Court File No. T-2506-14

FEDERAL COURT

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA and
THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

APPLICANT'S SUPPLEMENTAL BOOK OF AUTHORITIES

Aniz Alani
[redacted]

Applicant

On his own behalf

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INTRODUCTION

TO THE STUDY OF THE

LAW OF THE CONSTITUTION

BY

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TENTH EDITION

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CHAPTER XI

THE RESPONSIBILITY OF MINISTERS

Ministerial responsibility.

MINISTERIAL responsibility means two utterly different things.

It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.

This is a matter depending on the conventions of the constitution with which law has no direct concern.

It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.

This responsibility, which is a matter of law, rests on the following foundation. There is not to be found in the law of England, as there is found in most foreign constitutions, an explicit statement that the acts of the monarch must always be done through a Minister, and that all orders given by the Crown must, when expressed in writing, as they generally are, be countersigned by a Minister. Practically, however, the rule exists.[1]

In order that an act of the Crown may be recognised as an expression of the Royal will and have any legal effect whatever, it must in general be done with the assent of, or through some Minister or Ministers who will be held responsible for it. For the Royal will can, speaking generally, be expressed

[1] In the case of some of the independent statutory authorities, such as the National Assistance Board, the functions of the body and of its officers and servants are by statute deemed to be exercised on behalf of the Crown. The functions are such that they could not be exercised by the Crown or the body without statutory authority.—ED.

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only in one of three different ways, viz. (1) by Order in Council; (2) by order, commission, or warrant under the sign-manual; (3) by proclamations, writs, patents, letters, or other documents under the Great Seal.

An Order in Council is made by the Queen "by and with the advice of his Privy Council"; and those persons who are present at the meeting of the Council at which the order was made, bear the responsibility for what was there done. The sign-manual warrant, or other document to which the sign-manual is affixed, bears in general the countersignature of one responsible Minister or of more than one; though it is not unfrequently authenticated by some one of the seals for the use of which a Secretary of State is responsible. The Great Seal is affixed to a document on the responsibility of the Chancellor, and there may be other persons also, who, as well as the Chancellor, are made responsible for its being affixed. The result is that at least one Minister and often more must take part in, and therefore be responsible for, any act of the Crown which has any legal effect, *e.g.* the making of a grant, the giving of an order, or the signing of a treaty.[1]

The Minister or servant of the Crown who thus takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Now supposing that the act done is illegal, the Minister

[1] On the whole of this subject the reader should consult Anson, *Law and Custom of the Constitution*, vol. ii (4th ed., 1935), part i, pp. 62-72, 170, 171. Anson gives a full account of the forms for the expression of the Royal pleasure and of the effect of these forms in enforcing the legal responsibility of Ministers. See also Clode, *Military Forces of the Crown* (1869), vol. ii, pp. 320, 321; *Buron* v. *Denman* (1848) 2 Ex. 167; K. & L. 102, at p. 189; Great Seal Act, 1884; Wade and Phillips, *op. cit.*, App. B.

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concerned in it becomes at once liable to criminal or civil proceedings in a court of law. In some instances, it is true, the only legal mode in which his offence could be reached may be an impeachment. But an impeachment itself is a regular though unusual mode of legal procedure before a recognised tribunal, namely, the High Court of Parliament. Impeachments indeed may, though one took place as late as 1805, be thought now obsolete, but the cause why this mode of enforcing Ministerial responsibility is almost out of date is partly that Ministers are now rarely in a position where there is even a temptation to commit the sort of crimes for which impeachment is an appropriate remedy, and partly that the result aimed at by impeachment could now in many cases be better obtained by proceedings before an ordinary court. The point, however, which should never be forgotten is this: it is now well-established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law.[1]

[1] See Intro. pp. clxxix *et seq.*, *ante*, for the sanctions which ensure obedience to the conventions relating to ministerial responsibility. It is only since the Crown Proceedings Act, 1947, that the Crown may be held liable in tort for the acts of its servants and agents, with certain exceptions, especially ss. 9, 10.—Ed.

CHAPTER XIV

NATURE OF CONVENTIONS OF CONSTITUTION

In an earlier part of this work[1] stress was laid upon the essential distinction between the "law of the constitution," which, consisting (as it does) of rules enforced or recognised by the courts, makes up a body of "laws" in the proper sense of that term, and the "conventions of the constitution," which consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognised by the courts, make up a body not of laws, but of constitutional or political ethics; and it was further urged that the law, not the morality of the constitution, forms the proper subject of legal study.[2] In accordance with this view, the reader's attention has been hitherto exclusively directed to the meaning and applications of two principles which pervade the law of the constitution, namely, the Sovereignty of Parliament[3] and the Rule of Law.[4]

But a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of

[1] See pp. 23-30, *ante*.
[2] See pp. 30-32, *ante*.
[3] See Part i.
[4] See Part ii.

historians or of statesmen. He ought to ascertain, at any rate, how, if at all, the law of the constitution is connected with the conventions of the constitution; and a lawyer who undertakes this task will soon find that in so doing he is only following one stage farther the path on which we have already entered, and is on the road to discover the last and most striking instance of that supremacy of the law which gives to the English polity the whole of its peculiar colour.

