CHAPTER FIVE

CONSTITUTIONAL CONVENTIONS

Constitutional and Administrative Law

CONVENTIONS OF THE CONSTITUTION

INTRODUCTION

The sources of the constitution of the U.K. may be divided into two categories,

1) The legal rules of the constitution, as found in case law, statute and subordinate legislation,[1] and
2) The non-legal rules of the constitution, informal rules or Constitutional Conventions.

Since the U.K. does not have a *'written constitution'* the non-legal rules are considered by some commentators to be of greater importance in the U.K. than elsewhere. However even countries with a written constitution have also developed non-legal rules to supplement their written constitutions. The non-legal rules of the U.K. have thus become an important feature of our constitution. A knowledge of Constitutional Conventions is thus essential to an understanding of the structure and regulation of the constitution of the U.K.

These non-legal rules can be sub-classified as :-i) Constitutional Conventions, ii) customs ; and iii) usages.

It is important to be able to distinguish between each of these and to discuss their relationship to legal rules.

The main types of convention relate to use of the Royal Prerogative and the Cabinet, to Parliament and to the Commonwealth. This chapter will consider the nature, importance, purpose and origins of conventions and discuss how to identify conventions, why conventions are obeyed and in what ways, if at all, conventions are different to laws.

Definitions of Constitutional Conventions

Dicey defined Constitutional Conventions as "…. *rules for determining the mode in which the discretionary powers of the Crown (or ministers or servants of the Crown) ought to be exercised. Furthermore, he stated that conventions are constitutional rules, which are not laws in the strict sense ..... which are designed to control the use of discretionary power by the Crown."* This definition concentrates on what conventions are supposed to achieve.

Hood-Phillips describes conventions as "*Rules of political practice, which are regarded as binding, by those to whom they apply, but which are not laws because they are not enforced by the courts and parliament*." This definition concentrates on the nature of enforceability.

L.B.Curzon "... conventions are understandings, tacitly agreed, resulting from long practice by which the conduct of the Crown and Parliament is regulated in the absence of formal rules." This definition embraces origin, function and scope.

Freeman : ' .. *a whole code of political maxims, universally acknowledged in theory and universally carried out in practice.' and as "a whole system of political morality, a whole code of precepts for the guidance of public men*." Growth of the English Constitution. This definition targets the nature of conventions.

Be prepared to appraise, compare and contrast the various definitions of Constitutional Conventions. Is any one of these definitions adequate and if not, why is this so ? Propose a definition, which you consider to be more appropriate and say why.

The function and purpose of conventions

Constitutional Conventions are meant to be a means of bringing about change without recourse to formal change by legislation, as reflected by Jennings' comment about "keeping the constitution in touch with the growth of ideas". They allegedly give the constitution flexibility. Thus it has been asserted that "The English Constitution drifted from a monarchical system to parliamentary system by way of convention".

The ultimate object of most conventions according to Dicey is that the affairs of public account/interest should be conducted in accordance with the wishes of the majority of the electorate e.g. ministers are chosen from the party which has the majority in the House; there are annual Parliaments to ensure that the people's representatives can express their opinions on the system of government etc.

Jennings also considered that Constitutional Conventions enable the relevant persons to work the legal machine. He asserted that pairing in divisions eased the strains of being a member of the commons through agreements based on trust and honour. Are these fundamental Constitutional Conventions by Munro's standards discussed below ?

[1] See Chapter Four above

Constitutional and Administrative Law

The Importance of Conventions

Constitutional Conventions must be judged by their ability to fulfil their proclaimed function.

Dicey : Conventions 'secure the ultimate supremacy of the electorate as the true political sovereign of the State" and are "rules for determining the mode in which the discretionary powers of the Crown ought to be exercised."

The proposition therefore is that "*the discretionary powers of the crown, arising out of the royal prerogative, statute and common law are exercised on behalf of the electorate due to convention*." This much is true, in that the Crown exercises few such powers in person, the powers now being exercised by the Prime Minister and Ministers of the Crown in the name of His / Her Royal Majesty the King / Queen.

