Statutory Conventions: Conceptual Confusion or Sound Constitutional Development? [*]

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Introduction

Commentary on the recent decision of the Supreme Court in *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* ("*Miller*") has rightly focussed on the majority's ruling that the UK government cannot exit the European Union using the royal prerogative and without passing an Act of Parliament.[1] The constitutional importance of this element of the decision, however, has overshadowed another significant aspect of the judgment. The Court held that the UK Parliament is under no *legal* obligation to seek the consent of the Scottish Parliament before passing legislation to leave the European Union. The Court's reasoning on this point was remarkably unclear and underdeveloped, particularly in comparison with its commendably clear treatment of the main questions concerning the prerogative power.

In this paper, we critically assess this part of the Court's ruling and explain its implications for the constitutional arrangements of the United Kingdom.[2] We are not interested in considering the constitutional role of the devolved nations in the process of exiting the European Union, nor in the applicability of the Sewel convention to this issue. Our exclusive aim is to scrutinise the arguments offered by the Court to reach its

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[1] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5.

[2] Paul Daly, in the special issue on Brexit published by this journal, touches on the 'puzzling' nature of the majority's reasoning on this point. See Paul Daly, 'Miller: Legal and Political Fault Lines' [2017] Public Law 73, 90. Mark Elliott, while criticising the majority's approach to the question of conventions generally, says that the analysis as to the effect of section 28(8) of the Scotland Act was sound. Mark Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76 The Cambridge Law Journal 257, 280. The argument in this paper was originally, briefly outlined in Eugenio Velasco and Conor Crummey, "The Reading of Section 28(8) of the Scotland Act 1998 as a Political Convention in *Miller*", UK Constitutional Law Blog (3rd Feb 2017), available at https://ukconstitutionallaw.org/. For a response to this post, see Joe Atkinson, "Parliamentary Intent and the Sewel Convention as a Legislatively Entrenched Political Convention", UK Constitutional Law Blog (10th Feb 2017) (available at https://ukconstitutionallaw.org/)). Here we aim to examine this element of the judgment in greater detail than in the above sources.

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conclusion that section 28(8) of the Scotland Act 1998 (added by the Scotland Act 2016) is not a legal rule, but rather a political norm.

The Legal Background

The Sewel Convention embodies a political agreement between the UK Parliament and the Scottish Parliament. It originated in a parliamentary debate on what became the Scotland Act 1998 in which Lord Sewel, then Parliamentary Under-Secretary of State for Scotland, stated: "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament".[3] This commitment was later embodied in a Memorandum of Understanding between the UK government and the devolved institutions, originally published in 2001 and, subsequently, in the UK Government's *Devolution Guidance Note 10 Post–Devolution Primary Legislation affecting Scotland*.

The incorporation of the wording of the Sewel Convention in the Scotland Act 2016, which added section 28(8) of the Scotland Act 1998, came about as a result of the report of the Smith Commission, which agreed that "The Sewel Convention will be put on a statutory footing".[4] This agreement was endorsed by the UK Government.[5] Section 28(8) of the Scotland Act 1998 now reads: "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".

The Judgment of the Court in *Miller*

In *Miller*, the Court was asked whether the Sewel Convention required that the consent of the devolved legislatures be given before any legislation activating Article 50(2) of the Treaty of the European Union be enacted. In answering this question, the Court engaged with an analysis of the Sewel Convention. As noted above, in the case of

[3] H.L. Deb 21 July 1998, vol 592, col 791.
[4] *Report of the Smith Commission for the future devolution of powers to the Scottish Parliament* November 2014, para 22.
[5] *Scotland in the United Kingdom: An enduring settlement*, January 2015, Cm 8990.

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Scotland, the constitutional picture was complicated by the statutory recognition of the Sewel Convention.

The Court, then, was required to decide whether, in the case of Scotland, section 28(8) of the Scotland Act elevated the requirement of consent from the status of *political convention* to that of a *legal rule*. If it remained a political convention only, then the Court could not rule on the scope or operation of such a convention. If, on the contrary, section 28(8) of the Scotland Act created a legal requirement that the UK Parliament not normally legislate on devolved matters without the consent of the Scottish legislature, then it would be within the competence of the Court to assess the content and scope of that requirement.

The majority in *Miller* noted, first, that the Sewel Convention is a political convention, and, secondly, that it does not fall within the competence of the Court to decide on the scope and operation of political conventions. The courts are "neither the parents nor the guardians of political conventions; they are merely observers".[6] The majority relied here on a detailed consideration of conventions undertaken by the Canadian Supreme Court,[7] the failure before the Privy Council of an attempt to enforce a political convention,[8] and Colin Munro's influential academic treatment of the subject, in which he states that conventions cannot be the subject of court proceedings.[9]

We do not dispute either of these two initial findings here, although there is certainly an argument to be made that the Sewel Convention should be afforded greater political or legal weight given its constitutional implications. Problems arise, however, with the next step in the Court's reasoning. The majority went on to hold that despite its incorporation into the Scotland Act 1998, the Sewel Convention remained a political convention only. In other words, for the Court, section 28(8) of the Scotland Act was not a legal rule, but merely the acknowledgment of a convention in statutory form, and so compliance with section 28(8) was not a matter in which the Court could intervene. Paragraph 148 contains the full reasoning of the Court, and merits citing in full:

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[6] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [146].
[7] *Re: Resolution to amend the Constitution* (1981) 1 S.C.R. 753 (C).
[8] *Madzimbamuto v Lardner-Burke and Another (Southern Rhodesia)* [1968] U.K.P.C. 18.
[9] C. Munro, "Laws and Conventions Distinguished" (1975) 91 *Law Quarterly Review* 218.

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> As the Advocate General submitted, by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.[10]

Through this reasoning, the Court muddied the constitutional waters by throwing doubt on traditional understandings concerning the distinction between political conventions and legal rules. The reasoning that the Court employs in distinguishing between laws and conventions is out of step with most academic commentary and jurisprudence on the subject, including those cited by the Court in the judgment.