My aim therefore throughout the remainder of this book is to define, or ascertain, the relation or connection between the legal and the conventional elements in the constitution, and to point out the way in which a just appreciation of this connection throws light upon several subordinate questions or problems of constitutional law.

This end will be attained if an answer is found to each of two questions: What is the nature of the conventions or understandings of the constitution? What is the force or (in the language of jurisprudence) the "sanction" by which is enforced obedience to the conventions of the constitution? These answers will themselves throw light on the subordinate matters to which I have made reference.

Nature of constitutional understandings.

The salient characteristics, the outward aspects so to speak, of the understandings which make up the constitutional morality of modern England, can hardly be better described than in the words of Mr. Freeman:—

"We now have a whole system of political "morality, a whole code of precepts for the guidance of "public men, which will not be found in any page "of either the statute or the common law, but which "are in practice held hardly less sacred than any

"principle embodied in the Great Charter or in the "Petition of Right. In short, by the side of our "written Law, there has grown up an unwritten or "conventional constitution. When an Englishman "speaks of the conduct of a public man being consti-"tutional or unconstitutional, he means something "wholly different from what he means by conduct "being legal or illegal. A famous vote of the House "of Commons, passed on the motion of a great states-"man, once declared that the then Ministers of the "Crown did not possess the confidence of the House "of Commons, and that their continuance in office "was therefore at variance with the spirit of the con-"stitution. The truth of such a position, accord-"ing to the traditional principles on which public men "have acted for some generations, cannot be disputed; "but it would be in vain to seek for any trace of such "doctrines in any page of our written Law. The "proposer of that motion did not mean to charge the "existing Ministry with any illegal act, with any act "which could be made the subject either of a prose-"cution in a lower court or of impeachment in the "High Court of Parliament itself. He did not mean "that they, Ministers of the Crown, appointed "during the pleasure of the Crown, committed "any breach of the Law of which the Law could "take cognisance, by retaining possession of their "offices till such time as the Crown should think "good to dismiss them from those offices. What he "meant was that the general course of their policy "was one which to a majority of the House of Com-"mons did not seem to be wise or beneficial to the "nation, and that therefore, according to a conven-

"tional code as well understood and as effectual as "the written Law itself, they were bound to resign "offices of which the House of Commons no longer "held them to be worthy."[1]

The one exception which can be taken to this picture of our conventional constitution is the contrast drawn in it between the "written law" and the "unwritten constitution"; the true opposition, as already pointed out, is between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word at all. But this inaccuracy is hardly more than verbal, and we may gladly accept Mr. Freeman's words as a starting-point whence to inquire into the nature or common quality of the maxims which make up our body of constitutional morality.

Examples of constitutional understandings.

The following are examples[2] of the precepts to which Mr. Freeman refers, and belong to the code by which public life in England is (or is supposed to be) governed. "A Ministry which is outvoted in the House of Commons is in many cases bound to retire from office." "A Cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution." "If an appeal to the electors goes against the Ministry they are bound to retire from office, and have no right to dissolve Parliament a second time." "The Cabinet are responsible to Parliament as a body, for the general conduct of affairs." "They are further

[1] Freeman, *Growth of the English Constitution* (1st ed., 1872), pp. 109, 110.

[2] See, for further examples, p. 26, *ante*.

responsible to an extent, not however very definitely fixed, for the appointments made by any of their number, or to speak in more accurate language, made by the Crown under the advice of any member of the Cabinet." "The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office." "The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet." These are precepts referring to the position and formation of the Cabinet. It is, however, easy to find constitutional maxims dealing with other topics. "Treaties can be made without the necessity for any Act of Parliament; but the Crown, or in reality the Ministry representing the Crown, ought not to make any treaty which will not command the approbation of Parliament." "The foreign policy of the country, the proclamation of war, and the making of peace ought to be left in the hands of the Crown, or in truth of the Crown's servants. But in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed." "The action of any Ministry would be highly unconstitutional if it should involve the proclamation of war, or the making of peace, in defiance of the wishes of the House." "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point, not definitely fixed, to give way, and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of

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its responsible advisers, to create or to threaten to create enough new Peers to override the opposition of the House of Lords, and thus restore harmony between the two branches of the legislature."[1] "Parliament ought to be summoned for the despatch of business at least once in every year." "If a sudden emergency arise, *e.g.* through the outbreak of an insurrection, or an invasion by a foreign power, the Ministry ought, if they require additional authority, at once to have Parliament convened and obtain any powers which they may need for the protection of the country. Meanwhile Ministers ought to take every step, even at the peril of breaking the law, which is necessary either for restoring order or for repelling attack, and (if the law of the land is violated) must rely for protection on Parliament passing an Act of Indemnity."

