

## ARTICLE

**“Would Not Normally Legislate”:  
Brexit and Conventions**

AARON KIRKPATRICK\*

In 2017, the United Kingdom Supreme Court, as a part of its ruling in *Regina (Miller) v Secretary of State for Exiting the European Union*, regarded the Sewel convention, which concerns the consent of devolved legislatures to United Kingdom legislation on devolved matters, as unenforceable due to its political nature, its wording and the United Kingdom Parliament’s reserved right to legislate freely on devolved matters. This ruling illustrates one of the flaws in unwritten constitutions—namely, the unenforceable nature of its constitutional conventions. Constitutional conventions are unenforceable because they are political and subjective. They are political because they involve political content and bind political actors. They are subjective because they have no definitive legal source and operate solely through conscience. Because constitutional conventions are non-justiciable, there are no legal consequences or legal remedies for a constitutional breach. In New Zealand, this problem of unenforceability can be minimised by the adoption of a supreme constitution, which would codify specific conventions and make them justiciable in the New Zealand Supreme Court. A supreme constitution is desirable as it would increase accessibility and legal certainty and promote the rule of law, preventing the exercise of arbitrary power.

**I Introduction**

Brexit has been, and will continue to be, a rollercoaster of a ride. Over a year ago, the critical question to be resolved was how the United Kingdom would even start the leaving

---

\* The author wrote this article while studying a BA, LLB conjoint degree at the University of Auckland as part of a summer research project on Brexit undertaken from late 2017 to early 2018. The author’s warmest thanks go to his research supervisor, Professor Jane Kelsey, and Professor Janet McLean for their invaluable input.

process from the European Union. According to art 50 of the Treaty on European Union,<sup>1</sup> a state that wishes to leave the European Union must give the European Council official notice of its intention to leave. Upon giving such notification, a two-year countdown starts during which the leaving country tries to secure a negotiated agreement with the European Union.<sup>2</sup> However, the way in which a leaving country was to give the European Union notice of its intention to leave was left to its “own constitutional requirements”.<sup>3</sup> Due to the unwritten, decentralised nature of the British constitution, it was unclear whether the Prime Minister could give notice using the Royal prerogative (the residual powers of the Crown, now exercisable solely according to Ministerial discretion), or whether an Act of Parliament would be needed to give the Prime Minister the power to notify the European Union. This was the question ultimately resolved by the United Kingdom Supreme Court in the 24 January 2017 decision of *Regina (Miller) v Secretary of State for Exiting the European Union*.<sup>4</sup> The Supreme Court ruled by a majority of eight to three that the consent of Parliament through legislation was needed before notice could be given to the European Union of the United Kingdom’s intention to leave.<sup>5</sup> However, in the course of giving its decision, the Supreme Court also commented on the nature of constitutional conventions.<sup>6</sup>

According to Hilaire Barnett:<sup>7</sup>

A constitutional convention is a non-legal rule which imposes an obligation on those bound by the convention, breach or violation of which will give rise to legitimate criticism; and that criticism will generally take the form of an accusation of “unconstitutional conduct”.

One of the parties to the case, Raymond McCord, argued that the United Kingdom could not leave the European Union without legislation and that legislation could not be passed without the consent of the devolved assembly of Northern Ireland.<sup>8</sup> McCord relied on the Sewel convention—the constitutional convention that the United Kingdom Parliament “would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature”.<sup>9</sup> However, all 11 Justices of the Supreme Court unanimously ruled that the Sewel convention was legally unenforceable due to its political nature, its wording and the fact that the United Kingdom Parliament had reserved authority to legislate freely on devolved matters.<sup>10</sup> This ruling illustrates a flaw in unwritten constitutions—namely, the unenforceability of constitutional conventions due to their political nature. In the United Kingdom and New Zealand, the unenforceability of constitutional conventions is problematic because it means that aspects of the constitution, like the reserve powers, are non-justiciable in the courts. This means no legal remedy is available for breaches of the fundamental principles that constitutional conventions embody.

---

1 Consolidated Version of the Treaty on European Union [2016] OJ C202/1.

2 Article 50(2)–50(3).

3 Article 50(1).

4 *Regina (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

5 At [101], [152], [241]–[243] and [282].

6 At [136]–[151].

7 Hilaire Barnett *Constitutional & Administrative Law* (8th ed, Routledge, New York, 2011) at 39.

8 *Miller*, above n 4, at [9].

9 Cabinet Office *Devolution: Memorandum of Understanding and Supplementary Agreements* (1 October 2012) at [14] as cited in *Miller*, above n 4, at [138].

10 *Miller*, above n 4, at [146], [148], [150], [242]–[243] and [282].

In the first part of this article, I give a brief account of the main issues in the *Miller* decision and discuss whether it was rightly decided. In the second part, I discuss the history of the Sewel convention and why the Supreme Court declined to enforce it. In the third part, I argue that the *Miller* decision’s treatment of the Sewel convention illustrates that constitutional conventions are generally political, subjective and unenforceable. I conclude that codification of fundamental conventions, particularly those concerning the reserve powers and Royal prerogative, in a supreme constitution is desirable.

## II *Regina (Miller) v Secretary of State for Exiting the European Union*

The main issue to be resolved in *Regina (Miller) v Secretary of State for Exiting the European Union* concerned the effect of the European Communities Act 1972 (UK) (ECA)—in particular, whether it excluded the use of the Royal prerogative to give notification of an intention to exit the European Union under art 50 of the Treaty on European Union.<sup>11</sup> The Attorney-General, acting on behalf of the Secretary of State, argued that under the United Kingdom constitution the Government has the power as a sovereign state to contract and do business with other states on the international plane.<sup>12</sup> The ECA is the “conduit” by which “the [European Union] treaty obligations which the UK has entered into ... are given effect in domestic law”.<sup>13</sup> The United Kingdom Parliament has adopted “‘ambulatory’ legislation” through the ECA, meaning “the effect of international law obligations in domestic law changes as those obligations change at the international level”, whether by addition, amendment or removal.<sup>14</sup> Counsel for Gina Miller, the respondent, stated that the appellant’s argument that the ECA was merely a conduit “by which Parliament has implemented international obligations, and it imposes no restrictions on the prerogative power”, was flawed. Counsel averred that this argument ignores the principle that where international rights have been incorporated into domestic law, as they have here, prerogative powers cannot be used to defeat those rights.<sup>15</sup> Prerogative could not be exercised here because procedural rights, such as the rights to vote in the European Union’s parliamentary elections or to appeal to the Court of Justice, and substantive rights, like the right to freedom of movement of goods, persons, services and capital, would be frustrated.<sup>16</sup> Since the ECA is a constitutional statute exempt from the doctrine of implied repeal by vague, inconsistent legislation, only a clearly worded statute, and not merely prerogative powers, could put an end to its effect.<sup>17</sup> Ultimately, the majority was of the view that the ECA does function as a “‘conduit pipe’ by which [European Union] law is introduced into UK domestic law”, but it does so in a way that, while the “Act remains in force, its effect is to constitute [European Union] law an independent and overriding source of domestic law”.<sup>18</sup> Because the European Union Treaties are a source of domestic law and domestic rights, many of which are inextricably linked with other domestic law

---

11 At [1]–[5].

12 Appellant’s Case, *Regina (Miller) v The Secretary of the State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, at [3].