In particular, we highlight and interrogate four conclusions that can be drawn from the Court's cursory consideration of this point. These are:

(i) That a political convention does not cease being a political convention even if it is recognised in a validly-enacted statute;

(ii) That (i) obtains because of the *nature of the content* of a political convention, regardless of formal legal enactment procedures;

(iii) That Parliament did not intend that a legislative provision should create a justiciable legal rule, but rather should remain a political convention; and

(iv) That the words 'it is recognised' and 'will not normally' support (iii).

In what follows, we consider the implications of each of these these findings (or conclusions) in turn. Before proceeding, however, it is important to restate that we do not contest the soundness of the Court's holding. In other words, we do not wish to dispute the conclusion that Parliament did not intend to vest section 28(8) with the force of law. In fact, the parliamentary record offers ample evidence to the effect that the legislative intent behind this statutory provision was, in the words of the Political

[10] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [148].

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and Constitutional Reform Committee of the House of Commons, "'legally vacuous', *i.e.* merely declarative and without statutory force".[11] Our focus, therefore, is limited to analysing the argumentative path that the Court offered to reach it. This path, it must be noted, did not involve recourse to the parliamentary record, which courts have a constitutional duty to avoid save under certain circumstances.

The concern underlying our analysis is best captured by the House of Lord's Select Committee on the Constitution which, when analysing the statutory provision now at issue, was of the opinion that it "risks creating a route through which the courts might be drawn inappropriately into an area that has previously been within the jurisdiction of Parliament alone, namely its competence to make law".12 It was this same apprehension regarding the peril of obfuscating the constitutional boundaries between the legislature and the judiciary which led the Joint Committee on Conventions to counsel against codifying parliamentary conventions, since "It might create a need for adjudication, and the presence of an adjudicator, whether the courts or some new body, is incompatible with parliamentary sovereignty".[13]

Conclusion 1: Statutory Conventions?

The first conclusion reached by the majority in *Miller* is that a political convention may not obtain legal character even if it is enumerated in a validly enacted piece of legislation. This finding, we argue, is radical. In holding that a political convention's imperviousness to judicial scrutiny survives its codification in a statute, the majority in effect created a new constitutional entity, one which, despite its formal legal character, does not carry the force of law. We will use the expression "statutory convention" to refer to a legislative provision that is taken to carry no substantive legal force despite its formal legal pedigree. The majority's conceptualisation of statutory conventions, we argue, goes against the grain of academic commentary on the distinction between legal rules and political conventions. In its efforts to adopt a sober, non-intrusive approach

[11] Constitutional implications of the Government's draft Scotland clauses, Ninth Report of Session 2014-15, HC 1022 [58].
[12] Scotland Bill, 6th Report of Session 2015-16, HL Paper 59 [39].
[13] Conventions of the UK Parliament, Report of Session 2005-06, Volume I, HL Paper 265-I, HC 1212-I, [279].

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to the case at hand, the majority were unwittingly inventive, creating a new constitutional category.

Definitive criteria for distinguishing between legal rules and political conventions have proved slippery. Dicey, for instance, thought that the distinction lay precisely in the unenforceability of political conventions.[14] He says that "*since* [conventions] cannot be enforced by any Court of law, [they] have no claim to be considered law", and should properly understood as "understandings, or practices, which, though commonly observed, are not laws in any true sense of the word at all".[15] Rather, they provide a moral backdrop within which legal rules are to be understood. Such a backdrop, Dicey believed, would ensure that Parliament would "in the long run give effect to the will of that power which in modern England is the true political sovereign of the state – the majority of the electors, or (to use popular though not quite accurate language) the nation".[16] He points to standards surrounding the exercise of the royal prerogative,[17] as well as the dissolution of parliament,[18] as examples of constitutional conventions. The problem with this account is that it does not offer much of a definition of conventions at all. As a definitional exercise, Dicey's reasoning is circular. What makes certain norms unenforceable? Their conventional nature. What makes them conventional? Their unenforceability.

This purposive account and these paradigmatic examples do, however, form the basis of more sophisticated academic treatments of the distinction. Peter Morton considers the *enactedness* of legal norms, and the certainty that comes with such enactedness, to be fundamental to the distinction. He states:

> The rules employed by the judges have a relatively high degree of certainty. Though much has been made of the 'open texture' of legal rules, the process of legal incorporation is designed to make the rules as certain as can be. The judicial declaration of the law is an attempt to articulate precisely the rules

[14] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Liberty/Classics 1982) pp. 280-281.
[15] Dicey, *Introduction to the Study of the Law of the Constitution* (1982), pp. 280-281 [emphasis added].
[16] Dicey, *Introduction to the Study of the Law of the Constitution* (1982), p 352.
[17] Dicey, *Introduction to the Study of the Law of the Constitution* (1982), p. 281.
[18] Dicey, *Introduction to the Study of the Law of the Constitution* (1982), p. 287.

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> which justify decisions. Where there is uncertainty it is the job of the judges to remove it.[19]

By contrast:

> Lack of certainty, lack of precision, is an obvious feature of many informally created norms… And this is due in large part to the fact that there is no agency which can confer upon them such certainty and precision, and no rule of recognition against which the status of a particular norm can be tested.[20]

Section 28(8) of the Scotland Act is certainly worded in somewhat uncertain language. It is likely that this is what was meant by the Court when they relied on the words "it is recognised" and "will not normally". For Morton, however, the *institutionalisation* of legal rules is essential to their character: "In order to verify the truth of a proposition that a particular law exists – or is valid – we would have to see whether it had been, and still is, incorporated as a clear rule in that system."[21]

There is a tension here. Morton relies on both content (a clear rule) and form (incorporated into the system). The question then becomes: which is more important, the clarity of the rule, or its incorporation into the system? Consider again Morton's assertion that the lack of certainty surrounding unenacted norms is "*due in large part* to the fact that there is no agency which can confer upon them such certainty and precision, no rule of recognition against which the status of a particular norm can be tested". The uncertainty surrounding a convention, for Morton, is a result of its unenactedness. Uncertainty is a *symptom* of non-legality, not a necessary and sufficient condition of such. We can extrapolate from this reading that uncertain wording is not proof of the conventional nature of a validly enacted statutory provision, and indeed may very well not be enough to overcome the formal pedigree of such a provision. At the very least, this tension between content and form is something that the Court in *Miller* needed to explore. Section 28(8) is not worded in clear language, but it was validly enacted through the legislative process, and so is possessed of the institutional character traditionally associated with laws.

