Cambridge Law Journal, **64(1)**, March 2005, pp. 149–176
Printed in Great Britain

DO CONSTITUTIONAL CONVENTIONS BIND?

JOSEPH JACONELLI*

I. THE QUESTION POSED

CONSTITUTIONAL conventions are to be found in political and legal systems of very different types.[1] Not surprisingly, they exist in considerable abundance in those systems—the prime example is the United Kingdom—the affairs of which are ordered by an unwritten constitution. Familiar instances of constitutional conventions in British government include the following: that the Monarch is required to appoint as Prime Minister the person best placed to command a majority in the House of Commons; that governments are to resign when defeated on a vote of no confidence; that the judicial members of the House of Lords refrain from indulging in party political debate in the chamber; and that ministers are to resign from office after displaying an (admittedly indeterminate) degree of mismanagement of their departments. The preconditions of the existence of any particular constitutional convention are set out in a well-known passage by Sir Ivor Jennings. Three questions, according to Jennings, must be asked:

> ... first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? [2]

The second question, by focusing on the beliefs held by the relevant actors, appears to suggest an extremely flimsy basis for the existence of constitutional conventions. It seems to imply, as Jeremy Waldron has put it, that these are "rules that pull themselves up by their own bootstraps", since "if they weren't accepted by those they

* Professor of Law, University of Manchester. Much of this article was used as the basis of an inaugural lecture delivered in the Law School, University of Manchester, on 2nd December 2004. For correcting errors and drawing my attention to points that I would otherwise have missed, I am grateful to Jack Boger, the late Geoffrey Marshall, Katharine Perera, and Robert Thomas. Special thanks are due to Nigel Simmonds for patiently scrutinising a number of earlier drafts. The usual disclaimers apply.

[1] For accounts in, respectively, the USA, Canada, and Italy, see J. G. Wilson, "American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior" (1992) 40 Buffalo Law Review 645; A. Heard, *Canadian Constitutional Conventions:The Marriage of Law and Politics* (Toronto 1991); and G. U. Rescigno, *Le Convenzioni Costituzionali* (Padua 1972).

[2] I. Jennings, *The Law and the Constitution* (5th ed., London 1959), p. 136.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

bind they wouldn't be rules at all".[3] The purpose of this article is to consider whether constitutional conventions rest on nothing more than the mental states of the various political actors. Can a bolder claim be made for them: namely, that they impose obligations on those actors to conduct themselves in specific ways? In other words, do they bind?

Few writers on constitutional matters even advert to the issue. Those who do so imply that there is nothing further that can be said on the matter.[4] Dr. Geoffrey Marshall, in his monograph on constitutional conventions, states:

> No general reason needs to be advanced to account for compliance with duty-imposing conventions beyond the fact that when they are obeyed (rather than disobeyed, rejected or changed), they are believed to formulate valid rules of obligation.[5]

Waldron, too, appears to conclude, after the above-quoted passage, that constitutional conventions "... have no other validity, no other force, than their common acceptance by the people they govern".[6] Two practical instances are cited by Waldron in his discussion of the topic. These merit some consideration since they will sharpen our perception of the precise nature and role of constitutional conventions.

First, he refers to the practice whereby the Prime Minister moves residence from Downing Street to Chequers each Christmas in order to pass the holiday there. This, as Waldron points out, is merely an externally observed regularity of conduct. It does not represent a standard of behaviour: the disregard of the practice by a Prime Minister would not attract criticism. The annual move to Chequers, to quote the distinction first emphasised by Hart, is a mere practice, akin to people's regular attendance at cinemas on Saturday evenings. It is not a social rule, typified in Hart's well-known example that men are to remove their hats in church. The move from Downing Street to Chequers lacks the internal aspect, essential to such a rule, which regards the visible pattern of behaviour as a standard requiring adherence.[7] To this we could add

[3] J. Waldron, *The Law* (London 1990), p. 64.

[4] However, Sir William Wade did apparently touch on the matter when testifying in the Crossman Diaries case, describing a true convention as "an obligation founded in conscience only": *Att.-Gen.* v. *Jonathan Cape Ltd.* [1976] 1 Q.B. 752, 765F. See further, text to notes 35–38, below.

[5] G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford 1984), p. 210.

[6] Waldron, *The Law,* at p. 64. It is difficult to determine whether this is Waldron's actual view since his account at that point veers off the subject of constitutional conventions into a discussion of rules of recognition.

[7] H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford 1994), pp. 50–58.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

that, irrespective of whether it be habit or rule, the shift in the location of the Prime Minister's residence possesses no governmental—and, *a fortiori*, no constitutional—consequences. No aspect of the implementation of public policy, whether in the form of legislation or executive action, is affected by the place for the time being where the Prime Minister happens to lay his head.

Secondly, Waldron concentrates on the description of constitutional conventions, first made by Dicey, as the "morality" of the constitution.[8] The bare term "morality", as Waldron points out, is not especially helpful, since various moral stances are taken by those in government. Pacifist members of the legislature, for example, will feel morally bound to vote against expenditure on nuclear weapons, but no one would regard them as complying in this way with the conventions of the constitution. It is necessary, as he says, to be more specific. Or, as I would prefer to put it, one must attend to the *constitutional* element in constitutional conventions. Waldron's two examples, of respectively the most trivial and the most serious of actions, do not capture that element. In particular, the casting of votes on whether to deploy nuclear weaponry involves taking a stance about the ultimate aims of political activity (on which, naturally, opinions will be sharply divided),[9] not about the ways in which competitions for power are to be conducted (as to which there must be broad agreement within each polity).[10]

The term "constitutional convention", I have argued elsewhere, is to be limited to those social rules that possess a constitutional—and not merely a political—significance.[11] The categorisation of constitutional conventions as a species of social rule simultaneously captures two of their fundamental features: their normative quality, in prescribing standards of behaviour; and the fact that they are not enforced in the courts. The specifically constitutional character that they possess bears out, in addition, the role that they play, akin to that performed by written (and legally enforceable) constitutions, in

[8] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* with introduction by E. C. S. Wade (10th ed., London 1959), p. 24. F.W. Maitland, *Constitutional History of England* (Cambridge 1908), p. 398, makes the same point.

[9] This is most clearly borne out by reference to the "precedents" that are central to Jennings's method of identifying constitutional conventions: see text to note 2, above. There will be precedents of pacifists—but not those of a contrary persuasion—having voted against nuclear weapons. The same goes for every contested issue of public policy.

[10] It is necessary to be rather more precise. People will disagree about constitutional matters (monarchy or republic? proportional representation or first-past-the-post?) as they do about matters of policy. But at a deeper level there must be agreement as to how to select or change constitutional options.

[11] J. Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24. It might appear too obvious to require mention that constitutional conventions must necessarily possess a content that is constitutional in nature. Several writers, however, have failed to take the measure of this point: see *ibid.*, at pp. 35–39.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

allocating power and controlling the manner of its exercise as between the organs of government and political parties.

Yet to categorise them in this way does not, in itself, furnish an answer to the question whether or not they bind. The second of Jennings's questions—"did the actors in the precedents believe that they were bound by a rule?"—implies that an essential element in the question whether such conventions are binding in the present is the mental state of persons who found themselves in similar situations in the past. It may be that Jennings was merely attempting to identify the mental element that Hart was later to describe as essential to the existence of a social rule, namely the "critical reflective attitude" taken by members of the group where the rule is observed. But even on Hart's more sophisticated account a fundamental difficulty persists. Take a familiar example: that, prior to its enactment in legal form in the Twenty-Second Amendment to the US Constitution (in 1951), there was a constitutional convention that limited a President to two terms of office. Why should the fact that Presidents of the USA for the most part regarded themselves as debarred from seeking a third term of office give the present occupant of the White House reason to act in the same way? Simply to cite the two-term convention as the reason does not in any way advance the argument since it merely amounts to a compendious way of reporting the above-cited attitude of mind together with its expression in practice. Something more is needed.

Before commencing the inquiry, it is necessary to make two preliminary points, one specific, the other general, in nature.

To take up the point to which Marshall adverts,[12] conventions (like laws themselves) are not all of a duty-imposing kind. Clearly, the inquiry that is to be conducted in the present article is intelligible only when applied to this type of convention.[13] Perhaps, for this purpose, they are better described for the moment as *purportedly* duty-imposing, since to attribute the quality of duty to them is to imply, without more, that they possess obligatory force.

