

What is the role of constitutional conventions?



## **Abstract**

The UK does not have a written constitution and as such there is a heavy reliance on the constitutional conventions. This analysis considers the importance of the conventions and concludes that these conventions do indeed play a crucial role in the smooth running of the constitutions and indeed the development of written practices

## Introduction

The UK does not have a formal, written constitution, yet it does have a highly developed approach which broadly creates stability within the political framework of the country. The United Kingdom has therefore developed a codified constitution, which relies heavily on constitutional convention. The purpose of this paper is to consider the importance of constitutional conventions and to consider whether or not these can be attributed with the success of the strong political and constitutional approach taken in the UK. The first part of the paper will look at the definition of constitutional conventions and ascertaining the way in which these have evolved, over the years. The discussion will then look at the positive impact that these constitutional conventions have had, as well as the negative impacts, before undertaking the final analysis of whether or not constitutional conventions represent important rules when it comes to running of a constitution, as per the statement noted above (Loveland, 2003).

## Definition and History of Constitutional Conventions

A definition of a constitutional convention by Dicey, in 1898 p Cllii, stated that the Constitutional Convention refers to “conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power...are not really laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the ‘conventions of the constitution’, or constitutional morality...”

This creates an interesting starting point for the discussion here, with the recognition that a convention does not take a formal footing as, in the absence of a written constitution, the UK largely relies upon these conventions, in order to guide its operation.

There has been substantial constitutional change in the UK, since 1997, without the formal establishment of a written constitution. For example, in 1997, referenda were held in both Scotland and Wales which began to establish a period of devolution, with both Scotland and Wales pursuing their own parliament or, in the case of Wales, a National Assembly. Whilst again this did not ultimately change the existence of the constitution, it has altered the relationship between Scotland, Wales and England. Similarly, in 1998, the Good Friday agreement also allowed the devolved assembly in Northern Ireland and, later the same year, a Greater London authority was approved which enabled a directly elected mayor and an assembly to be established, to manage the running of London.

Another notable constitutional change which could be considered to be a convention although did not have the effect of establishing a formal written constitution include the establishment of the Human Rights Act 1998 which

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incorporates European law implemented on a global level, as well as the critically important Constitutional Reform Act 2005 which reformed the role of the Lord Chancellor and created a Supreme Court.

By looking at these developments, over recent years, there is substantial support for the idea that constitutional conventions, whether they are written or unwritten, will always find themselves subject to change to take into account underlying factors. These conventions are, therefore, crucially important when it comes to the establishment of rules and regulations and the operation of political parties and bodies (Barnett, 2006).

There is clearly merit in the argument that constitutional conventions in the United Kingdom are particularly important, due to the fact that there is no written constitution. Therefore, the way in which these conventions evolve, over time, and those conventions that are perceived to be relevant are currently likely to have a long-standing impact on the operation of the political bodies and the constitution of the UK, in such a way that may be greater than those jurisdictions which have written constitutions.

### Pro-Constitutional Conventions

Interestingly, when looking at the definition of constitutional conventions provided by Dicey, this definition seems to concentrate on the notion that conventions are supposed to achieve a certain aim, and this is a strong starting point. However, it is important to note that conventions need to be distinguished from other forms of practices or habits, as this latter definition simply describes what happens whereas a convention will look more at what should happen or how matters should be dealt with.

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Of perhaps greater relevance in this discussion, therefore, is the concept that constitutional conventions add value and “flesh” to the “bones” of basic rules and offer guidance which means that the constitution can operate effectively. As stated by Jennings (1959) p. 45: “The short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas”.

This seems to take on a much more positive view of the role of constitutional conventions and suggests that they take on a vitally important role within the constitution, in terms of offering guidance and specific rules which should apply, from a practical perspective.

This definition would suggest that the UK constitution is involved in such a way that it falls into one of two distinct categories. The first refers to the constitution itself, which is contained within the statutory provision and subordinate legislation and this will have an effect on the entire society, whereas the second set of rules is non-legal in nature and can be seen as constitutional conventions that are generally accepted as binding, but cannot be enforced in court. Despite the lack of enforcement powers given to constitutional conventions, it is argued here that their existence has been fundamental in the establishment of the smooth operation of government, over the years, and without these conventions, many of the legal rules would be lacking in efficiency or practicality.

Difficulty with Constitutional Conventions

Whilst there is a clear benefit in the use of constitutional conventions, a practical difficulty arises when determining what, precisely, is meant by a convention and whether or not a certain course of behaviour is to be considered a rule or a constitutional convention which can be relied on and can enforce certain behaviours, without having a legal basis. When it comes to the definition of convention, the concept of obligation is seemingly particularly important and this is a crucial element of the constitutional convention. Without some form of obligation underpinning the precise group of people or those involved in the management of government are likely to find themselves complying with the convention at hand.

If there is no obligation attached to the constitutional convention in question, then it will not necessarily be recognised by those who are observing the constitution (Foley, 1999).

Following this principle, it is therefore argued that the validity and usefulness of a constitutional convention depends on the way in which the constitutional convention is established and whether or not it is accepted by the masses and by those who are required to apply the convention in their day-to-day activities. The determination of the existence of the convention is a good starting point for this discussion as to whether or not the recognition of the existence of a convention can be linked to the point at which it is accepted. For example, once a constitutional convention is accepted as being a convention, there is an argument to suggest that it has gained the necessary support when it comes to the management of the government and activities associated with the government.