13 At [7].

14 At [44].

15 Written Case for the Lead Claimant, Mrs Gina Miller, *Regina (Miller) v The Secretary of the State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, at [31].

16 At [17]–[18].

17 At [37]–[38].

18 *Miller*, above n 4, at [65].

sources, the Royal prerogative to make and unmake treaties could not be exercised in relation to the European Union treaties.<sup>19</sup> The eight-to-three majority dismissed the appeal of the Secretary of State.<sup>20</sup> Thus, the United Kingdom Government was required to pass legislation to give Prime Minister Theresa May the power to notify the European Union of its intention to leave.

The Supreme Court came to the correct legal decision in *Miller*. Parliamentary approval is required to withdraw from the European Union Treaties because statutory rights are suspended as a result of withdrawal, and, as a matter of constitutional principle, statutory rights cannot be suspended by prerogative. The statutory right in question is the right of United Kingdom citizens to vote in and stand for elections to the European Parliament under the European Parliamentary Elections Act 2002 (UK).<sup>21</sup> The majority in *Miller* averred that “ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation”.<sup>22</sup> Robert Craig notes the difference between the abeyance principle and the frustration principle: “The abeyance principle means that where prerogative and statute directly overlap, the prerogative goes into abeyance and the Crown must use the statutory power”, while “[t]he frustration principle means that a prerogative persists and can be exercised by the Crown but not in a way that frustrates the intention of Parliament in any Act.”<sup>23</sup> The *Miller* decision is a simple application of the frustration principle. As Craig writes:<sup>24</sup>

... it is a simple fact that the [European Parliamentary Elections Act 2002] is clearly frustrated because it lacks any language of “conditionality” and the right to vote for [a Member of the European Parliament] will be inevitably “taken away by a side wind” by the exercise of the prerogative.

The Supreme Court’s decision is also the best principled approach: it is a clear statement that far-reaching constitutional change should not be made by the executive alone. The majority stated that it would be inconsistent with long-standing constitutional principles to make major constitutional changes without legislation and by ministerial action alone.<sup>25</sup> This statement by the majority has been criticised by academics like Mark Elliott, who consider that the Justices appear to have simply pulled a constitutional principle out of thin air and without any authority to substantiate it.<sup>26</sup> However, Gavin Phillipson argues that the Supreme Court’s argument about constitutional change “was wholly dependent upon ... [its] *prior* finding that a statute of major constitutional importance (the ECA) would be rendered a dead letter by use of the prerogative”, and that the argument was merely a reiteration of the frustration principle, because the constitutional change was the frustration of a statute of significance.<sup>27</sup>

---

19 At [86].

20 At [152], [241], [243] and [282].

21 At [114]–[115].

22 At [51].

23 Robert Craig “A Simple Application of the Frustration Principle: Prerogative, Statute and *Miller*” [2017] (Brexit Special Extra Issue) PL 25 at 28 and 33.

24 At 44.

25 *Miller*, above n 4, at [81]–[82].

26 Mark Elliott “Judicial Power and the United Kingdom’s Changing Constitution” (2017) 36 UQLJ 273 at 285.

27 Gavin Phillipson “EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*” (2017) 36 YEL 46 at 78 (emphasis in original).

The United Kingdom’s entry into the European Union represented a crucial change to the British constitution: it introduced a hierarchy of statutes, whereby European Union law prevailed over United Kingdom law. So, leaving the European Union also represents a fundamental constitutional change—one that, according to the doctrine of the separation of powers, should fall to the legislature and not the executive, because the role of the executive is merely to work within the existing legal framework and not to change it.<sup>28</sup> Because leaving the European Union is effectively a major constitutional change for the United Kingdom, it should be subject to procedures similar to those used in other countries for constitutional amendments—for example, receiving the consent of both legislative houses or being subject to a referendum, or both.<sup>29</sup> This becomes even more apparent when one considers a basic constitutional hierarchy: at the first level, executive action (delegated or subordinate legislation); at the second level, primary legislation; and at the third level, constitutional amendment.<sup>30</sup> On the other hand, the Supreme Court minority in *Miller* effectively argued “that the government may use the executive prerogative powers to do something that is *two levels* above its normal area of competence”.<sup>31</sup>

For instrumental and intrinsic reasons, then, the Supreme Court majority’s decision is correct.

### III The Sewel Convention and the Supreme Court

The Sewel convention has been evolving and developing in the United Kingdom since 1998, when the Scotland Act 1998 (UK) was passed. The convention was named after Lord Sewel, the Minister of State in the Scotland Office in the House of Lords, who was responsible for progressing the Scotland Bill.<sup>32</sup>

In July 1998, Lord Sewel, debating a section of the Scotland Bill in the House of Lords, famously said that even though the United Kingdom Parliament would still have competence to legislate for Scotland, “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”.<sup>33</sup> A few years later, in 2001, those words received official recognition in the Memorandum of Understanding between the United Kingdom Government and the three devolved administrations of Scotland, Wales and Northern Ireland.<sup>34</sup> In 2005, the Scottish Parliament Procedures Committee conducted a report on the Sewel convention amid criticisms that it was being used to hand power back to Westminster and inappropriately force a United Kingdom-wide approach to issues.<sup>35</sup> Lord Sewel himself said that the process was originally meant to be an inter-parliamentary convention but had since been “hijacked” by the government.<sup>36</sup> The Sewel convention was supposed to act as a limitation on Westminster intrusions into devolved areas, but the

---

28 At 83–84.

29 At 83.

30 At 84.

31 At 84.

32 *Miller*, above n 4, at [137].

33 (21 July 1998) 592 GBPD HL 791.

34 *Miller*, above n 4, at [138].

35 Scottish Parliament Procedures Committee *The Sewel Convention, Volume 1: Report* (SP Paper 428, 2005) at [2].

36 At [2].

devolved administrations subsequently “acquiesced to the regular use or misuse of the convention in order to avoid challenges to UK legislation”.<sup>37</sup> The Memorandum of Understanding from October 2013 stated:<sup>38</sup>

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.

At that time, the recognition was intended to be purely political in nature and not legally binding.<sup>39</sup> Elliott is of the view that the terms of the Sewel convention are now generally understood as broader than those set out in the Memorandum of Understanding, extending not only to legislation dealing with devolved matters but also to legislation that determines the scope of what is devolved.<sup>40</sup>

In recent years, Scotland has desired increasingly greater control over its own internal affairs. This culminated in the referendum on Scottish independence, which also had important implications for the development of the Sewel convention in relation to the devolved assemblies. The independence referendum took place on 18 September 2014 and saw Scotland’s highest ever voter turnout: 84.6 per cent. The result of the referendum was 55.25 per cent of Scottish voters against and 44.65 per cent of voters in favour of becoming an independent country.<sup>41</sup> A likely factor in this result was the fact that then Prime Minister David Cameron and leaders of other parties actively campaigned for the “No” vote and signed a pledge to grant Scotland greater devolved powers if it voted to stay in the United Kingdom.<sup>42</sup> The Smith Commission was created to recommend legislative changes to give effect to these increased devolved powers.<sup>43</sup> In its November 2014 report, the Smith Commission recommended that the Sewel convention be “put on a statutory footing”.<sup>44</sup> This recommendation was put into effect by s 2 of the Scotland Act 2016 (UK), which amended the 1998 Act as follows:<sup>45</sup>

In section 28 of the Scotland Act 1998 (Acts of the Scottish Parliament) at the end add—

“(8) 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.”