Generally, to pose the question "Do constitutional conventions bind?" might appear to invite an immediate answer in the negative.

[12] See the text to note 5, above.

[13] If one proceeds by analogy with the classification of legal rules, it would appear that duty-imposing conventions are to be contrasted with those that are power-conferring. However, Marshall, *Constitutional Conventions*, pp. 7–8, draws the contrast with conventions that are "entitlement-conferring", with the word "entitlement" probably being meant in the sense of a Hohfeldian liberty. As an instance of the latter he refers to the point that the Monarch is entitled, in certain circumstances, to reject a request of the Prime Minister that Parliament be dissolved. But this situation can be more neatly categorised as an *exception* to the convention that the Queen is to exercise her legal powers on ministerial advice. The idea of an entitlement-conferring convention is therefore superfluous, as simply referring to a situation which falls within an exception to some other duty-imposing convention.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

Constitutional conventions are not enforceable in the courts. Of some of them it cannot even be said that there exists an absolutely uniform record of compliance with the standards that they set. It would, however, be erroneous to take these objections as decisively disposing of the question. It is accepted, for example, that there is an obligation to obey the law, even though the content of that obligation is perforce moral only, and despite the fact that breaches of the law are frequent—both those that are selfishly motivated and those that are grounded on conscientious refusal to obey particular laws.[14] The making of promises, too, generally places the promisor under an obligation. The existence of the obligation remains unaffected by the fact that promises are frequently broken, and only if they happen to comply with the requirements of the law of contract can they be the subject of redress in the courts. This article asks whether constitutional conventions, similarly, impose moral obligations on the governmental actors to conduct themselves in the ways prescribed by those conventions.

II. A Source of Legal Obligation?

1. The Conceptual Gap between Law and Convention

If constitutional conventions formed part of the law—that is to say, if they were enforced by the courts—there would be a clear answer to the question: do they bind? The reasons generally advanced in favor of the obligation to obey the law would apply equally to constitutional conventions. There would, indeed, be no effective difference between the two phenomena. Moreover, from the particular perspective of issues of civil disobedience, constitutional conventions would pose fewer difficulties in practice than do legal rules. Their subjects being political actors, they would not pose situations of conflict between governors and governed that characteristically give rise to issues of obedience to law.

The approach taken by the present article is that, despite the doubts raised from time to time by various writers, there exists a clear conceptual divide between laws and conventions.[15] Within legal systems of the common law family, at any rate, there is a firm dividing line between laws and social rules (of which constitutional conventions form a sub-group). This is reflected in two ways. First,

[14] P. Singer, *Democracy and Disobedience* (Oxford 1994) contains a general survey of the issues. See at pp. 5–9 for the specifically moral nature of the obligation to obey the law.

[15] Those who have sought to obfuscate the dividing line have employed one of two techniques. Some, like Sir Ivor Jennings, have argued that laws and conventions are ultimately alike in that they both rest on the consent of the people that they regulate: *Law and the Constitution*, at pp. 117–118. More recently, T.R.S. Allan and Mark Elliott have suggested that constitutional conventions, like legal rules, are or could become enforceable in the courts. See section II(2) below for criticism of the views of the latter two.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

long-standing social norms do not give rise to legal rights and duties that correspond in content to the relevant practices.[16] This was borne out in the dramatic circumstances of the seizure of the American steel mills by President Truman to advance the aims of the Korean War. In *Youngstown Sheet and Tube Co.* v. *Sawyer*[17] the United States Supreme Court ruled the seizure to be illegal, rejecting (among other arguments) the submission based on the fact that other Presidents had deemed it right to take possession of private businesses without the authority of the Congress in order to bring an urgent settlement to labour disputes. Secondly, the converse is equally the case. A long-standing failure to invoke legal powers or to enforce legal duties does not detract from the continuing existence of the same powers and duties. In other words, there is no doctrine, in the common law, of desuetude.[18]

The conceptual divide between constitutional law and constitutional convention prompts the following questions. When does the presence of the one preclude the existence of the other in regard to the same subject matter? Under what circumstances can the two co-exist? Clearly, it is conventions which provide the more flexible norms of conduct. Colin Munro adds: "... it is at least arguable that conventions should play a larger role in countries with written constitutions; the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring".[19] Yet, however great the need for adaptation in such constitutions, conventions can supply that element only in the absence of legal regulation of the same subject matter. No role for the application of constitutional conventions is left by legal rules of a duty-imposing nature. The enforcement of the duty in the courts trumps all consideration of conventional

[16] It is remarkable how often writers on the subject use the figure of speech—and not in a uniform sense—of constitutional conventions "crystallising" into law. The expression suggests that, if something (a liquid, a convention) is left undisturbed for long enough, it will gradually assume a different form (a crystal, a law).

[17] 343 U.S. 579 (1952).

[18] See, for example, *Manchester Corporation* v. *Manchester Palace of Varieties Ld.* [1955] P. 133, where the jurisdiction of the High Court of Chivalry (which had not sat for centuries) was successfully invoked by the claimant to protect its monopoly power to display the city's armorial bearings. There are suggestions, however, that prerogative powers can be lost simply through disuse: the authorities are set out in G. Winterton, *Parliament, the Executive and the Governor-General* (Melbourne 1983), pp. 118 and 301–302 (note 75). It is especially striking that the prerogative is the sole area where claims for the existence of a doctrine of desuetude have been made since, in Dicey's view, the primary role of constitutional conventions is to control the mode of exercise of prerogative powers. Recall his famous definition of constitutional conventions as "rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised": Dicey, *The Law of the Constitution*, pp. 422–423.

[19] C.R. Munro, "Laws and Conventions Distinguished" (1975) 91 L.Q.R. 218, 219.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

rules.[20] Power-conferring legal rules, on the other hand, do permit scope for the play of constitutional conventions. It makes perfect sense to say of the exercise of a governmental function that it is compounded of a legal *power* (*e.g.,* to veto bills, or to run for office as President) and a conventional *duty* (*e.g.,* to exercise the veto only in certain circumstances, or to abstain from running for more than a certain number of terms).

The existence of the conceptual dividing line does not detract, however, from a number of points at which the two phenomena may intertwine.

Occasionally the terms of a law, for example, will proceed on the assumption of the existence of a constitutional convention. A much recited instance is the recognition, in the legislation on ministerial salaries, of the existence of such creatures of convention as the office of Prime Minister.[21] The statutory provisions do not require the appointment of such officials as the Prime Minister: they merely "recognise that they exist" [22]—or, to be more precise, that they *can* exist. Better examples, it is submitted, are to be found in the principal provisions of the Parliament Act 1911. Section 1(1) reflects the conventional rule that Money Bills are to originate in the House of Commons. Without legally mandating such a practice, the terms of the section would be rendered unintelligible if Money Bills were to be capable of being introduced in the Lords. In addition, the drafting of section 2(1), which sets out the Parliament Act procedure, is underpinned by the long-standing convention that the proceedings on a public bill are to be completed in a single parliamentary session: otherwise the bill falls and must undergo the whole process again in the following session.[23]

In a different way, the facts that bring into play the conventional rules governing ministerial resignation may also furnish the basis of a legal claim against the minister. A case in point here is the resignation in 1988 of Mrs. Edwina Currie as Parliamentary Under-Secretary of State at the Department of Health and Social Security in the aftermath of her public statements concerning the levels of salmonella infection in eggs. Sales having dropped by more than a half, the egg producers

[20] It should be emphasised that not all duty-imposing legal rules are enforced in the courts. A procedural duty may be violated with impunity if it is classified as being of directory (rather than mandatory) importance: see, for example, *Simpson* v. *Att.- Gen.* [1955] N.Z.L.R. 271.

[21] Jennings, *Law and the Constitution*, at pp. 118–119.

[22] *Ibid.*, at p. 119.