Dicey claims that Constitutional Conventions provide rules governing the way the discretion is exercised. What then is the role of judicial review and the doctrine of ultra vires, which also purports to regulate the government's exercise of discretion? Compare the positive and highly developed judicial attitude towards government use of statutory powers and the tentative approach being developed toward judicial control of Royal Prerogative powers. Presumably therefore, Dicey regarded Constitutional Conventions as a powerful method of controlling the royal prerogative.

Which is the most effective method of controlling the discretionary power of the crown? Is it more desirable that the power be controlled by the un-elected courts or by self-regulation by the elected members of government, subject to the control of Constitutional Conventions?

If so, do Constitutional Conventions provide a genuine control of the exercise of such discretion? Hood-Phillips describes Constitutional Conventions as "*Rules of political practice, which are regarded as binding, by those to whom they apply, but which are not laws because they are not enforced by the courts and parliament*." Since ministers are accountable to Parliament on behalf of the people (at least in the Commons) then it is true to say that the lack of legal control of Constitutional Conventions provides a role for Parliament as the controller of the executive.

Consider the Constitutional Conventions regarding ministerial responsibility. How effective are they as mechanisms for accountability to the electorate? How often are ministers punished as a result of adverse newspaper reporting ? Do papers report ministerial behaviour for the public good or to boost the paper's circulation and thus make money ? If sales are the main criterion papers are likely to concentrate on newsworthy and scandalous ministerial behaviour rather than ministerial incompetence. If so, is the ultimate purpose of holding ministers to account regarding their exercise of discretionary power effectively controlled by Constitutional Conventions?

De Smith considered that " ... *some Constitutional Conventions are far more important than most of the statutory and common-law rules connected with the British system of government*." If De Smith is correct, why is this so? Are the rules insufficient? Are they badly drafted? Are they badly enforced? The sleaze controversy during the Major administration and the impact of the Nolan Committee Report indicates that Parliamentary control can be very public and potentially effective and at the very least highly damaging to those in public life who abuse their position. However, not all Select Committees enjoy the prestige accorded to the Nolan Inquiry. During the Blair administration, the conventions on ministerial responsibility have ultimately, if rather late in the day, proved to be effective as demonstrated by the resignations of both Peter Mandelson and Estelle Morris, even if somewhat marred by Mandelson's appointment as a European Commissioner.

To the extent that exercise of the royal prerogative is beyond the control of the courts, Dicey's statement may well be true. This can be seen in the abortive attempt by Lord Rees Mogg to prevent the Government ratifying the Maastricht Treaty. This view is reinforced by Thompson & Munro, who claim *'effort should be directed to trying to separate the fundamental from the minor*". If so one needs, for analytical purposes, to identify those conventions, which are indeed fundamental to the constitution and separate them from those that are not.

According to Jennings, Constitutional Conventions "*provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas*".[2] Jennings appears to assert that the legal constitution would not work without conventions. To what extent, if at all, is it correct to say that the constitution would become outmoded and unsuitable for modern society without conventions?

[2] Jennings *'The Law and the Constitution'*.

Dicey asserted that "*Conventions exist to control the discretionary and arbitrary powers of the crown*." This is probably too narrow since some conventions do not relate to the powers of the crown, though perhaps Munro's fundamental Constitutional Conventions do.

Identification of and establishment of Constitutional Conventions

How do Constitutional Conventions become established? Some conventions are based on particular agreements e.g. many of the Constitutional Conventions regarding the Commonwealth result from agreements. When they start is clear. Other Constitutional Conventions are based on usage. It is not easy then to say precisely when any such convention crystallised into a convention. Thus, every significant act within the political sphere is a potential convention. When did the conventions that the Prime Minister sits in the Commons start ? or that the Monarch has to assent to Bills ? Queen Anne rejected a Bill in 1708.

How long does it take for a convention to become established?