Common characteristic of constitutional understandings.

These rules (which I have purposely expressed in a lax and popular manner), and a lot more of the same kind, make up the constitutional morality of the day. They are all constantly acted upon, and, since they cannot be enforced by any court of law, have no claim to be considered laws. They are multifarious, differing, as it might at first sight appear, from each other not only in importance but in general character and scope. They will be found however, on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown)

[1] It is doubtful if this convention has survived the Parliament Acts, 1911 and 1949, and the Life Peerages Act, 1958; see Intro. p. clxxiii, *ante*.

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ought to be exercised;[1] and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the constitution. This matter, however, requires for its proper understanding some further explanation.

Constitutional conventions are mainly rules for governing exercise of prerogative.

The discretionary powers of the government mean every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority. Thus no statute is required to enable the Crown to dissolve or to convoke Parliament, to make peace or war, to create new Peers, to dismiss a Minister from office or to appoint his successor. The doing of all these things lies legally at any rate within the discretion of the Crown; they belong therefore to the discretionary authority of the government. This authority may no doubt originate in Parliamentary enactments, and, in a limited number of cases, actually does so originate.[2] Thus the British Nationality and Status of Aliens Act, 1914, gives to a Secretary of State the right under certain circumstances to convert an alien into a naturalised British subject; and the Extradition Act, 1870, enables a

[1] They go further and provide for the whole working of the complicated government machine. Nowadays the majority of Ministers are concerned with statutory functions; the exceptions include, however, the Prime Minister, the Secretaries of State, and the First Lord of the Admiralty. But much of the work of the Home Secretary and the Secretary of State for Scotland is statutory. See Jennings, *The Law and the Constitution* (4th ed., 1952), pp. 86-88.—Ed.

[2] In 1958 the greater part of this authority is statutory. See Intro. p. cxvii, *ante*.—Ed.

Secretary of State (under conditions provided by the Act) to override the ordinary law of the land and hand over a foreigner to his own government for trial. With the exercise, however, of such discretion as is conferred on the Crown or its servants by Parliamentary enactments we need hardly concern ourselves. The mode in which such discretion is to be exercised is, or may be, more or less clearly defined by the Act itself, and is often so closely limited as in reality to become the subject of legal decision, and thus pass from the domain of constitutional morality into that of law properly so called. The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the prerogative—a term which has caused more perplexity to students than any other expression referring to the constitution. The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.[1] The King was originally in truth what he still is in name, the sovereign, or, if not strictly the sovereign in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power. In 1791 the House of Commons compelled the government of the day, a good deal against the will of Ministers, to put on trial Mr. Reeves, the learned author of the *History of English Law*, for the expression of opinions meant to exalt the prerogative of the Crown at the expense of the authority of the House of

[1] Cited by Lord Dunedin in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, at p. 526; K. & L. 86.

Commons. Among other statements for the publication of which he was indicted, was a lengthy comparison of the Crown to the trunk, and the other parts of the constitution to the branches and leaves of a great tree. This comparison was made with the object of drawing from it the conclusion that the Crown was the source of all legal power, and that while to destroy the authority of the Crown was to cut down the noble oak under the cover of which Englishmen sought refuge from the storms of Jacobinism, the House of Commons and other institutions were but branches and leaves which might be lopped off without serious damage to the tree.[1] The publication of Mr. Reeves's theories during a period of popular excitement may have been injudicious. But a jury, one is happy to know, found that it was not seditious; for his views undoubtedly rested on a sound basis of historical fact.

The power of the Crown was in truth anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative. If therefore we omit from view (as

[1] See (1796) 29 St. Tr., at pp. 530-534.