[23] Note, in particular, the words: "... is passed by the House of Commons in [two] successive sessions" and "... is rejected by the House of Lords in each of those sessions". However, in 1998 the House of Commons adopted the proposal of the Third Report of the Modernisation Committee, H.C. 543 (1997–8), that in special circumstances a public bill should be capable of being carried over from one session to the next.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

commenced legal proceedings against Mrs. Currie. Since the case was settled out of court it is not possible to know whether there was a basis for imposing legal liability.[24] Any conclusion, therefore, that the courts, in entering judgment for the claimants, would be enforcing a constitutional convention must be hedged with a number of reservations. Not least among these is the point that enforced resignation, the principal sanction imposed for ministerial shortcoming, is not a form of redress that the courts would be in a position to decree. Nevertheless, as this episode illustrates, an adverse judgment of the courts may have the effect of bringing to a head criticisms of the minister which have not hitherto been couched in terms of issues of legality.[25]

2. Bridging the Gap?

In two respects, however, there have been attempts to bridge the gap between the enforcement of the law and the observance of constitutional conventions. According to the one attempt, the disregard of constitutional conventions will lead ultimately to breach of the law. Only in this (admittedly indirect) sense can constitutional conventions be said to be legally enforceable. According to the second approach, constitutional conventions derive some measure of (direct) enforcement in the courts.

The former approach is to be found in the writings of Dicey. At no point did Dicey consider the question whether constitutional conventions impose obligations. He confined himself, rather, to a discussion of the psychological factors that led persons in

[24] The case was based on claims in negligence, malicious falsehood and slander of goods (another possible form of action, incidentally, might have been misfeasance in public office). It appears that the writs would be served on the Treasury Solicitor since the claims involved an issue of government policy: *The Independent*, 17 December 1988, p. 3. As to the prospects of success of the claimants' action, one leading tort textbook is especially forthright: "The feeble government produced £19m!" states T. Weir, *A Casebook on Tort* (7th ed., London 1992), p. 555.

[25] The Pergau Dam affair of the mid-1990s is an additional instance where an adverse judgment of the court and a ministerial resignation very nearly coincided. The construction of the Pergau Dam, in Malaysia, by means of aid money had proved controversial for some time. Notwithstanding his reservations the Foreign Secretary, Douglas Hurd, authorised payments for the scheme in the belief that the government should honour an undertaking that had been given by Mrs. Thatcher. The making of the payments was successfully challenged by several overseas aid charities as being *ultra vires* the Overseas Development and Co-operation Act 1980: *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd.* [1995] 1 W.L.R. 386. Mr. Hurd publicly admitted that he had contemplated resigning in the aftermath of the ruling of the Divisional Court. He does not advert to this in his *Memoirs* (London 2003), pp. 494–495, but see M. Stuart, *Douglas Hurd—The Public Servant: An Authorised Biography* (London 1998), p. 406: "The day after the High Court ruling, the Foreign Secretary revealed on BBC Radio Four that he had contemplated resignation".

The episode furnishes an interesting contrast with the case of Edwina Currie, where the legal actions commenced by the egg producers provided a focus for seeking redress for the manifest damage inflicted on the industry by the minister's remarks. In the Pergau Dam affair, by contrast, but for the ruling of the Divisional Court the question of Mr. Hurd's possible resignation would not even have arisen.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

governmental positions to comply with constitutional conventions. The relevant passage, however, merits some attention since it has some bearing on the question that is being explored in this article.

"The puzzle", Dicey wrote, "is to see what is the force which habitually compels obedience to rules which have not behind them the coercive power of the courts".[26] For this purpose he considered and rejected in turn two possible answers: the fear of impeachment; and the power of public opinion.[27] His conclusion was that it is the force of law itself which ensures compliance with constitutional conventions, for the breach of them "will almost immediately bring the offender into conflict with the courts and the law of the land".[28] Dicey supported it in the following way. It was (and remains) a conventional rule that Parliament is to be summoned at least once a year. What would happen, he asked, if that convention were broken? The result would be that there would be no opportunity to pass two annual items of legislative business: the Army (Annual) Act and the Finance Act. Consequently, in the one case "all means of controlling the army without a breach of law would cease to exist", and in the other "large portions of the revenue would cease to be legally due and could not be legally collected, whilst every official, who acted as collector, would expose himself to actions or prosecutions".[29]

In short Dicey was arguing that constitutional conventions *are* legally enforced, albeit indirectly. A few pages later he deploys the same consequences—failure to pass the Army (Annual) Act and the Appropriation Act, with resulting breaches in the law—in order to show how a government that loses a vote of confidence will ultimately be forced to resign.[30] Such a government, since it would not be able to secure the passage of the Army (Annual) Act and the Appropriation Act, would not be in a position effectively to rule. His argument, when adapted to the latter context, has undergone a significant modification. No longer is it possible to say—as it was in a situation where Parliament had not been

[26] Dicey, *The Law of the Constitution*, p. 440.

[27] In a democracy, of course, the failure of a person or political party to comply with constitutional conventions may lead to electoral unpopularity. This general point aside, there are some constitutional conventions the observance of which is *directly* monitored by the electorate, and in the breach of which they may choose to acquiesce: for example, President Franklin Roosevelt's successful bids to return to the White House in 1940 and 1944, arguably in breach of the two-term convention.

[28] Dicey, *The Law of the Constitution*, p. 446.

[29] Dicey, *The Law of the Constitution*, p. 447. It is worth noting that Jennings, see note 2 above, at p. 129, disagrees with the conclusion. Citing the instance of the refusal of the House of Lords to pass the "People's Budget" in 1909, he draws attention to the standing powers of the government to borrow money.

[30] Dicey, *The Law of the Constitution*, pp. 449–450. The example proceeds on the assumption that the Monarch declines to dismiss the government on its losing the vote of no confidence. On the propriety of dismissal in these circumstances, see note 60 below.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

convened for a year—that there would be no scope for the possible enactment of the two critically important pieces of legislation. One can only speak now of the extreme unlikelihood of their being passed, since a government which has lost a motion of confidence would not be placed so as to secure the legislative implementation of its programme. Be that as it may, the examples cited by Dicey of illegality following hard on the heels of breach of a constitutional convention can be criticised on two counts. First, they are unrepresentative of such conventions as a whole. How, for example, would he deal with the refusal of a minister to resign in the aftermath of proven mismanagement of his department? Or with breaches of collective responsibility? Secondly, as we shall now see, they fail to bear out his reasoning.

Let us take for this purpose the particular instance of the army legislation. For a long time the passage of the Army (Annual) Bill was a yearly item of legislative business.[31] But why was there a need for annual authorisation of the maintenance of the army?[32] In the light of the doctrine of parliamentary sovereignty nothing would appear simpler than the enactment of legislation providing for a standing army—and, to refer to the other example mentioned by Dicey, providing for the raising of taxes for a number of years at a time. The obstacle (though it is not mentioned by him) would appear to be Article 6 of the Bill of Rights 1689:

> That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

There would seem to be two possible approaches to this alleged obstacle.[33] On one approach, Article 6 of the Bill of Rights is fundamental law and cannot be repealed. This thesis would be extremely difficult to sustain. And if Dicey had sought to argue for

[31] That is, until the enactment of the Army Act 1955. The last such annual renewal was in the combined form of the Army and Air Force (Annual) Act 1954. For discussion of the change see P. Rowe, "Armed Forces Act 1981" (1981) 44 M.L.R. 693, at pp. 693–694.

[32] It appears to have been a matter of convention, not only that the authorisation be *annually* granted, but also that the authorisation be *actually* granted and in standard form. It is known that, at the beginning of the parliamentary session for 1914, the Unionist representatives in Parliament considered seeking to amend the Army (Annual) Bill for that year in such a way as to prevent Ulster from being coerced by military force into a system of Home Rule for the whole of Ireland. In the event, they refrained from attempting to do so.

[33] It is necessary, however, to advert to an initial point of interpretation. Article 6, read literally, would seem to suggest that an Act of Parliament would be all that was required to provide the "consent of Parliament" necessary to the lawful existence of a standing army. Indeed, this literal interpretation of Article 6 appears to accord with the original understanding of the provision: see L.G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore 1981), pp. 71–74. However, the fact that until 1955 authorisation was granted on an annual basis would appear to indicate that Article 6 came to be interpreted as an absolute prohibition of a standing army. So much so that, a quarter of a century after 1955, it was possible to find an (anonymous) article entitled "The British Army: 25 Years of Illegality" (1981) 4 State Research Bulletin 149.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

it, he would have been contradicting one of the central tenets of his classic work: the sovereignty of Parliament. On the alternative approach, Article 6 is capable of being repealed, whether expressly or impliedly, with the same legal ease as any other statute. By convention, however, it was to be treated *as if* it were unalterable. In short, the consequence of breach of the convention requiring Parliament to meet at least once a year would be, not breach of the law (as Dicey maintained), but rather the breach of a *further convention*: that Article 6 be treated as if it were fundamental law.

