Part II: Firing the Brexit Bullet – Who Pulls the Article 50 Trigger?
symposium

MILLER AND NORTHERN IRELAND: 
THE NORTHERN IRELAND CONSTITUTION BEFORE 
THE UK SUPREME COURT

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1 Introduction

Anyone interested in high level judicial debate on the Constitution conducted extra-judicially (and politely) need look no further than the speeches on the website of the United Kingdom Supreme Court (`the Court'). Here is Lord Neuberger, for example, hinting that the UK does not have a constitution and there is Lady Hale emphatically stating not only that it does but the Court is that constitution’s guardian. Those supportive of Lord Neuberger’s position might observe how curious it is that the UK Parliament and the Court itself have been remarkably reticent in using the word ‘constitution’. The UK Parliament, in both s 1 of the Scotland Act 2016 and s 1 of the Wales Act 2017 (two clearly constitutional statutes), in what might be burlesqued as a parody of proverbial English reticence and understatement, employs the expression ‘United Kingdom’s constitutional arrangements’ where one might expect to find ‘constitution of the United

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2 Lady Hale, ‘The Supreme Court: Guardian of the Constitution?’ (UK Supreme Court, 9 November 2016) <https://www.supremecourt.uk/docs/speech-161109.pdf> accessed 31 October 2017, 2 (‘But the fact that we in the United Kingdom do not have a written constitution does not mean that we do not have a constitution. We clearly do.’).
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Kingdom’. In Secretary of State for Exiting the European Union v R (Miller) (‘Miller’), the phrase ‘constitutional arrangements of the United Kingdom’ is also used; and the majority of the Court then observes that ‘the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law.’

In Northern Ireland, there is much less reticence about using the word ‘Constitution’. As a first year law student in Belfast, I noticed that some teachers owned a maroon pamphlet, unambiguously entitled ‘The Constitution of Northern Ireland’, which contained an updated edition of the Government of Ireland Act 1920 that was then still in force and which, in its heyday between 1921 and 1972, came close to being such ‘a single coherent code of fundamental law which prevails over all other sources of law’ for Northern Ireland. The Northern Ireland Act 1998 (‘NIA 1998’), the current successor of the 1920 Act, also comes close to being, but is not, ‘a single coherent code of fundamental law’. Hence, when the arrangements for electing a First Minister and deputy First Minister under the NIA 1998 came before the House of Lords in Robinson v Secretary of State for Northern Ireland (‘Robinson’), Lord Bingham noted that ‘[t]he 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution.’ Lord Hoffman was less hesitant: ‘The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.’

A categorisation of the NIA 1998 as ‘constitutional’ gave rise to an obligation, so Lord Bingham held, that its ‘provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.’ It cannot be doubted that the constitutional nature of the NIA 1998 was central to that ‘generous and purposive’ interpretation (‘generous’, if one liked the

4 ibid [4] and [40] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge).
5 ibid [40].
8 Miller (n 3) [40].
11 ibid [25].
12 ibid [11]. The word (and any underlying concept) of ‘generously’ has been remarkably absent from subsequent constitutional litigation.

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outcome) given to ss 16(8) and 32(3) of the 1998 Act by a majority of the Appellate Committee of the House of Lords in Robinson.

In this chapter, I look at two of the key devolution issues that were considered by the Court in Miller. These are whether the giving of notice under art 50 of the Treaty on European Union (‘TEU’) without the consent of the people of Northern Ireland impedes the operation of s 1 of the NIA 1998 and whether the consent of the Northern Ireland Assembly is required before the relevant legislation – that is, legislation required before an art 50 TEU notice can be given – is enacted.13 These issues vary considerably in importance; the latter usefully explores a convention of undoubted political importance, the former is important only in demonstrating that there are limits to Northern Ireland’s admittedly unusual constitutional law.

In the Northern Ireland References14 in Re McCord and Re Agnew, which were heard by the Court with the appeal of the Secretary of State for Exiting the European Union in Miller,15 the majority judgment avoided characterising the NIA 1998 in terms of either a ‘constitution’ or a ‘constitutional statute’, preferring to describe it instead as ‘the product of the Belfast Agreement and the British-Irish Agreement, and […] a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland.’16 This is an unhappy characterisation. The NIA 1998 is not a ‘product’ of the Belfast Agreement, indeed the British-Irish Agreement may be said to owe its existence to the NIA 1998, rather than the other way around, since that 1998 Act is the ‘British legislation […] for the purpose of implementing the provisions of Annex A to the section entitled ‘Constitutional Issues’ of the Multi-Party Agreement’, which was a condition for the coming into force of the British-Irish Agreement.17 Indeed, the long title of the NIA 1998 describes the Act as ‘An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883’.