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we conveniently may do) powers conferred on the Crown or its servants by Parliamentary enactments, as for example under an Aliens Act, we may use the term "prerogative" as equivalent to the discretionary authority of the executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out. This statement holds good, it should be noted, of all the discretionary powers exercised by the executive, otherwise than under statutory authority; it applies to acts really done by the Queen herself in accordance with her personal wishes, to transactions (which are of more frequent occurrence than modern constitutionalists are disposed to admit) in which both the Queen and her Ministers take a real part, and also to that large and constantly increasing number of proceedings which, though carried out in the Queen's name, are in truth wholly the acts of the Ministry. The conventions of the constitution are in short rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the Queen herself or by the Ministry. That this is so may be seen by the ease and the technical correctness with which such conventions may be expressed in the form of regulations in reference to the exercise of the prerogative. Thus, to say that a Cabinet when outvoted on any vital question are bound in general to retire from office, is equivalent

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to the assertion, that the prerogative of the Crown to dismiss its servants at the will of the Queen must be exercised in accordance with the wish of the Houses of Parliament; the statement that Ministers ought not to make any treaty which will not command the approbation of the Houses of Parliament,[1] means that the prerogative of the Crown in regard to the making of treaties—what the Americans call the "treaty-making power"—ought not to be exercised in opposition to the will of Parliament. So, again, the rule that Parliament must meet at least once a year, is in fact the rule that the Crown's legal right or prerogative to call Parliament together at the Queen's pleasure must be so exercised that Parliament meet once a year.

Some constitutional conventions refer to exercise of Parliamentary privilege.

This analysis of constitutional understandings is open to the one valid criticism, that, though true as far as it goes, it is obviously incomplete; for there are some few constitutional customs or habits which have no reference to the exercise of the royal power. Such, for example, is the understanding—a very vague one at best—that in case of a permanent conflict between the will of the House of Commons and the will of the House of Lords the Peers must at some point give way to the Lower House.[2] Such, again, is, or at any rate was, the practice by which the judicial functions of the House of Lords are discharged solely by the Law Lords, or the understanding under which Divorce Acts were treated as judicial and not as legislative proceedings.[3] Habits such as

[1] In practice it is perhaps the House of Commons only. This was the view first taken by the Labour Government, 1929–31.—Ed.

[2] See now Parliament Acts, 1911 and 1949. Intro. pp. clxix *et seq.*, *ante*.

[3] Divorce Bills are now unnecessary; before the establishment of

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these are at bottom customs or rules meant to determine the mode in which one or other or both of the Houses of Parliament shall exercise their discretionary powers, or, to use the historical term, their privileges.[1] The very use of the word privilege is almost enough to show us how to embrace all the conventions of the constitution under one general head. Between prerogative and privilege there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament. Understandings then which regulate the exercise of the prerogative determine, or are meant to determine, the way in which one member of the sovereign body, namely the Crown, should exercise its discretionary authority; understandings which regulate the exercise of privilege determine, or are meant to determine, the way in which the other members of the sovereign body should each exercise their discretionary authority. The result follows, that the conventions of the constitution, looked at as a whole, are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is the "Queen in Parliament,"[2] should each exercise their discretionary authority, whether

the Irish Free State in 1922 they were used by persons domiciled in Ireland who were thus excluded from the jurisdiction of the English High Court in matrimonial causes.—ED.

[1] There are many other rules to be included in the law and custom of Parliament. The privileges, for example, are enforced by each House of the High Court of Parliament, as by a court of law.—ED.

[2] See p. 39, *ante*.

it be termed the prerogative of the Crown or the privileges of Parliament. Since, however, by far the most numerous and important of our constitutional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and clearness if we treat the conventions of the constitution, as rules or customs determining the mode in which the discretionary power of the executive, or in technical language the prerogative, ought (*i.e.* is expected by the nation) to be employed.

Aim of constitutional understandings.

Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character a step farther. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular though not quite accurate language) the nation.

At this point comes into view the full importance of the distinction already insisted upon[1] between legal sovereignty and political sovereignty. Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any court throughout the realm.[2] But if Parliament be in the eye of the law a supreme legislature, the essence of representative government

[1] See pp. 70-76, *ante*.

[2] See Intro. pp. lxxxiii *et seq.*, *ante*.

is, that the legislature should represent or give effect to the will of the political sovereign, *i.e.* of the electoral body, or of the nation. That the conduct of the different parts of the legislature should be determined by rules meant to secure harmony between the action of the legislative sovereign and the wishes of the political sovereign, must appear probable from general considerations. If the true ruler or political sovereign of England were, as was once the case, the King, legislation might be carried out in accordance with the King's will by one of two methods. The Crown might itself legislate, by royal proclamations, or decrees; or some other body, such as a *Conseil d'Etat* or Parliament itself, might be allowed to legislate as long as this body conformed to the will of the Crown. If the first plan were adopted, there would be no room or need for constitutional conventions. If the second plan were adopted, the proceedings of the legislative body must inevitably be governed by some rules meant to make certain that the Acts of the legislature should not contravene the will of the Crown. The electorate is in fact the sovereign of England. It is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature. The result of this state of things would naturally be that the conduct of the legislature, which (*ex hypothesi*) cannot be governed by laws, should be regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation. And this is what has actually occurred. The conventions of the constitution now consist of customs which (whatever

their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the "sovereignty of the people."