The same argument has greater force when applied to the other governmental function mentioned by Dicey in the present context, the raising of taxes. The applicable provision of the Bill of Rights—Article 4[34]—does not even carry the implication of a need for parliamentary authorisation that is annual (or even frequent). Dicey's argument therefore fails, even within the ambit of the unrepresentative examples that he cites, to support his thesis concerning the indirect enforcement of constitutional conventions.

It is now necessary to examine the second approach to the question of the legal enforcement of constitutional conventions. To what extent are such conventions determinative of individuals' legal rights and duties? For this purpose two cases—one civil, the other criminal—will be considered. (It is worth noting, incidentally, that in each case the extent of the relevant convention had the potential to impinge on the legal position of non-political actors).

Among the several civil cases that are available for analysis the Crossman Diaries case, *Att.-Gen.* v. *Jonathan Cape Ltd.*,[35] is especially instructive. The Attorney-General here secured a ruling that governmental secrets could in principle be protected by the action for breach of confidence (though he lost on the particular facts on account of the lapse of time between the events chronicled in the diaries and the hearing of the case). It is quite clear from the judgment of Lord Widgery C.J. that the issue did not turn simply on the application to the case of the elements of breach of confidence: that is, A imparts information in confidence to B, who in breach of the expectation of confidence discloses the information to C. The hearing was also marked by evidence and argument of a "constitutional" nature. Some such evidence can be explained simply on the basis that it went to prove essential elements in the action for breach of confidence ("The general understanding of Ministers while in office was that information obtained from

[34] "That levying of money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal".
[35] [1975] Q.B. 752.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

Cabinet sources was secret and not to be disclosed to outsiders'').[36] Other points, however, ranged well beyond such confines (''It is convenient next to deal with [the] submission ... that the evidence does not prove the existence of a convention of collective responsibility'').[37]

Was this additional element, which was decided in favor of the Attorney-General (''I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practised and equally strong evidence that it is on occasion ignored'')[38] decisive in awarding him judgment on the general point? If the constitutional element were to be subtracted from the case – if the author of the diaries, say, was the director of a leading public company who had kept a record of discussions at board meetings which he now proposed to publish—would the result of the case have been the same? It is possible that the factor of collective responsibility had a critical impact on the result. What is clear is that the ''enforcement'' of the constitutional convention in such cases is parasitic on the ascription of rights and duties of hitherto uncertain extent. It is inconceivable that the breach of a constitutional convention could furnish a free-standing cause of action.

In discussing cases such as that of the Crossman Diaries, T.R.S. Allan draws the inference:

> ... the recognition of convention by a court in the course of adjudication generally entails its acceptance as a rule which is legitimate. It is acknowledged as a rule of practice which is grounded in political principle. Curial ''recognition'' implies judicial approval. In the result, the distinction between recognition and enforcement—that last refuge of orthodox theory—plainly dissolves. To recognise a convention is necessarily to endorse the principle which justifies it; and, in a context where legal doctrine is developed to reflect that principle, recognition means enforcement.[39]

This, however, is to infer too much from the occasional recognition, in cases such as this, of the existence of a constitutional convention. Allan's leap from recognition to enforcement, in particular, is totally unwarranted. Recall the typical example of a social rule: that men are to remove their hats in church. That standard of conduct may meet with widespread approval, including the approval of the judges. It does not follow that judges would be right to express their approval in the shape of

[36] *Ibid.*, at p. 767F.
[37] *Ibid.*, at p. 770A.
[38] *Ibid.*, at p. 770B.
[39] T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993), p. 244.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

inflicting a *legal* sanction on the occasional man who has refused to bare his head in church.

Criminal cases, lacking a clearly articulated set of reasons for their outcome, pose greater problems on the question of the legal enforcement of constitutional conventions. In fact, it is extremely difficult to find criminal cases where such conventions have ever figured in the issues.

A rare example in this respect is the unsuccessful prosecution of Clive Ponting in 1985 on a charge under section 2 of the Official Secrets Act 1911. Mr. Ponting, it will be recalled, was a civil servant who, in clear contravention of the wishes of his minister, sent papers to a Labour MP who was striving to establish the truth about an episode in the conflict to recover the Falkland Islands some years before. The material tended to show that Parliament had been misled by the Secretary of State for Defence in his explanation of the events surrounding the sinking of the Argentinian vessel, *Belgrano*. The remarkable aspect of the trial for the present purposes was the calling by the defence of two witnesses: the former Home Secretary, Merlyn Rees; and the constitutional lawyer, Sir William Wade.[40] Emphasising the importance that ministers give truthful answers to Parliament, Wade explained that constitutional conventions are the fundamental rules of British political life, without which "relations between Government and Parliament would all go awry".[41] Likewise Merlyn Rees cited a recent instance where a minister who had inadvertently given false information to Parliament corrected it immediately.[42]

It seems odd that the testimony of Rees and Wade was even declared admissible by the court, since it does not appear to have been relevant to the elements of the charge under the Official Secrets Act. There are various possible ways of categorising the evidence. It may be that it was wrongly admitted—though, being in favour of the defence and in the light of the acquittal, in a form that was not susceptible to appellate correction. But the thesis that constitutional conventions are enforceable in the courts must not only identify instances where such conventions have figured in legal argument, it must also maintain that the courts acted correctly in entertaining submissions based on the conventions. An alternative line is that evidence of any relevant constitutional convention may be adduced in court. But in the event of its being admitted, it will do no more than exercise a "gravitational pull" on the strictly legal

[40] We are dependent on Ponting's account of his trial to glean the nature of their testimony: C. Ponting, *The Right to Know: The Inside Story of the Belgrano Affair* (London 1985), ch. 7.
[41] *Ibid.*, at p. 181.
[42] *Ibid.*, at pp. 181–182.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

materials and their application to the case in hand. As with civil cases, it is impossible to conceive of arguments based purely on the relevant convention being dispositive of the outcome.

It has been anticipated, however, that the time may come when those constitutional conventions that have acquired strong normative force through long periods of observance may be enforced in the courts. The claim, advanced by Mark Elliott, is made specifically in the context of conventions that limit parliamentary sovereignty.[43] The thesis is speculative, but it may be appropriate to conclude this section with some observations on it.

The idea that constitutional conventions could acquire the force of law through a process similar to prescription[44] has, at present, no basis in legal authority. Elliott's thesis, nonetheless, appears to proceed by analogy with the recent history of judicial intervention in matters of the royal prerogative. From a situation where all prerogative powers were placed beyond judicial control the courts have moved to a position in which only those touching on matters of high policy will continue to be treated in this way. Those, by contrast, which involve matters of little political moment will now be subject to judicial review.[45] By the same token, many constitutional conventions admittedly involve matters which would be regarded as not justiciable. The remainder, by implication, could in time become ripe for judicial enforcement.[46]

There are a considerable number of difficulties with this thesis. Why, for instance, should it hold only in regard to one particular category of constitutional conventions: namely, those limitative of the sovereignty of Parliament? If, to avoid such inconsistency, it were to apply to all constitutional conventions, it would raise the problem of identifying those conventions which are genuinely constitutional and those which are not.[47] Clearly, the longer a convention has been followed, the less likely it is to be breached.[48] It is difficult, moreover, to envisage a constitutional convention which would be apt for judicial enforcement—a matter on which Elliott does not offer any guidance. Therefore if the tests of length

[43] M. Elliott, "Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention" (2002) 22 Legal Studies 340, 362–376.

[44] It is a familiar idea in land law, at least, that long established practices may eventually acquire legal status as (for example) easements. See *Megarry's Manual of the Law of Real Property* 8th ed., by A.J. Oakley (London 2002). pp. 430–441.

[45] A case in point, though it is not cited by Elliott, is judicial control of decisions to grant or withhold passports: *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] Q.B. 811.

[46] Elliott, "Parliamentary Sovereignty", p. 362, note 98.

[47] On this issue see Jaconelli, "The Nature of Constitutional Convention", at pp. 35–39.