Although the NIA 1998 has ‘implementing the [Belfast] agreement’ as its purpose, it might accurately be said to only partly fulfil that purpose. One striking illustration of non-implementation comes from Strand One of the Belfast Agreement. There are references in Strand One to the Northern Ireland Assembly being ‘capable of exercising executive and legislative authority’ that it ‘will exercise full legislative and executive authority’ in

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13 These issues are taken, with necessary modifications, from Miller (n 3) [126].
15 Miller (n 3).
16 ibid [128].
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respect of devolved matters and that ‘the Assembly [...] will be the prime source of authority in respect of all devolved responsibilities’. These provisions of the Belfast Agreement are, plainly, at variance with the classic constitutional understanding under which ‘the supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen.’ Indeed, these provisions of the Belfast Agreement, if given domestic legal effect, would be revolutionary in their constitutional consequences.

Unsurprisingly, then, these provisions of the Belfast Agreement are not given effect in the NIA 1998; indeed, they are contradicted emphatically by ss 23 (1) and (2) of that Act. Section 23(1) of the NIA 1998 provides, by way of constitutional orthodoxy, that ‘the executive power in Northern Ireland shall continue to be vested in Her Majesty’ and then s 23(2) goes on to provide that ‘as respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to subsection (3) [which relates to the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland] be exercisable on Her Majesty’s behalf by any Minister or Northern Ireland department.’ Thus, while the Belfast Agreement provides for executive power to emanate from the Northern Ireland Assembly, the NIA 1998 provides, in contrast, for it to (continue to) emanate from the Crown.

Separately, it may be observed that describing the NIA 1998 as ‘a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland’ implies that the NIA 1998 is a part of a larger (constitutional?) whole (‘the programme’). This description raises, inevitably, but does not answer, the question of what ‘the programme’ consists of exactly. This infelicitous raising of the curtain by the majority of the Court is not, to be sure, followed by anything other than an almost completely assured analysis of the five issues referred that were referred to the Court. Two of those key issues are considered below.

19 Miller (n 3) [128].
20 ibid [126]. The five issues referred – the first four by Maguire J in the Northern Ireland High Court and the fifth by the Court of Appeal in Northern Ireland – are set-out as follows:

(i) Does any provision of the [NIA 1998], read together with the Belfast Agreement and the British-Irish Agreement, have the effect that an Act of Parliament is required before Notice can be given [to the European Council under art 50(2) of the TEU]?
(ii) If the answer is “yes”, is the consent of the Northern Ireland Assembly required before the relevant legislation is enacted?
(iii) If the answer to question (i) is “no”, does any provision of the [NIA
2 The need for the consent of the people of Northern Ireland

Northern Ireland is a statutory creation. Northern Ireland has been defined as consisting of the Parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone and the Parliamentary boroughs of Belfast and Londonderry. This is a definition dependant on the existence of counties, units that began to come into being in Ireland during the 12th century with shiring not being completed until the seventeenth century. There was nothing organic in the Irish counties at their inception; they were created to assist the extension and operation of English common law: `for the law cannot be put in execution where breve domini regis non currit, and the king’s writ cannot run, but where there is a county and a sheriff, or other ministers of the law, to serve and return the king’s writs’. This meaning of Northern Ireland was carried on for some time. Now, however, we have the much less clear text within the NIA 1998 reading: “Northern Ireland” includes so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Northern Ireland.