37 Ronald Watts “The United Kingdom as a federalised or regionalised union” in Alan Trench (ed) *Devolution and power in the United Kingdom* (Manchester University Press, Manchester, 2007) 239 at 261.

38 Cabinet Office, above n 9, at [14] (emphasis added).

39 At [2].

40 Mark Elliott “The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle” (2017) 76 CLJ 257 at 274.

41 Electoral Commission (UK) *Scottish Independence Referendum: Report on the referendum held on 18 September 2014* (ELCI/2014/02, December 2014) at 1 and 6–7.

42 “UK party leaders issue joint pledge to give Scottish parliament new powers” *The Guardian* (online ed, London, 16 September 2014).

43 Scottish Government “The Smith Commission” <[www.gov.scot](http://www.gov.scot)>.

44 The Smith Commission *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (27 November 2014) at [22].

45 Scotland Act 2016 (UK), s 2.

This new s 28(8) of the 1998 Act is balanced, however, by the pre-existing s 28(7), which states: “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.”<sup>46</sup> The Scotland Act 2016 thus constituted the first statutory recognition of the Sewel convention, potentially taking it out of the realm of politics and into the realm of law.

This began a process of further statutory recognition of the Sewel convention. Between June 2016 and January 2017, the Wales Bill 2016 (UK) was progressing through Parliament, and would go on to give a similar statutory force to the Sewel convention in Wales as the Scotland Act 2016 did for Scotland.<sup>47</sup> On 17 January 2017, during one of the debates, Carwyn Jones, the First Minister of Wales, stated:<sup>48</sup>

The issue with Brexit has been the issue of Sewel for me. The Prime Minister herself said today that there will be no roll-back of powers, and I have to take her on her word, but *if it is enshrined in law that there's a requirement of consent from a devolved parliament or assembly, then that obviously carries more weight than if it's just a convention*. So, enshrining that in law is important, not just in terms of Brexit negotiations, but in terms of negotiations on a number of issues in the future where the UK Government will not be able to say, “Of course, in Scotland it's the law, but in Wales, it isn't, so we don't have to pay Wales the same regard as Scotland.”

The First Minister must have been disappointed once the Supreme Court's decision in the *Miller* case was released on 24 January 2017, effectively indicating that the newly minted legislation would not turn the Sewel convention from a political convention into a legal rule enshrined in law, as he appears to have intended it to do.

The Supreme Court in *Miller* unanimously dismissed the devolution issues before it and rejected any attempt to give the Sewel convention legal force, despite its statutory incorporation by the Scotland Act 2016, or to constrain Parliament's ability to legislate.<sup>49</sup> The reasons for the Court's decision can be classed under three heads: the political nature of the convention; the language used; and the reservation of the United Kingdom Parliament's power to legislate under the Northern Ireland Act and other devolution legislation.<sup>50</sup>

The first reason for the Court's rejecting the Sewel convention's legal force is that the nature of the convention is political. The Court held “it is necessary to consider the role of the courts in relation to constitutional conventions. It is well established that the courts of law cannot enforce a political convention”.<sup>51</sup> The Court's phrasing seems to suggest the terms “constitutional convention” and “political convention” may be used interchangeably. Political conventions are neither created nor guarded by judges. This means that judges cannot give legal rulings on the operation or scope of political conventions, which are decided by the political world.<sup>52</sup> The Supreme Court was careful to note that while the Sewel convention had no legal force, it “operates as a political

---

46 Scotland Act 1998 (UK), s 28(7).

47 See s 2 of the resulting Wales Act 2017 (UK), which amended s 107 of the Government of Wales Act 2006 (UK) to include the Sewel convention in a new subs (6).

48 Alys Thomas “The Wales Bill passes the Assembly and Parliament” (27 January 2017) In Brief <[www.seneddresearch.blog](http://www.seneddresearch.blog)> (emphasis added).

49 *Miller*, above n 4, at [150]–[151], [242]–[243] and [282].

50 At [146], [148], [150], [242]–[243] and [282].

51 At [141].

52 At [146].

restriction on the activity of the UK Parliament”.<sup>53</sup> In that sense, Parliament may legally ignore the convention, but this comes with the risk of political sanction: outcry from the Opposition, protest from the devolved administrations, denouncement by the media, public pressure or a negative election result.

Secondly, s 28(8) of the Scotland Act 1998 does not use strong, declaratory language; rather, it uses passive, optional language. The provision states that the United Kingdom Parliament “will not normally” legislate without consulting the devolved assembly. It is clear from this wording that the United Kingdom Parliament had situations in mind where it could and would legislate without the consent of the Northern Ireland Assembly. The purpose of adding the Sewel convention into the Scotland and Wales Acts was to show that it was a permanent feature of the devolution settlement and nothing more.<sup>54</sup> If Parliament had intended to turn the Sewel convention into an enforceable legal rule, it would have used different words.<sup>55</sup> For example, it would have said, “Parliament *must not legislate* on devolved matters without the prior consent of the devolved assemblies.”

Finally, the Sewel convention had to be read consistently with s 5(6) of the Northern Ireland Act 1998 (UK),<sup>56</sup> which provides “the power of the Parliament of the United Kingdom to make laws for Northern Ireland” is not affected. The Justices made it abundantly clear that none of the devolved assemblies of Scotland, Wales or Northern Ireland had a legal veto on the United Kingdom’s withdrawal from the European Union.<sup>57</sup>

The Supreme Court’s commentary on the Sewel convention might have taken some by surprise; after all, it would not be unreasonable to assume that the statutory recognition of the Sewel convention meant it would have legal and not merely political force. Tom Mullen said it was at least arguable that the Sewel convention’s recognition in statute changed it from an otherwise non-justiciable matter into a justiciable one.<sup>58</sup> Under this line of reasoning, the Court would have interpreted the statutory Sewel convention as setting up a legal presumption that the United Kingdom Parliament would not legislate without the devolved legislature’s consent. In order to assess whether that statutory presumption had been rebutted by virtue of a non-“normal” situation, the Court would have then developed a set of criteria. These criteria would have acted as a legal test as to when circumstances were “normal” or not and thus when Parliament could legislate without the consent of the devolved assemblies on devolved matters. There might have even been a presumption that big decisions, such as the United Kingdom’s leaving the European Union, are exactly the sorts of decisions in which normal protocol of getting devolved consent should be followed; if not, the provision would only ever come into effect when it was needed most. Another argument is that the “will not normally” qualification would apply in the case of the United Kingdom’s leaving the European Union because this would be an exceptional situation well outside normal parliamentary proceedings.<sup>59</sup> However, it is interesting to note the Secretary of State’s argument in *Miller* that there was no legislation

---

53 At [145].

54 At [148].

55 At [148].

56 Northern Ireland Act 1998 (UK).

57 *Miller*, above n 4, at [150].