Other writers have pointed out that conventions can be 'codified' while remaining non-legal. David Feldman, building on the work of Morton, points out that

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[19] P.A. Morton, "Conventions of the British Constitution" [1991] *Holdsworth Law Review* 114, 134-135.
[20] Morton, "Conventions of the British Constitution" [1991] *Holdsworth Law Review* 114, 135.
[21] Morton, "Conventions of the British Constitution" [1991] *Holdsworth Law Review* 114, 138.

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such written conventions exist in the context of devolution, where negotiations between Westminster and the devolved governments led to fairly detailed agreements.[22] The Memorandum of Understanding signed after the articulation of the Sewel Convention could be considered just such a written convention. Other writers have pointed to the Ministerial Code or the Civil Service Code as examples.[23] Such "concordats" exist throughout the legal system, and many embody constitutional principles.[24] These written conventions are generally thought to embody some space between traditional, "verbal" conventions, and legislation. They are still conventional only, but have some additional declaratory effect. Should we then place Section 28(8) in the same category as these concordats? This would be rather counter-intuitive, given that section 28(8), unlike these concordats, has gone through the trial of Parliament. It is possessed of an institutional character that the Ministerial Code, for example, lacks. This formal distinction is of great importance. As McHarg points out, the writtenness of these concordats is unconnected to their bindingness; the binding force of the convention predates its codification.[25] Legal rules are generally thought of differently. While we may have moral reasons to comply with the behaviour mandated by law before the law is enacted, there is something special about its enactedness that provides reasons for action. Its status *qua* legislation gives it a special character. The idea that a given piece of legislation does not give what we might call a "legislative reason" for action is an unusual one. The formal process of *legislative codification* is important to the distinction between laws and conventions, even if it does not tell the whole story. We have at least a prima facie reason for considering section 28(8) as representing a legal rule.

The next question to ask is how definitive this formal distinction is. Can a validly-enacted statutory provision ever be considered not to carry the force of law? Feldman draws attention to several types of statutory provision that he claims are "non-

[22] D. Feldman, "Constitutional Conventions" in M. Qvortrup (ed), *The British Constitution: Continuity and Change* (London: Hart Publishing, 2013), p. 100.
[23] A. McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 *Modern Law Review* 853, 857. It should be noted that one of McHarg's examples of a convention – the Civil Service Code – has since the publication of her article been enshrined in a binding legal rule, as a result of section 5 of the Constitutional Reform and Governance Act 2010, which puts on statutory footing the requirement of the Minister for the Civil Service to publish the Civil Service Code.
[24] R. Rawlings, 'Concordats of the Constitution' (2000) 116 *Law Quarterly Review* 257.
[25] McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 *Modern Law Review* 853, 857.

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law-bearing". [26] Statutory provisions can be non-law-bearing if they are instead "promissory", "declaratory", "aspirational", "or rhetorical".[27] We will not engage in a full analysis of all of Feldman's criteria here. We focus only on the overlapping categories of "promissory" and "declaratory" provisions, since Feldman explicitly claims that section 28(8) of the Scotland carries a combination of declaratory and promissory effect. [28] It is designed, he claims, to formalise a particularly significant political agreement. The effect of formalisation in statute, in this case, is to give "psychological gravitas" rather than legal effect to "political or moral" commitments.[29] Section 28(8), under this understanding, is no different to the Memorandum of Understanding that preceded it.

Just as with Dicey's account of conventions, Feldman's account of the *purpose* of the phenomenon under investigation does not provide an account of the criteria that identify the phenomenon. After all, is part of the purpose of any piece of legislation not to give added psychological weight to political or moral commitments? It is generally accepted that one of the key features of a legal system is that the members of the political community in question regard deviation from legal rules as reason for legitimate criticism.[30] Arguably, the way that legislation performs this conjuring trick is through providing specifically *legal* reasons for action, to supplement moral or political reasons we already have.[31] That is, the psychological effect of legislation exists *because of* the legal force of legislation. For example, we might have moral reasons to redistribute some of our wealth through taxation. Taxation laws thus provide us with legal reasons which make us (further) psychologically predisposed to comply with these moral reasons. Whether one believes that the psychological effect produced by legislation is because of or independent to its specifically legal character, it is clear that law-bearing legislation also carries the psychological effect that Feldman associated with non-law-bearing legislation. The claim that certain legislative provisions are non-law-bearing then, cannot succeed simply by showing that the legislation was designed to have some

[26] D. Feldman, "Legislation Which Bears No Law"' (2016) 37 *Statute Law Review* 212.
[27] Feldman, "Legislation Which Bears No Law"' (2016) 37 *Statute Law Review* 212, 214.
[28] Feldman, "Legislation Which Bears No Law"' (2016) 37 *Statute Law Review* 212, 219.
[29] Feldman, "Legislation Which Bears No Law" (2016) 37 *Statute Law Review* 212, 216.
[30] H.L.A. Hart, *The Concept of Law*, 3rd edition (Oxford: Oxford University Press, 2012).
[31] See generally Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev ed, repr, Clarendon Press, 2001).

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psychological effect. It must show that the provision was designed *only* to have this psychological effect.

