to establish devolved institutions in Scotland and Wales (see V. Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 2001), esp. chs. 3 and 6).

4 N. Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' [2000] PL 384.

take on 'the appearance of a structure with multiple, but inter-connected and sometimes overlapping layers.'[5]

For many jurisdictions, of course, a geographical distribution of powers (and the division of sovereignty between local and national-level units) is an inherent feature of constitutional government. Notwithstanding this, trends towards 'sub-state nationalism'[6] and a 'new regionalism'[7] have led to the establishment of governmental structures that have been pragmatically retrofitted onto an established constitutional architecture or have otherwise prompted refinement of accepted understandings of constitutional structures of national government.[8] Federal and non-federal solutions to the accommodation of sub-national government alike recognise intra-state diversity and the imperative of subsidiarity, but do so through either constitutionalised arrangements (eg Australia, Canada, Germany) or other sub-constitutional mechanisms of governmental decentralisation (eg France, Spain, the United Kingdom). Both present alternative loci of power which might be seen to challenge – or at the very least prompt refinement of – state-centric visions of constitutional authority.

The jurisdictional integrity of the state and ability of the constitution to map allocation of governmental powers may also be challenged by developments on the international plane. As states have sought to operate collectively (eg via treaty-based organisations such as the Council of Europe, the African Union, the Association of Southeast Asian Nations) and to pool sovereignties in semi-autonomous supra-national legal structures (eg the European Union) the exercise of competences 'above' state-level institutions has become commonplace. Though the extent to which such upward dispersals of constitutional authority impact on domestic affairs may vary – both as a result of the substantive powers exercised beyond the state and the means by which such powers will be domestically-effective or enforced – the transfer of powers away from the state may challenge jurisdictional autonomy, raise questions relating to resolving issues of contested competence and see the political and economic authority of state institutions apparently diminished.

In this age of 'post-sovereignty'[9] or 'constitutional pluralism'[10], state-level institutions – the typical receptacles of supreme legal power – are but one component of an increasingly complex

5 N. Bamforth and P. Leyland, 'Public Law in a Multi-Layered Constitution' in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003), p.3.

6 S. Tierney, 'Sub-State Nations and Strong States: The Accommodation Impasse?' in S. Tierney (ed.), *Nationalism and Globalisation* (Hart Publishing, 2015).

7 M. Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change* (Edward Elgar, 1998).

8 See eg: R. Schütze and S. Tierney, *The United Kingdom and the Federal Idea* (Oxford: Hart Publishing, 2018).

9 N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, 1999), ch.8.

10 See eg: N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.

series of governance networks across which constitutional authority is dispersed (and contested). For national legal systems, often characteristically wedded to the idea of law's emanation from a single authority or institution, the diffusion of authority towards supra- and sub-national loci of power may pose particular difficulties for the continuing integrity of the notional 'sovereign' and therefore for one of the defining characteristics of the national constitution.

1. Internal Layering

a. Structure and Sovereignty

Federal, regional and devolutionary approaches each share the common purpose of recognising and accommodating diversity within a larger 'national' framework.[11] As such, the allocation of governmental powers between state-level and sub-national institutions through both federal and regional/devolved arrangements can be seen to give broad effect to the principle of subsidiarity.[12] Beyond this however, a range of motivations for the maintenance of distinct institutions of sub-national government are discernible. These include a desire to limit the range of powers exercisable by central government (eg USA), an intention to recognise through self-government a particular regional or national identity (eg Basque, Catalonia, Scotland, Quebec), the need to provide stability and continuity during a period of transition (eg Hong Kong), and may seek to provide a conciliatory mechanism by which politically-divided communities might be brought together in shared government (Northern Ireland).

Within federal constitutions the division of power to provincial/regional institutions is frequently uniform, established by the constitution and immune from unilateral amendment by either national or state legislature. Devolutionary arrangements, by contrast, may be underpinned by legislation (as distinct from the constitution), may be more *ad hoc* and may tend more towards an asymmetric division of competence between territories.[13] In theory at least, the latter may be more sensitive to the specific, potentially differing, needs of the territory or territories in question. Spain's autonomous communities (*comunidad autónoma*), for instance, enjoy varying degrees of

[11] *Reference re Secession of Quebec* [1998] 2 SCR 217, 244-245, 250-252.

[12] Here taken as encapsulating the principle that 'decisions affecting the life and activities of the citizen should generally ... be made at the lowest level of government consistent with economy, convenience and the rational conduct of public affairs' (Lord Bingham, 'The Evolving Constitution' [2002] EHRLR 1, 2. See generally: D. Halberstam, 'Federalism: Theory, Policy, Law' in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

[13] Federations may also display asymmetry. In Australia, for instance, there is a distinction drawn between State and territory governments.

autonomy, within a state framework otherwise considered to be unitary.[14] Equally, devolved structures may – as in the United Kingdom – also include the *absence* of sub-national structures of government (as in England) as well as the devolution of power to city-level administrations (as in the Greater London Authority). As such, the legislative basis of the United Kingdom's devolutionary arrangements has allowed structural change to be partially led by demand, or, indeed, by an absence of such demand.[15] Consistently with this relative flexibility – and indeed with the statutory framework upon which devolution in the United Kingdom rests – devolutionary arrangements may be established and/or amended without the need for fundamental (state-level) constitutional renewal and see the sovereign legal power of the central/unitary legislature at least formally preserved.