That this is so becomes apparent if we examine into the effect of one or two among the leading articles of this code. The rule that the powers of the Crown must be exercised through Ministers who are members of one or other House of Parliament and who "command the confidence of the House of Commons," really means, that the elective portion of the legislature in effect, though by an indirect process, appoints the executive government; and, further, that the Crown, or the Ministry, must ultimately carry out, or at any rate not contravene, the wishes of the House of Commons. But as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation. The same thing holds good of the understanding, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional

ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new peerages.[1] How, it may be said, is the point to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.[2]

Rules as to dissolution of Parliament.

By far the most striking example of the real sense attaching to a whole mass of constitutional conventions is found in a particular instance, which appears at first sight to present a marked exception to the general principles of constitutional morality. A Ministry placed in a minority by a vote of the Commons have, in accordance with received doctrines,

[1] Hearn denied, on inadequate grounds as it seemed to the author, the existence of this rule or understanding. See Hearn, *op. cit.*, p. 178.

[2] Cf. Bagehot, *English Constitution* (1872 ed.), pp. 25-27.

a right to demand a dissolution of Parliament. On the other hand, there are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority, and to dissolve the Parliament by which the Ministry are supported.[1] The prerogative, in short, of dissolution may constitutionally be so employed as to override the will of the representative body, or, as it is popularly called, "The People's House of Parliament." This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.

The dissolutions of 1784 and 1834.

This is the doctrine established by the celebrated contests of 1784 and of 1834. In each instance the King dismissed a Ministry which commanded the confidence of the House of Commons. In each case there was an appeal to the country by means of a

[1] See Jennings, *Cabinet Government* (3rd ed., 1959), pp. 412-428; Evatt, *The King and his Dominion Governors* (1936), ch. ix-xii, xx.

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able to settle issues during a heated constitutional confrontation. However, the mere presence of such extensive and fairly authoritative accounts of conventions may help defuse and avoid some conflicts that might otherwise escalate into more serious crises.

It should be noted that the Canadian government also has some useful manuals of its own, which tend to be forgotten or ignored by many scholars in this country. The PCO has published guidelines on a range of subjects, including accountable government, the roles of deputy ministers, the appearance of public servants before parliamentary committees, and responsible government.[26] Taken together, these documents amount to a substantial collection, but the range of issues covered in them still do not extend as far as those covered in the NZ or UK Cabinet Manuals.

LAW AND CONVENTION REVISITED

It is also important to make distinctions among conventional rules when examining the relationship between law and convention. When A.V. Dicey first wrote about conventions as an amorphous group of political ethics, he was content to dismiss all these informal rules as a subject that "is not one of law but politics."[27] Modern constitutional defenders of Dicey's rigid division between law and convention have continued to base their assumptions about the nature of conventions on observations of all informal rules lumped together. For example, both Hood Phillips and Colin Munro point to the ambiguity of many conventional rules in criticizing the notion that conventions can be properly justiciable in the courts.[28] In his denial of justiciability, Munro objected to the fact that there is no system of rule-making that conventions emerge from. But the ability to distinguish among different classes of informal rules allows one to eliminate controversial, ambiguous, and rarely followed supposed rules and focus on the core of precise and accepted conventions. Fruitful discussion of the relationship between law and convention begins with the recognition that informal rules fall into various categories that have differing relationships to positive law.

Dicey's dichotomy between law and convention clearly needs rethinking in the light of judicial practice in the late twentieth century. Although the courts have not treated conventional rules exactly as they would rules of statutory or common law, it is quite evident that some conventions can be a fit subject for litigation. A wide range of cases has been discussed here, in the early chapters, where conventions were dealt with in some manner by Canadian courts. And there is great potential for judicial consideration of other conventions in future cases dealing with such matters as the legal powers and immunities of governors, cabinet government, judicial independence, the powers of reservation and disallowance, and the international

competence of provincial governments. The relevant question to be posed in contemporary constitutional debates is not whether conventions are subject to judicial adjudication, because they have been many times. The more pressing question for Canadian constitutional jurisprudence is which conventions should be justiciable and in what manner.