[48] In these circumstances a putative breach is likely, on reflection, not to turn out to be a breach after all: the circumstances might conceivably be characterised, rather, as raising a hitherto unenvisaged exception to the general norm.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

of observance and justiciability of subject-matter are to provide the twin criteria of enforcement, conceivably no situation would ever arise to test the validity of Elliott's hypothesis.

III. Misconceived Objections to the Binding Nature of Constitutional Conventions

Any obligatory force that constitutional conventions might possess, therefore, must be derived from some basis other than that of legal obligation. Before seeking out that basis, it is necessary to consider a number of reasons that may be advanced as to why constitutional conventions do not impose obligations. An examination of these reasons, and why they are mistaken, will help to clarify the issues.

(1) The most obvious objection, that constitutional conventions are not legally binding, was encountered and dismissed at the outset of this article. It is founded on the erroneous supposition that the only form of obligation is the obligation that is enforceable in the courts.

(2) A related point is based on the fact that, even where constitutional conventions have been committed to paper (without, at the same time, gaining the force of law),[49] there exists no authoritative machinery for adjudicating on the question of their precise extent or on whether a violation has occurred on a particular occasion.[50] The point would seem to carry even stronger force where conventions have not even been declared in written form.[51] Yet the same objection might be made in regard to matters of moral obligation. But there, as here, the point lacks substance. The existence of a moral duty remains unaffected by the absence of

[49] As in Australia: see C.J.G. Sampford, "'Recognise and Declare': An Australian Experiment in Codifying Conventions" (1987) 7 O.J.L.S. 369.

[50] It is possible (though unusual) to have formal machinery of adjudication in regard to written, non-legal norms. An example is furnished by the body of rulings of the Press Complaints Commission on alleged transgressions of the Commission's Code of Practice. However, the procedure of the Press Complaints Commission depends on the lodging of complaints by aggrieved individuals, being akin in this respect to ordinary litigation. Who, it should be asked, would be allowed to perform this role with respect to the monitoring of written conventions?

[51] The lack of adjudicative machinery is a reflection of the fact that constitutional conventions are not enforceable in the courts as legal norms. Yet there exists a judicial procedure that is flexible enough to overcome this obstacle—the advisory opinion. This furnished the avenue for exploring the conventions governing federal-state relations in the context of the dispute about the patriation of the Canadian constitution: see the opinion of the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)* (1982) 125 D.L.R. (3d) 1. In English law, the general advisory jurisdiction conferred by section 4 of the Judicial Committee Act 1833 would seem wide enough to range beyond purely legal issues, permitting the Monarch to refer to the Committee "... for hearing or consideration any such other matters whatsoever as His Majesty shall think fit". K. Roberts-Wray, *Commonwealth and Colonial Law* (London 1966), p. 448, notes: "In practice, questions dealt with under this section would be justiciable".

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

recourse to a tribunal to pronounce authoritatively on matters of moral obligation.

(3) It may be objected that no sanctions are inflicted for breach of constitutional conventions. Some legal theorists take the presence of a sanction as the test of the existence of a genuine legal obligation. Sanctions, though of a different kind, might therefore be taken as the hallmark of a non-legal obligation.

The term "sanction" is used in various ways in connection with breaches of constitutional conventions. It is employed sometimes to refer to the unpleasant consequences that are likely to ensue from disregard of convention. Sanctions, in this sense of the word, undoubtedly exist. A chapter of Dicey's *Law of the Constitution*, for example, is entitled "The Sanction by which the Conventions of the Constitution are Enforced",[52] but this turns out to be devoted to such considerations as the threat of impeachment and the power of public opinion which we considered in section II(2) above. In the same vein Munro states: "The sanction for misconduct of government is that a minister is exposed to criticism or censure in the House".[53] Criticism and censure, however, also flow from the mere fact of political disagreement with the minister's policy. As such, they do not furnish a criterion for differentiating between those acts which are constitutionally improper, on the one hand, and those done in the execution of unpopular policies, on the other.

When qualified by the adjective "formal", the word "sanction" is taken as referring to the systematic infliction of "punishment" for proven breach of a norm that is characteristic of violations of the law.[54] There does exist one type of constitutional situation where "punishment" is meted out regularly enough to merit the designation of a "sanction". That is where personal misconduct or the mismanagement of a government department results in enforced resignation of a minister (or, as in some cases, the resignation of a whole ministerial team).[55] This situation occurs with sufficient regularity to exhibit a diversity of responses similar to the range of sanctions available for breach of the criminal law. At one extreme, the minister might retain his post, escaping with a reprimand only. At the other extreme, he may be banished for ever from holding

[52] Dicey, *The Law of the Constitution*, ch. 15.

[53] C.R. Munro, *Studies in Constitutional Law* (2nd ed., London 1999), p. 57.

[54] It was used in this sense by the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)*, (1982) 125 D.L.R. (3d) 1, 85: "... to enforce [constitutional conventions] would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach".

[55] As occurred in 1982 with the resignation, over the Falkland Islands invasion, of the Foreign Secretary, Lord Carrington, and two junior ministers, Richard Luce and Humphrey Atkins.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

office (akin to life imprisonment). In between there might be a period of exclusion from government, of greater or lesser duration, culminating in rehabilitation (akin to the earning of remission of sentence).[56]

Yet the search for sanctions to enforce the obligatory character of constitutional conventions should not be pressed too far. The idea of sanctionless duties, in the realm of law, is perfectly intelligible. Since sanctions attach to the breach of a good many legal duties, it is unnecessary to identify a sanction for breach of each individual legal norm. However, an important feature of law is its systemic nature: laws are characteristically found only in clusters, namely legal systems. Matters might be thought to stand on a different footing with regard to social rules in general, and constitutional conventions in particular. These, unlike laws, are not systemic. It is entirely possible for a convention to exist independently of any other convention in the same social group. However, in general terms, it is difficult to resist the conclusion that the need to identify sanctions for breach of constitutional conventions proceeds on the basis of a misconceived analogy with the enforcement of legal rules. The search for the obligations imposed by the making of promises, for instance, has not been concerned with finding phenomena that might be described as sanctions imposed for the breaking of promises. Nor, it is submitted, should a search be conducted in similar terms in the realm of constitutional conventions.

(4) In view of the absence of machinery of adjudication, noted in (2) (above), there will inevitably be dispute as to how to categorise individual constitutional incidents. Departures from established practice, in particular, are perhaps too readily viewed as breaches of convention. For example, the decision of President Franklin Roosevelt to run for a third (and ultimately a fourth) term in the White House in 1940 and 1944 has been generally regarded as a violation of the then well-established convention that

[56] The clearest example in this regard is that of Peter Mandelson, who resigned as Secretary of State for Trade and Industry in December 1998 over the failure to disclose a loan from a fellow member of the government. He was "rehabilitated" in October 1999, being brought back into office as Northern Ireland Secretary. In the event, he was required to resign again, in January 2001, in connection with his supposedly improper involvement in the Hinduja passport application.

Other examples of return to government are less clear-cut. Cecil Parkinson lost office as Secretary of State for Trade and Industry in 1983 after the exposure of an extra-marital affair, returning four years later as Secretary of State for Energy. Sexual infidelity in a minister, however, is arguably of no consequence for the constitution and therefore not the subject of a convention that can be termed "constitutional". Estelle Morris, too, returned to government as Minister of State for the Arts in June 2003, a mere eight months after resigning as Secretary of State for Education in the aftermath of the fiasco surrounding "A" level grading. In her case, however, there appears to have been a voluntary element in the departure from office, she frankly admitting that she was "not up to the job".

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

limited US Presidents to two terms of office.[57] I have argued for a different interpretation: that the convention could be read as subject to an exception where emergency conditions prevailed, and therefore on both occasions Roosevelt could be viewed as having acted within the terms of the convention.[58] Perhaps those who have too readily opted for the orthodox interpretation have been overly anxious to assert the rule-like quality of constitutional conventions. But, as Hart points out, "A rule that ends with the word 'unless . . .' is still a rule".[59] Constitutional conventions, like any other rule, may be subject to exceptions—even exceptions which have yet to be exhaustively enumerated—and yet still retain that quality.[60]

(5) A related objection is that some constitutional conventions, at least, allow for possible suspension or waiver on particular occasions. In regard to any type of rule, there is a clear difference between the existence of *exceptions to* the rule and the possibility of *suspension of* the rule. Exceptions to a rule, like the main body of the rule itself, are directed to classes of situation. Suspension is a discrete act taken in full knowledge of the existence of the relevant convention, decreeing that it is not to apply on the occasion in question. It is a process that, in formal terms at any rate, is largely unknown in the realm of legal rules, for in that context it has been viewed with considerable disapproval.[61] Occasional instances, however, are to be found of waiver of constitutional conventions. The best-known example is to be found in the statement of the then Prime Minister, Harold Wilson, in April 1975 concerning the referendum campaign on continued membership of the European

[57] E. Barendt, *An Introduction to Constitutional Law* (Oxford 1998), p. 40. See also C.R. Munro, *Studies in Constitutional Law* (1st ed, London 1987), p. 51: the second edition (1999), at p. 76, is more cautiously expressed.