By contrast with such essentially pragmatic allocations of power, separations of power between national/federal level institutions of government and a federation's component states, provinces or regions provide an *essential* division of powers and foundational architecture for numerous constitutional systems. While the constitutional, geographical, division of power is therefore foundational to the internal constitutional order, so too is the idea of an essentially divisible sovereignty. As Wheare famously claimed, the core of the federal principle is the division of power 'so that the general and regional governments are each, within a sphere, co-ordinate and independent' with 'neither general nor regional government … subordinate to the other.'[16] The ability of federal systems to 'split the atom of sovereignty'[17] sees divisible sovereignty treated as a quality of constitutionalism, rather than a threat to it.

Though it is commonplace for federated divisions of power to be referred to as 'vertical' the description is not entirely apt. While the existence of a supremacy clause may ensure the primacy of federal laws over those of the state components,[18] the implication of a hierarchy as between federal and states governments does not accurately capture the vital formative, or centripetal, role played by the state or regional components of federal systems such as the USA. In those states in which the influence of unitary government remains, the notion of hierarchical constitutional ordering may appear to be more appropriate, given that devolved/regional competences may be

[14] Constitution of Spain 1978, Article 2: 'The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.'

[15] A proposed scheme to establish elected regional assemblies throughout England (*Your Region, Your Choice: Revitalising the English Regions*, Cm.5511 (2002)) was – following the rejection of such a body in a pilot referendum held in the North East of England 2004 – abandoned. Since 2014 enhanced powers have been devolved to local government in England in a range of areas under the Cities and Local Government Devolution Act 2016.

[16] K. C. Wheare, *Federal Government* (4th ed) (Oxford University Press, 1963), p.10 and 12.

[17] *US Term Limits, Inc v Thornton* 514 US 779 (1995) (Kennedy J), 838: 'The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.'

[18] For instance, Article VI, cl.2, Constitution of the United States.

the product of a centrifugal redistribution of central authority. If federal systems are predicated on the divisibility of sovereignty within the federation, then the maintenance of a 'sovereign' central authority is perhaps the characteristic that most clearly delineates unitary/devolutionary systems. Though unitary government persists in a range of jurisdictions (for instance, Denmark, Ireland, Sweden) the adoption of regional or devolutionary approaches in previously highly centralised states indicates something of a trend towards sub-state constitutionalism. In France, considered to be 'the cradle of the unitary state', the 'hierarchical subordination of [local authority] to central authorities was intended to guarantee unity in the direction of public power.'[19] The recognition of the French Republic as being 'indivisible' has not however prevented the redistribution of central authority; 'recent decades have witnessed decentralisation, and even some forms of regional autonomy, within a unitary state, resulting in a new division of competences between the central state and the *collectivités territoriales* (sub-state administrative units) and a constitutional principle of subsidiarity in territorial organisation.'[20]As Roobol has observed, '[m]ost European states are by now either decentralised unitary states with increasing autonomy for the regions or federations with historically or linguistically defined Member States.'[21]Beyond Europe, the tendency towards sub-state constitutions is equally pronounced: 'documents that can fairly be described as constitutions govern the affairs of some two hundred sub-national divisions of nations around the world.'[22]

b. Competences

Though maintenance of the form of the unitary state may be the consequence of sub-constitutional decentralisation that is not to say that the advent of regionalisation or devolution will be accompanied by the continued *exercise* of centralised powers; in practice the involvement of the central power in the exercise of devolved competences may be limited. The United Kingdom's devolutionary arrangements reflect a system that maintains the form of a legal hierarchy but in which *political* control over areas of devolved competence is substantial. While the legislative bases of the United Kingdom's territorial governance structures contemplate the continuing *legal* power of the Westminster Parliament to legislate on any matter[23] the exercise of such power is limited by

19 S. Bartole, 'Internal Ordering in the Unitary State' in M. Rosenfeld and A. Sajó (eds), *The Oxford Companion to Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 610, 614.

20 E. Daly, 'The indivisibility of the French republic as political theory and constitutional doctrine' (2015) *European Constitutional Law Review* 458, 462.

21 W.H. Roobol, 'Federalism, Sovereignty, etc' (2005) *European Constitutional Law Review* 87, 88.

22 J.A. Gardner, 'Perspectives on Federalism: In Search of Sub-National Constitutionalism' (2008) 4 *European Constitutional Law Review* 325, 325.

23 Scotland Act 1998, s.28(7). See also *Tribunal Constitucional de España* Decision STC 4/1981: 'autonomy makes reference to a limited power … autonomy is not sovereignty … in no case can the principle of autonomy be opposed to that of unity.'

(*ordinarily* binding) constitutional convention[24] with the structural allocation of power to sub-national units accompanied by a shared political commitment to self-government.