A slightly different alternative definition of constitutional convention was provided by Dicey and suggested that constitutional conventions are habits and practices which regulate the way in which sovereign power is used. Although, on the face of it, most of these definitions of the constitutional convention are very similar, this latter definition suggests that the convention describes the way in which certain groups of people operate, rather than the former definition which suggests that the convention gains legitimacy in its own right (Bradley and Ewing 2007).

### The Importance of the Constitutional Convention

It is argued here that the importance of constitutional conventions suggested by the theory presented by Jennings that a constitutional convention is the way to add value to the rules and regulations that are being complied with by government or a small segment of government. By pursuing the approach taken by Jennings, it is suggested that society, or groups within society such as the government, will conform to specific trends of behaviour. As certain behaviours become more, and more readily accepted, they then become established as the accepted way to do something, or indeed the way not to do something. In many cases, these conventions suggest activities out of respect, e. g. the removal of a hat when attending a church service. However, failing to abide by these specific conventions has consequences attached and is simply likely to result in an individual being “looked down upon”, or shunned in some way. When applying this to a constitutional situation, these conventions can be seen as ways in which people are expected to act, in order to be accepted by their peer group and by society

around them. Failure to comply with these conventions could result in sanctions from other bodies, but fundamentally no law is broken.

Given the flexible way in which the establishment of conventions takes place, it is not surprising that some established conventions have greater strength than others and in many cases the constitutional convention actually plays a pivotal role in the politics of governance of the country. A particularly obvious example of this is the convention that the Queen will automatically pass any statutory provision put in front of her for Royal Assent. The actual rule relating to the need for Royal Assent places no burden on the Queen to automatically accept or reject any statutory provision put before her; yet, any refusal by the Queen to do so would potentially create constitutional chaos.

A further example that could be presented in terms of when a constitutional convention provides stability and efficiency is the convention of collective ministerial responsibility. This concept of collective responsibility indicates that all of the ministers working within the government need to demonstrate a degree of responsibility for the actions of the government, including policies and decisions, even if there is an individual disagreement with certain aspects of these decisions. This constitutional convention is a clear indication of just how important these constitutional conventions can be. Therefore, although there are no specific rules stating that there needs to be collective ministerial responsibility, without it, any policies and decisions emanating from the government could be disowned by individual ministers, thus creating an almost impossible situation with no responsibility being held by anyone (Gordon 2010).

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This convention places notable obligations on all ministers to both support and comply with any government policy and there is an expectation that ministers within the government will speak with one voice. This convention has been established as a means of giving public confidence in the policies and procedures laid out by government. Any ministers who find themselves in a position that they outwardly cannot support a government policy would typically be expected to resign from office. Again, this is not a requirement, but is a constitutional convention which has developed over the years and has created a situation whereby collective responsibility is a pillar of government policy. Without this, it would be difficult for the public to have any confidence in government policies and this would seriously reduce the ability of the government to be effective (Fenwick and Gavin 2003).

### Cases Dealing with Conventions

Despite the positive aspects of constitutional convention, there have been several cases where courts have refused to accept the reliance on constitutional convention as a means of either bringing an action, or denying an action, but have ultimately given effect to the convention, in such a way that it may as well have been a formal legal rule. For example in the case of *Jonathan Cape (1976)*, it was held by the court that the publication of the diaries which contained details of Cabinet proceedings was not to be seen in the public interest. The attorney general, in this case, stated that they wanted to prevent publication, on the basis that it would have resulted in a breach of convention. Despite this, it was held that confidentiality and the need to protect the public interest was such that the publication should not

take place. However, the courts do not accept that this was due to convention, but rather to the need to act in the public interest.

A similar approach was taken in the Manuel case of 1983, where the court once again had the opportunity to crystallise a convention into a firm legal principle. In this case, the debate was about the ability of the UK Parliament to legislate on behalf of Canada, and it was held that convention did not have the power to bring about a change of rules although it may be that a certain conventional breach can, ultimately, be the catalyst to review legal principles. Despite this, conventions themselves could not be held responsible and convention could not therefore be used as the foundation for a legal decision.

### Analysis and Conclusions

It can be argued, therefore, that the main goal of the convention is to look at the application of concepts and prevent these from becoming too rigid and to enable changes to take place, to reflect social and economic movement. Conventions are, however, extremely important, as they are observed by a broad range of individuals, including the Prime Minister, judges, civil servants, sovereign and ministers. It is convention for example that the ministers are responsible to the government through parliament for the actions of those within their team. Conventions create the situation whereby a minister may be responsible for the actions of those working within his own department, even if they are not aware of the misdemeanour.

Although it is rare for the courts to utilise and rely on constitutional conventions when making decisions, they are regularly used as a means of

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interpretation. This again indicates just how important constitutional conventions are, not only in terms of indicating acceptable conduct, on a day-to-day basis, but also when dealing with an acrimonious and potentially difficult situation. It is argued here, therefore, that constitutional convention, as a theory put forward by Jennings, are vitally important within the UK, particularly given the lack of written constitution.

The critical factor associated with the effectiveness of constitutional conventions is thought to be down to the fact that these constitutional conventions are readily accepted rules and obligations by those who are responsible for complying with them. In the case of collective responsibility, for example, the strength of the constitutional convention comes from the fact that all ministers accept this collective responsibility, unquestioningly. Difficulties, however, emerge when a constitutional convention is questioned.

On balance, however, it is concluded here that the statement made at the outset is an accurate reflection of the importance of constitutional conventions and in its assessment that constitutional conventions are largely responsible for the smooth running of political agendas within the UK. Crucially, these conventions also present reasonable expectations of how public bodies are likely to act, in a variety of different situations, all of which is fundamental for long-term public confidence.

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