It took at least 70 years for establishment of the convention that the Queen must act upon the advice of her ministers. When the King wished to consult the leader of the opposition in the Lords in 1910 he was reminded by Asquith that "The part to be played by the Crown, in such a situation as now exists, has happily been settled by the accumulated traditions and the unbroken practice of more than 70 years."

From this point of view how certain are Constitutional Conventions or their existence? Which practices have developed sufficiently to constitute Constitutional Convention and which have not? Will those have not, ever mature sufficiently to do so ? How then can anyone be sufficiently confident of a conventions existence to be able to decide whether or not to be bound by it ? It had appeared that a convention was developing to the effect that there would be no more hereditary peerages created. However, the peerage granted to Dennis Thatcher was a full hereditary peerage.

Distinguish between Constitutional Conventions and habit.

Usages and customs are rules, which are no more than the description of usual practices which have not yet obtained obligatory force.

Sir Ivor Jennings[3] developed criteria for deciding whether or not a particular Constitutional Convention exists, namely:

a) What are the precedents?
b) Did the actors believe they were bound by a rule?
c) Is there a reason for the rule?

Society in general habitually conforms to certain norms or patterns of behaviour. One does not wear one's hat in church; varying degrees of respect are accorded to those in authority over us; hats are doffed at some types of ceremony etc. Equally there are many traditional ways of doing things, which are normally followed by Members of Parliament. Are these habits, customs or Constitutional Conventions? What is the penalty for failing to abide by the rules of society? Is there a reason for acting in a particular manner beyond its being traditional or efficacious?

The Distinction between Laws and Conventions

Geoffrey Marshall asserted that Conventions "*are unlike legal rules because they are not the product of a legislative or a judicial process.*" Constitutional Conventions.

Curzon observed that "*Laws are the written and unwritten body of rules, largely derived from custom and formal enactment which are recognised as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions.*"

Hood-Phillips claimed that Conventions are "*Rules of political practice which are regarded as binding, by those to whom they apply ....*" This suggests that those subject to laws have no choice in their subjugation to the law, but those subject to conventions have a collective choice as to whether or not they will be bound by them.

If the electorate is sovereign, then the content of the law is challengeable by the electorate who could support a party proposing changes in the law. Theories of social contract would suggest that the people obey the law because there is a contract between governor and governed, whereby the people submit to central authority in exchange for security.

[3] 'The *Law and the Constitution'* Chapter III

The conventions of the constitution develop consensually between those subject to them. The Houses of Parliament could debate and propose amendments to conventions and could agree to new modes of practice.

In neither of the situations so described has the individual a personal choice. The laws or conventions develop through consensus. Those subject to them must abide by them as and until a change to the laws or conventions can be agreed and implemented.

Reference Re Amendment of the Constitution of Canada.[4]
Can a convention crystallise into a law ? This was the question raised in **Manuel v Attorney General.**[5] Native Indians claimed that the **Canada Act 1982** was ultra vires, on the grounds that their consent had not been sought. Had the convention that prior provincial consent would be sought crystallised into a law so that if consent was not sought before the passing of legislation, that legislation would be invalid ? The court categorical rejected this assertion. Laws are justiciable, conventions are not. No convention can limit the legislative capacity of parliament. Thus laws and conventions can be distinguished.[6]

Are all laws enforced or enforceable?
The fact that laws are broken in itself does not prove that a measure is not a law, since the law will punish the wrongdoer (criminal law) or otherwise provide a remedy for the innocent party (civil law). Certain types of 'public law' are effectively non-justiciable as where a general duty is placed upon a public authority. The authority attempts to comply with the duty and exercises its discretion as to how much of its finite resources are spent on different aspects of its duty and what course of action will satisfy that duty. This involves political judgements, which the courts are unwilling to question. [7] Many laws do not require obedience, for example laws regarding property ownership.
It would appear that laws are obeyed because there is a sanction against those that do not obey the law (fear of the sanction may not be that coercive e.g. double yellow lines. Society will shun those who do not obey the law. People in general wish to be seen to conform to the legal norms of society (a sizable minority are prepared to park on double yellow lines etc).