[58] Jaconelli, "The Nature of Constitutional Convention", at p. 33.

[59] Hart, *Concept of Law*, at p. 139.

[60] Another example of reluctance to admit of exceptions to constitutional conventions is to be found in Sir William Wade's memorandum to the Foreign Affairs Committee of the House of Commons in connection with its inquiry in the early 1980s into issues of the "patriation" of the Canadian Constitution. Wade states: "it may be necessary to correct one infringement [of a constitutional convention] by another. If for example a British government were to refuse to resign after being defeated on a motion of no confidence, the Queen would be justified in dismissing the ministers against their will". (Reproduced, with full reference, in C. Turpin, *British Government and the Constitution: Text, Cases and Materials* (5th ed., London 2002), pp. 123–124.) Such an approach, however, would open up the possibility of an infinite regress of violations (an infringement of a third convention in order to correct infringement of the second, and so on). More to the present point, it must be doubted whether the Queen would be acting in violation of a constitutional convention in dismissing a government which had lost the confidence of the House of Commons in this way. Her action would be better characterised as falling full square within an exception to the rule that the Monarch acts on ministerial advice.

[61] Cf. the first article of the Bill of Rights 1689: that "the pretended power of suspending of laws" is illegal. While this assertion was qualified by the need for parliamentary consent, a modern view would regard even the presence of that consent as irrelevant to the impropriety of the process.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

Community. In the "unique circumstances of the referendum" [62] ministers were to be free for the duration of the campaign to voice their disagreement with the government's recommendation that the United Kingdom should remain a member of the Community. The possibility of waiver, however, does not detract from the obligatory force of the convention under normal circumstances. Furthermore, there may emerge a convention which limits the conditions under which the application of constitutional conventions may be waived.

(6) It is generally appreciated that constitutional conventions can, and do, change over time. Those of the eighteenth century, for example, have scant application in the modern constitutional order.[63] Can political actors, then, be subjected to obligations by shifting standards? This is a more difficult objection to refute, but it can be done by comparison with an aspect of human life where the measure of correctness is supplied by that which is conventionally accepted: namely, natural language. What is correct English (or French, or any other living language) at any point in time is the usage that is conventionally accepted as such among the educated speakers of that language.[64] Languages, of course, evolve. That which is accounted as incorrect English, say, at time *t1* may have gained sufficient a measure of acceptance at *t2* that it has ousted the previous standard and become itself the measure of correct English. Constitutional conventions are like languages in this regard. What is judged a spelling error or grammatical mistake (or the breach of a constitutional convention) may turn out to have been a nascent linguistic usage (or the first signs of an emerging—or disappearing—constitutional convention).[65]

[62] For a discussion of the issues, see G. Marshall (ed.), *Ministerial Responsibility* (Oxford 1989), ch. 7 ("The 'Agreement to Differ' of 1975") by Arthur Silkin. The quotation is from the statement of Mr. Wilson, at p. 60, announcing the "waiver" of the doctrine of collective responsibility.

[63] The specific instance of the eighteenth century is taken as the point of comparison since it is the subject of an article by Sir William Holdsworth: "The Conventions of the Eighteenth Century Constitution" (1932) 17 Iowa Law Review 161.

[64] This point holds quite generally—even in regard to languages (French, for example) where there exists a body (the Académie Française) which lays down edicts as to correct linguistic usage. Even in countries where such organizations exist, there is generally an insufficient degree of adherence to their "rulings" for obedience to them to qualify as a linguistic "rule of recognition" and to oust the standard of conventional usage among educated speakers of the language as a whole.

[65] This raises, incidentally, the question whether the development of constitutional conventions is characterised by linear progression. Take, for example, the convention that emerged in the course of the twentieth century requiring the Prime Minister to sit in the House of Commons—a convention that had set firm, at the very latest, by the time of the premiership of Sir Alec Douglas-Home in 1963–4. In the period since the last Prime Minister to sit in the Lords (Lord Salisbury in 1895–1902) there were two episodes when the convention was, arguably, in play: to disqualify Lord Curzon in 1923 and Lord Halifax in 1940. Of the latter it has recently been claimed that there was "little doubt that he could have secured the appointment" if he had wished it: R. Jenkins, *Churchill* (London 2001), p. 584. If this is correct, a linear interpretation of the convention's development would indicate that Lord Curzon was appointable, his peerage notwithstanding, seventeen years earlier.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

It is worth emphasizing that the test of correct language use is that which is accepted by the educated members of the linguistic group for the time being, without systematic reference to *past* usage. There would appear, therefore, to be a marked dissimilarity with constitutional conventions, where (as has been noted) the emphasis is placed on precedents. However, the difference between language and constitutional convention in this regard is readily explained. The conduct of government provides instances that are few and far between for gauging the reactions of the political actors to the various situations in which most constitutional conventions may conceivably be in play. In the interim since the last observed instance, attitudes and understandings may have changed significantly—so much so that precedent may provide a most unreliable guide to present norms of conduct.[66]

(7) Finally, it is not necessarily the case that there exists a convention to regulate every conceivable situation. There can be "convention-free" areas of constitutional life. In a situation which, in all other respects, is bounded by social rules there may be areas of activity where there will be practices only—or where the qualifying background presents itself so infrequently that it cannot even be claimed that there exists a practice governing (if that is the right word) what is normally to happen in the particular situation. The existence of such "convention-free" regions does not detract from the obligatory force of conventions in those situations that are occupied by social rules. Where such rules are absent, conduct is neither required nor prohibited but simply permitted.

IV. A Tentative Answer

If the question of the obligatory nature of constitutional conventions has attracted almost no attention, the same cannot be said in regard to the similar social phenomenon of the making of promises. Whether, and how, promises give rise to obligations has generated a centuries-old literature. The basis for the obligatory force of promises has been identified in sources as diverse as the tenets of natural law or those of utilitarianism, or—in more practical terms—in the expectations engendered in the promisee by the promise, or in acceptance of the social institution of promise-

[66] An example is provided by the debate on the constitutional position of the Crown conducted in September to October 1913 as the Irish Home Rule Bill entered its final stages in the legislative process. There was a suggestion that the enactment of the Parliament Act two years earlier, by debilitating the legal powers of the House of Lords, had enhanced the conventional rights and responsibilities of the Crown. The suggestion was effectively scotched by the Prime Minister, Herbert Asquith, in a communication to King George V. The memorandum is reproduced in R. Jenkins, *Asquith* (London 1964), Appendix B.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

making.[67] Yet the inquiry into the obligatory force possessed by promises is relatively straightforward by comparison with the same investigation in regard to constitutional conventions. There are at least two reasons why this is so.

First, in the institution of promising there exists a canonical verbal formula ("I promise you that I will ..."), the utterance of which engages the obligation (if any there be).[68] Constitutional conventions, by contrast, are only exceptionally the subject of verbal or written formulation. When they are, the formula *records*, rather than *creates*, the convention. For, as Atiyah has correctly observed: "Customs and conventions arise from what people do, not from what they agree or promise".[69] There exists no recognised way of acting that similarly brings into play any obligatory force that is possessed by constitutional conventions. Secondly, it is relatively easy to define the task of deriving the content of any promissory obligation (although determining its application to some situations may prove very problematical). It is to perform whatever action is encompassed in the speech act of promising. Yet which, among the various actions of constitutional consequence taken by political actors, form the object of obligation on the part of such actors?