58 Tom Mullen “The Brexit Case and Constitutional Conventions” (2017) 21 *Edinburgh L Rev* 442 at 446.

59 At 447.



before the Court, so no issue regarding the Sewel convention, which provides that Parliament “will not normally *legislate*”, arose.<sup>60</sup>

In light of the fact that the Supreme Court decided the Sewel convention was purely political and not legal, the Sewel convention can, in a sense, be regarded as having limited applicability. Elliott, for example, characterised the Sewel convention’s statutory recognition as a “smoke-and-mirrors exercise”, “political tokens dressed in legislative garb” and an act of “window-dressing”.<sup>61</sup> The implication of the Court’s ruling is that the statutory recognition of the Sewel convention gives it no legal status and that the convention is “no more secure against unilateral variation or breach of its requirements than it was before” its codification.<sup>62</sup> If the statutory recognition of the Sewel convention was simply recognition and not the creation of a legally enforceable rule, then its normative source lies outside the legislation. This means it is possible for the convention to evolve or break down regardless of the legislation.<sup>63</sup> Effectively, the United Kingdom Parliament can decide on its own whether it will be bound by the Sewel convention. This is because there is no judicial oversight of the exercise of the Sewel convention. Any political restraint that statutory recognition of the convention brings is quite weak since the party with the majority of seats in Parliament is easily able to impose its own interpretation of the convention.<sup>64</sup> This is hardly surprising given there was the ever-present danger that if the Supreme Court ruled otherwise it would have limited parliamentary sovereignty by establishing manner and form requirements for when Parliament could legislate. But it was not open to the Court unilaterally to set up such manner and form requirements because “[i]n each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature.”<sup>65</sup>

The decision that the Supreme Court came to regarding the Sewel convention was perfectly reasonable when one considers that constitutional conventions are not meant to create legally binding norms. Aileen McHarg argues that constitutional conventions should be seen as “soft law” attempts to influence constitutional behaviour, rather than as legally binding norms.<sup>66</sup> In this sense, “‘soft law’ ... [allows] the creation of new constitutional norms without disturbing existing legal rules”, such as the Sewel convention, which gives some political sovereignty to the devolved administrations while maintaining the overall legal sovereignty of Westminster.<sup>67</sup> To ask the Supreme Court to turn the Sewel convention into a legally enforceable rule would be to ask the wrong question of it; the Court’s role was merely to recognise the existence of the political convention and to declare it a permanent part of the devolution settlement.<sup>68</sup> Elliott thinks the Court was correct in viewing s 28(8) of the Scotland Act 1998 as not restricting Parliament’s ability to legislate because it uses the phrase “it is recognised”, which is consistent with the Court’s view that

---

60 Appellant’s Case on the Devolution Issues, *Regina (Miller) v The Secretary of the State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, at [3].

61 Elliott, above n 40, at 280.

62 Mullen, above n 58, at 446.

63 Elliott, above n 40, at 279.

64 Mullen, above n 58, at 447.

65 *Miller*, above n 4, at [136]. See s 5(6) of the Northern Ireland Act, s 28(7) of the Scotland Act 1998 and s 107(5) of the Government of Wales Act.

66 Aileen McHarg “Reforming the United Kingdom Constitution: Law, Convention, Soft Law” (2008) 71 MLR 853 at 856.

67 At 868.

68 Mullen, above n 58, at 443.

stronger language is necessary for the Sewel convention to be binding.<sup>69</sup> Even if the Court was willing to legally enforce the Sewel convention, it could not because to do so would require the Court's assessing and questioning the circumstances in which the convention had been followed or not in the past, and this would violate parliamentary privilege.<sup>70</sup> So, to criticise the Court's ruling on the sole basis that it did not use the Sewel convention to restrict Parliament's ability to legislate without devolved consent would be unfair.<sup>71</sup>

It is difficult to fault the Supreme Court for refusing to turn the Sewel convention into a legally enforceable rule, as doing so would have limited parliamentary sovereignty. However, it is possible to offer a more nuanced critique of the ruling on the basis that it did not adequately take the Sewel convention into consideration or give it appropriate weight. Between the Sewel convention's limiting parliamentary sovereignty and its having no effect at all, there is a spectrum of possible views. Elliott is critical that the Supreme Court treated the Sewel convention as being unnecessary to answer the question before it; he argues it was in fact directly relevant to the question as to the meaning of the words "in accordance with its own constitutional requirements" in art 50 according to representatives of the devolved administrations.<sup>72</sup> The Lord Advocate for Scotland argued in *Miller*: first, that leaving the European Union would alter the competence of the Scottish government, which meant the Sewel convention was engaged; and secondly, that in accordance with the United Kingdom's "constitutional requirements" any decision to leave the European Union should include both an Act of Parliament and observance of the Sewel convention, even though Scotland had no veto on Westminster legislation.<sup>73</sup> If the Supreme Court had adopted the Lord Advocate's reasoning, it might have engaged in a more nuanced discussion of the Sewel convention, while still respecting the fact that devolved legislatures could not veto Brexit legislation. It would have been a tighter rope to walk certainly, but not impossible. To avoid a legal question whenever it requires determining the scope of a constitutional convention, according to Elliott, would be to impoverish analysis in constitutional adjudication as it would deprive the courts of the ability to take into account crystallised fundamental constitutional principles, like the Sewel convention.<sup>74</sup> This treatment of the Sewel convention could potentially marginalise "the role that such conventions — and the often fundamental principles that animate them — can play in constitutional adjudication".<sup>75</sup> The political consequence of the United Kingdom Government's failure to get a legislative consent motion for its Brexit legislation as a matter of political imperative would be to exacerbate tensions further between Westminster and devolved administrations, and perhaps even push Scotland to another independence vote.<sup>76</sup> Although the Supreme Court came to the correct legal outcome, that outcome has many political repercussions. It is also generally significant in demonstrating how constitutional conventions are treated both legally and politically in countries with unwritten constitutions, such as New Zealand.

---

69 Elliott, above n 40, at 279.

70 Alison L Young "R (Miller) v Secretary of State for Exiting the European Union: Thriller or Vanilla?" (2017) 42 EL Rev 280 at 286–287.

71 See Elliott, above n 40, at 283.

72 At 277–278.

73 Written Case of Lord Advocate, *Regina (Miller) v The Secretary of the State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, at [85].

74 Elliott, above n 40, at 277.

75 At 278.

76 Young, above n 70, at 288.

#### IV Implications for New Zealand

“The way in which the court [in *Miller*] dealt with these issues has implications ... for the way in which the courts take account of constitutional conventions in general.”<sup>77</sup> We have seen from *Miller* that constitutional conventions in general have political aspects to them and so are inherently political in nature. Because constitutional conventions have political content and because they are subjectively self-imposed by political actors, legally they can be unilaterally ignored (even though there might be a political cost or sanction for doing so). Because political conventions are legally unenforceable in the courts, there are no legal consequences or legal remedies for breach of them.