If statutory conventions are to be accepted as a legitimate constitutional category, what criteria should we set out for their identification? It should be clear that the standard for demonstrating that a statutory provision is non-law-bearing should be extremely high. It should not be open to the parties to a case to claim, except in the most exceptional of circumstances, that a statutory provision does not carry the force of law. A prevalence of statutory conventions would devalue the status of Acts of Parliament. Concordats of the Constitution already exist to endow political conventions with a psychological effect. There seems to us little reason for using legislation to achieve such a purpose, and we remain unconvinced that there is a constitutional space to occupy between concordats, which give "psychological effect" to conventions, and legislation, which gives legal effect. The presumption should be that validly-enacted legislation carries legal effect, and the onus should be on the party claiming otherwise to demonstrate why this is not the case. This presumption entails two sub-principles of interpretation.

First, appropriate weight should be given to the formal properties of legislation. Legislative provisions are qualitatively different to other norms that have not been subjected to the rigour of the parliamentary arena. Any analysis of the content of the provision should be weighted against the formal quality of the provision qua legislation. The courts must not shy away from the tension between form and content in the identification of statutory conventions.

Secondly, and relatedly, that a legislative provision contains the same content as a norm that previously enjoyed conventional force only is not by itself a reason for the legislative provision enjoying conventional force only. It is clear that constitutional conventions *can* be placed on statutory footing. Section 24 of the Constitutional Reform and Governance Act 2010, for instance, provides that a treaty is not to be ratified unless it is laid before Parliament. Any treaty placed before Parliament can be ratified if neither House of Parliament resolves that it should not be ratified within 21 days of it being laid before Parliament.[32] This places on statutory footing the

[32] Constitutional Reform and Governance Act 2010, section 24(c).

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constitutional convention previously embodied in the "Ponsonby Rule".[33] While this issue has not come before the courts, we can infer that a governmental attempt to ratify a treaty without laying it before Parliament would be justiciable, and it would be open to the Court to hold that the treaty was enacted illegally. Few would argue that this provision of the Constitutional Reform and Governance Act is "non-law bearing" because it mimics the content of a pre-existing convention. In fact, that Parliament went to the effort of embodying this requirement in legislation could be seen as evidence in favour of the proposition that the Parliament intended the duty to become a legal one. This could of course be counteracted by further facts about the provision. If the provision expressly states that its content is to remain conventional, for instance, then that would count in favour of the conclusion that its content is conventional. We can, however, make the weak claim that the fact that a statutory provision contains content that is identical to a pre-existing convention does not *by itself* count in favour of the conclusion that the statutory provision enjoys only conventional force.

It is clear that the treatment of section 28(8) by the majority in *Miller* closely resembles Feldman's account of non-law-bearing legislation. Both the Scotland Act 1998 and the Scotland Act 2016, which inserted section 28(8) into the 1998 Act, enjoy the character of primary legislation by virtue of their passage through Parliament. In holding that section 28(8), despite these formal characteristics, carried no legal effect, the majority implicitly acknowledged the category of statutory conventions. The purpose of section 28(8), they said, was to "entrench" the Sewel Convention.[34] We can surmise from this that the Court viewed the constitutional landscape in the UK as a continuum, going from non-entrenched political conventions at one end to legislation at the other, with "concordats" of the Constitution and now statutorily entrenched conventions in between.

In the next section, we analyse the reasoning offered by the Court against the standard set out above. We argue (i) that the Court focused too heavily on the "nature of the content" of section 28(8), disregarding entirely its formal character as a validly-enacted statutory provision; (ii) that the Court began from the presumption that

[33] Arabella Lang, 'Parliament's Role in Ratifying Treaties' (House of Commons Library 2017) Briefing Paper 5855, 10.

[34] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [149].

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Parliament did not intend to create a legal rule, rather than the appropriate presumption that any statutory provision carries legal effect; and (iii) that their analysis of the wording of the section 28(8) in support of their position was underdeveloped.

Conclusion 2: "The Nature of the Content"

The conclusion that section 28(8) of the Scotland Act 1998 recognises a political convention that cannot "be interpreted, let alone enforced, by the courts", according to the Court, "follows from the nature of the content, and is acknowledged by the words ('it is recognised' and 'will not normally') [...]".[35] In this key passage, the Court offers two discrete reasons in support of its conclusion regarding the status of the statutory provision in question as a political convention: one refers to "the nature of the content" of section 28(8) while, the other, concerns the wording in which it is couched. In other words, the "nature of the content" refers to the conduct that is regulated by the rule, regardless of the wording used by the legislator, whereas the terminology employed does not refer directly to the conduct. The Court's reasoning on this point warrants a two-part analysis that scrutinises each of these reasons separately. In this part, we focus our attention exclusively on the first of these reasons. We will consider the second reason in the subsequent section.

The notion that the content of a validly enacted statutory provision may determine its status as a legal rule, in opposition to a political convention, is unorthodox in light of the conceptual analyses considered in the previous section. As we pointed out there, none of the myriad conceptions of constitutional conventions offered by scholars take the material element of the norm – ie the *manner* in which the individual(s) to which the norm applies ought to behave – as a relevant aspect to consider for the purposes of assigning it either a political or a legal status. The Court's reasoning, unfortunately, does not make it abundantly clear what it is about the nature of the content of section 28(8) that strips it of its legal character. Nevertheless, it is possible to surmise a plausible explanation from the Court's earlier allusion to Article 9 of the Bill of Rights as "a further reason why the courts cannot adjudicate on the

[35] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [148].

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operation of this convention".[36] In what follows, we will, therefore, proceed from the reasonable assumption that the Court's decision to characterise section 28(8) as a political convention by virtue of the nature of its content derives from the fact that it seems to be in tension with parliamentary privilege. Specifically, we take the Court to mean that section 28(8) is in conflict with Article 9's prohibition on courts to "impeach or question" proceedings in Parliament.