In his discussion of the conventions associated with the practice of promising Atiyah asserts: "It is difficult to understand why [conventions] should not be regarded as creating at least some form of obligation even without any agreement or promise to observe them, at any rate where there is some underlying purpose to the custom or convention".[70] Certainly, writers on the subject of constitutional conventions have stressed the need for a "reason" for any putative convention. Jennings, it will be recalled, places it at the end of his tripartite test. But the mere existence of a "reason" will not suffice to form the basis of any obligatory force that conventions might possess. For any given social rule, armed with a reason, that is followed in constitutional matters there will often be a reason (or purpose) for following a diametrically opposed practice. There may, in fact, be stronger reasons for following the latter. The answer to the search for an obligatory basis is to be found, not in the content of any convention, but rather in its mode of emergence.

[67] See, generally, P.S. Atiyah, *Promises, Morals, and Law* (Oxford 1981) for a work that straddles both philosophical writing and practical law.
[68] It is possible, however, to make a promise without using the formula.
[69] Atiyah, *Promises, Morals, and Law*, p. 116. See also Jaconelli, "The Nature of Constitutional Convention", at pp. 39–42.
[70] Atiyah, *Promises, Morals, and Law*, pp. 116–117.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

Constitutional conventions are sometimes represented as arising from a form of contract or agreement between the various parties.[71] If they were so founded, there would be no difficulty in giving an account of their obligatory force. For we regard freely entered agreements as giving rise to obligations between the contracting parties, even if they are not always obligations which a court of law would enforce. Yet constitutional conventions are founded on contract or agreement only if these terms are used in some loose, figurative sense. Rather, their essence is found to subsist in a stream of concordant actions and expectations deriving from such actions. In such a system of reciprocal acts and forbearances it is possible to derive the basis of obligation. The kernel of the idea was expressed by David Hume, in the course of his exposition in *The Treatise of Human Nature* of the origins of justice and property:

> I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition that something is to be perform'd on the other part. Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it. On the contrary, this experience assures us still more, that the sense of interest has become common to all our fellows, and gives us a confidence of the future regularity of their conduct: And 'tis only on the expectation of this, that our moderation and abstinence are founded.[72]

In a modern formulation of Hume's position Gilbert Harman has argued that the whole of morality is conventional in nature and consists of behavior that is implicitly reciprocal, and frequently characterised by mutual adjustment, between members of society.[73]

[71] A. Heard, *Canadian Constitutional Conventions*, at p. 11, refers to several writers who describe such conventions as "a sort of contractual agreement among the relevant actors".

[72] D. Hume, *A Treatise of Human Nature* edited by Selby-Bigge: 2nd ed., revised by P.H. Nidditch (Oxford 1978), p. 490.

[73] G. Harman, "Justice and Moral Bargaining" (1983) 1 Social Philosophy and Policy 114. For a recent, qualified acceptance of the same position, see I.M.D. Little, *Ethics, Economics, & Politics: Principles of Public Policy* (Oxford 2002), pp. 81–83.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

This is a very controversial position since moral philosophy is beset with the feeling that there is a single true morality that transcends the practices of particular social groups. No such difficulty attends the subject of constitutional conventions. Although, as we have seen, the discourse on the subject has viewed them as the "morality" of the constitution,[74] it has never been suggested that there exists a uniquely correct constitutional morality applicable to all governmental systems.[75]

The Humean analysis, adapted to our subject-matter, runs as follows: the party that is in power at the moment respects the constraints that are imposed on it by constitutional conventions in the expectation that the opposition parties, when they attain office, will likewise respect the same constraints. When constitutional conventions are seen in this way the nearest analogy to them in legal doctrine is provided, not by the institution of contract, but by those unusual cases (predominantly to be found in land law) in which rights and duties have been held to spring up from positions of mutual benefit and burden. In this way those, for example, who wish to benefit from the performance by others of obligations contained in covenants must themselves accept the burdens imposed on them by those same covenants.[76]

How is this approach exemplified in practical, constitutional terms? It means that the majority party, while taking its position as the elected party of government, does not monopolise appointments to office. It takes account of the claims of the main opposition parties or, in some cases, the claims of the official Opposition only—as reflected (to give respective examples of each) in the system of appointing to such posts as that of life peer and EU Commissioner.[77] In the same vein the Opposition is also allocated a number of days in the parliamentary session when it may choose the business to be debated in the House of Commons. More specifically, if the Opposition tables a motion of no confidence in

[74] See note 8, above.

[75] Indeed, one wonders whether the conventions that are followed in countries with written constitutions are ever described as the morality of their constitutional systems.

[76] *Halsall* v. *Brizell* [1957] Ch. 169. Another case taken as exemplifying the same doctrine is *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, though it is less in point here since the mutual benefits and burdens sprang from an explicit agreement. For an analysis of the doctrine in general see C.J. Davis, "The Principle of Benefit and Burden" [1998] C.L.J. 522.

[77] The EU is now moving to a system where each Member State has only one Commissioner. Hitherto the UK, among others, has been entitled to nominate two members of the Commission. By convention one member was drawn from the party in government, the other from the ranks of the Opposition party. The Leader of the Opposition used to be invited to nominate a person for the second post, but it appears that there was no convention that he should make more than one nomination or that the Prime Minister should accept the person so named. The Prime Minister's office stated in 1992 that there had been three occasions since Britain joined the European Community when the Prime Minister had appointed from the ranks of the Opposition party without seeking the approval of the Leader of the Opposition: see *The Observer* 27 March 1994, p. 2.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

the government, the latter must make time available to have the motion debated.[78] Other examples, too, can be given of conventional arrangements whereby the governing party sets aside its personal advantage in favour of other parties in both legislative arrangements[79] and executive administration.[80] It may, of course, be debatable as to what are properly to be regarded by the government as legitimate "spoils of office" and which matters are the subject of conventional rules requiring that they be shared with the Opposition.[81] Equally, the extent to which a constitutional convention requires a party to act against its own interests will vary. At one extreme, convention requires that the government implement the periodic recommendations of the Boundary Commissions, even when the changes in constituency boundaries will result in the loss to it of parliamentary seats. At the other extreme, the removal of a minister whose conduct has been found wanting can be as much in the selfish interests of the party as it is against those interests or for the general health of the constitution.

It is now possible to appreciate the limitations of the first two limbs of Jennings's three-part test of the existence of a constitutional convention. To ask about the "precedents", and the beliefs of the "actors" in those precedents, is too limited an inquiry. Assume that Minister X of the White Party is today confronted with a dilemma as to how to act in a situation that raises a constitutional dimension. Suppose, also, that Minister Y, when

[78] For a detailed account of the rules applicable to "opposition days" (formerly "supply days") and the debating of motions of censure, see J.A.G. Griffith and M. Ryle, *Parliament: Functions, Practice and Procedures*, 2nd ed., by R. Blackburn and A. Kennon (London 2003), pp. 480–487. Both started out as matters of convention but in 1982, on the transition from supply days to opposition days, the Opposition's entitlement was embodied in standing orders.

[79] For example, in the rule permitting the party that formerly occupied a parliamentary seat to determine the timing of the by-election by deciding when to move the writ: see generally M. Rush, "The Timing of By-Elections" (1973–74) 27 Parliamentary Affairs 44.

[80] As evidenced in the rule forbidding the government access to the papers of an earlier administration of a different party—a rule now embodied in the *Ministerial Code*, para. 22: "By convention, written opinions of the Law Officers, unlike other Ministerial papers, are generally made available to succeeding Administrations".

[81] A good example is provided by the Speakership of the House of Commons. Although convention requires the Speaker to act in a politically neutral manner, there has been some dispute as to whether the occupancy of the post is to alternate between the opposing sides of the House. In 1992, on the retirement of Speaker Weatherill (a former Conservative), Neil Kinnock claimed that it was now Labour's turn to supply a person to occupy the position. The existence of any such convention was denied at the time by the Conservative Whips, as it was subsequently in the memoirs of the person elected: see *Betty Boothroyd: The Autobiography* (London 2001), pp. 138–139. The competing interpretations of the precedents are set out in P. Routledge, *Madam Speaker: The Life of Betty Boothroyd* (London 1995), pp. 215 and 232. Kinnock's claim for the alternating pattern of Speakerships rested on the evidence since the 1960s. The Conservatives, on the other hand, pointed out that since the Second World War it was the majority party for the time being that supplied the Speaker. In any event, Kinnock's interpretation lost much of its force on the retirement of Betty Boothroyd in 2000, when another former Labour MP, Michael Martin, was elected to the post.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

confronted some years ago with a situation that was identical in all material respects, behaved in a certain way—and, moreover (let us assume for the sake of argument) believed that he was obligated to act in that way. If Y had held office in a White Party government at the time, X's decision to conform his actions to the "precedent" that was "set" by Y may signify the emergence of a social rule. But, even so, it will be a rule that applies within the White Party only. If, on the other hand, the Black Party gains power and Minister Z is appointed to office in that government, only if Z decides to follow suit is it possible to speak of the emergence of a social rule that obtains across parties, in other words a constitutional convention.