In substance therefore the establishment of sub-national governmental structures in otherwise unitary states may result in significant practical decentralisation. In practice it has been argued that devolution amounts to a formal redistribution of power not dissimilar to that resulting from federal arrangements.[25] Statutory recognition of the 'permanence' of devolved institutions in Wales and Scotland serves to underscore the potential for devolved government to morph into something with a more overtly constitutional character. Spain, similarly (and in spite of the formal indivisibility of the State), has been referred to as a 'federation in all but name.'[26]

Extra-ordinary circumstances may however permit the reassertion of central power. The collapse of the power-sharing arrangements in Northern Ireland (under which members of the nationalist and unionist communities are required to govern in effective perpetual coalition) has seen 'direct rule' from Westminster re-established on a number of occasions since the devolution of power to institutions in Northern Ireland pursuant to the Belfast/Good Friday Agreement 1998. Similarly, the unilateral issue of the Catalan declaration of independence in October 2017 – issued following a disputed referendum and annulled shortly after by the *Tribunal Constitucional de España* – resulted in the suspension of the Catalan statute of autonomy (*Estatutos de Autonomía*) and the imposition of centralised government. By contrast then with the formal division of sovereignty by federal structures, extra-ordinary political circumstances *may* render the devolution or decentralisation of power susceptible to reassertions of central authority. Elsewhere however, political circumstance may well dictate that central involvement in otherwise local power be entirely routine. Though the position of Hong Kong as a Special Administrative Region (SAR) under the 'one country, two systems' model operational in the Peoples' Republic of China the 'genuine autonomy' provided for under Hong Kong's 'mini-constitution' is in practice also 'subject to potentially far-reaching political control by the PRC central government.'[27]

c. Integration and Cooperation

Even if the result of federal structuring is that similar assertions of central authority may not necessarily enjoy overriding status, this is not to say that there is no potential for competence disputes between state and federal authorities. Nor does the constitutional delineation of functions

[24] Scotland Act 1998, s.28(8) as amended by the Scotland Act 2016, s.2: '... 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' (the Sewel convention).

[25] V. Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 2001), ch.8.

[26] R. L. Watts, *Comparing Federal Systems* (Montreal: McGill-Queens University Press, 2008), p.42.

[27] Q. Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing, 2012), p.112-113.

mean that the potential for competence creep is eradicated. The 'judicial nationalization of individual rights'[28] by the United States Supreme Court in the post-New Deal era provides a salient example, with the Court seeking to ensure uniformity – a common standard of rights protection – at the apparent expense of State autonomy.[29] While the accommodation of diversity within a national framework is an objective of both federal and non-federal systems of decentralised government, means of ensuring unity between states/regions may also be apparent.[30] It is therefore commonplace for the role of the Supreme Court in a federal system to be to determine 'between what is truly national and what is truly local.'[31]

Political and bureaucratic means through which national and sub-national government might be managed may be less obviously adversarial than litigation. As Russell observes, many second chambers – in federal and non-federal systems alike – are tasked with 'binding different levels of government together'.[32] The extent to which second chambers may provide for regional participation in government may vary; some may be elected on a territorial basis but otherwise provide only a relatively weak connection to sub-national government (for instance, the Australian and Canadian Senates), others might properly be described as a representational and operational 'fulcrum' of the system of government (for instance the German *Bundesrat*).[33] The appointment by the autonomous communities of a proportion of members of the Spanish *Senado* illustrates that the representation of regional affairs in national institutions is not the sole preserve of federal systems.[34]

Alongside formal accommodation of sub-state representation within legislatures, many systems exhibit executive-driven machinery of intergovernmental relations. The well-established machinery of intergovernmental relations in Canada, for instance, revolves around First Minsters' Conferences and Ministerial Meetings and is supported by both national- and province-level Ministers of Intergovernmental Affairs and a dedicated central secretariat. The advent of devolution in the United Kingdom was accompanied by the establishment of a Joint Ministerial Committee, comprising Ministers from national and devolved administrations, as well as a range of soft-law instruments designed to regulate interactions between Westminster and Whitehall and

28 C. Warbrick, 'Federal Aspects of the European Convention on Human Rights' (1989) 10 *Michigan Journal of International Law* 698, 703.

29 Cf. M. Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton and Co., 2006), ch.10.

30 On the necessity of, for instance, a unified Australian common law see: *Lange v ABC* (1997) 189 CLR 520, 563.

31 *United States v Morrison* (2000) 529 US 598, 617-618.

32 M. Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), ch.10.

33 Ibid.

34 Article 69, Constitution of Spain.

the devolved administrations.[35] As the experience of devolution to Northern Ireland also demonstrates, the establishment of mechanisms of intergovernmental relations may also serve political and/or diplomatic ends that resound beyond the boundaries of the territory to which power has been devolved.[36]

2. Internalising the External

a. Monism/Dualism

The necessary implication of subsidiarity is that just as particular governmental functions might be most appropriately administered at the local level, certain governmental functions are better addressed on a national, or indeed international, plane.[37] The logic of this dimension of subsidiarity is that particular (external) issues or problems which transcend national borders are better confronted via state collaborations (addressing the causes and implications of climate change provides an obvious example). Participation in structures at the international level is, in turn, generally motivated by concerns relating to the greater influence or effectiveness of inter-state arrangements in relation to particular governmental activities. The extent to which inter-state agreements might impact upon domestic legal affairs is however contingent on a range of factors.

In the first instance, the translation of external norms into the domestic polity will also be a matter either explicitly addressed by, or a necessary implication of, national constitutional law. In relation to the nature of national constitutional orders, it remains a relevant start point to distinguish monist and dualist constitutions.[38] Monist constitutions essentially treat international norms as being as one with those of domestic origin. The impact of translating international legal norms in a monist system may not be immediately pronounced, as they are effective without the need for domestic legislative implementation. Dualist systems, by contrast, will require that treaty obligations should be implemented (translated) by domestic legislative means in order that the formal supremacy of the domestic legislature or constitution – and the jurisdictional integrity of the domestic constitutional order – be better maintained. Dualist systems may be able to preserve

35 On which see: R. Rawlings, 'Concordats of the Constitution' (2000) 116 LQR 257; J. Poirier, 'The Functions of Intergovernmental Agreements: Post-Ddevolution Concordats in a Comparative Perspective' [2001] PL 134.