While the proposition that Article 9 may prevent a rule contained in primary legislation from being enforced by the courts is not unprecedented in the United Kingdom, the conclusion that this fact makes the rule a political convention is novel. A particularly relevant precedent on this point is *Bradlaugh v Gossett*.[37] In this case, Charles Bradlaugh, an elected MP and atheist, had requested that he be allowed to forego the usual religious parliamentary oath, required by the Parliamentary Oaths Act 1866 in order to take his seat. This request was denied, and Bradlaugh was excluded from taking his seat when he refused to take the oath. He subsequently took legal action against the Sergeant-at-Arms of the House of Commons, who had been directed to remove him. Lord Coleridge CJ, acknowledging the tension that existed between the legal right provided to members in the statute and the principle of parliamentary privilege, came to the conclusion that the House of Commons is "the absolute judge of its own privileges".[38] Additionally, he noted that in such cases, "the remedy, if remedy it be, lies, not in actions in the courts of law [...] but by an appeal to the constituencies whom the House of Commons represents".[39]

Stephen J also came to the conclusion that the courts cannot control conformity with the statute law that has an impact on the internal proceedings of Parliament.[40] The enforcement of said statutory provisions, in his view, rested with the House.[41] Noting that there are relevant differences between the norm-applying activity that is carried out by the courts and by Parliament, he nevertheless suggests that "the effect of its privileges to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of

[36] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [145].
[37] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271.
[38] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 274.
[39] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 277.
[40] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 278.
[41] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 280-281.

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Parliament".[42] Even more significantly, Stephen J says that "If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible".[43] Stephen J ends his judgment with the following passage:

> In my opinion, the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologize for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their decision.[44]

Bradlaugh is significant to our analysis because the conclusion it reached regarding the unenforceability of certain statutes by the courts did not lead the court to deny their legal status. On the contrary, while admitting its lack of jurisdiction over certain matters covered by statute, the court goes to great lengths to point out their legal validity, as well as Parliament's responsibility to supervise their proper application. Erskine May also understands the exclusive cognisance of Parliament in the same terms:

> Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, [...] The principle holds good even where the procedure of a House or the rights of its Members or officers to take part in its proceedings depends on statute.[45]

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[42] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 285.
[43] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 285.
[44] *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 286.
[45] Erskine May, *A Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed, 2011, LexisNexis, p. 227.

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In its most recent report, the Joint Committee on Parliamentary Privilege is of the opinion that the ruling in *Bradlaugh* "holds true to this day and should do so in perpetuity.[46]

No doubt, the principle of parliamentary privilege is of fundamental importance for the harmonious constitutional relationship between Parliament and the courts. But maintaining this relationship does not require denying the legal status of a statutory provision duly enacted by Parliament. This point is not without practical consequences. For Parliament, for instance, the fact that a rule has been enshrined in a statute means that it cannot be overridden by a resolution of either House. A political convention, on the contrary, could be done away with through this means. In addition, the fact that a rule has been included in a statute engages the principle of the rule of law in a way that a political convention does not. Should Parliament decide not to follow a statutory provision that it is in charge of applying, this would entail a violation of the rule of law, regardless of whether a court is entitled to do anything about it. The consequences of viewing a statutory provision as a mere political convention, moreover, are even more delicate from the courts' perspective given recent developments in the constitutional landscape of the United Kingdom. It is in this context that the relevance of *Bradlaugh* can be seen most clearly.

The decision to characterise section 28(8) of the Scotland Act 1998 as a political convention outside of the courts' purview directly impacts the judicial pronouncements in *Jackson v Attorney General* made by several justices that fuelled many interesting debates envisaging a significant transformation of the principle of parliamentary sovereignty by the courts.[47] In that landmark ruling, Lord Steyn considered the possibility of Parliament deciding to "redistribute legislative power in different ways", citing as an example, that Parliament "for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords". In his view: "This would involve a redefinition of Parliament for a specific purpose", adding that "Such redefinition could not be disregarded [by the courts]".[48] Baroness Hale, for her part, held that:

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[46] Joint Committee on Parliamentary Privilege, Parliamentary Privilege (Report of Session 2013-14), H.L. Paper 30, H.C. 100, 3 July 2013 par 18.
[47] *R. (Jackson) v Attorney General* [2005] U.K.H.L. 56.
[48] *R. (Jackson) v Attorney General* [2005] U.K.H.L. 56 at [81].

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> If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular Parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed. But that is for another day.[49]

Although that day seems to have come in the form of section 28(8) of the Scotland Act 1998, the Court's conclusion in *Miller* appears to contradict the statements made in *Jackson*, and to reaffirm the Court's commitment to a more traditional understanding of parliamentary sovereignty.

In other words, while the aforementioned passages in *Jackson* appeared to endorse the 'manner and form' conception of parliamentary sovereignty, the Court's decision in *Miller*, establishing that certain statutory provisions can be considered political conventions because of the "nature of the content" of those provisions, effectively puts a stop to this development. This is because if what makes the nature of the content of section 28(8) a political convention is the fact that its judicial application would require the courts to inquire into the way in which legislation is passed, then so would the scenarios offered by Lord Steyn and Baroness Hale in *Jackson*. For instance, suppose that Parliament were to enact a statute requiring a two-thirds majority of both Houses in order to abolish the House of Lords but subsequently decides to enact a statute abolishing the House of Lords which is only supported by a simple majority in both Houses. The dicta in *Jackson* would lead one to believe that the Court would be prepared to look into the procedural history of the bill and to then strike down the second act for its failure to conform with the legislative procedure envisaged in the previous act. The decision in *Miller*, however, would take the first statute to be nothing more than a political convention and, therefore, its contravention would not be a matter which the courts could consider. It is difficult to see how one could arrive at any other conclusion: much like a statute requiring a heightened majority for certain purposes, section 28(8) of the Scotland Act 1998 requires Parliament to seek the consent of the Scottish Parliament when legislating on a matter which falls under the competences of the latter. In both cases, a court would have to look into the

[49] *R. (Jackson) v Attorney General* [2005] U.K.H.L. 56 at [163].