A few fundamental conventions regarding the reserve powers and the Royal prerogative should be codified as part of a supreme constitution in New Zealand. This would serve three purposes: first, it would definitively confirm the existence (or lack thereof) of these constitutional conventions; secondly, it would give clear and precise wording to the conventions so as to make them legally binding rules; and thirdly, it would make the conventions justiciable in the Supreme Court, so legal remedies could be given for breaches of them.

Before delving into this argument, we should briefly consider why the British and New Zealand unwritten constitutions are sufficiently similar such that the experience of the former may help inform the creation of the latter.

The United Kingdom and New Zealand unwritten constitutions are incredibly similar due to shared history, the adoption of British law in New Zealand during colonisation, parliamentary sovereignty, strong Cabinet government, and a weak separation of powers between the legislature and the executive.<sup>78</sup> There are only three countries in the world today that have an unwritten constitution with decentralised sources in place of a codified constitution in a single document: Israel, the United Kingdom and New Zealand.<sup>79</sup> For a long time, the United Kingdom was slowly drifting out of the unwritten constitution club due to the primacy of European Union law over United Kingdom law and the aid of the European Convention on Human Rights in developing British rights jurisprudence.<sup>80</sup> However, that process is starting to reverse with Brexit. In a way, New Zealand has adhered more closely to Westminster constitutionalism than the British themselves. Nevertheless, there are clear contrasts between the British and New Zealand systems: the United Kingdom still uses the first-past-the-post electoral system whereas New Zealand uses mixed-member proportional representation; the United Kingdom does not have the Treaty of Waitangi and Māori context present in New Zealand; and the United Kingdom has a quasi-federal system of devolution to Scotland, Wales and Northern Ireland while New Zealand is a classic example of unitary government.<sup>81</sup> But these differences do not matter when it comes to discussing constitutional conventions because the New Zealand constitution essentially developed out of the British one and there is a great deal of common constitutional principles between the two systems.

---

77 Mullen, above n 58, at 442.

78 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [5.1], [5.3]–[5.4.1] and [6.3.3(2)].

79 James Allan “Against Written Constitutionalism” (2015) 14 Otago LR 191 at 193.

80 At 191–192.

81 Watts, above n 37, at 250.

The nature of constitutional conventions is hard to pin down. “[T]here is no universally accepted definition” of constitutional conventions.<sup>82</sup> Two main approaches to constitutional conventions are the “principle-based analysis” approach and the “users of conventions” approach.<sup>83</sup> The principle-based approach argues that a convention should be based on underlying principles, while the user-based approach looks at the users of conventions and their actions.<sup>84</sup> This article will consider the user-based approach in order to reflect constitutional reality.

AV Dicey characterised constitutional conventions as being the “customs, practices, maxims or precepts which are not enforced or recognised by the courts, [and which] make up a body not of laws, but of constitutional or political ethics”.<sup>85</sup> Thus, we can clearly distinguish between the “law of the constitution”, which is the body of laws enforced by the courts, and “conventions of the constitution”.<sup>86</sup> By contrast, Nicholas Barber writes that there is no absolute distinction between conventions and laws but rather a spectrum or sliding scale between the two, and “that conventions can ‘crystallise’ into laws over time”.<sup>87</sup> Joseph Jaconelli, on the other hand, agrees with Dicey and is firmly against the proposition that there are no hard differences between conventions and laws.<sup>88</sup> At the end of the day, conventions are fundamentally different from laws because they are political rather than legal in nature, subjective rather than objective, and unenforceable rather than justiciable in the courts.

Constitutional conventions have an inherently political nature since they are made by political actors and concerned with political content. Jaconelli summarises the idea perfectly: “[A]ll constitutional matters are political, but not all political norms are constitutional in nature”.<sup>89</sup> Philip Joseph characterises constitutional conventions as “binding rules of political practice”.<sup>90</sup> The Supreme Court in *Miller* endorsed the Canadian Supreme Court’s description of “[t]he very nature of a convention” as being “political in inception and as depending on a consistent course of political recognition”.<sup>91</sup> An example of this is the Governor-General’s reserve power to appoint a Prime Minister, which can be exercised without the advice of Ministers. In the New Zealand general election of 2017, the National Party received 44.4 per cent of the vote, compared to the Labour Party’s 36.9 per cent, the New Zealand First Party’s 7.2 per cent and the Green Party’s 6.3 per cent.<sup>92</sup> An interesting constitutional question arose as to whether there was a convention that the largest party would have the first opportunity to form the government. National Party leader, the Rt Hon Bill English, maintained that there was such a convention while Labour

---

82 Ian Killey *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia’s Constitutions* (Australian Scholarly Publishing, Melbourne, 2009) at 7.

83 At 8.

84 At 8.

85 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 417.

86 At 417.

87 NW Barber “Laws and Constitutional Conventions” (2009) 125 LQR 294 at 294.

88 Joseph Jaconelli “The Proper Roles for Constitutional Conventions” (2015) 38 DULJ 363 at 363 and 369.

89 At 364.

90 Philip Joseph “The Legal History and Framework of the Constitution” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168 at 169.

91 *The Attorney General of Manitoba v The Attorney General of Canada* [1981] 1 SCR 753 [*Re Resolution to Amend the Constitution*] at 774 as cited in Miller, above n 4, at [141].

92 Electoral Commission “New Zealand 2017 General Election—Official Results” (media release, 7 October 2017).

leader Jacinda Ardern maintained that there was not.<sup>93</sup> Mai Chen writes regarding the political situation following an election:<sup>94</sup>

If there is one party which has more seats than the others ... the Governor-General could be guided by convention, asking that party to form a coalition government. If they fail, then the party with the second greatest number of seats is asked to attempt to form a government ...

In Germany, where the mixed-member proportional system originated, the President usually nominates a Chancellor from the party with the most votes.<sup>95</sup> In Canada, there is a constitutional convention that the Governor-General will ask the leader of the largest party to form the government (though Canada does not use the mixed-member proportional system).<sup>96</sup> But if there was any such convention in New Zealand it would potentially conflict with the convention that the Governor-General remains politically neutral and does not interfere in the political process. Andrew Stockley’s view is that a preference for the largest party would distort the Governor-General’s options and that the Governor-General should simply wait for political negotiations among the parties to deliver up a clear result.<sup>97</sup> Only if the politicians reach an impasse does the Governor-General have any discretion to intervene by appointing a Prime Minister who is able to command a majority in the House.<sup>98</sup> According to the Governor-General’s website, it would appear Stockley’s view is accepted, with the Governor-General having no role in post-election negotiations. The role of the office is only to ensure that there are clear statements of intent by any potential coalition and that a coalition will have the confidence of the House.<sup>99</sup> We can see from this example that constitutional conventions are inherently political, since things like the appointment of a Prime Minister has the flow-on effect of determining which party governs, and what political policies will ultimately be on the government’s agenda.