36 See Strands 2 and 3 of the Belfast Agreement 1998 (available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf\0) (accessed ???) and Part V of the Northern Ireland Act 1998 in relation to the activities of the North-South Ministerial Council and the British Irish Council.

37 D. Halberstam, 'Federal Powers and the Principle of Subsidiarity' in V. D. Amar and M. Tushnet, *Global Perspectives on Constitutional Law* (Oxford University Press, 2009), p.34.

38 Though it should be noted that doubts exist as to the continuing utility of the labels: G. Gaja, 'Dualism – A Review' in J.E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).

the impression that international obligations resound only as against the state, and may not permit those obligations to be employed in domestic adjudication in the absence of domestic implementing legislation.[39]

b. Incorporation and Receptivity

Even in the event that 'incorporating' legislation gives some degree of domestic effect to the relevant international norm, the precise terms of that legislation will be conditioned both by the nature of pre-existing constitutional arrangements and the extent to which the international norm might compel, or provoke, change in the domestic sphere. As to the first of these, the longstanding and robust commitment to the protection of constitutional rights evident in the German Basic Law (*Grundgesetz*) has seen the direct influence of the jurisprudence of the European Court of Human Rights limited by comparison with experience in those states historically lacking a domestic Bill of Rights or comparable tradition of enforceable individual rights. As a point of contrast, the United Kingdom's Human Rights Act 1998, for instance, serves the specific purpose of 'giving further effect to rights and freedoms guaranteed under the European Convention on Human Rights.' To that end, the human rights standards against which public authority activities and legislation are measured are those contained in the ECHR and partially defined by the European Court of Human Rights. As a result – as perhaps also as a product of the previous *absence* of legally enforceable individual rights in the United Kingdom's legal orders – the Convention rights enjoy a prominence and immediacy in the United Kingdom context that is not necessarily evident in other states within the Convention system.

Though specific domestic legislation may allow local actors to claim ownership of the standards to be upheld/enforced[40] – and will adhere to the form required by the doctrine of dualism – perceptions of excessive external influence may still permit accusations of over-reach by extra-jurisdictional actors into the national political domain.[41] In response to the tensions prompted by such external drivers there have been notable moves to reassert the authority of national institutions in the face of perceived or potential encroachment from outside. The Russian Constitutional Court has, for instance, declared the ability to find decisions of international bodies

39 See *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

40 *Re McKerr* [2004] UKHL 12, at [65] (Lord Hoffmann).

41 In the context of the reach of the European Court of Human Rights into national affairs in the United Kingdom see: R. Masterman, 'Federal Dynamics of the UK/Strasbourg Relationship' in R. Schütze and S. Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing, 2018).

'impossible to implement'[42] while the German Federal Constitutional Court reserved to itself the right to review European legislation for compliance with the rights protected in the Basic Law.[43]

The 'alien' heritage of the translated norms may also hamper their effective deployment at the domestic level.[44] This tendency is all the more prominent in those spheres in which the subject matter of the constitutional arrangement is 'perceived as going to the core of national sovereignty.'[45] The so-called 'sovereignty clause' in the United Kingdom's European Union Act 2011 provides evidence of an unsuccessful attempt to reiterate that the influence of external norms was solely the product of a domestically-taken legislative decision. The United Kingdom's decision to leave the European Union, and the unresolved question of whether the Human Rights Act should be replaced by a *British* Bill of Rights, are both symptomatic of a concern to insulate the national from external influence.

While legislative and constitutional instruments may condition the extent to which the importation of external norms is possible. The degree to which external norms will permeate the domestic constitutional order is also a question of (inter alia) constitutional culture and judicial technique. As to the first of these, monism may encourage receptivity to external influence; in the words of the President of the *Bundesverfassungsgericht*, '[t]he Basic Law is open, or as we say friendly, to European Law (*Europarechtsfreundlichkeit*)'. [46] Constitutional reasoning from an originalist perspective may drive a species of jurisdictional exceptionalism limiting the influence of international norms, as well as the decisions of other national courts. By contrast, the shared traditions of common law jurisdictions may permit the importation (or influence) of constitutional standards that the doctrine of dualism would otherwise appear to preclude. In practice, care should be taken to guard against over-generalisation. Systems which may be in one sense appear open to the influences of international norms[47] may prove in another to be resistant to external stimuli;[48] systems that otherwise maintain the form of dualism, might occasionally display monist traits;[49]

42 M. Smirnova, 'Russian Constitutional Court affirms Russian Constitution's Supremacy over ECtHR decisions' *UK Const. L. Blog*, 17 July 2015.

43 See: 37 BVerfGE 271 (*Solange I*); 73 BVerfGE 339 (*Solange II*).

44 See: *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41; Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, HL103/HC924 (December 2013), [67]-[113].

45 D. Nicol, 'Lessons from Luxembourg: Federalisation and the Court of Human Rights' (2001) 26 EL Rev HR3, HR3.

46 A. Voβkuhle, 'European Integration and the *Bundesverfassungsgericht*' Sir Thomas More Lecture, Lincoln's Inn, 31 October 2013.