While it is helpful to know what Northern Ireland ‘includes’ it might be

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22 Government of Ireland Act 1920, s 1(2).
25 It seems useful to apply the words of TF Tout on the Welsh shires to Irish counties: ‘They are ‘departments’, administrative districts established for convenience, rather than organic divisions of land and people.’ TF Tout, The Welsh Shires: A Study in Constitutional History' in The Collected Papers of Thomas Frederick Tout (Manchester UP 1934) vol 2, 1.
26 Sir John Davies, A Report of Cases and Matters in Law, Resolved and Adjudged in the King’s Courts in Ireland (printed for Sarah Cotter under Dick’s Coffee House 1762) 102 (The case of Tanistry).
27 Northern Ireland Constitution Act 1973, s 43(2). Both s 1 (2) of the Government of Ireland Act 1920 and s 43 (2) of the Northern Ireland Constitution Act 1973 were repealed by ss 2 and 100 and sch 15 of the Northern Ireland Act 1998.
28 Northern Ireland Act 1998, s 98(1).
better to have set out (as the 1920 and 1973 Acts had previously done before the NIA 1998\textsuperscript{29}) what Northern Ireland ‘is’ exactly. An explanation for the drafting approach taken in the NIA 1998 may be that, when it came to drafting the Government of Ireland Act 1920 in the early 20\textsuperscript{th} century, Northern Ireland had no previous existence and it was necessary to define, with precision, what the new entity was exactly. On one view, it might be thought that this was no longer necessary in the NIA 1998 – even if it still was, apparently still required, when it came to drafting the Northern Ireland Constitution Act 1973 in the 1970s.

The absence of definition may be very important when s 1(1) of the NIA 1998 is considered, as it must be by the fifth issue referred to the Court in \textit{Miller}. Section 1(1) of the NIA 1998 provides that Northern Ireland in its entirety remains part of the UK and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll for that purpose. If Northern Ireland were to be defined by statute in a manner that embraced less territory then the territory that was the ‘Northern Ireland’ of the 1920 and 1973 Acts but was not Northern Ireland in some (hypothetical) later statute, that (‘surplus’) territory would not fall within s 1(1) of the NIA 1998. If s 1(1) of the NIA 1998 is a safeguard against constitutional change, s 1(2) makes provision for what is to happen in the event that a majority of the people of Northern Ireland vote in favour of a United Ireland.

Northern Ireland is the only region of the UK equipped with a constitutional departure lounge, no possibility for a return journey, and an electoral lock on the entrance to the departure lounge. Quite apart from the presently existing departure lounge, Northern Ireland is the only region now forming part of the UK that has, briefly, once ceased to belong to the UK. The ‘area of the jurisdiction of the Irish Free State […] at the coming into force of [the Irish Free State] Constitution’\textsuperscript{30} included the entire island of Ireland. A map of the territory of the Irish Free State when the Constitution of the Irish Free State came into force on 6 December 1922 would have included – and rightly included – Northern Ireland.

The Articles of Agreement of a Treaty between Great Britain and Ireland provided that until the expiration of one month from the passing of the Act of Parliament ratifying that Agreement, the powers of the Parliament and Government of the Irish Free State should not be exercisable as respects Northern Ireland.\textsuperscript{31} The Articles of Agreement enabled the Parliament of

\textsuperscript{29} See Government of Ireland Act 1920, s 1(2); Northern Ireland Constitution Act 1973, s 43(2).

\textsuperscript{30} Constitution of the Irish Free State 1922, art 3.

\textsuperscript{31} Irish Free State (Agreement) Act 1922, sch 2, art 11.
Northern Ireland to present an address to the Crown that the powers of the Parliament and Government of the Irish Free State should no longer extend to Northern Ireland, following which address those powers would not so extend and the Government of Ireland Act 1920 would remain in force.\(^{32}\) Such an address was presented on 8 December 1922.\(^{33}\)

For the few days between the coming into force of the Free State Constitution and the presentation of the address to the Crown, the jurisdiction of the Irish Free State extended over the entire island of Ireland even though that jurisdiction could not be exercised by the Parliament and Government of the Irish Free State for the ‘Ulster Month’ (as it was called) and, because of the address, never, in fact, became exercisable.\(^{34}\) That Free State jurisdiction never became exercisable in Northern Ireland did not detract from its undoubted – but admittedly, short – existence. The existence of such jurisdiction and its later interplay with the British Nationality Act 1948 had a surprising (and unintended) effect later on the British status of some residents of Northern Ireland.\(^{35}\)