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parliamentary procedure leading up to the Act in order to determine whether the statutory requirements had been fulfilled. The Court's decision in *Miller*, contrary to the aforementioned opinions in *Jackson*, would not allow this. So it seems that Lord Campbell's famous pronouncement that "[…] all that a court of justice can look to is the parliamentary roll; they see that an act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can inquire into the manner in which it was introduced, or what passed in parliament during the various stages of its progress through both Houses of Parliament",[50] continues to be the law in the United Kingdom, even when a statute redistributes the legislative responsibilities in a different manner.

It is interesting to note, moreover, that the majority's reasoning in *Miller* does not simply revert to a more traditional approach to parliamentary sovereignty: it may also be used to deny legal status to any primary legislation that it is unable to adjudicate due to Parliament's exclusive cognisance. It thereby contravenes Lord Reid's opinion that "The idea that a Court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our Constitution […]".[51] As far as the legal status of section 28(8) is concerned, the Court in *Miller* has disregarded it: the law is not law by virtue of its content. Paradoxically, in trying to maintain its allegiance to one of the fundamental principles of the British constitution (ie parliamentary privilege) the Court has inadvertently dealt a blow to two others: parliamentary supremacy and the rule of law.

In *Prebble v Television New Zealand Ltd*, Lord Browne-Wilkinson explained that "the courts and Parliament are both astute to recognise their respective constitutional roles".[52] Nevertheless, Parliament's decision to enact provisions, such as section 28(8), that bind its own conduct risks creating friction between these two institutions due to another important development in British constitutional law spearheaded by the courts: constitutional statutes. The idea of distinguishing constitutional from ordinary statutes was first endorsed by Laws LJ in *Thoburn v Sunderland City Council*,[53] and

[50] *Edinburgh and Dalkeith Railway Company v Wauchope* 8 E.R. 279 (1842) 8 Cl. & F. 710.
[51] *British Railways Board and others v Pickin* [1974] U.K.H.L. 1.
[52] *Prebble v Television New Zealand Ltd* [1995] 1 A.C. 321.
[53] *Thoburn v Sunderland City Council* [2002] E.W.H.C. 195 (Admin).

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subsequently recognised by the Supreme Court in *H v Lord Advocate*.[54] According to these authorities, constitutional statutes cannot be impliedly repealed. In a subsequent ruling, in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,[55] Lord Reed explained that "If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom".[56] Moreover, Lords Neuberger and Mance said that

> It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[57]

They added that "We are not expressing any view on whether or how far article 9 of the Bill of Rights would count among these, but the point is too important to pass without mention".[58] According to Mark Elliott, this opinion "envisages a far richer constitutional order in which the differential normative claims of constitutional and other measures fall to be recognised and calibrated in legal terms".[59] In *Miller*, however, faced with the perceived tension between section 28(8) of the Scotland Act and Article 9 of the Bill of Rights, the Court offers no such calibration. The overriding hierarchy of Article 9 is taken for granted without offering any reason for this conclusion. Furthermore, Article 9 not only overrides the Scotland Act; it strips it of its legal character. While it was perfectly open for the Court to determine that the fundamental constitutional importance of Article 9 and the principles that it protects are of such significance that it must override section 28(8) of the Scotland Act, it is unclear that this is the exercise that the Court engages in in order to reach its conclusion. It is more likely that the Court simply took for granted that Article 9 is hierarchically superior

[54] *H v Lord Advocate* [2012] U.K.S.C. 24.
[55] *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] U.K.S.C. 3.
[56] *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] U.K.S.C. 3 at [79].
[57] *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] U.K.S.C. 3 at [207].
[58] *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] U.K.S.C. 3 at [208].
[59] M. Elliott, 'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law' U.K. Const. L. Blog (23rd January 2014) (available at http://ukconstitutionallaw.org [last accessed on November 2017]).

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without engaging in this analysis. Even if it did do so implicitly, it is important to note that the decision in *Miller* implies that Article 9 overrides section 28(8) of the Scotland Act 1998.

Perhaps the Court's conclusion follows from its characterisation of the Sewel convention in the following terms:

> The practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate [...] and to avoid any risk of legal challenge to the vires of the devolved legislatures [...].[60]

And subsequently: "The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures".[61] What is striking about the Court's description of the convention is its focus on its practical benefits and the absence of any mention of the more fundamental values which may be thought to underlie it. The devolution settlement in the United Kingdom is thus reduced to an administrative tool, deprived of any profound political significance. This stands out in light of the Supreme Court's analysis of the nature of the Scottish Parliament in *AXA General Insurance Ltd v Lord Advocate*.[62] At issue in that case was the question over the appropriate scrutiny to be applied in order to determine the validity of Acts of the Scottish Parliament. Lord Hope considered this issue to be "a matter of very great constitutional importance" and characterised it in precise terms as one issue which, "goes to the root of the relationship between the democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of this relationship".[63] In that case, the democratic legitimacy of the Scottish Parliament is highlighted in the following terms: "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature".[64] And subsequently:

> The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. [...]

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[60] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5, at [137].
[61] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5, at [151].
[62] *AXA General Insurance Limited v Lord Advocate* [2011] U.K.S.C. 46.
[63] *AXA General Insurance Limited v Lord Advocate* [2011] U.K.S.C. 46 at [42].
[64] *AXA General Insurance Limited v Lord Advocate* [2011] U.K.S.C. 46 at [46].

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> But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate.[65]

It is difficult to conclude that the Court's decision would have been swayed by acknowledging the political values embodied by the Scottish Parliament (and underlying the Sewel convention) as it did in *AXA*. But it is important to contrast the way in which the Court extols the democratic credentials of the Scottish Parliament in one case but does not seem to consider them in any meaningful way when it comes to interpreting the role that it is called upon to play according to section 28(8). The political nature of the devolved legislatures may not, in the last instance, prove to be sufficiently fundamental to override the parliamentary privilege of the Westminster Parliament. But it does add a further dimension to the considerations that the Court should have in mind when its relationship with Parliament is at issue, especially if the issue arises because Parliament has decided to regulate its own conduct via statute.