47 See eg: US Constitution, Article VI.

48 See eg: *Sosa v Alvarez-Machain* (2004) 124 S. Ct. 2739, 2776 (Scalia J): 'The notion that a law of nations, redefined to mean that consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory*, is a 20th-century invention of internationalist law professors and human-rights advocates.'

49 English courts, for instance, have traditionally regarded customary international law as being a part of the common law (See: *Triquet v Bath* (1764) 3 Burr 1478; W. Blackstone, *Commentaries on the Laws of England* (1st edn, Clarendon Press, 1765–1769) Vol. IV, 67).

systems displaying exceptionalist tendencies may simultaneously belong to a broader grouping of systems sharing, and exchanging, characteristics.[50] In other words, monist and dualist constitutions should not be thought of as neatly defined categories, but rather should be considered as predominating tendencies which may permit degrees of fluidity.

3. External Layering (I): Regional/Continental Regimes

a. Hierarchy or Heterarchy?

Regional human rights regimes – in their efforts to place limitations on the ability of governments to interfere with certain norms – share common ground with the constitutionalist motivations behind the internal power divisions visible in certain federal systems. While domestic constitutional arrangements provide a start point for the importation (and therefore influence) of such external norms, the specific nature of the international agreement will determine the extent to which its norms infiltrate the domestic sphere. While both the European Convention on Human Rights and Inter-American Convention require state compliance with their terms, the extent to which each permeates the national sphere falls short of requiring direct effect. In both regimes however, the extent to which states have taken steps to internalise the norms originating in the treaties has led Gardbaum to conclude that the formal absence of direct effect is a matter of form as opposed to substance.[51] It should also be noted however that – since the gradual assumption by the European Court of Human Rights of a more explicitly constitutional function – the difference between the two may be similarly characterised. Though the ECHR might only be characterised as a partial – or 'abstract'[52] – constitution, the Convention is regarded as being a 'European Bill of Rights'[53] or – as the Court has recognised – an analogous 'instrument of European public order ("*ordre public*").'[54] While decisions of the European Court of Human Rights may lack the supremacy or finality typically enjoyed by those of domestic constitutional courts, they otherwise enjoy significant gravitational pull.[55] The ability of the Court to adjudicate on inter-

50 On which see generally: M. Elliott, J.N.E. Varuhas, and S. Wilson Stark, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018).

51 S. Gardbaum, 'Human Rights as International Constitutional Rights' (2008) *European Journal of International Law* 749, 760-762.

52 S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), p.172.

53 On which see: E. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010).

54 *Loizidou v Turkey* (1995) 20 EHRR 99, [75].

55 Gardbaum characterises the Convention case-law as having '*de facto* rather than *de jure* direct effect' within the member States as a result (S. Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 EJIL 749, 760).

state applications also provides a parallel to the constitutional functions of a centralised supreme court within a 'federal' structure.[56] The ECHR's devolution of remedial action to the member states, by contrast, is reflective of a system in which state responsibility for compliance with the Convention's requirements remains pronounced.

It is the development of the European Union that provides the most salient example of a fully-formed supranational constitutional system. Since creation of the EEC in 1958, the EU has grown from an economic collaboration into a quasi-federal structure concerned with diverse social and political initiatives, now displaying many structural and constitutionalist features commonly internal to national constitutions (including quasi-federal characteristics,[57] a separation of powers broadly adhering to the tripartite model,[58] a hierarchy of norms,[59] and a bill of rights[60]). The sui generis nature of the EU clearly sets it apart from other international agreements and structures. It is clear, for instance, in the jurisprudence of the Court of Justice of the European Communities that the establishment of the EEC, as it then was, was to be understood generating a new 'legal order' that would have a profound transformative effect on the competences of national-level governmental structures:

> the Treaty giving effect to the European Economic Community, as well as the other two so-called European Treaties, creates its own legal order which is separate from that of each of the member-States but *which substitutes itself partially for those* in accordance with rules precisely laid down in the Treaty itself and which consist in a transfer of jurisdiction to Community institutions.[61]

The self-conscious establishment of a supra-national legal order, the norms of which enjoy supremacy over the ordinary and constitutional laws of the member states,[62] underpins the ability of EU law to permeate, and – potentially[63] – disrupt the constitutional laws of the EU's member states and speaks to its transformative influence.

Yet while the EU legal order outwardly claims supremacy over the laws of the member states, it also 'envisages the co-existence of national constitutional orders within [its] supra-national constitutional order'[64] much as federal or regional states envisage the coexistence of sub-national governmental units. Reflecting an external dimension of the federal principle, the German Basic Law recognises that sovereign power may be divided externally, with Article 23(1) of the

56 For instance: *Ireland v United Kingdom* (1979-1980) 2 EHRR 25 (and now (2018) 67 EHRR SE1).
57 On which see: R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009); R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union (2010) 47 Common Market Law Review 1385.
58 G. Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 ELJ 304.
59 *Costa v ENEL* [1964] ECR 585; [1964] CMLR 425.
60 The EU Charter of Fundamental Rights became operative on the coming into effect of the Lisbon Treaty, in 2009.
61 *Costa v ENEL* (Case 6/64) [1964] CMLR 425, 439 (emphasis added).
62 *Costa v ENEL* [1964] ECR 585; [1964] CMLR 425.
63 *R v Secretary of State for Transport, ex parte Factortame Ltd* (No. 2) [1991] 1 AC 603.
64 E. de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 52.