If there is a place for conventions in the courtroom, it will apply to fundamental conventions and semi-rigid conventions, because of their general acceptance and their vital role in the practical operation of the constitution. It is also crucial to distinguish the most important types of conventions from the others, as there is a general and high degree of obligation to obey them. This focus on the most fundamental conventions eliminates one of the objections to conventions, their seemingly varying levels of obligation. As Joseph Jaconelli notes, laws are either binding or not; but he opined that conventions have different degrees of obligation.[29] However, an analysis of conventions shows that the varying degrees of obligation are associated with distinct classes of convention; within the most important categories of conventions, all are equally binding. In the total absence of specific rules belonging to these two classes of convention, the constitution would function in a significantly different manner. Any judicial decision based only on positive laws alone, and ignoring relevant fundamental or semi-rigid conventions, would enforce a legal framework bearing little semblance to the actual character of the constitution. The courts could thus provoke a crisis of political legitimacy. A rigorous examination of the relationship between law and convention would be best approached by recognizing the distinctions to be drawn among informal rules, and by excluding flexible conventions, infra-conventions, and usages from the analysis. With this approach we would be left to study what relationship judges should foster between the positive laws of the formal constitution and only those true conventional rules that are widely accepted, equally binding, are fundamentally important to the structure and operation of the political system, and are capable of fairly clear formulation.

The main defence of Dicey's dichotomy between law and convention rests on an insistence that legal rules are judicially enforced while conventions are not. However, it is important to note that not all laws are enforceable in any event. For example, the provisions relating to equalization payments in s. 36 of the Constitution Act, 1982 are not regarded as justiciable. And it is hard to envision any enforcement of the National Anthem Act, beyond a declaration of its terms. Nevertheless, it is a crucial to consider whether conventions have been or should be considered judicially enforceable.

The particular uses to which judges put conventions have varied a great deal, and although conventions have been dismissed or ignored in some cases, others may arguably amount to "enforcement." On the one

extreme Sir Lyman Duff banished them completely from his consideration of any restrictions on the powers of reservation and disallowance;[30] Mr Justice James Jerome declared that explicit statutory provisions relating to the authority of the Auditor General must prevail over the conventions of cabinet secrecy;[31] and a 1969 decision of the Judicial Committee of the Privy Council refused to consider that conventions could affect the legal power of the British Parliament to legislate for post-Unilateral Declaration of Independence Rhodesia.[32] These cases would support the rigid dichotomy proposed by Dicey.

There are other examples, however, of conventions receiving more favourable attention from the courts. The Australian High Court in 1958 explicitly referred to conventions in deciding that a British Act did not have effect in Australia;[33] in *Jonathan Cape* (1975),[34] discussed in Chapter 3, the judge was prepared to use the convention of cabinet secrecy to extend the application of an existing common law rule dealing with confidentiality; and the Ontario trial judge in *Stopforth* (1978) similarly employed a convention to extend a common law defence against defamation.[35] In 1986 the Supreme Court of Canada referred to the conventions supporting the neutrality of the public service in upholding the dismissal of a federal official and in justifying the legitimacy of Ontario legislation limiting the political rights of civil servants.[36] The convention that the monarch or Governor General acts on the advice of the prime minister or cabinet has also played an important role in judicial findings that Crown prerogatives may be exercisable by the ministers rather than by the Queen or Governor General.[37] Furthermore, the Supreme Court has twice used the conventions of responsible government as an interpretative guide to extend statutory provisions.[38] The Federal Court relied on the convention requiring that royal assent must be granted to all bills duly passed by the Senate and House of Commons in order to find that judges of the Supreme Court of Canada do not contravene the principle of judicial independence when they act as deputy governors general in granting royal assent to bills.[39] The terms of a range of conventions have often been defined in *obiter dictum* passages of a decision.[40] The most direct adjudication of conventions came in the two reference cases heard by the Supreme Court over the amendment of the constitution. In the first case in 1981 the Court both recognized the existence of the convention requiring substantial provincial consent and commented on its terms, even though it considered them to be ambiguous; and in the *Quebec Veto* case (1982), the Court held that there had never been a convention giving Quebec a veto over constitutional amendments affecting provincial powers.[41]

The potential for parties to seek a declaratory judgement about the existence or terms of conventions also requires one to consider judicial enforcement of conventions in a new light. In *Conacher*, two levels of court seemed

prepared to discuss whether a convention constrained the prime minister's discretion to advise an early election in 2008. While the trial and appeal level judges believed no convention existed, the precedent clearly exists for other applications to be launched seeking a declaratory judgement. While there is no formal enforcement mechanism for a declaratory judgement, these operate within a constitutional culture that assumes that relevant parties will comply with an authoritative declaration from the court. While the Harper government simply ignored a declaratory judgement that the Minister of Agriculture had acted contrary to his legal obligations under the Wheat Board Act in 2011, such disregard is rare.[42]