Conclusion 3: A Presumption of Non-Legality?

Another problematic element of the majority's judgment in *Miller* concerns their finding that the words "it is recognised" and "will not normally" in section 28(8) demonstrate that the Westminster Parliament intended that section 28(8) would still have conventional force only. The majority noted that "We would have expected the UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts."[66] There are two problems with this argument (or reasoning): first, the majority's beginning from the presumption that Parliament did not intend a validly enacted legislative provision to create a legal rule; and secondly, the finding that the words "it is recognised" and "will not normally" support such a presumption. In this section, we deal briefly with the first of these problems, and the in the following section we deal with the latter.

As we have noted in the previous two sections, the *Miller* Court's opinion that section 28(8) was a political convention only was out of step with much prevailing

[65] *AXA General Insurance Limited v Lord Advocate* [2011] U.K.S.C. 46 at [49].
[66] *Miller & Anor, R. (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] U.K.S.C. 5 at [148].

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academic commentary on the nature of constitutional conventions, and their reliance on the "nature of the content" of that provision as justification for this conclusion presents problems for the principles of parliamentary supremacy and the rule of law. The manner in which they came to the conclusion that Parliament did not intend to create legal rule when it enacted section 28(8) gives rise to similar problems.

Given, as we have argued, that the effect of the non-legality of a provision surviving the process of parliamentary enactment is an extraordinary one, we believe that Parliament should have to use clear and express language if a provision is to have this effect. It is well established that there are certain statutory effects that can only occur if Parliament chooses to specify them in precise detail. In general, this principle has applied in cases where the statutory provision in question violated human rights. Thus, the courts have gone to great lengths to interpret statutes in a way that would preserve the right of access to courts,[67] the right to a fair hearing,[68] freedom of expression,[69] and the right to confidential legal advice.[70] In *R v Secretary of State for the Home Department, ex p Simms*, Lord Hoffmann stated:

> Parliament can, if it chooses, legislate contrary to fundamental human rights. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.[71]

Section 28(8) of the Scotland Act does not implicate fundamental human rights (at least not directly but definitely does have the potential to implicate them directly depending on what part of the competence of the Scottish Parliament is engaged: think health or education). The claim that it does not have legal effect, however, does, we have claimed, engage the principle of legality. In recent years, the Courts have expressed a willingness to use their interpretive powers widely in order to uphold the rule of law.[72] In *Evans v Attorney General*,[73] a majority of the Court, led by Lord Neuberger, performed what Mark Elliott calls "radical interpretive surgery" on the Freedom of

[67] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147.
[68] *Ridge v Baldwin* [1964] A.C. 40.
[69] *R. v Secretary of State for the Home Department, ex p Simms* [2000] 2 A.C. 115.
[70] *R. (Daly) v Secretary of State for the Home Department* [2001] U.K.H.L. 26; [2001] 2 A.C. 532.
[71] *R. v Secretary of State for the Home Department, ex p Simms* [2000] 2 A.C. 115 at 131.
[72] *AXA General Insurance Limited v Lord Advocate* [2011] UKSC 46; *R. (Jackson) v Attorney General* [2005] U.K.H.L. 56; *R. (Evans) v Attorney General* [2015] U.K.S.C. 21.
[73] *R. (Evans) v Attorney General* [2015] U.K.S.C. 21.

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Information Act.[74] The statutory provision in question in this case was section 53 of the Freedom of Information Act 2000 (FoIA), which allowed the executive to resist releasing information if the relevant minister "on reasonable grounds formed the opinion" that refusal to release would not be unlawful. The Attorney General, citing public interest grounds, claimed that this provision allowed him to override the decision of a judicial tribunal, which had ruled that the Information Commissioner could not refuse to release a series of letters sent by Prince Charles to members of the government. Lord Neuberger, stating that conferring the ability on a minister to override the decision of a tribunal would be a "remarkable effect", held that such an effect could only be read into the statute if the language of the statute was "crystal clear".[75] This is because the purported effect of the statute (as characterised by Lord Neuberger) engaged, in a meaningful way, the rule of law.

As we have argued, the nature of a validly enacted statute's content conferring on it a non-legal status, and so shielding it from judicial scrutiny, is a "remarkable effect". It engages, in a meaningful way, the principle of the rule of law. The Court's decision to read the statute in a way that had this effect, seemingly without considering the alternative, is out of step with *Evans* and the aforementioned cases. In *Miller*, the Court seemingly did not recognise that the rule of law was engaged at all, and so they took what they believed was a more orthodox approach to the interpretation of section 28(8).

The Court's presumption that Parliament did not intend to create a legal rule with the Scotland Act 2016 was perhaps based on a particular understanding of the doctrine of parliamentary sovereignty. That is, the Court perhaps began with the presumption that Parliament could not have intended to set legal limits on its own powers or bind its own successors. The majority in *Miller* were, unfortunately, not explicit on this point, so we can only extrapolate. If this is the case, then the Court's consideration of the principle of parliamentary sovereignty was uncharacteristically unsophisticated. It is now uncontroversial to say that the principle of parliamentary sovereignty must be read in the light of other constitutional principles. As Lord Steyn states: "Parliament does not legislate in a vacuum. Parliament legislates for a European

[74] M. Elliott, "A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture" (2015) *P.L.* 539, 546.
[75] *R. (Evans) v Attorney General* [2015] U.K.S.C. 21 at [58].

