

Constitutional Conventions in the United Kingdom: Should they be codified?

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Abstract

This Article outlines whether constitutional conventions should be codified in the event that the United Kingdom were to adopt a codified constitution. Currently, the UK's constitution is un-codified. There has however, been much debate as to whether the UK should adopt a codified constitution. One of the overwhelming questions that faces those who propose the adoption of a written constitution is whether constitutional conventions should be codified and thus, whether the nature and purpose of conventions would allow for this radical change. Arguments for and against codification of conventions are considered in the context of four leading solutions: codify and legally enforce them, codify them and leave them as non-legal guidelines (as is the position in Australia), codify a selection or not codify them at all. This complex debate has been considered by Parliament, the courts and numerous academics; this article seeks to outline this complex debate and the many conflicting opinions. It is concluded in this article that to leave conventions as uncodified would be the best course of action for a newly codified constitution in the United Kingdom.

I. Introduction

A.V.Dicey separates legal rules from conventions whereas, Sir Ivor Jennings believes that the two can not be separated: 'without conventions legislation and case law are quite unintelligible.'¹ If law can not be separated from conventions as Jennings suggests, it would surely be difficult to create a codified constitution without including conventions. Marshall's argument however, is closer to that of Dicey's as he implies that constitutional conventions are unlike legal or

¹ Geoffrey Marshall, *Constitutional Theory*, (Clarendon Press, Oxford, 1980), 10.

moral rules because they are neither an outcome of legislative or judicial decisions and they rarely govern matters that are morally debatable.² It could be argued that it is unnecessary to codify conventions that do not have a direct moral impact upon the population. This debate regarding the distinction between legal rules and conventions is questionable because of their significance within the UK's legal system. Whichever theory is preferred it cannot be ignored that 'their constitutional importance in the United Kingdom is immense'.³ As a result of their importance, it is a challenging task to decide whether or not conventions should be codified. In considering this debate it is also to consider the nature and impact of conventions themselves. This essay seeks to examine whether constitutional conventions should be codified if the United Kingdom were to adopt a codified constitution. There is the choice to codify and legally enforce them, codify them and leave them as non-legal guidelines, codify a selection or finally, not codify them at all; each potential outcome will be discussed in turn.

II. Should conventions be codified?

i. The easy way out? Not codifying conventions

The easiest approach would be not to codify conventions at all.⁴ The United Kingdom has never had a codified constitution and the conventions within this uncodified constitution have never been the clearest set of rules to follow. In the United Kingdom's uncodified constitution, conventions do not have to be followed unconditionally⁵ and it is possible for a Government to set aside a constitutional convention if by following it, justice will not be provided. In the Crossman diaries case⁶ in 1976 the Attorney General was

² Geoffrey Marshall, *Constitutional Conventions*, (OUP, 1984), 216.

³ David Jenkins, 'Common law declarations of unconstitutionality', [2009] 7(2) *IJCL*, <<http://icon.oxfordjournals.org/content/7/2/183.full.pdf+html>>

⁴ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, (Oxford University Press, 2008), 164.

⁵ Marshall (n 2), 216.

⁶ *Attorney General v Jonathan Cape Ltd* [1976] QB 752 .

unsuccessful in enforcing the convention of collective cabinet responsibility. Lord Widgery noted that: “whatever the limits of the convention...there is no obligation enforceable at law to prevent the publication of Cabinet papers, except in extreme cases where national security is involved.”⁷ In this case a constitutional convention was applied but ignored; as a consequence we do not know how they will apply when put to the test⁸ or whether they can be morally justified. To legally enforce or codify conventions that are impractical would be to inflict problems upon the Government and courts who would have no choice but to apply them.

Without codification, conventions can be ‘applied to fresh political circumstances’⁹, not ignored, but applied where necessary. Again, this argument is in support of not codifying constitutional conventions. Jenkins comments that ‘...without conventions, the Constitution loses its modern, democratic mechanisms and becomes no more than the bare frame of an old, still autocratically minded relic of the Glorious Revolution.’¹⁰ He implies that constitutional conventions bring flexibility to what would be a rigid legal framework but also that the constitution can be kept up to date with the changing needs of Government.¹¹ In 2006, both the House of Lords and the House of Commons began to consider codifying certain conventions that affected the House of Lords and legislation.¹² The ideas were rejected on the grounds that to codify conventions would be a contradiction, considering that their purpose is to provide flexibility and have the capacity to evolve.¹³ To codify conventions would be to reduce their adaptability as circumstances change and

⁷ *Attorney General* (n 6) (Lord Widgery)

⁸ Institute for Public Policy Research, *A written constitution for the United Kingdom*, (Mansell, London, 1993), 214.

⁹ Marshall, *Conventions*, (n 2), 217.

¹⁰ Jenkins (n 3)

¹¹ Peter Leyland, *The Constitution of the United Kingdom*, (Hart Publishing, 2007) 25.