These cases pose a strong challenge to Dicey's litmus test of court-enforceability. Although it is quite plain that some distinction between conventions and law ought to be maintained because formal legal sanctions may be provided by a court for the breach of most rules of positive law, this distinction is not clear-cut because the recognition and formulation of conventional rules in the course of a court decision may provide some manner of "enforcement" in a broad sense. For instance, the Supreme Court's declaration in the *Patriation Reference* that unilateral amendment would breach existing conventions may have resulted in the enforcement of those conventions, since it has been widely credited with spurring on political leaders to reach an accord. As T.R.S. Allan has argued: "No water-tight divide exists, however, between recognition and enforcement. To recognize a convention, in a context where legal doctrine can be invoked in its support, is in practice to enforce it."[43]

Since the essence of enforcement of a rule by the courts is to ensure compliance with that rule, the courts may be "enforcing" conventions even without formal legal sanctions. If this kind of enforcement of conventions is admitted, then Dicey's distinction between laws and convention wears quite thin. The dichotomy is further eroded in instances where conventions are used to extend the application of a statutory or common law rule, because a formal court sanction may then be offered for the breach of convention. It seems rather pedantic to insist that the sanction is issued for the *legal* rule and that the convention is merely an interpretative guide; in the absence of the convention, the legal rule would not have been extended and no enforcement by the court would be possible. Judicial enforcement of conventions is quite possible, even if it is formally indirect.

The use of conventions as guides for understanding statute and common law raises the question of whether the courts are employing conventions as legal rules of interpretation. The answer is of more than just theoretical interest: if conventions are viewed as legal rules in this sense, then judges are under some obligation to consider them and to respect their terms in the course of resolving issues of interpretation. I would argue that judicial

decisions of recent decades illustrate that most judges have in fact referred to conventions where they are relevant to the matters at issue. The need to account for the conventional setting of constitutional law seems particularly acute where fundamental and semi-rigid conventions are involved. Without resort to these conventions, the courts would enforce a rather unreal set of rules.

The Supreme Court of Canada has made repeated use of unwritten constitutional principles and explicitly advocated the legitimate inclusion of these principles in judicial interpretations of the constitution. Protection of Canada's federal principle underlay both the *Senate Reference*[44] and *Patriation Reference*.[45] The Court relied heavily on the rule of law in *Reference re Manitoba Language Rights*,[46] to hold that the province could not be thrown into a legal vacuum as a result of its finding that almost 90 years of legislation was invalid because it had been enacted only in English. In *Beauregard v. the Queen*,[47] the Court declared that judicial independence was such an important principle that it must be considered part of the constitution. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,[48] the Court declared more generally that the preamble to the Constitution Act, 1867 should be considered as a source for fundamental constitutional matters not explicitly referred to elsewhere in the Act. Thus, it ruled that Canadian legislatures inherited the inherent privileges of the British Parliament and that those privileges constituted part of the formal constitution of Canada. In 1997, the Supreme Court built on the *New Brunswick Broadcasting* and *Beauregard* precedents to credit the 1867 preamble with providing basic constitutional status to the general principle of judicial independence.[49] A majority of the judges hearing this case declared that the existing provisions in sections 96 to 101 of the 1867 Act and s. 11(d) of the Charter of Rights could not in themselves cover all the aspects of judicial independence. Instead, Chief Justice Antonio Lamer concluded for the majority that the preamble to the Constitution Act, 1867 "recognized and affirmed" judicial independence. He added: "In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the constitution, that the true source of our commitment to this foundational principle is located."[50] This "grand entrance hall" once again provided the source for unwritten principles to play a key constitutional role in *Reference re Secession of Quebec*. A key discussion in this decision is worth quoting at length:

> A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate

> certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."
>
> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada."[51]

The Court then went on to invoke both the federalism and democracy principles to find that a constitutional obligation would exist on the Canadian government to negotiate the terms of secession if a clear majority voted in favour of a clear question on separation.[52]

Chief Justice Beverley McLachlin not only gave a sterling defence of the Court's use of unwritten principles in a speech given in New Zealand in 2005, but she also went on to invoke a kind of natural law that should be considered as part of modern liberal democratic constitutions.[53] McLachlin quite clearly justified the possible use of these unwritten principles to nullify authoritarian laws. By referring to natural law, the Chief Justice seems to be envisioning relevant constitutional principles as what Alex Schwartz has called *transcendent* principles, which are not related to the existing experience or practice of a particular society. Schwartz has argued cogently that if judges are to draw from unwritten principles, it is more easily justified if they refer to *immanent* principles, which are to be deducted from the existing documents and established practices of a political system.[54] But despite her grand rhetorical allusions to transcendent natural law, McLachlin ultimately appears to favour drawing from mainly immanent principles when she discusses how to identify those principles that might take precedence over written law: "At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered."[55] By "customary usage" she seems to mean constitutional convention.