Since constitutional conventions are political in nature, they are consequently inherently subjective. This is because they only have any power or force so long as the political actors in question consider themselves bound by the conventions. The essential condition for a constitutional convention to be recognised is “that the parties concerned regard it as binding upon them”.<sup>100</sup> The terms of constitutional conventions are whatever the political actors deem them to be.<sup>101</sup> But despite their having no legal effect, constitutional conventions are still considered binding because of habit, “social ‘rules of obligation’” and the fact that political sanctions are brought to bear on those who do not follow them.<sup>102</sup> Constitutional conventions are usually adhered to because political actors

---

93 Audrey Young “Biggest party might not lead new Government” *New Zealand Herald* (online ed, Auckland, 22 September 2017).

94 Mai Chen “Remedying New Zealand’s Constitution in Crisis: Is MMP part of the answer?” [1993] NZLJ 22 at 32.

95 Sam Bollier “Understanding Germany’s elections” (17 September 2013) Al Jazeera <[www.aljazeera.com](http://www.aljazeera.com)>.

96 *Re Resolution to Amend the Constitution*, above n 91, at 857.

97 Andrew P Stockley “Becoming a Republic? Issues of Law” in Luke Trainor (ed) *Republicanism in New Zealand* (The Dunmore Press, Palmerston North, 1996) 81 at 91–92.

98 At 92.

99 Governor-General of New Zealand “The Governor-General’s role in a General Election” (12 September 2017) <[www.gg.govt.nz](http://www.gg.govt.nz)>.

100 *Re Resolution to Amend the Constitution*, above n 91, at 857.

101 Killey, above n 82, at 24.

102 At 22.

see the wisdom behind the relevant custom and conform to it to avoid accusations of unconstitutional conduct.<sup>103</sup>

However, the flaws in this system can be illustrated by strong-willed politicians who do not consider themselves bound by a particular norm. One such politician was Robert Muldoon, who was elected Prime Minister in 1975 on the promise that the New Zealand Superannuation Act 1974, which required compulsory employee superannuation payments, would be abolished.<sup>104</sup> After his election, Muldoon publicly stated that the public service did not have to comply with the Act's requirements, and could simply ignore them, because he was going to pass legislation with retrospective effect.<sup>105</sup> The Prime Minister, through his statement, was held to have violated the Bill of Rights 1688, which provides "[t]hat the pretended power of suspending laws ... by regal authority ... is illegal" and that only Parliament can make or repeal legislation.<sup>106</sup> Geoffrey Palmer notes that unlike *Miller, Fitzgerald v Muldoon* did not concern constitutional convention but rather hard law.<sup>107</sup> However, if *Fitzgerald v Muldoon* did only concern constitutional convention, it is clear the Prime Minister would have steamrolled over it either because he subjectively did not recognise the constitutional norm in question or because he simply did not care. What this example highlights is the flaws of relying on the consciences or good faith of politicians alone when it comes to constitutional boundaries. As the law currently stands, although courts can assess what constitutional conventions political actors consider themselves bound by, actors are not obliged to comply with the court's view of what a convention entails if they disagree.<sup>108</sup> The reality is that by having a system of "self-policing" when it comes to constitutional conventions, we allow Ministers to violate or ignore at will the standards they set.<sup>109</sup> This brings us to enforceability.

At first glance, it seems perfectly possible and reasonable for courts to enforce constitutional conventions. Two good sources for this proposition are the decisions of the Queen's Bench Division of the English and Welsh High Court in *Attorney-General v Jonathan Cape Ltd* and the Canadian Supreme Court in *The Attorney General of Manitoba v The Attorney General of Canada (Re Resolution to Amend the Constitution)*.<sup>110</sup> In *Jonathan Cape*, a former Minister, Richard Crossman, wished to publish his diaries he had kept from his time in Cabinet ten years prior.<sup>111</sup> The defendants argued that regardless of joint Cabinet responsibility, there was no enforceable obligation in law to prevent the publication of Cabinet papers; there was merely a convention binding one's conscience.<sup>112</sup> The High Court concluded that "when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court" provided the Attorney-General shows it would be a breach of confidence, restraint is in the

---

103 Anthony H Angelo *Constitutional Law in New Zealand* (2nd ed, Kluwer Law International, Alphen aan den Rijn (Netherlands), 2015) at 26.

104 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) at 616.

105 At 616–617.

106 Bill of Rights 1688 (Eng) 1 Will & Mar c 2. See *Fitzgerald v Muldoon*, above n 104, at 621–622.

107 Geoffrey Palmer "Do the British understand their own unwritten Constitution?" [2017] NZLJ 27 at 27.

108 Killey, above n 82, at 25.

109 Joseph Jaconelli "Do Constitutional Conventions Bind?" (2005) 64 CLJ 149 at 176.

110 *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752 (QB); and *Re Resolution to Amend the Constitution*, above n 91.

111 Ian Loveland *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (7th ed, Oxford University Press, Oxford, 2015) at 274.

112 *Attorney-General v Jonathan Cape Ltd*, above n 110, at 765.

public interest, and there are no other public interests that outweigh it.<sup>113</sup> The injunction sought by the Attorney-General was not granted in this case.<sup>114</sup> One could argue that this case represents the court’s enforcement of, or at least willingness to enforce, the constitutional convention of collective Cabinet responsibility and confidentiality.<sup>115</sup> In reality, though, the court was not enforcing a convention but merely stretching and extending existing common law obligations of confidentiality from marital and commercial contexts.<sup>116</sup> In *Re Resolution to Amend the Constitution*, the Canadian Supreme Court recognised there was a convention that “the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces” and thus that there must be some form of provincial consent.<sup>117</sup> The Court recognised that “some conventions may be more important than some laws” and “it is perfectly appropriate to say that to violate a convention is ... unconstitutional” as long as it is not used in a strictly legal sense and “it entails no direct legal consequence”.<sup>118</sup> The Court ruled that the agreement of the Canadian provinces was constitutionally required by convention for the proposed resolution to amend the Canadian constitution to be sent for approval. Passing a resolution without provincial agreement would be unconstitutional (in the conventional but not legal sense).<sup>119</sup> Ultimately, though, as ground-breaking as this ruling seems, the Court was not actually being called upon to enforce a convention here but merely to recognise whether one existed.<sup>120</sup>

Although it may seem like constitutional conventions can be enforceable on occasion, this does not accord with how constitutional conventions are ordinarily treated in the courts. In reality, the United Kingdom Supreme Court’s following view in *Miller* still prevails nine times out of ten:<sup>121</sup>

Judges ... can recognise the operation of a political convention in the context of deciding a legal question ... but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.

Chen writes: “Constitutional conventions are not enforceable in the courts, but are ‘unwritten maxims of the constitution’ that ‘regulate, control and in some cases transform the use of the legal powers.’”<sup>122</sup> Regardless of practice in the United Kingdom and Canada, New Zealand courts have only ever merely *recognised* constitutional conventions on the rare occasion they are discussed in case law at all. There are constitutional conventions concerning the relationship between the three branches of government; for example, that there will be non-interference, comity and mutual respect between them.<sup>123</sup> The Crown

---

113 At 770.

114 At 772.

115 Loveland, above n 111, at 273–274.

116 At 274.

117 *Re Resolution to Amend the Constitution*, above n 91, at 870.