Why are conventions obeyed?
Dicey asserted that "*... conventions ..... are obeyed because a breach of the rules would ultimately lead to a breach of the law and which are designed to control the use of discretionary power by the Crown.*" Even if true, who knows whether this has ever deterred a politician? It is not quantifiable. The bold will break the rules whereas the more astute are more concerned with political consequences. Clearly the breach of some conventions will result in conflict with the law. If Parliament is not called annually and finance bills are not passed there is no legal mechanism for raising the money needed to run the country. The breach of many other conventions will not however result in a legal conflict e.g. if a minister refuses to resign for personal misbehaviour.

Munro[8] stated that "*The validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breach of such rules will not be affected by any legal sanction. There are no cases, which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.*"

Will breach of a convention lead to a breach of law ?
Dicey wrote that "*... conventions are constitutional rules, which are not laws in the strict sense, but which are obeyed because a breach of the rules would ultimately lead to a breach of the law*" and that Constitutional Conventions "*are designed to control the use of discretionary power by the Crown.*"

Hood-Phillips discusses whether or not the breach of a convention will ultimately lead to the court. If the Queen breaks a convention would she end up in court? [9] He further observed that Conventions are "*Rules of political practice which are regarded as binding, by those to whom they apply, but which are not laws because they are not enforced by the courts and parliament.*"

4 **Reference Re Amendment of the Constitution of Canada** [1982] 125 DLR.
5 **Manuel v Attorney General** [1983] 1 Ch 77
6 See also **Adegbenro v Akintola** [1963] A.C. 614 and **Ningkan v Government of Malaysia** [1970] AC 379.
7 e.g. legislation regarding health, social welfare, education etc.
8 *Laws & Conventions Distinguished*. [1975] 91 L.Q.R. 218.
9 See also, later notes on the Royal Prerogative and conventions.

Mitchell [10] quoted the **Ibralebbe Case**[11] as a possible example of a court enforcing a convention. Conventions have from time to time received judicial notice regarding their existence, but not necessarily as a means of enforcing the convention. Thus in **Carltona v Commissioners of Works**[12] the court considered the powers of a government minister and placed considerable emphasis upon the importance of Constitutional Conventions regarding the duties of government ministers. Ultimately however, the decision of the court was made on the basis of a breach of the doctrine of ultra vires.

The question before the court in **A.G. v Jonathan Cape Ltd**.[13] was "whether or not the courts would enforce the convention of cabinet secrecy ? Would an injunction be granted to prevent publication ?" The court ruled in the negative reinforcing the view that Constitutional Conventions are not enforceable as laws, and thus an injunction to prevent publication was refused.

Other reasons why conventions be obeyed.

The consequences of breaching a convention are frequently unattractive and therefore breach is very difficult eg if the Queen tried not to assent to a Bill then it is possible that she might be removed. It is claimed that conventions are obeyed because those subject to them fear the political consequences of disobedience. A blatant breach of convention is likely to be criticised by the press and bring the violator into disrepute and tarnish his political party's standing in the eyes of the electorate.

By convention, minister's must resign for personal misbehaviour. Thus, Cecil Parkinson's misbehaviour regarding Miss Keyes forced him to resign despite the personal support of the Prime Minister because of persistent adverse press coverage. If the minister does not have the support of the Prime Minister, manufactured public opinion will force him to resign. If the minister does not do so, the Prime Minister may be forced to have a cabinet reshuffle to prevent further adverse publicity. If the press do not make an issue out of a minister's misbehaviour then the minister may not have to resign, unless the Prime Minister makes it clear that such a resignation is sought.

Conventions may be observed by force of habit; inertia; a desire to conform; a belief that it is right and reasonable; or part of a good structure; fear of political implication. The reasons for obeying law are similar!

