The UK Case: Conventions, Constitutional Power and Constitutional Practice

A constitution normally:

(1) describes the institutions of government and their functions

(2) sets out the relationship between individual and institutions - plus contains legal rules as well as conventions and practices.

(3) contains the procedure to change the constitution - this allows for entrenchment because these procedures are normally deliberately protracted.

The key feature of the UK constitution is that it is uncodified. It is not contained in a single document or linked series of documents. So what does it consist of?

Legal and non-legal sources

(1) In other nations the constitution is *antecedent* to government (Tom Paine); here, it is *part* of it.

A constitution was described by **Tom Paine** as: "... a thing *antecedent* to government and a government is only a creature of the constitution .... A constitutioin is not the act of a government, but of a people constituting a government, and government without a constitution is power without a right."

The point being that not having a constitution amounts to arbitrary rule with all the potentially undesirable consequences that this may bring. However, having a constitution is no guarantee in itself of good government. UK has no act of foundation and the (uncodified) *grundnorm* of the constitution is the doctrine of parliamentary sovereignty / supremacy recognised in the Bill of Rights of 1689. We shall observe that there are crucial statutory sources.

(2) It should be noted that because there is no document of fundamental law, many areas of law are of relevance to constitutional theory and practice – e.g . family law and the ECHR Article 8 (privacy); civil liberties law which sets out police powers and the rights of the individual (PACE 1984); employment law and freedom of association (picketing) - Public Order Act 1986, CJPOA 1994; property law and public control of private rights etc.

Legal rules in the UK - the Hierarchy of Law

(i) Legislation

Statute Law - Acts of Parliament and delegated legislation – but there are some statutes that have special constitutional significance: – e.g . Petition of Right 1620 (no tax without representation); Bill of Rights 1689 (not a modern bill of rights but (a) secures the protestant succession and (b) tips the balance of power away from the monarchy and towards Parliament); Act of Settlement 1700, Union with Scotland 1706, Union with Ireland 1800, Parliament Act 1911, Representation of the People's Acts 1918, European Communities Act 1972, PACE 1984; Human Rights Act 1998.

Bill of Rights 1689
Act of Settlement 1700
Union with Scotland Act 1706
Union with Ireland Act 1800
European Communities Act 1972
Representation of the Peoples Acts
Parliament Act 1911 and House of Lords Act 1999
PACE 1984
Human Rights Act 1998
Scotland Act 1998
Government of Wales Act 1998
Northern Ireland Act 1998
Constitutional Reform Act 2005

(ii) Common law sources

Case law / judicial precedent

Case law decisions which expand the common law become part of the law and thus of the constitution. E.g. *Entick v Carrington* (1765) set limits on the power of arrest, while more recently in *M v Home Office* [1994] 1 AC 377 the Home Secretary was found in contempt of court for ignoring an order of the High Court and allowing the deportation of a Zairean national. It is important to stress that decisions of the courts (including the House of Lords) may be amended and overriden by a later statute e.g. *Burmah Oil v Lord Advocate* [1965] AC 75 and the subsequent War Damage Act 1965.

We shall soon see that the judges accept parliamentary sovereignty and thus validate the concept. Judges cannot challenge the validity of Acts of Parliament but part of their job is to interpret statutes under the rules of statutory interpretation.

(iii) EC law

From 1973 EC law became a source of the British Constitution, it is applicable in areas defined by the Treaties. The sources include the Treaty(ies) and Regulations, Directives, and Decisions - can all be binding. Also, we should note the importance of rulings and decisions of the ECJ - where there is conflict with national law it is EU law that prevails - the courts must interpret EU law in line with Community objectives. It is ..."part of our law. It is equal to any statute...". per Lord Denning in *Bulmer v Bollinger* [1974] 2 All ER 1226.

(a) customary rules
(b) royal prerogative
(c) judicial decisions
(d) judicial interpretation of statutes

(iv) European Convention on Human Rights (ECHR) since the enactment of the Human Rights Act 1998 the rights comprising the convention are incorporated into UK domestic law.