Section 1 of the NIA 1998 and a history that includes a brief formal departure from the UK would be striking features of any constitutional landscape, but the fifth issue identified in Miller proposed an even more unusual feature, implying that the giving of notice under art 50 of the TEU without the consent of the people of Northern Ireland impeded the operation of s 1 of the NIA 1998. The Court gave this suggestion short shrift: ‘[i]t [s 1 of the NIA 1998] neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. […] this section cannot support any legitimate expectation to that effect.’\(^{36}\)

Although, as noted above, the constitutional landscape of Northern Ireland displays unusual features, at least by the reckoning of constitutional orthodoxy in the UK as a whole, that landscape is not as lunar as an affirmative answer by the Court to the fifth issue in Miller would have made it. Bluntly, the issue was so devoid of substance that one is driven to conclude that the decision of the Northern Ireland Court of Appeal to refer it must have been driven by the fear, that if it were not referred, it might have longer haunted the Courts.

\(^{32}\) ibid sch 2, art 12.

\(^{33}\) Quekett (n 6) 58-59.

\(^{34}\) Irish Free State (Agreement) Act 1922, sch 2, arts 11 and 12.


\(^{36}\) Miller (n 3) [135].
3 The effect of the Sewel Convention

While the present system of devolution in Northern Ireland, Scotland and Wales constitutes a species of ‘political federalism’ insofar as a matter of constitutional practice, under what is known as ‘the Sewel Convention’, the UK Government will normally not seek to give legal effect to policy cutting across transferred responsibilities without the consent of the Northern Ireland Assembly, there is no relevant restriction on the sovereignty of the Crown in the UK Parliament. In Scotland and Wales, the Sewel Convention has been given statutory expression. No statutory form has been given to this Convention in Northern Ireland. The Sewel Convention follows a convention applicable to the Northern Ireland Parliament under the Government of Ireland Act 1920 that ‘Westminster would legislate over transferred matter only with the consent […] of the Northern Ireland Government.’

The Convention arises from the statement of Lord Sewel during the passage of the Bill that became the Scotland Act 1998 that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Although Lord Sewel spoke only of Scotland, the Convention in its current form applies to all of the devolved legislatures:

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.


38 This summary of the effects of the Sewel Convention does not embrace the apparent extension of the Convention to matters affecting the competence of the Northern Ireland Assembly.


40 Hadfield (n 37) 81.


42 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales.
It may be observed that the second sentence of the Convention in its current form deals with legislation by the UK Parliament;\(^43\) it has no role at all, therefore, with respect to prerogative or other acts by the UK Government alone, nor does it have any role in relation to Parliamentary action short of legislation such as negative or affirmative resolution.

Northern Ireland Assembly Standing Order 42A deals with legislative consent motions\(^44\) and, in doing so, provides a definition of ‘devolution matter’:

In this order a “devolution matter” means—

(a) a transferred matter, other than a transferred matter which is ancillary to other provisions (whether in the Bill or previously enacted) dealing with excepted or reserved matters;

(b) a change to—

(i) the legislative competence of the Assembly;

(ii) the executive functions of any Minister;

(iii) the functions of any department.\(^45\)

The meaning given to ‘devolved matter’ by (10) (b) (i) to (iii) of Standing Order 42A sits ill with the meaning of ‘devolved’ set out in the first footnote of the 2013 Memorandum, which says ‘in the Northern Ireland context ['devolved' means] any matter which is not an excepted or reserved matter under Schedules 2 and 3 to the Northern Ireland Act [1998].’\(^46\) I do not think that Northern Ireland Assembly Standing Order 42A can be relied on to extend the meaning of what would otherwise not be a devolved matter. If one relies on the Sewel Convention, one relies on the meaning of the terms given in and by the Sewel Convention, and not on a meaning given by a document (here, Northern Ireland Assembly Standing Order 42A) external to that Convention.

While it is not entirely clear, it seems that Standing Order 42A (and the expanded meaning of ‘devolved matter’) may originate in the Cabinet Office’s Devolution Guidance Note 8 Post Devolution Legislation Affecting

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\(^{43}\) ibid.

\(^{44}\) A legislative consent motion is the device, contemplated by paragraph (14) of the 2013 Memorandum (n 42) by which the relevant consent of the devolved legislature is conveyed.