Grundgesetz acknowledging that '… the Federation may transfer sovereign powers by a law with the consent of the Bundesrat'. While such provision formally recognises that constitutional powers can be allocated to supra- or international institutions, it is accompanied by a more informal acceptance that national authorities may not hold a monopoly over constitutional authority. This openness comes with limits however, and the influence of external norms cannot come at the expense of the constitutional 'identity' of the Basic Law. As such, the Federal Constitutional Court's *Lisbon* decision confirms that the Basic Law does not permit accession to a European Federal State, and that – while sovereignty may be transferrable – it cannot be relinquished.[65] The powers allocated to the Federal Constitutional Court by the Basic Law do not give rise to the suggestion that the national court is hierarchically inferior to the CJEU:

> [t]he relationship between the two courts is not one of supremacy and subordination. Instead it should be seen as a sharing of responsibility within a complex multilevel cooperation of courts. We call this cooperation the *Gerichtsverbund*.'[66]

The perceived *absence* of a similar constitutional resilience in the face of external incursions can be seen in the counter-integration pressures that culminated in the United Kingdom's decision to exit the European Union.[67]

b. Self-Government and Subsidiarity

While sub-national constitutionalism is supported in order to address democratic deficits, inter- or supra-national constitutionalism is often argued to exacerbate such shortfalls.[68] The transfer by national institutions of decision-making competence to external bodies, often perceived as being 'remote' from national concerns and therefore lacking accountability to a national electorate, contributes to an absence of democratic legitimacy that is potentially damaging to the perceived legitimacy and implementation of associated norms in the domestic constitutional framework.[69] The Treaty-based origins of enterprises such as the European Union and European Convention on Human Rights are undoubtedly grounded in the principle of State-consent. But the increased

65 See: 123 BVerfGE 267, 346-000.

66 A. Voβkuhle, 'European Integration and the *Bundesverfassungsgericht*' Sir Thomas More Lecture, Lincoln's Inn, 31 October 2013.

67 Cf. *R (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.

68 The widespread antipathy towards 'European' human rights law in the United Kingdom is one such symptom of such a perception. It should be noted that this antagonism to decisions of the European Court of Human Rights is not confined to the United Kingdom (see generally: P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System – Counter-Dynamics at the National and EU Levels* (Intersentia, 2016).

69 The establishment of a Caribbean Constitutional Court, however, serves to illustrate that the establishment of a supra-national judicial organ can be presented as an exercise in subsidiarity, given that part of its jurisdiction was previously exercised by the (generally London-based) Judicial Committee of the Privy Council.

constitutionalisation of those regimes – and concurrent ability of each system to autonomously generate norms – weakens what was once seen as the foundation of the international legal order.

By way of a partial response, the language of constitutional law has developed in order to explain (or attempt to resolve) some of the tensions between national and international structures of government. As a result, despite speaking directly to the issue of *local* governance subsidiarity has come to be seen as a distinct principle of 'European' law,[70] and the European Court of Human Rights has employed the terminology of the margin of appreciation in order to accommodate difference and policy variance within and among the Convention signatories.[71] Through articulating the parameters of such concepts, international courts – in common with many of their domestic counterparts – play a role in delineating between local (national) and central (international) spheres of competence. And in so far as notions such as subsidiarity and the margin of appreciation allow for a degree of deference to be permitted to national level decision-makers, they enable supra-national constitutionalism to be presented as being both partially parasitic upon domestic, or state-level, authority and also grounded in the terminology of deference which is so familiar to national constitutional adjudication. However, de Wet argues that expectations that international legal structures display characteristics common to national institutions are rooted in a flawed 'mythologizing of national democratic governance as a model for international governance', suggesting that the legitimacy of post-national constitutionalism is not solely the product of democratic inputs.[72] Though it is undoubtedly the case that international constitutionalism rests on a footing that is materially different to that supporting a national constitution, international actors have nonetheless sought to respond: the Council of Europe has recently re-emphasised the fundamentality of national democratic institutions as holding primary responsibility for upholding the ECHR standards,[73] while the implementation of the Lisbon Treaty saw a conscious effort to democratise the European Union. Similar pressures are evident (but perhaps not so keenly felt) outside of Europe,[74] for it remains the case that the development of

[70] Lord Bingham, 'The Evolving Constitution' [2002] EHRLR 2, 2. On which see Article 5(3) Treaty of European Union: 'Under the principle of subsidiarity … the Union shall act only if an in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.'

[71] The margin of appreciation has also shown itself able to accommodate sub-national variation (see eg *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34).

[72] E. de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 71-74.

[73] Protocol 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms.

[74] For a South American comparison see: T.G. Daly, 'Baby steps away from the State: Regional Judicial Interaction as a Gauge of Postnational Order in South America and Europe' (2014) 3 *Cambridge Journal of International and Comparative Law* 1011.

regional international institutions with such reach and influence remains 'a partial development, felt more in Europe than elsewhere.'[75]

4. External Layering (II): The Influence of 'Global' Norms

a. Symbiosis and Circularity

International law undoubtedly displays constitutional characteristics – '[t]he Charter of the United Nations is … described as a constitution for the international community, and the World Trade Organization as an economic charter'[76] – and is subject to the processes of constitutionalisation.[77] Each is the topic of independent inquiry. But the increasing range and influence of instruments, institutions and laws with a potentially global reach has also impacted upon understandings of the concept of constitutional law,[78] and on the extent to which the external is able to permeate the domestic constitution. The relationship between the internal and the external in this particular sphere is somewhat circular, and is driven by developments within and without state institutions. Discourse on 'global' constitutional law has therefore been given succour as a result of the cross-jurisdictional conversations on 'universal' values[79] and gradual convergence of constitutional idea(l)s[80] evident in the decisions of national courts *as well as* through the proliferation of international governance regimes and constitutional instruments with a potentially global reach.[81]

Though many global instruments have not been internalised in the same manner as – for instance – the European Convention on Human Rights in many European states, they may nonetheless exercise an indirect effect in influencing the contours of domestic laws as templates for national legislation and bills of rights,[82] or as influences upon judicial decision-making. International law writ large also plays a role in the shaping of domestic constitutional standards.