118 At 883.

119 At 909.

120 At 885.

121 *Miller*, above n 4, at [146].

122 Mai Chen *Public Law Toolbox: Solving Problems with Government* (2nd ed, LexisNexis, Wellington, 2014) at [3.4].

123 See *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 (EnvC) at [46]; and *Cao v Ministry of Business, Innovation and Employment* [2014] NZHC 1551, [2014] NZAR 871 at 876.

must respect the right of the courts to resolve private issues; conversely, it is not the courts' role to predict or comment on what legislation is introduced into Parliament<sup>124</sup>. Further, before Parliament passes legislation that affects the judiciary, "it should take into account the principle of judicial independence";<sup>125</sup> on the other hand, the judiciary should not make major decisions of public policy, since "the remedy for a person aggrieved by legislation has always been political".<sup>126</sup> There are also constitutional conventions regarding the executive and the use of its powers; for example, the Queen exercises the prerogative of mercy solely at Her Majesty's discretion and no one is entitled as of right to be a candidate for mercy;<sup>127</sup> "the Governor-General in any action should take advice from his Ministers", unless the government has lost support of the House of Representatives;<sup>128</sup> and the Governor-General cannot "exercise a personal judgment as to the existence of the statutory criteria before agreeing to sign an Order in Council".<sup>129</sup> Cabinet is "a body existing by constitutional convention rather than law".<sup>130</sup> Finally, there are constitutional conventions regarding the neutrality of the public service; for example, "the Solicitor-General is a non-political appointment"<sup>131</sup> and, "except in truly exceptional cases, it is never appropriate for the Attorney-General to exercise statutory powers conferred on him in criminal matters".<sup>132</sup> There are many other constitutional conventions besides those mentioned above. New Zealand courts generally identify constitutional conventions incidentally for the purposes of, and in the course of, resolving other legal questions.<sup>133</sup> Lord Reed's statement in *Miller* that "a political convention, such as the Sewel Convention ... [does not] give rise to a legally enforceable obligation"<sup>134</sup> is thus directly applicable to the New Zealand context.

As demonstrated, constitutional conventions, for all intents and purposes, are by their very nature political, subjective and legally unenforceable. The logical consequence of this is that there is no legal remedy the courts can give if a constitutional convention is breached. The "total constitution" is defined as constitutional law (comprising statute and common law) plus constitutional conventions.<sup>135</sup> If a public body breaches a constitutional convention, there is no legal consequence for the breach. For example, if the Monarch (or the Governor-General in New Zealand) refused to assent to a Bill passed by Parliament on the grounds that he or she disagreed with the policy contained therein, the people disliked it, or it violated the Bill of Rights, he or she would face no legal obstacles.<sup>136</sup> The Royal Assent and the ability to appoint a Prime Minister are prerogative powers that the courts have never considered as being justiciable.<sup>137</sup> Other aspects of New Zealand's constitution

---

124 *Iron Ore New Zealand Ltd v Rio Tinto Mining and Exploration Ltd* HC Christchurch CIV-2009-409-1947, 11 June 2010 at [31] and [41].

125 *Claydon v Attorney-General* [2004] NZAR 16 (CA) at [110].

126 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 482.

127 *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 677.

128 *Slipper Island Resort Ltd v Minister of Works and Development* [1981] 1 NZLR 136 (CA) at 138; *Burt v Governor-General* [1989] 3 NZLR 64 (HC) at 69; and *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (HC) at [145]-[147] and [157].

129 *Crawford v Securities Commission* [2003] 3 NZLR 160 (HC) at [48].

130 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 177.

131 *Attorney-General v New Plymouth District Court* [2002] 1 NZLR 414 (HC) at 430.

132 *Commissioner of Police v Dotcom* [2012] NZHC 634 at [55] (footnotes omitted).

133 Killey, above n 82, at 25.

134 *Miller*, above n 4, at [242].

135 *Re Resolution to Amend the Constitution*, above n 91, at 877 and 883-884.

136 Loveland, above n 111, at 266.

137 At 266.



that are contained in constitutional conventions are also non-justiciable by the courts. According to Jaconelli, the first requirement of justice in any legal system is to have “an independent machinery of adjudication on questions of alleged violation”.<sup>138</sup> Codifying a few specific constitutional conventions (particularly those regarding the reserve powers and prerogative) and bringing New Zealand constitutional law together into a single written document would make the fundamental parts of the constitution enforceable. A written constitution would do this in the following ways: first, by definitively confirming the existence (or lack thereof) of certain constitutional conventions; secondly, by giving clear and precise wording to these conventions so as to make them legally binding; and thirdly, by granting the Supreme Court jurisdiction to uphold the constitution through supervising and adjudicating between the different branches of government.

We now turn briefly to the arguments for and against a supreme constitution.

New Zealand’s constitution should be codified for many reasons, but chiefly because it would increase accessibility, legal certainty and respect for the rule of law.<sup>139</sup> Palmer and Andrew Butler argue that an ordinary New Zealander trying to figure out New Zealand’s constitution would be frustrated and confused due to its fragmented nature.<sup>140</sup> A supreme constitution would make transparent exactly how New Zealand is governed.<sup>141</sup> There is a degree of uncertainty as to the existence of some constitutional conventions. Palmer is of the view that the Governor-General has no discretion to refuse to assent to legislation as an exercise of reserve powers because no sovereign has done so since Queen Anne in 1707.<sup>142</sup> It is at least arguable, though, that this discretion exists because the Cabinet Manual, which guides executive behaviour, states that the Sovereign or Governor-General “may assent — *or not* — to Bills passed through the House”.<sup>143</sup> The Constitution Act 1986 also states that “[a] Bill ... shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent.”<sup>144</sup> Therefore, while a Bill does not become law unless and until the Governor-General assents to it, this discretion is uncertain. Palmer’s proposed constitution would solve this uncertainty by definitively providing that “[t]he Head of State ... *must* signify assent to all Bills” passed by Parliament.<sup>145</sup>

Further, codification would ensure that the rule of law prevails as all powers exercised by the executive would be granted by the constitution or by an Act of Parliament, and the Royal prerogative—the residue of arbitrary, absolute monarchical power—would be abolished.<sup>146</sup> It is highly desirable that we avoid a constitutional crisis like that in Australia in 1975, where then Governor-General John Kerr dismissed then Prime Minister Gough Whitlam through an exercise of the reserve powers because supply was being blocked by the Senate. This was despite the fact Mr Whitlam still had confidence and supply from the House of Representatives and supply had not actually run out yet.<sup>147</sup> Although academics are still bitterly divided over the issue, it is arguable that Governor-General Kerr had conflated losing a vote of supply with a vote of no confidence, dismissed Mr Whitlam far

---

138 Jaconelli, above n 109, at 176.

139 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 25–26.