- The convention of annual parliaments is reinforced by the need for annual finance.
- The convention that the P.M. has to be a leader of the party which commands a majority in the House of Commons, is reinforced by the fact that without a majority it is impossible to pass any legislation.

Hood-Phillips suggests that statesmen like the status quo and so they do not rock the boat by breaching conventions.

The Consequences of breaching Conventions

1). The convention might cease to exist.

2). A small number of isolated breaches might be treated as exceptions to the rule, eg the Doctrine of Ministerial Responsibility (that the cabinet must speak with one voice on policy decisions) was breached in 1975 on the vote to stay in the E.E.C. with the famous 'agreement to differ'. [14]

3). A breached convention can be turned into a statute to prevent further breach as with the passing of **The Parliament Act 1911** following breach of the Constitutional Convention that stated that the Lords should always bow down to the will of the commons. It was established in **Madzimbamuto v Lardner-Burke**[15] that U.K. legislation can overturn a commonwealth convention arising out of an international agreement.

4). A convention can always change or even develop eg the convention that a Member of the House of Lords could not be the Prime Minister developed into one where if one renounced title to the Lords, then the convention would be satisfied as with Sir Alec Douglas Home who became Prime Minister.

5) The issue might be fudged so that the convention appears to be theoretically intact - whereas its coercive force is limited - this could be the case regarding the conventions on ministerial responsibility where resignation hinges on a lot of different factors.

10 Infra at p35

11 **Ibralebbe v R** [1964] AC 900 Privy Council

12 **Carltona v Commissioners of Works** [1943] 2 All ER 560.

13 **A.G. v Jonathan Cape Ltd** [1976] QB 752.

14 See also 1932 for a further example of such a breach.

15 **Madzimbamuto v Lardner-Burke** [1969] 1 A.C. 645.

If a law is breached it is still a law. However, if a convention is breached then it might cease to be a convention.[16] Both laws and conventions are based on precedent and usage. Though some conventions are the result of agreements, especially those concerning the Commonwealth, and some become law as a result of statute.

Are conventions uncertain and conversely are laws certain ?

The books tend to suggest that Constitutional Conventions are relatively uncertain and that law is certain. However, on closer examination, it can be seen that much law is not at all certain and awaits judicial clarification, whereas many conventions are very certain. Even the meaning of statutes is subject to judicial interpretation.

Codification, Sources of Laws and Constitutional Conventions

The Law can be found in the reports of judicial decisions and in the Acts of Parliament. It is therefore easy to find out what the law is (if you are a trained lawyer). The sheer bulk and complexity of the law means that, it is far from accessible to the ordinary man.

Conventions are unwritten so they are not easy to find or to identify. There is no definitive list of conventions. Their existence and scope is uncertain. However, there are a finite number of core conventions which are discussed in all the main text-books on constitutional law.

Should the law be codified so that it is readily accessible, as in civil law countries and in India?

- Could such a list ever be definitive?
- Would codification inhibit flexibility and development?

Not all conventions carry the same weight and the pecking order is relative to the times.

- Could or should such conventions then be entrenched?
- Is it possible to entrench such conventions?

Should the conventions form part of a new bill of rights? If so,

- Who would decide which of the 'conventions' discussed by the constitutional commentators are sufficiently defined to codify and exactly what do these conventions stand for?
- Immediately after codification would new conventions begin to develop?
- Should there then be a committee to monitor the development of conventions and to admit new conventions to the list as appropriate and to repeal obsolete ones?
- What would be the penalty for breach of such codified conventions? Or, as in India should they be codified but then declared non-justiciable?

If as Dicey says Constitutional Conventions *'secure the ultimate supremacy of the electorate as the true political sovereign of the State*" and are "*rules for determining the mode in which the discretionary powers of the Crown ought to be exercised*" would a legal sanction for breach of codified conventions result in the courts being forced to take a political stand and so jeopardise judicial impartiality? Would we then have to create a special constitutional court to deal with such issues?