75 S. Tierney, 'Sub-State Nations and Strong States: The Accommodation Impasse?' in S. Tierney (ed.), *Nationalism and Globalisation* (Hart Publishing, 2018), p.58.

76 See for instance J.-R. Yeh and W.-C. Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions (2008-2009) 27 Penn State Int. L. Rev. 89, 90.

77 A. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014).

78 Peters has argued that globalisation 'means that state constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions' original claim to form a complete basic order is thereby defeated' (A. Peters, 'Compensatory Constitutionalism: The Potential and Function of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, 580).

79 See eg: C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499.

80 See eg: M. Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225.

81 The paradigm example being the so-called International Bill of Rights (comprising the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 (and its two optional protocols) and the International Covenant on Economic, Social and Cultural Rights 1966).

82 The substantive rights protected by the New Zealand Bill of Rights Act 1990 and the Hong Kong Bill of Rights Ordinance 1991, for instance, are taken from the ICCPR.

Beyond the basic incorporationist stance of formally monist systems, international law may be allocated a specific role in the interpretation and application of domestic constitutional laws. The Constitution of the Republic of South Africa, for instance, is receptive to the broad influence of international law, making it mandatory for the courts to consider relevant international law in the interpretation of the Bill of Rights:

> 'When interpreting the Bill of Rights, a court, tribunal or forum
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.'[83]

By contrast however with the comparatively direct influences of the bodies of European Union and European Convention norms (both reinforced by the extensive jurisprudence of their specialised judicial bodies), the domestic influence of law with a *global* reach is often rather less pronounced. In part, this is due to the relatively small body of constitutional rules that are binding upon *all* states (including the prohibitions on genocide, torture, enslavement, refoulement, and so on), the absence (barring perhaps in the sphere of UN Security Council Resolutions) of an effective equivalent to 'direct effect' and may also be due to the non-judicial means of enforcement that underpin instruments such as the ICCPR and ICESCR.

b. Minimalist Universalism

The aspirations of human rights law to universal application provide perhaps the paradigmatic case of a global set of norms. Lord Bingham has described, for instance, the 1948 Universal Declaration of Human Rights as setting 'a common standard of rights to be *universally* observed and secured.'[84] The vindication of this objective necessitates that rights must resound within the national sphere; as Thomas Poole has observed, '[r]ights drive an international discourse the objective of which is to infiltrate and influence the national.'[85] In the face of the claimed ubiquity of human rights protections, the doctrine of dualism may still present an obstacle to importation of such norms.[86] In the Australian context, for instance, the absence of a national bill of rights and a long-standing

[83] Constitution of the Republic of South Africa 1996, s.39(1). See also Constitution of India 1949, s.51(c).

[84] T. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010), p.56 (emphasis added).

[85] T. Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in L. Pearson, C. Harlow and M. Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Oxford: Hart Publishing, 2008), p.16.

[86] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *Al-Kateb v Godwin* [2004] HCA 37, [62]-[73] (McHugh J).

and influential tradition of judicial formalism have combined to render the influence of external human rights standards heavily contested.[87]

Even where the influence of international human rights instruments is in evidence in domestic measures, this may fall well short of an equivalent to direct effect. By contrast with the previously-considered United Kingdom Human Rights Act, the Victorian Charter of Human Rights and Responsibilities 2006 – though similarly taking its substantive inspiration from the rights enshrined in an international charter (the ICCPR) – is *not* tailored towards ensuring domestic consistency with the requirements of that specific international agreement. Indeed, the meaning of the Victorian Charter's protected rights may be determined by reference to a rather more diffuse body of laws, including 'international law, and the judgments of domestic, foreign and international tribunals' so far as they are 'relevant' to the human right under consideration.'[88] The operation of the Victorian Charter – by contrast to the Human Rights Act – is not therefore intimately intertwined with the decisions of an extra-jurisdictional judicial body, either as a matter of international law, or on the terms of the Charter itself. As such, the influence of international law in the Victorian Charter context is more a partial template for constitutional design than a normative guide to implementation.[89]

The 'universal' character of certain other constitutional principles – such as the rule of law, and perhaps proportionality – has both spurred the process of constitutional borrowing and transplantation, and been deployed in national courts as a tool of judicial argumentation. While reference to such principles may provide evidence of the symbiosis of domestic and international constitutional norms, it is not uncommon to find reference to the 'global' values attaching to principles such as the rule of law[90] and the employment of common analytical tools, such as proportionality,[91] in the decisions of national apex courts.