140 At 10.

141 At 26.

142 At 100.

143 Cabinet Office *Cabinet Manual 2017* at 3 (emphasis added).

144 Constitution Act 1986, s 16.

145 Palmer and Butler, above n 139, at 37 (emphasis added).

146 At 39 and 96.

147 Killey, above n 82, at 148–149.

too prematurely and acted well beyond established precedent.<sup>148</sup> Palmer's proposed constitution would do away with the reserve powers of appointment and dismissal of the Prime Minister altogether, and thus fix the problem of the arbitrary exercise of authority. The Governor-General would simply confirm the Prime Minister after being notified by the Speaker of the House that a Prime Minister had been selected from among the parties, and the Prime Minister could only lose their position if they ceased to be a Member of the House of Representatives or resigned, or if another Prime Minister was chosen.<sup>149</sup> This would avoid a possible "high-noon situation" between a Governor-General that could dismiss a Prime Minister and a Prime Minister that could dismiss a Governor-General, where one party might feel pressured to strike preemptively before they lost their position.<sup>150</sup>

There are also distinct reasons why a single, supreme constitution might be difficult or undesirable to implement. These include the desire for flexible, soft constitutional law, which gives Ministers the ability to adapt to unforeseen circumstances; the concern of giving the judiciary too much power at the expense of the legislature; the complexity in agreeing on a new settlement between the New Zealand state and Māori iwi; and the adequacy of some lesser form of codification. Our current system has flexibility, which is useful in keeping the constitution up to date with the changing needs of government.<sup>151</sup> James Allan argues that a supreme constitution would lock things in permanently when no generation knows better than the next and that, under the living constitution interpretation that would likely develop in the courts, we do not know what will be taken off the table for Parliament to deal with in the future.<sup>152</sup> This argument, though, does not take into account the varying ease or difficulty of different constitutional amendment procedures. James Bowden and Nicholas McDonald go further and argue that codification of convention is paradoxical since political enforceability and legal enforceability are mutually exclusive; political enforceability depends on the electorate while legal enforceability depends on the courts.<sup>153</sup> Indeed, in terms of enforcement it might be difficult to formulate certain conventions in a concrete form that would be clear enough to avoid misinterpretation. However, even if the formulation of conventions was not clear, it is questionable whether the courts would be the most appropriate body to adjudicate over conflicts between the different branches.<sup>154</sup>

Any serious consideration of a written constitution must squarely confront how the constitution would deal with the Treaty of Waitangi, since it is almost "unthinkable for a proposed written constitution *not* to be based on the Treaty".<sup>155</sup> Some options include keeping the Treaty as a non-legal founding document, incorporating the text of the Treaty, incorporating the principles of the Treaty, or implementing an entirely new power-sharing scheme. While such questions may potentially be divisive among the populace, they are not legally insurmountable, given that "[t]he Crown's Treaty obligations have *already* been

---

148 At 150–154.

149 At 37–38 and 41.

150 Stockley, above n 97, at 95.

151 Megan Caulfield "Constitutional Conventions in the United Kingdom: Should they be codified?" (2012) 1 MRLCE 42 at 44–45.

152 Allan, above n 79, at 199–200.

153 James WJ Bowden and Nicholas A MacDonald "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia" (2012) 6 Journal of Parliamentary and Political Law 365 at 399.

154 Stockley, above n 97, at 97.

155 Joseph, above n 78, at [6.6.2] (emphasis in original).

passed from the Queen in right of Britain to the Queen in right of New Zealand” (that is, to the New Zealand state).<sup>156</sup>

Additionally, we might not need to codify some of our constitutional conventions because the Cabinet Manual already gives adequate certainty. Official political handbooks reinforce constitutional conventions by facilitating greater understanding of Ministerial responsibilities and acting as guides for conduct.<sup>157</sup> However, Cabinet Manuals are not “legitimate sources of law”, even though they comment on legal doctrine and discuss constitutional conventions.<sup>158</sup> They may give conceptual certainty, but not legal certainty. Alternatively, a new Constitution Act could be passed codifying existing powers with ordinary legislative effect. A comprehensive Constitution Act that turns a few specific constitutional conventions into legal rules would be more desirable than the present situation. However, in the absence of the courts’ ability to enforce it, the legislation would merely be an act of “window-dressing” that would not properly protect people’s rights, as other legislation inconsistent with the Act could still be passed.<sup>159</sup>

## V Conclusion

The United Kingdom Supreme Court’s decision in *Miller* has far-reaching implications not only for the United Kingdom but also for the Commonwealth more generally, and especially for New Zealand. Deciding that the Sewel convention, despite its statutory incorporation, was purely political and legally unenforceable was fully consistent with the classic conception of constitutional conventions and parliamentary sovereignty. Even though it was the correct legal decision, it will have detrimental political effects on the United Kingdom’s future—through increased mistrust and weariness on the part of the devolved administrations towards Westminster—as well as being a potential catalyst for a second referendum on Scottish independence. However, the United Kingdom does not exist in a vacuum, even with Brexit.

The Supreme Court decision, being highly persuasive in common law jurisdictions, will reverberate throughout the Commonwealth for the proposition that constitutional conventions are recognisable by the courts but non-justiciable due to their political nature. The problem is not that the Supreme Court got it wrong when it came to constitutional conventions. The problem is that it reinforced the idea that constitutional conventions can effectively be ignored as long as the political actor is willing to bear the risk of accusations of unconstitutional conduct. New Zealand, due to the key role constitutional conventions play in its system, has entire areas of its constitution that can be disregarded at will. From *Re Resolution to Amend the Constitution*, it is clear that when it comes to constitutional conventions, an action can be unconstitutional and yet still legal. Such an idea is dangerous when it comes to the executive. In the modern era, the executive branch has attempted to seize more power wherever it can and using whatever method, including by the Royal prerogative, which was traditionally exercised under constitutional convention.<sup>160</sup> This is exactly what the United Kingdom Government was trying to do with the prerogative in *Miller*, as it was inconvenient to go through Parliament.

---

156 Stockley, above n 97, at 101.

157 Bowden and MacDonald, above n 153, at 399.

158 *Carter v Coroner’s Court at Wellington* [2015] NZHC 1467, [2016] 2 NZLR 133 at [64].

159 Palmer and Butler, above n 139, at 16.

160 At 96.

One potential solution for New Zealand is a supreme constitution, which would abolish the Royal prerogative so that all public power would only be exercisable under the constitution or by statute. It would also either legally codify or discard conventions regarding the reserve powers on a case-by-case basis. This approach is not without its own problems, however. It might be difficult to determine which conventions should be codified and which should be left alone, and what precise phrasing should be used in the codification of those conventions. Although conventions form an important part of the overall constitutional picture, we should not adopt a supreme constitution solely on the grounds that it would give certain conventions the force of law. Instead, it could well be that a new and expanded Constitution Act, of ordinary statutory force, is the best way forward. Either way, we owe a duty to New Zealand citizens to make our constitution knowable, accessible and enforceable. In 1944, Professor JC Beaglehole described New Zealand's constitution as being "some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the sleepless priests of the Crown Law Office tread with superstitious awe".<sup>161</sup> His assessment will continue to ring true until we choose otherwise.

---

161 JC Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944) at 50.