(v) The law and custom of Parliament

Following the 1642 Civil War constitution recognises the rules regulating how Parliament operates e.g. composition and procedure which are formulated and upheld by Parliament itself and are never impugned. Article IX Bill of Rights guarantees free speech and legal immunity. *Stockdale v Hansard* (1839) Parliaments will prevailed over that of the courts.

(vi) Authoritative works

Bagehot W *The English Constitution* (1867) ("efficient" versus "dignified") - Dicey AV *An Introduction to the Study of the Law of the Constitution* (1885)

CONSTITUTIONAL CONVENTIONS

The important constitutional conventions derive from constitutional history and acknowledge a passage of power from the Monarch to Parliament and to the executive branch. In other words the path from absolute monarchy to a modern system of parliamentary government.

(A) Definition

The important thing is to contrast them with legal rules / strict law.

Conventions

(the "political constitution") these are rules which describe / prescribe certain constitutional practices (see Bradley & Ewing for debate between the meanings)

Conventions "...provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep in touch with the growth of ideas" (Brazier p.37).

A good example is the Royal Assent which is always given to an Act of Parliament.

The crisis of 11th September 2001 triggered a number of conventions:

(a) Parliament recalled on an emergency basis on two occasions;

(b) Opposition leaders briefed on aspects of government involvement (Privy Council terms) and on intelligence information - this is part of the basis for all party support
(c) less formally in government there have been extra meetings of the Cabinet to brief them and PM chairs a committee consisting of top ministers, service chiefs and intelligence chiefs.

But many conventions which deal with vital areas of government are less certain e.g., individual ministerial responsibility. They are recognised by but not enforced by the courts - see *A-G v Jonathan Cape Ltd* [1976] QB 752.

In other words: (1) they enable what would otherwise be a rigid legal framework to be kept up to date with the changing needs of government; (2) conventions oil the formal machinery of government and assist in making government work and in this sense they have an important *practical* dimension because they help explain the reality of political life.

Turpin - "....if we were to limit our attention to legal rules we should get a very incomplete and misleading picture of the system of government, for the legal structure of the constitution is everywhere penetrated, transformed and given efficacy by conventions" (p.113). - i.e. laws and conventions closely interlocked. From another perspective Waldron in *The Law* states that they are "...not merely habits or regularities of behaviour; they enter into people's consciousness and become the subject-matter of reflection and of a sense of obligation".

Sir Ivor Jennings in *The Law and the Constitution* proposed three questions for recognising a valid convention:

(1) Is there a precedent? (he suggests they are vague – political rules and not like legal precedents) How often and how consistently has the practice been observed before? E.g. the Prime Minister must come from the majority party.
(2) Do those operating the constitution accept the convention as binding? Does it create an obligation? – this is problematic with some conventions such as ministerial responsibility. There may be a strong sense of obligation - why do some ministers resign and not others? But on the other hand there may be a completely different view as to what the convention itself is. See later lecture - Westland Affair, etc.
(3) Is there a good *political* reason for the convention existing? The deference of the House of Lords to the House of Commons has come into being as the legitimacy of the Commons increased because it was the democratically elected chamber.

Conventions are somewhat elusive to define - this is because they encompass a wide range of practices, some of which are a lot more certain than others.

De Smith 'Forms of political behaviour regarded as obligatory' - but for Hood-Phillips conventions need to be distinguished from practices (e.g. the pomp and circumstance of Queen's Speach)

JP Mackintosh - *British Government* - regarded them as "a generally accepted political practice" – They provides a *descriptive* view of what actually happens, based on observation.

However, the most influential definition comes from A V Dicey - *An Introduction to the Study of the Law of the Constitution* (1885) – he drew a distinction between laws (enforceable in the courts) and conventions which include understandings, habits, practices, maxims, precepts necessary to secure the *political sov*ereignty of the people which regulate the conduct of officials. Important to note that for Dicey the key characteristic is that conventions, unlike laws, are *not* enforceable in the courts.

Dicey believed that conventions should be contrasted with legal rules and strict law i.e. they are 'understandings, habits and practices' which regulate the conduct of the sovereign power.

He argued that conventions are followed because failure to obey them would lead to *legal* difficulties. For example, Parliament has to assemble each year because of the need to pass financial resolutions and make a budget. It has been pointed out that this explanation is insufficient to explain why Parliament meets for so long - rather this can be accounted for by the expectations of politicians and the public.