\(^{46}\) The 2013 Memorandum (n 42) n 1.
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Northern Ireland (‘DGN8’)**\(^{47}\)** (which appears to pre-date the 2013 memorandum**\(^{48}\))** I confess to finding DGN8 a strange document. Paragraph 4 covers how legislative plans should be made**\(^{49}\)** and divides Bills into three categories. The third category is a Bill which ‘contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted matters) or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of Northern Ireland Ministers or departments’. Only Bills in this third category are said to be subject to the convention on seeking the agreement of the Northern Ireland Assembly. Nowhere in DGN8 is it indicated that there is an explicit extension to the Memorandum; DGN8 is designed as a guide to the implementation of the Memorandum yet paragraph 5 of DGN8 seems utterly at variance with the first footnote in the Memorandum and any conventional approach to the meaning of ‘devolved matter’.**\(^{52}\)**

Reading paragraph 4.I–4.III of DGN8 together tends to reinforce the view that: (1) DGN8 did not intend to expand the meaning of ‘devolved matter’; and (2) a matter which is excepted or reserved does not fall within the meaning of that term. In paragraph 4.II of DGN8 are Bills which have ‘provisions which apply to Northern Ireland which deal with reserved or excepted matters but which will impinge on transferred matters (i.e. are for non-devolved purposes, such as provisions about human genetics which will require action from health service organisations)’. This type of Bill is described in the guidance note as subject to the convention. If it is assumed that repealing the European Communities Act 1972 would change the legislative competence of the Northern Ireland Assembly by removing one of the limits to that competence – i.e that contained in s 6 (2)(d) of the NIA 1998**\(^{54}\)** – then that would appear to fall within para 10(b)(i) of Standing Order 42A but it would fall outside the definition of ‘devolved’ in the first footnote to the 2013 Memorandum.**\(^{55}\)**


**\(^{48}\)** It refers, for example, to the December 2001 version of the memorandum.

**\(^{49}\)** DGN8 (n 47) para 4 (this paragraph falls under the title ‘Long Term legislative plans’ – a title itself that does not suggest that questions of definition are in play).

**\(^{50}\)** ibid para 4.III (emphasis added).

**\(^{51}\)** ibid para 5.

**\(^{52}\)** ibid; cf the 2013 Memorandum (n 42) n 1.

**\(^{53}\)** DGN8 (n 47) para 6.

**\(^{54}\)** In fact, while repeal of the European Communities Act 1972 would have a profound underlying effect on what the Northern Ireland Assembly could properly legislate about, the formal relevant alteration of competence here would come from the repeal of s 6 (2)(d) of the NIA 1998 itself.

**\(^{55}\)** Northern Ireland Assembly (n 45) Standing Order 42A, para 10(b)(i); cf the 2013 Memorandum (n 42) n 1.
In addition to the general observation above that the definition in the Memorandum is what matters, there are other powerful indicators that matters relating to EU membership are not (either in the 2013 Memorandum or elsewhere) to be regarded as devolved matters. Firstly, the 2013 Memorandum relevantly provides that: ‘As a matter of law, international relations and relations with the European Union remain the responsibility of the United Kingdom Government and the UK Parliament.’

This passage is, I think, inconsistent with any reading of the 2013 Memorandum that, relying on para 14 alone, would require the consent of devolved legislatures before withdrawal from the EU could validly occur. I observe, however, that the Memorandum goes on to provide that the devolved administrations are to be involved ‘as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters.’ Quite apart from any issue about requiring consent of the Northern Ireland Assembly, there is strong support within the 2013 Memorandum for the entitlement of devolved administrations to be concretely involved in discussions about the nature of future relations with the EU.

In the NIA 1998, relations with the EU are an excepted matter. As the Northern Ireland Assembly cannot legislate directly in this field, it does not seem that relations with the EU can, with any respect for the normal meaning of words, be regarded as a devolved matter. Further, and quite separately from the ‘excepted matter’ limitation, the European Communities Act 1972 is an ‘entrenched enactment’ which the Northern Ireland Assembly cannot modify, subject to certain, at present unimportant, exceptions. The separate effects of the relevant provisions of the NIA 1998 and, a fortiori, their combined effect point to legislative territory upon which the Northern Ireland Assembly cannot enter.