If conventions are binding in any case, why not codify them? If conventions are obeyed why bother to codify them? Conventions evolve. Laws are created. Much can be evolved that cannot be politically achieved by sudden abrupt changes. Evolution permits experimentation.

The Widdicombe Conventions. In 1985 a committee set up to discuss the ground rules regarding what is and what is not, by usage permitted in relation to government spending on advertising of government policy committed the current conventions on advertising to print. The publication is now issued as a guide-line to government departments.

Are Conventions flexible and laws rigid ?

It is claimed that laws are rigid. However, much of the common law has gradually developed, taking into account the changing attitudes of society. Statute law is forever changing at the whim of Parliament. None the less it may be impossible to get Parliament to agree to certain changes in the law. Conventions are supposed to be flexible. However, whilst a convention may be seen as undesirable it may not be easy to create a general consensus of opinion that a new or alternative way of doing things would be better than the current practice.

[16] See Mitchell p p 3 5 - 3 6 on the relationship between law and convention.

Which can be changed quickest, laws or conventions? Whilst it is true to say that the common law has developed slowly over a long period of time, fundamental changes in the law can be implemented very quickly simply by passing a statute assuming consent can be achieved in Parliament. Conventions, by contrast, usually take a very long time to come into being, with the exception of Commonwealth Conventions, which are born in an instant out of international agreement. Even when a convention is breached it does not necessarily die. The breach may in time come to be seen as an exception to a general rule.

There may in fact be times when a lack of clarity and certainty is desirable. Certain changes may be brought about by a gradual process, which could never be achieved by a direct approach. A large number of people may desire a change but would never admit to it because vociferous minority pressure groups would make a big thing out of it as can be seen with the Sunday Trading issue. Often the values in society shift quietly and imperceptibly from one stance to another.

The role of and seat of the Prime Minister illustrates a change in convention. Originally a member of the House of Lords, the last time that the P.M (Lord Salisbury) was a member of that House was in 1902. Now, according to Hood-Phillips, the P.M. must by convention be a member of the House of Commons. Since 1911 it has been clear that the main seat of power is the House of Commons, as demonstrated in 1923, 1940 and again in 1962 when Lord Home became Sir Alec Douglas Home.

The Classification of Conventions

Hood-Phillips identifies three main groups.

1) The exercise of the Royal Prerogative and the cabinet. The most important!
2) Conventions to regulate the relations between the two houses and proceedings inside parliament.
3) Conventions that deal with relations between the U.K. and the Commonwealth.

Royal Prerogative and the Cabinet System :

The (Crown) Queen can legally declare war and peace ; dissolve parliament at any time ; refuse to assent to bills ; appoint new ministers of her choice. In practice, within the modern constitution, the Queen's ability to do any of these things is severely restricted. Her Majesty will exercise her legal powers in the majority of cases on the advice of the ministers. Again she must usually assent to bills. The choice of Prime Minister is restricted to that person who can command a majority in the House of Commons. Obviously, if there were no clear-cut candidate, then the Queen's power would be much stronger.

The Queen must appoint ministers of the Prime Minister's choosing and they must be members of one of the Houses of Parliament or quickly become one. After 1964, Mr.Cousins and Mr.P.Walker were appointed ministers though they failed to be returned at the preceding election. In January 1965, they both stood in by-elections, which had been created by moving two members over to the Lords. Cousins was elected and continued as a minister (though as a strong union supporter he later quarrelled with the Prime Minister and resigned). P.Walker failed to be returned and had to give up his post.

Parliament must be summoned at least once a year. The government can continue in office while it commands a majority of the house. The government is collectively responsible to parliament and is judged as a group by Parliament. It speaks with one voice, and discussions in cabinet should be secret. As a result one government cannot see the cabinet papers of a previous government.