In contrast, for Jennings non adherence to conventions would give rise to *political* difficulties rather than legal ones. This might be illustrated by:

(i) The passage of the 1911 Parliament Act - the fact that the House of Lords refused to pass a budget and then the dispute over the Parliament Bill came down to a matter of who governs;

(ii) Abdication Crisis of 1936. (It was established by convention that the King was unable to marry contrary to advice of ministers.) In these respects Jennings seems closer to the truth today.

Unlike Dicey Jennings believed the rules for conventions to be essentially the same as for laws. The reasons for taking this view:

(a) Certain crucial constitutional laws e.g., parliamentary privilege and the Parliament Act 1911 are *not* enforced in the courts but by Parliament itself. Further, Jennings noted that most constitutional law concerned the activitites of government. He argued that the law in respect to these matters could not be enforced against government (thus such law operates like conventions). Munro points (p.65ff) out that this supposition seems mistaken, especially given the high profile of judicial review. The error is because Jennings confuses enforcement with execution (a matter of semantics?). What is court enforced law? The courts in JR proceedings set aside unlawful decisions or may even instruct a public body to act - thus they do enforce the law - but the courts are not responsible for the execution of the law itself.

(b) laws, like conventions, ultimately depend on consent for their operation. Some laws are not in fact enforced e.g., prohibition, Sunday trading laws, soft drugs;

(c) although conventions are not enforced by the courts they are *recognised* - as aids to interpretation so gaining legal recognition (they are justiciable in this sense).

But this view can also be criticised. Any law is valid if a court declares it to be so. On the other hand, there is no one way of definitively knowing what an established convention is, except from the behaviour of politicians or others responsible in the constitution. The issue becomes: do the actors regard conventions as binding upon them? (e.g. did Mrs Thatcher breach a convention about civil service neutrality by the way she intervened in senior civil service appointments and was the then Cabinet Secretary Sir Robert Armstrong colluding in allowing this change? Was the active role of the PM's press secretary Alistair Cambell who gave instructions to civil servants in breach of convention? Should Tony Blair have sought Parliamentary approval before involvement in the Iraq war) Also, we can clearly see that law comes from Parliament or the courts. Ultimately, the courts can not *enforce* conventions they only recognise that conventions *exist.*

Sir K Wheare provided a two pronged definition of conventions: (i) a rule of behaviour determined by usage and accepted as *obligatory* by those concerned in the workings of the constitution; (ii) but they may originate from a single usage and not depend on precedent as long as accepted by the parties as binding (*Modern Constitutions* 1966 p.179). However, Munro regards conventions as existing on a continuum, some can be stated with precision while others are harder to define (p.60).

Positive morality - Dicey and (Austin) also thought that conventions formed part of positive morality of a constitutional kind. Basically, it is immoral to infringe a convention because it meant acting contrary to the *unwritten* but generally accepted (spirit of the) constitution. We might say that to ignore an important convention is to act unconstitutionally but not to act illegally. In regard to local government Mrs. Thatcher's decision to abolish the GLC was not "illegal' but perhaps "unconstitutional"? Could this be repeated given that the current assembly will be introduced following a referendum. Has a convention been established that it could only be abolished following a further referendum?

From the above definitions it will be clear that conventions also have a practical / utilitarian aspect to them. In order to work effectively the constitution depends upon conventions.

Munro - yet we should note that a law remains in force even if it is disobeyed (road traffic laws) – but are conventions worth anything if they are not obeyed?

(These two aspects bound up with whether conventions should be codified as laws)

Turning conventions into law

Would a process of juridification see an end to such uncertainty and vagueness? It might be possible to make some conventions into law, but this area is too diverse in character to comprehensively codify. It has also been pointed out that these formal rules would in any case be subject to the same process of modification by new non-legal rules. Many commentators consider that flexibility is probably an advantage, despite the possibility of this feature being used by the executive to increase its power. But to codify would be to rigidify. Accountability - see Australia?

Professor Griffith (B & E p.29) resists a view of the constitution dominated by backward looking conventions, for him - "the constitution is what happens" and "if it works, its constitutional". This a positivism founded on an appraisal of political realities. For example, disregarding any convention it would be contrary to democratic principles for the monarch to withhold the Royal assent to legislation or for the PM to come from the House of Lords.