Even if, contrary to the analysis above, the relations between the UK and the EU were to be properly regarded as a devolved matter, this status would not prevent the UK Parliament from repealing the European Communities Act 1972. As a matter of elementary constitutional law, a convention, even one framed in clear and unambiguous terms (and I explore the text of the 2013 Memorandum below) cannot operate to deprive a statute of its intended effect. Thus, the operation of s 5(6) of the NIA 1998 cannot, for example, be affected by the terms of the 2013 Memorandum. The relevant

56 The 2013 Memorandum (n 42) para 18.
57 ibid para 20.
59 ibid s 6(2)(b), sch 2, para 3. The Assembly can (cf ss 6 (2)(b) and 8(a)) with the consent of the Secretary of State enact a provision which deals with an excepted matter and is ancillary to other provisions dealing with reserved or transferred matters.
60 Northern Ireland Act 1998, s 7(1)(a) and 7(2).
terms of the 2013 Memorandum are inapt to create any reliably enforceable expectation.\textsuperscript{62} Indeed, a statement about present and future behaviour is not a rule.\textsuperscript{63} Even if it were a rule, the use of the textual escape hatch ‘normally’ would render it unenforceable against a UK Government that could plausibly suggest that circumstances were not ‘normal’.

By way of comparison, I draw attention to the position in Scotland about the Sewel convention. The Scotland Act 1998 presently provides: ‘But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’\textsuperscript{64} This provision has unusual content for an Act of Parliament insofar as it merely replicates the language of an administrative understanding about what is expected to happen rather than, as is normal for a legislative provision, making positive (or negative) provision for something to happen (or not happen). Section 28(8) of the Scotland Act 1998 does not prevent the UK Parliament from legislating with respect to devolved matters; it merely ‘recognises’ that Parliament will ‘normally’ act in a particular way, but Parliament is not required by s 28(8) of the Scotland Act 1998 to act in that way. Indeed, the preceding subsection expressly provides that: ‘this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.’\textsuperscript{65} Thus, the legislative codification of the Sewel Convention does not diminish the power of the UK Parliament to make laws for Scotland; it merely adds a predictive expression about how it is expected to work in practice in normal circumstances.\textsuperscript{66} In any event, international relations including relations with the EU are a reserved matter.\textsuperscript{67} It follows that even if the statutory embodiment of the Sewel Convention were (contrary to any sober analysis of its text) to be taken to have the effect of restraining the UK Parliament from legislating without the consent of the Scottish Parliament with respect to devolved matters, this would not prevent the UK Parliament from repealing (or amending) the European Communities Act 1972 because that 1972 Act falls within the definition of a reserved matter in the Scotland Act 1998.\textsuperscript{68} ‘There is also a standing order of the Scottish Parliament very similar to Standing Order 42A of the Northern Ireland Assembly.’\textsuperscript{69} But

\textsuperscript{62} The 2013 Memorandum (n 42) para 14.
\textsuperscript{63} ibid para 14, second sentence.
\textsuperscript{64} Scotland Act 1998, s 28(8), which was inserted by virtue of s 2 of the Scotland Act 2016 under the heading ‘the Sewel Convention’.
\textsuperscript{65} Scotland Act 1998, s 28(7).
\textsuperscript{66} ibid ss 28(7) and 28(8).
\textsuperscript{67} ibid sch 1, para 7.
\textsuperscript{68} ibid s 28(8) and sch 1, para 7.
whatever the use of the term ‘Sewel convention’ means in that statutory
context in Scotland, inevitably, I think, the term ‘devolved matter’ must take
its meaning from the 2013 Memorandum rather than from any standing
order. 70

An example of the operation of the Sewel Convention as respects Northern
Ireland is the operation of the National Crime Agency in Northern Ireland.
Although a key element in UK Government policy on combating organised
crime, the National Crime Agency provisions of the Crime and Courts
Act 2013 were not extended to Northern Ireland until a draft order for
their extension had been approved by the Northern Ireland Assembly on
3 February 2015, 71 Parliament could simply have extended the 2013 Act to
Northern Ireland as a matter of elementary constitutional law but it was
considered politically proper not to do so until consent had been obtained.
It is, however, significant that provisions of the 2013 Act dealing with
Northern Ireland were enacted without the consent of the Northern Ireland
Assembly – consent was sought and obtained only for their coming into
effect.