¹² A.W.Bradley, K.D.Ewing, *Constitutional and Administrative Law*, (Longman, 2010, 15th edition), 28.

¹³ Joint Committee on Conventions, *Conventions of the UK Parliament*, HL Paper 265-1, HC 1212-1.

society progresses; they should not be legally enforced and they should not be codified to preserve this advantage that our constitution has.¹⁴

ii. The desire for certainty: codifying conventions

It could be argued that codifying conventions would bring certainty and make constitutional law more easily accessible. The *Ministerial Code* is an example of a set of codified conventions published by the Government that apply to Ministers in Parliament. It could be useful to bring together rules on a defined subject so that they are readily available for the public; this is one option open to Parliament.¹⁵ In response however, it could be argued that although it may provide easier access, the majority of conventions, like those in the *Ministerial Code* do not directly affect citizens of the state. They ‘do not affect individuals closely enough’¹⁶ to justify the need of a single, accessible document being produced, especially when considering the difficulties that would accompany its drafting.

iii. The Australian example: Codifying a selection of conventions

If we decide not to codify the entirety of constitutional conventions, another option would be to codify a small selection: certain conventions that affect the public could be codified and those otherwise should not. A similar approach has been adopted in Australia, which has a statement of the main constitutional conventions that affect the federal Government.¹⁷ This could be a course of action that the United Kingdom could take; to codify certain conventions but not legally enforce them.

The nature of conventions themselves obstruct this seemingly reasonable idea. Not only are they flexible but

¹⁴ Brazier (n 4), 164.

¹⁵ Bradley (n 12), 29.

¹⁶ Bradley (n 12), 29.

¹⁷ Brazier (n 4), 165.

their ‘content and scope is at times unclear.’¹⁸ Identifying conventions presents a difficult task and their uncertainty has caused a significant amount of debate in Parliament. In 1955, Sir Antony Eden wanted to appoint Lord Sailsbury as Foreign Secretary but was deterred from doing so according to the convention that the Foreign Secretary must be appointed from the House of Commons. Despite this, Lord Home was appointed as Foreign Secretary in 1960 by Harold Macmillan and Lord Carrington by Margaret Thatcher in 1979. That which was perceived to be a convention initially, eventually turned out to be a generalisation.¹⁹ This clearly illustrates the uncertainty surrounding conventions and why it would be inconceivable to codify only a selection.

vi. Codifying and legally enforcing conventions

In considering the uncertainty of conventions it would not be plausible to either codify or legally enforce a set of regulations that are so vague and unclear. Conventions, by their very nature, are ambiguous but also flexible and thus, should not be codified or legally enforced in order to maintain this vital characteristic of the United Kingdom’s constitution.

Despite their ambiguity conventions are observed because of the problems that arise if they are not.²⁰ Dicey argues that it is legal difficulties that arise whereas Jennings notes that ‘conventions are observed because of the political difficulties which arise if they are not.’²¹ In 1909 the House of Lords refused to pass a money Bill, which was a clear breach of convention and caused both legal and political outrage. As a result, in 1911 a statute²² was introduced to enforce in law that which had previously been a convention. If certain conventions are found to have serious consequences when

¹⁸ Vernon Bogdanor, Stefan Vogenauer, ‘Enacting a British Constitution: some problems’ [2008] PL Spr 38-57.

¹⁹ Bogdanor (n 18.)

²⁰ Leyland (n 11), 27.

²¹ W.I.Jennings, *The Law and the Constitution*, (University of London Press, 1938, 2nd edition), 128-9.

²² Parliament Act 1911, s1(1).

breached, it would be reasonable to enforce a selection as law and codify them. Conventions are rarely ignored and thus, to begin a process of codifying and enforcing them could be seen to be unnecessary when considering the extremely challenging task in hand.

III. Conclusion

As has been illustrated in this article, deciding whether to codify constitutional conventions poses a complex question. To codify and enforce all conventions by law would arguably introduce certainty but completely restrict the flexibility that the United Kingdom's constitution holds. Instead a proportion of the most significant rules could be enforced and codified. This raises the issue of how to classify conventions and why those that are not classified as important are valuable as conventions at all. It has also been suggested that a 'non-legal statement'²³ could be made of conventions, as in Australia. However, the fact that they are not all agreed upon or followed raises concerns.

Considering the arguments and nature of conventions, it is clear that the easiest approach to take is to leave them as they are²⁴ and embrace the flexibility that they bring to our constitution. It is noted that conventions play a more significant role in countries with written constitutions because '...the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring.'²⁵ Thus, if the United Kingdom were to adopt a written constitution the informal, flexible and non-legal rules would continue to work as a fundamental part of the UK constitution, as they have for hundreds of years. To leave conventions as un-codified would be the best course of action for a newly codified constitution in the United Kingdom.

²³ Brazier (n 4), 164.

²⁴ Brazier (n 4), 164.

²⁵ C.R. Munro, 'Laws and Conventions Distinguished' [1975] 91 LQR, 218-219.

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