Ministers form the government (executive) but only a select few become cabinet ministers. The cabinet is entirely a result of convention. It has been recognised by the courts occasionally and cabinet ministers pay has been authorised by statute. Ministers unable to toe the government line should resign. Ministers that do not agree with government policy have to make a choice between power and conscience. That there is so little cabinet dissent indicates that power is more operative than conscience and that power is an effective coercive factor in silencing dissent.

The theory that the collective responsibility of the government is subject to the control of parliament is not significant since the government usually controls a majority of the House in any case - though it can be seen that when the government is heavy handed and commands a large majority, a back bench revolt is possible and may force the government to change its policies.

Ministers are also individually responsible to Parliament for their actions, for conduct unbecoming of a minister, as exemplified by the resignations of Cecil Parkinson and Douglas Fairbourne, and are also responsible for the conduct

of their Departments as with the resignations of Sir Thomas Dougdale over the Critchell Down Affair and more recently Estelle Morris, Minister for Education over the A-Level marking fiasco.

The Commons as an elected body should prevail over the Lords. Both Houses can control their own proceedings in the manner that they think fit. This has resulted in the rules regarding Parliamentary privilege. [17] The majority in Parliament should not stifle the minority. The Speaker should take the view-point of each of the parties in turn. Conversely, the make up of Parliamentary Committees should reflect the strength of the parties. Peers of the House of Lords who do not possess high judicial rank should not attend when the House is sitting in its judicial role. In the past, certain Lords have attended but have wisely been ignored by the Law Lords.

The U.K. parliament should not, by convention, legislate for independent Commonwealth countries against their wishes. When appointing a Governor general, the Queen should consult the advice of the government of the country concerned.

How real are conventions?

Where did the notion of constitutional conventions come from and why ? Dicey, as a common law lawyer opposed the development of a separate enforceable body of public law in specialise courts with its own procedures. He saw the French *'Droit administratif* as alien to the British Constitution and unnecessary. The common law represented the champion of the rights of the people and was quite capable of providing all the protection the citizen needed to control the executive.

However, exercise of the royal prerogative was clearly outside the jurisdiction of the common law courts. The degree of judicial control of the executive exercising discretion in respect of statutory powers by way of ultra vires was very limited in his day. The notion of conventions to control the excesses of the executive was a convenient tool to paper over the deficits in his argument that the United Kingdom did not need the equivalent of his despised *'droit administratif.*

Since conventions provide guidelines to politicians as to what is politically possible and acceptable, guidelines which the timid adhere to but which the bold adventurer breaks or at least pushes to the absolute limit, elevating conventions to a central role in constitutional theory enabled Dicey, a lawyer, to justify discussing political theory in what was otherwise espoused to be a legal discussion of the constitution. By doing so, Dicey did not have to overtly admit that he has strayed outside the confines of his discipline.

Are new controls needed to replace conventions?

It was claimed by Dicey that conventions control exercise of the Royal Prerogative. The effectiveness of such control is questionable. As will be seen later, the courts have started to assert a degree of judicial control over exercise of the royal prerogative but areas involving national security are excluded by the **G.C.H.Q.** case[18] and national policy and foreign affairs have been ruled to be beyond the jurisdiction of the courts. Whilst it is true that parliamentary question time and electoral constraints exist such control is imperfect.

Is the U.K. unique in this respect ? President Clinton lost all significant control of executive action that required legislation. Because the U.S. elects its President and the legislature by separate processes and at different times it frequently occurs that the President and control of the Legislature vests in the hands of different political parties. President Clinton is a Democrat, but the Legislature was controlled by the Republican Party. Similar problems occur in France as well. The only major power left to the President is Foreign Affairs. This leaves the American President with a similar power to that of the Royal Prerogative in Foreign Affairs and National Security. If the President commits 'his boys' i.e. the armed forces, then the American spirit forces Congress, the Senate and House of Representatives to give him enough support to keep them safe. A common feature of the final instalment in the careers of political leaders is the desire to make a mark on the world arena.