In considering the effect of the Sewel Convention, the starting point must
be to acknowledge that the UK is not a federal state. Even though I will
suggest that under its present system of devolution it can often operate
politically in an apparently federal manner, the UK does not have a federal
constitution and there is no area of national or local policy in which
Parliamentary sovereignty is restricted by the exclusive and competing
competence of any region of the UK. An attempt in the references to the
Court from Northern Ireland concerning the Northern Irish cases of
Re McCord and Re Agnew to render the Sewel Convention legally enforceable
failed in Miller. 72 Thus, the Court concluded that: ‘[t]he Sewel Convention
has an important role in facilitating harmonious relationships between the
UK Parliament and the devolved legislatures. But the policing of its scope
and the manner of its operation does not lie within the constitutional remit
of the judiciary, which is to protect the rule of law.’ 73 Yes, but. Interpreting
legislation is centrally ‘within the constitutional remit of the judiciary’ and

70 Importantly, during the passage of what became the Scotland Act 2016, the Advocate Gen-
eral for Scotland confirmed that the approach of the UK Government to the convention
was to prefer the 2013 Memorandum to any apparent extension in Devolution Guidance
Note 10 (Post–Devolution Primary Legislation affecting Scotland (the Scottish equivalent
of DGN8 (n 47))). See Devolution Guidance Notice 10: Post-Devolution Legislation
Affecting Scotland (UK Cabinet Office) <https://www.gov.uk/government/uploads/sys-
accessed 31 October 2017.
71 See HL Deb 9 February 2015, vol 592, col 25WS (Secretary of State for the Home
Department, Theresa May MP).
72 Miller (n 3).
73 ibid [151].
if there were to be litigation about the meaning of the expression ‘devolved matters’ in s 107 (6) of the Government of Wales Act 2006 and s 28 (8) of the Scotland Act 1998 it is difficult to see how a Court before which the issue properly came could decline to say what these words meant.

Perhaps paradoxically, the giving of statutory form to the Sewel Convention as respects Scotland and Wales permits the core of that Convention to be cast as a restriction on the activity of the UK Parliament, and, thus, is contrary to art 9 of the Bill of Rights and ineffective accordingly. The (non-statutory) Sewel Convention does not contain a restriction on the activity of the UK Parliament; it contains a restriction on the activity of the UK Government. Indeed, the non-statutory Convention expressly provides: ‘The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power.’

More tricky, though, is the use of ‘normally’ in s 28(8) of the Scotland Act 1998 and s 107 (6) of the Government of Wales Act 2006. The brief conclusion of the Court in Miller with respect to the Sewel Convention does not discuss authority but it is not implausible here to see the hand of Lord Kerr who, as Kerr J (as his Lordship then was), had occasion to consider the use of ‘normally’ in a provision of the non-statutory Northern Ireland Ministerial Code. In Re De Brun, the Northern Ireland Health and Education Ministers challenged the refusal by the First Minister to nominate them to attend relevant meetings of the North-South Ministerial Council. According to Kerr J:

> the words of the [relevant] paragraph [of the Ministerial Code] are plain. The Minister with executive responsibility is normally to be nominated. It is clear that there may be a departure from the norm. There is nothing in the paragraph which compels the First Minister and the deputy First Minister

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74 ibid [145].
75 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (CM 5240, December 2001), para 13; the 2013 Memorandum (n 42) para 14.
76 As noted above (n 64), subsection (8) was inserted into s 28 of the Scotland Act 1998 by s 2 of the Scotland Act 2016.
77 Subsection (6) was inserted into the Government of Wales Act 2006 by s 2 of the Wales Act 2017.
78 Miller (n 3).
to appoint the Minister with executive responsibility for the areas to be considered on every occasion. On the contrary it is clearly recognised that exceptions to this normal position may occur.\footnote{ibid.}

Although the argument in \textit{Re De Brun} based on an asserted substantive legitimate expectation was rejected by Kerr J, he went on to explain that:

\begin{quote}
‘the most that could be demanded of the decision-maker in those circumstances is that he should have regard to what was stated to be the normal course and to have some reason for departing from it. There is nothing in the present case to indicate that the First Minister did not have regard to the undertaking contained in the Code and he has explained why he decided not to nominate the applicants.’
\end{quote}