If 'global' standards of constitutional law are to some extent derivative of the standards visible in national constitutions, then global constitutional law assumes a homogeneity amongst constitutional orders[92] that is in tension with the diversity of constitutional models and practice. Though it is common to contrast systems of parliamentary sovereignty with those of constitutional sovereignty even this binary distinction obscures the diversity of constitutions in terms of their

87 See generally: F. Wheeler and J. Williams, '"Restrained Activism" in the High Court of Australia' in B. Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press, 2007).

88 Victorian Charter of Human Rights and Responsibilities 2006, s.32(2).

89 In practice – due to largely internal constitutional factors – the impact of the Victorian Charter has been limited (see: *Momcilovic v The Queen* [2011] HCA 34).

90 For instance: *R (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] AC 1787.

91 For instance: *McCloy v New South Wales* [2015] HCA 34.

92 See for instance J.-R. Yeh and W.-C. Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions (2008-2009) 27 Penn State Int. L. Rev. 89.

form and substance. At the very least, if a system of global constitutional law is apparent, it is rather more fragmentary than its regional (European) and domestic counterparts. As de Wet has observed, the 'contrast between a well-developed European public order that benefits from the enforcement of a centralized court, and a much more fragile international value system that has to be enforced in a decentralized fashion'[93] is marked. It is perhaps the absence of robust centralised enforcement mechanisms and any equivalent to direct effect however that sustains the emergence of a looser, less prescriptive, framework of global constitutional norms. Though global constitutional law is just – if not more – susceptible to the charges of democratic deficit that beset European constitutionalist institutions, its incomplete and remote nature mean that its ability to penetrate the national is less acutely felt.

Conclusion

The division of governmental power along territorial lines is an accepted characteristic of constitutional systems. While State boundaries may once have provided the primary parameters within which such divisions were historically evident, the advent and expansion of international governance structures has seen a similar philosophy deployed beyond the state, as governments have sought to establish structures and institutions to operate for the collective benefit or the achievement of a particular set of political/legal objectives. The accommodation of diversity within a common unifying framework – one of the animating principles of federal structures – has become a principle of international legal governance. Though the importation of external norms is conditioned in part by the design of national constitutions, international institutions have increasingly sought to demonstrate that subsidiarity operates effectively alongside the homogeneity that inter-state collaboration requires. This is especially the case where some degree of direct effect is operative. As the former US Supreme Court Justice Sandra Day O'Connor has written, '[a]s salutary as national and supranational bodies can be, we must not let their potential obscure the simple truth that government often governs best when it governs close to the people.'[94]

Just as decentralisation might prompt the dilution of the sovereign power within an otherwise unitary state, the upward transfer of power to inter- or supra-national institutions sees sovereignty further challenged through its subjection to the rulings and directions of extra-jurisdictional structures. While for many such developments should have proven fatal to traditional notions of

[93] E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611, 631.

[94] S. Day O'Connor, 'Altered States: federalism and devolution at the "real" turn of the millennium' (2001) 60 CLJ 493, 508.

sovereign national institutions, sovereignty has arguably shown itself to possess a fluidity – in its sometimes uncomfortable acceptance of intra- and extra-jurisdictional sources of authority – that has seen it take on pluralistic characteristics. Such are the constitutional pressures now exerted by forces within and beyond states that MacCormick has argued that the stifling effect of 'monocular' conceptions of sovereignty *must* give way to conceptions that accommodate a more systems-based approach to constitutional/legal power.[95] It does not necessarily follow, however, that the general direction of travel is towards the diminution of centralised national institutions. In the United Kingdom, Brexit has provoked tensions between the Westminster Parliament and devolved Governments in Wales and – in particular – Scotland relating to the London-centric pressures evident in the proposed division of EU competences once returned to domestic stewardship. The governance of Spain, similarly, continues to display considerable centrist tendencies, while the experience of regional government in Italy demonstrates an ebb and flow between centralising and decentralising initiatives.[96] But the concept of *national* sovereignty – as the prospect of Brexit and insular trends in politics in the United States, Italy, the Netherlands and elsewhere illustrates – is showing itself to be resilient:

> The squeeze on statehood both from above and below has its limits. Either because the state remains strong in unexpected ways, or because it feels threatened and … will not allow its shrinking power to be diminished further.[97]

The statist narrative of constitutional law clearly no longer holds a monopoly on constitutional thought, but its influence – in, among other things, prescribing or conditioning much of the interplay between (sub-national, national and international layers) of government, in animating the democratic critique of international constitutional norms, in providing a language through which constitutional change can be expressed or interrogated – remains pervasive.

Further Reading

N. Bamforth and P. Leyland, *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003)

[95] N. MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1, 8: 'To escape from the idea that all law must originate in a single power source, like a sovereign, is this to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law. It is a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other to some third system.'

[96] B. Guastaferro and L. Payero, 'Devolution and Secession in Comparative Perspective: The case of Spain and Italy' in R. Schütze and S. Tierney, *The United Kingdom and the Federal Idea* (Oxford: Hart Publishing, 2018), esp. pp.141-145.

[97] S. Tierney, 'Sub-State Nations and Strong States: The Accommodation Impasse?' in S. Tierney (ed.), *Nationalism and Globalisation* (Hart Publishing, 2015), p.69.

T. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010)

E. de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51

P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010)

B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529

S. Gardbaum, 'Human Rights as International Constitutional Rights' (2008) *European Journal of International Law* 749

D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995)

N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999)

A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579

S. Tierney (ed.), *Nationalism and Globalisation* (Hart Publishing, 2015)