This perspective provides at least one reason why the rotation of parties is (instrumentally) beneficial for democracy. Such a state of affairs, certainly, could be seen as good in itself. For it amounts to a form of *serial* power-sharing between the various political groupings in society and may thus embody some of the benefits that certain thinkers have associated with *concurrent* power-sharing.[82] For our purpose, however, it might be accounted as instrumentally good, for as each party comes to government in turn it gains a schooling in the discipline of observing the constraints imposed by constitutional conventions and is allowed the opportunity to perform its side of the constitutional compact.

However, the idea of mutual forbearance does not furnish an obligatory basis of every type of social rule, nor even of every constitutional convention. Each of these limitations must be considered in turn.

A man who fails to observe the rule that requires him to remove his hat in church will be open to the charge of being discourteous. One who does not conform to the linguistic usages of his community, at best, will be considered illiterate or, at worst, will fail to make himself understood by his fellows. In neither instance can we speak of breach of an *obligation* to follow the respective practices. Indeed, the requirement that men enter churches bareheaded cannot even be viewed as an example of a "co-ordination problem", for the solution of which conventions typically emerge.[83]

[82] Most notably by Lijphart, as expressed in his idea of consociational democracy: see, for example, A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven 1980). However, it should be added that what may be optimal from the constitutional viewpoint may well prove sub-optimal when judged from the perspective of particular policy areas (economic, educational, etc.) as the rotation of parties in government brings with it the potential for frequent and abrupt changes in policy direction.

[83] See generally D.K. Lewis, *Convention: A Philosophical Study* (Cambridge, Massachusetts 1969). For a brief account of the concept of a "co-ordination problem" see Jaconelli, "The Nature of Constitutional Convention", at p. 30.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

A similar difficulty afflicts the rule of recognition, which Hart places at the apex of every legal system. In *The Concept of Law* Hart distinguishes between two perspectives: the external point of view, that of the uninvolved observer of the workings of a legal system; and the internal point of view, exemplified by the judge who (explicitly or implicitly) appeals to the rule of recognition as a justification for his decisions. When challenged concerning his adherence to the rule of recognition, however, the judge is reduced to assuming the external point of view, pointing to the behaviour and attitude of his fellow judges which demonstrate the existence of the rule. The answer to this impasse, and the derivation of the obligatory force of the social rule of recognition, has been argued to be found in the fundamental need to co-ordinate the activities of legal officials and the part played by that rule in securing this end.[84]

It has also been conceded that the Humean line of analysis cannot yield an obligatory basis for every single constitutional convention. Many constitutional conventions are inter-*institutional* rather than inter-*party* in character. Unlike political parties, the institutions of government (the Crown, the House of Lords, the House of Commons, the Scottish Parliament) occupy relatively fixed points in the constitutional firmament. It would prove extremely difficult to adapt the above analysis, therefore, to such a well-established convention as that which requires the Monarch to give the royal assent to bills duly passed by both Houses of Parliament, or again the convention which requires the House of Lords to pass bills from the House of Commons that are based on the government's election manifesto. There will clearly be strong reasons of a prudential nature for the observance of these conventions, but that would appear to be all that could be said of them.

There is, it should be added, a type of convention that reflects a policy of abstention by a political body in its legal dealings with an inferior body. For example, the Westminster Parliament retains the legislative authority to abolish or amend the devolved system of government in Scotland.[85] Under the nascent "Sewel convention", however, it will not legislate for Scotland in contravention of the scheme established by the Scotland Act 1998 without the consent of

[84] G.J. Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 Journal of Legal Studies 165.

[85] In case there were any doubt on the matter, section 28 of the Scotland Act 1998, after setting out the legislative power of the Scottish Parliament, stipulates in subsection (7): "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

the Scottish Parliament.[86] For half a century Westminster exercised similar self-restraint in its dealings with the devolved government of Northern Ireland. Only in the face of a mounting catalogue of abuses of power was there increased intervention from London, culminating in 1972 in the re-introduction of full direct rule.[87] Something akin to the same rule was also fundamental to the constitutional structure of the Commonwealth. Prior to its (approximate) embodiment in section 4 of the Statute of Westminster 1931, there was a convention that the Imperial Parliament would not legislate for a Dominion without the latter's consent.

In these situations it is possible to derive the *quid pro quo* for Westminster's observance of the convention from the running of a fair system of government by the inferior body and due acquiescence in its subordinate status. A case well placed for exploring the issues that emerge from the breakdown of such arrangements is *Madzimbamuto* v. *Lardner-Burke*,[88] arising as it did out of Rhodesia's unilateral declaration of independence. The judgment of the Judicial Committee of the Privy Council contains some discussion of the convention in regard to the Dominions (which, consistently with the account in section II of the present article, was held not to be legally enforceable).[89] It includes, moreover, the telling phrase: "... it may also be that the unilateral Declaration of Independence *released* the United Kingdom from any obligation to observe the convention"[90] (Emphasis added). Such pronouncements are typically made in the gravest constitutional crises. The argument is heard on these occasions that it is the breach of a fundamental understanding by one side that justifies its opponents in departing from a different, but equally important, norm of conduct.[91]

[86] The truly testing time for the existence of the convention, however, will come when the party that is in control at Westminster is not the same as the ruling party in Edinburgh.

[87] For a full discussion see H. Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (London and Belfast 1968), pp. 86–93.

[88] [1969] 1 A.C. 645.

[89] It should be added that the convention, rather than the Statute of Westminster, was the applicable norm since the terms of the Statute did not apply to Southern Rhodesia: *ibid.*, at p. 722D. Even if the Statute had so extended, it would *pro tanto* have been repealed by the Southern Rhodesia Act 1965, which re-asserted the jurisdiction of the United Kingdom over the area.

[90] *Ibid.* at p. 723C.

[91] Such norms, of course, are different from the practical, workaday standards of conduct that form the principal focus of this article. A case in point arose from the unparliamentary advocacy of extreme measures against Irish Home Rule urged in 1912 by the Leader of the Opposition, Andrew Bonar Law. It has been said that Bonar Law could claim to be "justified in breaking the conventions of the constitution" since the Liberal government was proposing to place the Protestants of Ulster under the power of their enemies—and that without having submitted the issue of Home Rule to the test of a general election. See R. Blake, *The Unknown Prime Minister: The Life and Times of Andrew Bonar Law 1858–1923* (London 1955), pp. 130–131.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press

V. Concluding Comment

This article has offered an answer to the question of the circumstances under which constitutional conventions give rise to obligations. A similar question, it should be noted, has long surrounded the phenomenon of judge-made rules. Why is a judge, confronted today with case *p*, bound to rule in the same way as the court decided in the past in case *q* (which case he deems to be indistinguishable from the present one)? For most purposes the standard of formal justice—that like cases are to be treated alike and unlike cases are to be decided differently—serves well enough as an explanatory basis. But it does not provide an answer that is complete in every respect. How, it is asked, is it possible to describe the previous rulings of the courts as binding on a judge when he is in a position to escape their force by distinguishing them, or even (in the case of some of the higher courts) by overruling them?[92] The whole question appears to take a more problematic form in the context of constitutional conventions, where considerations of formal justice are inapplicable. For they lack the first requirement of a system that could be founded on such considerations: namely, an independent machinery of adjudication on questions of alleged violation. Constitutional conventions, like all conventions, are "self-policing".[93] Furthermore, short-term personal interest often inclines those who occupy governmental positions in the direction of violating the standards that they set. Yet, ultimately each party political actor must conduct himself in the realisation that he is helping to shape a social rule. As he acts, so too may those of the opposite political persuasion when they, in their turn, attain office.

[92] See N. E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* 2nd ed., (London 2002), pp. 146–149.
[93] They are so described in Little, *Ethics, Economics and Politics*, at p. 81.

https://doi.org/10.1017/S0008197305006823 Published online by Cambridge University Press