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liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial presumption".[76] This presumption should have readily applied in *Miller*. Instead, the Court, wittingly or not, relied on an orthodox conception of parliamentary sovereignty, without considering whether any other constitutional principles were in play. This approach's orthodoxy does not automatically make it wrong or inappropriate, but in failing to acknowledge or realise that this approach was out of step with recent, more sophisticated treatment of the relationship between the different constitutional principles, the Court muddied the constitutional waters. Rather than assume that Parliament intended a piece of legislation to have conventional force only, the Court should surely begin from the presumption that Parliament, in passing a statutory provision through its ordinary legislative means, intended for that provision to carry the full force of law. If Parliament truly did not intend for the provision in question to have this effect, they should clearly and explicitly state this unusual circumstance.

Further, as *Bradlaugh* demonstrates, the courts have been willing to recognise that there are statutory provisions with which the courts cannot control conformity, but which nevertheless can be characterised as legal rules, and therefore as engaging the principle of the rule of law. In that case, the Court did not begin from the presumption that the conditions for admittance of duly elected Members into Parliament were matters of convention alone. However, while acknowledging that the rules involved were legal in nature, the nature of the statute was such that its enforcement rested with the House of Commons. In a constitutional system whose functioning relies largely on the weighing of political costs, there is value in certain norms carrying the force of law, even if the only enforcement available is to be found outside of the courtroom. Charles Bradlaugh, for instance, could assert to his constituency that his exclusion from parliament was illegal, rather than simply lacking in institutional decorum. It is not necessarily the case that the Westminster Parliament acted illegally by failing to seek the consent of the Scottish legislature before triggering Article 50. However, the Court should begin from the presumption that the creation of a legal rule to that effect is what the legislature intended, unless clear and precise wording to the contrary is utilised. The UK's constitutional architecture is subject to development and change,

[76] *R. v Secretary of State for the Home Department, ex p Pierson* [1998] A.C. 539 at 587.

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particularly in matters of devolution. The question of whether some of the norms pertaining to the devolved constitution are legal rather than conventional in nature merits more serious consideration than the Court in *Miller* gave it.

Conclusion 4: "it is recognised" and "will not normally"

We have argued that, in the absence of clear and precise wording to the contrary, the Court in *Miller* should have started from the assumption that Parliament intended any piece of validly enacted legislation to have legal effect. In this section, we briefly consider the statutory wording that the Court did consider in its analysis. We claim that the statutory wording on which the majority relies to support its presumption is not particularly supportive of their finding. The relevant sections of the provision are italicised: "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."

This particular element of the Court's conclusion is grossly under-developed. They did not elaborate on precisely what it is about this wording that suggests it should be read as having conventional effect. For instance, the italicised sections could mean, following *Bradlaugh*, that the legal obligation created is an extremely broad one, and that the UK Parliament will generally have a wide ambit of discretion to decide whether they require the consent of the Scottish legislature. This would make the legislation vague, and it could encounter some rule of law issues on that basis. This does not, however, mean that the legislation is not valid as a matter of domestic law. The majority also stated that they "would have expected UK Parliament to use other words" if they had intended to create a legal rule. It is not clear what such words might have been. Again, it seems strange to presume that a validly enacted piece of legislation should not carry legal weight unless the content of the provision explicitly says so. It is unusual to require that a statutory provision declare, "I am a law."

It is true that this wording is unusual when compared with most statutory provisions. Feldman believes that this choice of language reflects the intention of Parliament to create "promissory" legislation. He argues:

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> The drafter has therefore carefully ensured that the provision would have no legal effect. That has been done partly by using the predictive form of the main verb, 'will', rather than the imperative form, 'shall', and partly by qualifying it with the adverb 'normally', which is calculated to provide wriggle-room for all concerned.[77]

While Feldman's analysis is certainly plausible, his reasoning could equally be viewed as evidence for a conclusion of the sort reached in *Bradlaugh*. Consider the following variation:

> The drafter has therefore carefully ensured that the provision would not be enforceable by the courts, but only by Parliament itself. That has been done partly by using the predictive form of the main verb, 'will', rather than the imperative form, 'shall', and partly by qualifying it with the adverb 'normally', which is calculated to provide wriggle-room for all concerned.

Under this analysis, section 28(8) would still possess the status of a legal rule, but the courts would adopt an extremely deferential approach because of the language used in the statute.

Again, our point is not that it is implausible that Parliament intended section 28(8) to retain conventional effect only. However, because of the unusual nature of such a measure, the Court should begin from the presumption that Parliament intended any validly enacted legislation to be possessed of legal character. The question of what reading of the statute the words "it is recognised" and "will not normally" support should proceed from this starting point. They may not enforce compliance with section 28(8), but the political debates surrounding governmental compliance with it would now involve the principle of the rule of law. Instead, the Court began from the presumption that Parliament did not intend for a statutory provision to have legal effect, offered up at best under-developed reasons for this conclusion: the "nature of the content" of the provision, which we have argued is constitutionally problematic, and the words used in the statute, which we have argued are not conclusive.

Conclusion

[77] Feldman, "Legislation Which Bears No Law" (2016) 37 *Statute Law Review* 212, 219.

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We have argued here that the Court in *Miller*, in reaching the conclusion that section 28(8) of the Scotland Act was not legal in character, effectively created a new constitutional category: the "statutory convention". This novel kind of norm, which seems to blur the political and legal elements that make up the constitutional landscape, demands a conceptual clarity that the Court, in its analysis, did not give it. The Court's finding that the "nature of the content" of the provision merited this finding was out of step with much of academic commentary on the nature of constitutional conventions. Further, the cursory analysis of Parliament's purported intention, and the words that were supposed to be evidence of such an intention, saw the Court adopt an orthodox approach to parliamentary sovereignty that goes against the grain of their recent treatment, in *Evans* and other cases, of the interplay between constitutional principles like parliamentary sovereignty and the rule of law.

The notion of statutory conventions has profound consequences for constitutional values such as parliamentary sovereignty and the rule of law. They may represent a conceptual confusion or a welcome development. If we are to find out, a more careful and considered judicial consideration is demanded than the one that was offered in *Miller*. This issue, sure to arise again in an increasingly devolved constitutional landscape, provides an opportunity to reflect on and reconsider the configuration of the boundaries of public law.

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