Importance of Conventions in the operation of the British Constitution

Conventions are crucial in the following areas: -

(1) Sovereign - Royal prerogative and its exercise is of particular importance in the case of monarchy. We have to contrast the site of legal power as opposed to the constitutional reality of its practice.

(a) In regard to the Royal Assent the way the power is exercised is determined by convention. The Queen acts on advice ministers and never (since Queen Anne) refuses to give consent to legislation (Clearly a very important convention).
(b) The leader of majority party is appointed PM.
(c) The monarch appoints ministers and many others at the request of PM
(d) The Queen grants the PM a dissolution of parliament for a general election when this is requested by the PM
(e) Queen's speech setting out policy is always written by the government
(f) The Monarch always follows the advice of her ministers

Compare the situation in Thailand which is also a constitutional monarchy.
Thai King is prepared to intervene in extremely difficult constitutional situations
Symbol of unity for the Thai nation

(2) Executive

In regard to the government we will see that the development of cabinet government/ committee system depends upon the conventions of ministerial responsibility and collective cabinet responsibility.

Ministers and members of the House of Commons / Lords will resign following a vote of no confidence e.g. 1979.
It is a convention that the PM / Chancellor are members of the House of Commons.
Ministerial responsibility may be the 'Achilles heel' of conventions, it is very important yet not clear.
What is the current role of the "deputy PM"? Also it is true today that the PM decides date of a general election, but this has only been true since 1920's.

If a convention is breached the consequences can be far reaching e.g., the disruption by the House of Lords of the legislative programme of the Liberal government culminated in the rejection of Lloyd George's 'People's Budget'. This precipitated a constitutional crisis. A conventional had been established that the upper house should

not vote down financial legislation. This resulted in the formal curtailment of the powers of the House of Lord by the Parliament Act 1911.

(3) Parliamentary Conventions

there are a large number of procedures within Parliament itself that are determined by convention:
public expenditure measures always derive from Commons,
pairing arrangements for MPs,
the deference of the House of Lords to the elected House of Commons (doctrine of mandate / manifesto).
The fact that Parliament has to be summoned at least once per year.
Political parties are represented on committees according to the precentage of their support in the House of Commons.
The Speaker acts impartially.

(4) Judiciary

Judges professional conduct should not to be questioned in Parliament except on a substantive motion (e.g. motions for dismissal)?
Strong disapproval of David Blunkett as Home Secretary for criticising the decision of Collins J in *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 195 Admin. See A. Bradley 'Judicial Independence under Attack' [2003] PL 397. Ministers of the Crown should refrain from casting aspersions on members of the judiciary'. The judgment according to Lord Lester 'involves a conventional exercise in statutory interpretation of the scope of the powers entrusted by Parliament to the Home Secretary, and the application of well established principles of natural justice, fairness and humanity'.

While on the other hand, judges are expected to keep their noses out of party politics. The Law Lords include at least two Scottish lawyers - selected on professional grounds. The question of the independence of the judges will be considered at a later stage.

Conclusion

Dicey had maintained that conventions were "rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown" - but now (Jennings' position) as the above list indicates demonstrates that the application of conventions is much broader i.e. - they determine the conduct of those holding public office – e.g., Cabinet government. Conventions are particularly important in the UK because it has an uncodified constitution. There is an assumption that the players know the conventions and that they will follow them. If they are not followed there is no legal means of enforcing them.

We have seen that conventions vary from the established and certain to some that are ambiguous but how do we sort out the most fundamental? Especially as we are dealing with the least definable part of the constitution. The lack of a written and precise legal form and the extent of disagreement where there is an absence of pre-

existing usage remains problematic e.g., what should happen if there is a hung parliament, as there was in 1974.

Conventions do help by offering important guidance on the behaviour of the government and ensure that the legal framework of the constitution is operated in accordance with prevailing constitutional values and principles. They help fill the gap between *constitutional formality and political realities.* But where they really fall down is in the control of executive power and in regulating the state machinery. For example, individual ministerial responsibility has not been sufficiently modified to account for the growth of contracting state and this raises central questions of accountability.