On appeal by the First Minister, the Court of Appeal in Northern Ireland did not engage with the larger question of whether the Ministerial Code had to be complied with but contented itself with a short analysis of the text of para 5.1 of the Ministerial Code and, in doing, approved the conclusions of Kerr J:

\begin{quote}
We agree with the judge’s conclusion that the terms of paragraph 5.1 of the Ministerial Code, by using the word “normally”, carry the clear implication that it is not obligatory to nominate the Minister responsible for the topic to be discussed.\footnote{Re De Brun [2001] NICA 43 (Carswell LCJ).}
\end{quote}

A claim based on the Sewel Convention in its non-statutory form would be even weaker than one based on provisions of the non-statutory Ministerial Code. The claim in \textit{Re De Brun} fell down on the slipperiness of ‘normally’ but a claim based on the 2013 Memorandum would have to confront, additionally, that document’s own insistence that it cannot give rise to legal obligations. In this respect, the 2013 Memorandum could not be clearer: ‘[t]his Memorandum is a statement of political intent, and should not be

\footnote{ibid. The Applicants succeeded on the ground that the First Minister’s discretion had been vitiated by a collateral purpose.}
interpreted as a binding agreement. It does not create legal obligations between the parties.84

4 Conclusion

That the Sewel Convention is not justiciable (or, at least, not practically justiciable), does not detract from its political and constitutional significance. It does (as the National Crime Agency example above shows) act materially on the behaviour of the UK Government, and it can be deployed in our political constitution as a factor of some weight. For Scotland and Wales, the legislative codification of the Sewel Convention is, as now glossed by the Court in Miller, almost entirely devoid of legal – as opposed to political – effect.85 This gloss, a gloss that cannot be criticised for interpretive flights of fancy, raises an awkward question about the purpose of a legislative provision that lacks normative effect. Such a lack of normative effect – dismaying to the Cartesian – prompts a look across the English Channel.

In two cases the Conseil Constitutionnel has regarded French legislation as unconstitutional because the law rather than do something wrong does not do anything meaningful at all. Relying on art 6 of the 1789 Déclaration des droits de l’homme et du citoyen, the Conseil considers that the role of the law is to set out rules and a law should, consequently, have normative weight (la loi a pour vocation d’énoncer des règles et doit par suite être revêtue d’une portée normative).86 In Decision Number 2012 – 647 DC of 28 February 2012, the Conseil Constitutionnel held that the law on the repression of denials of genocides recognised by the law was unconstitutional. In the official commentary on Decision 2012 – 647, the Conseil observes that in relation to laws that fall foul of art 6 of the 1789 Declaration it has sometimes held that constitutionality cannot be usefully challenged or that these laws do not cause any measurable damage. On one earlier occasion, art 6 had given rise to a finding of unconstitutionality in Decision N 2005-512 DC on the law on the future of schools, in which the Conseil found that arts 12 and 7 of

84 The 2013 Memorandum (n 42) para 2. In the 2001 version of the memorandum, this sentence was followed by ‘It is intended to be binding in honour only’. The omission of this sentence does not detract from the force of the disclaimer in para 2 of the 2013 Memorandum but it does prompt reflection about the decline in honour as a matter of political consequence. For the 2001 version of the 2013 Memorandum, see: Memorandum of Understanding and Supplementary Agreements (CM 5240, 2001) <http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf> accessed 31 October 2017.

85 Miller (n 3) [151].

86 Commentaire Décision n 2012-647 DC du 28 février 2012 (Constitutional Council, 28 February 2012) <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2012647DCccc_647dc.pdf> accessed 31 October 2017, 10 (‘the law is intended to lay down rules and must therefore have normative weight’).
that law were ‘manifestement dépourvues de toute portée normative’ and, accordingly, unconstitutional.\textsuperscript{87}

Northern Ireland has not needed the Sewel Convention to be given statutory form in order for it to work politically. Now that the Court has exposed the lack of legal usefulness in the statutory expression given to it for Scotland and for Wales in \textit{Miller}, it may be time to look at the desirability not of importing a rule of French constitutional law, but of acting practically to ensure that enactments serve a purpose other than political declamation. While we have the assurance of the very highest authority that ‘the British Constitution has always been puzzling and always will be’,\textsuperscript{88} there is, surely, every reason to strive for, and preserve, a distinction between the merely puzzling and the clearly pointless.


\textsuperscript{88} Peter Hennesy, \textit{The Hidden Wiring unearthing the British Constitution} (Gollancz 1995) 33 (quoting HM Queen Elizabeth II).