Margaret Thatcher concentrated on her image as a world leader towards the end of her political career. Clinton seemed to do the same, as did presidents Carter, Regan and Bush Senior. Carter has capitalised on this now as a world ambassador for peace in Bosnia, Haiti, and North Korea regarding decommissioning nuclear weapons programs. Thatcher is still doing the world lecture circuit. Clinton, having exhausted his two permitted terms as president, had little to lose by putting all his efforts into Foreign Affairs.

17 See **Stockdale v Hansard** (1839) 9 Ad. & E 1.

18 **Council for Civil Service Unions v Minister of State for Civil Service [**1985] 374 G.C.H.Q

The important issue here however, is whether constitutional conventions can or will be able to control the actions of a president. Foreign affairs is a separate area of executive action which is difficult to keep under control and scrutiny by formal legal and informal non-legal methods. Could either Constitutional Conventions or the Law control a megalomaniac President ? It appears that only Congress exercises any control over President George Bush Junior's drive to war with Iraq. This at least is greater than that which constrains Prime Minister Blair, who has not even bothered to consult Parliament to date on the pending invasion of Iraq. Perhaps there is no possible mechanism to control such activity beyond the normal parliamentary structures since foreign affairs cannot be subject to electoral mandate. They are a reaction to world affairs as they develop after the executive is voted into office. The electorate places their trust in a person and hopefully chooses that person on the basis that they feel confident that they will do a good job and make the right decisions. Perhaps the executive must be left unhampered to make quick decisions on behalf of the nation, for which they will be judged by posterity alone. However, ill judged alliances may be difficult or impossible to break later and the costs could be very high for the nation. For example, now that Maastricht has been signed it would be very difficult to resile from.

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Constitutional and Administrative Law

CONSTITUTIONAL CONVENTIONS MATRIX

Definitions of Conventions

1 Dicey re purpose – reinforce democracy.
2 Hood-Phillips - enforceability.
3 Curzon – origin function and scope.
4 Freeman – nature of conventions.

Rationale for Conventions : Function and Purpose

Jennings – flexible informal change to adapt to changing needs of society.
Dicey – to reinforce democracy
Jennings – an informal system of trust and honour which oils the legal constitutional machinery

Importance of Conventions : Test – "Do they fulfil their functions?"

Dicey : Reinforce Democracy
Conventions on ministerial and cabinet responsibility seek to hold the executive to account for omissions, failure and conduct unbecoming of a state official. See Chapter 9 The Executive on evaluation of effectiveness. Are such rules regarded as binding by ministers ?

Jennings : Facilitates change
Illustrated by acknowledgement that Lords must bow to the commons ; Prime Minister now a member of Commons.
But Compare formal change of Rules of Procedure by Executive are common eg Prime Minister's Question Time.

Dicey : Control Exercise of executive Discretion
Central feature – control of the Royal Prerogative – See Chapter 10 for evaluation of effectiveness.
Compare House of Commons debates on War!

Jennings – Code of Conduct
Assertion that Conventions are a self regulatory code of conduct – filling in the gaps in the law.
Note that self-regulation is not currently in government favour for others outside Parliament!

Questions :
"Do Conventions fulfil their functions?" "If not, is it a problem?" "Are Conventions necessary and is their function important? If so, what should be done to reform the constitution?"

Establishment of and Identification of Conventions

Questions : "How do we know what is or is not an established convention?"
"Is a rule a convention or a mere habit?" See tests by Jennings.

Comparison between Conventions and Laws

Enforceability by Courts
Law : Yes – if detected
Conventions : No – but may be referred to and indicate bad behaviour

Certainty / Accessibility
Law – perhaps but bulky
Convention – some certain – others less so.

Effect of Breach
Law still a law
Convention may cease
Temporary lapse.

Flexibility
Law – Rigid but rapid change possible.
Conventions – informal – good for socially sensitive issues.

Why are they obeyed?
Law – Fear – habit – duty – accepted as reasonable.
Conventions – similar reasons to law.

Codification or Reduction to Law.
Inhibits change and evolution – problem what to put in?