Retired Supreme Court Justice Ian Binnie has also penned a strong defence of the necessity to include unwritten principles in constitutional cases. His argument is based on the fact that the formal constitutional documents are both incomplete and do not even claim to be the exclusive sources of constitutional law:

> The preamble of the *Constitution Act, 1867* says that Canada will have "a constitution similar in principle to that of the United Kingdom." The essential structure of the British Constitution is also, of course, unwritten. Apart from the division of powers and the *Canadian Charter of Rights and Freedoms*, many of the really important elements of our Constitution are not enacted by any formal legislative process. Section 52(2) of the *Constitution Act, 1982*, itself says only that the Constitution *includes* the enumerated "statutes." Nowhere does it say, nor could it plausibly say, that the listed statutes are exhaustive. Rather than being characterized as an exception, "unwritten" constitutional principles are more accurately described as the general rule. It is also salutary to point out that much of what the constitutional text does say is, in modern terms, unworkable.[56]

The novelty of the positions mapped out in these cases has generated a very lively debate in the scholarly literature over their logic and significance.[57] Critics of the use of unwritten principles are concerned that they would encourage a raft of cases seeking to nullify constitutional laws or executive actions on the grounds of nebulous, unwritten principles. As Peter Hogg particularly warned, "Unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy."[58] And Warren Newman has noted, "In the wake of the Supreme Court of Canada's opinions . . . the courts have been seized with an ever-burgeoning multitude of new cases in which constitutional principles of judicial independence, federalism, democracy, the rule of law and the protection of minorities have been invoked to challenge the validity of constitutional amendments, statutory provisions and government action."[59] While many of these cases have been unsuccessful, several have borne fruit; for example, in the *Monfort Hospital* case the Ontario Court of Appeal held that the unwritten principle of minority group representation was violated by decisions to limit services available to Franco-Ontarians at the Monfort Hospital.[60] In 2005, the BC Court of Appeal partially invalidated a provincial statute on the grounds that it offended the unwritten principle of the rule of law by potentially limiting access of low-income people to the courts.[61] And in 2011, a group secured a declaration from the Federal Court that the minister responsible for the Wheat Board, Gerry Ritz, had breached the rule of law by introducing a bill in the House of Commons to gut the

Board without first having held a referendum of producers, as required by statute.[62] With litigants making fairly frequent use of unwritten principles, it is crucial to consider whether they open the door for further judicial consideration of constitutional conventions.

Since constitutional conventions are born out of and protect the largely unwritten principles of the constitution, they would appear to have become all the more suitable for judicial consideration given the courts' willingness to incorporate unwritten principles into the law of the land. Conventions are, in essence, evidence of the acceptance of these principles and of the rules of behaviour expected when these principles are applied to real-world constitutional processes. It seems odd to embrace principles *simpliciter* but object to widely accepted rules that demonstrate the application and limits of these principles.

While there is a good argument that conventions *could* be judicially considered, there still remains the greater question of whether they *should* be. Those who support the traditional categorical exclusion of conventions from the courtroom will simply say no, on principle. A more practical concern is that reliable analysis of conventions may be beyond the specific professional competence of judges. Academics have roundly criticized judges for perceived mistakes in identifying either the terms or existence of particular conventions. For example, Adam Dodek has castigated the Supreme Court for misstating the terms of the conventions surrounding the formation of governments; he objected to the Court's declaration that a convention requires the leader of the largest party to be appointed prime minister after an election.[63] And I have argued that a Federal Court judge was wrong to find that no convention had arisen to constrain Prime Minister Harper from calling an election in 2008, contrary to the spirit of his own legislation establishing a fixed election date.[64] Both Dodek and I have objected to judges' inability to process and properly weigh a wide enough range of information before coming to their conclusions. My objections stem from the reliance of judges on what I believe to be the fundamentally unreliable Jennings test endorsed in the *Patriation Reference*. However, there should be much less chance of faulty analysis when dealing with fundamental conventions, whose terms are clear and widely accepted.

A good argument can be advanced that the observed weaknesses of the courts in dealing with conventions may be outweighed by the importance of constraining judges from simply pronouncing *ex cathedra* on unwritten principles. If judges are going to invoke unwritten principles, and they appear to have already fully embraced them, then reference to the most fundamental and semi-rigid conventions can provide a more rigorous evidentiary grounding for the accepted application and limits of these norms. Deference to and the legitimacy of judicial decisions are firmly rooted in

the normal requirement to offer reasons, and judicial opinions based on established and fundamental conventions can provide clearer explanations than extemporizing on vague principles. The use of conventions as evidence of unwritten constitutional principles would be consistent with a focus on immanent principles based on an existing consensus in the society, rather than vague transcendent ones. It would also provide a useful congruity with the sources of law that judges consider in public international law. The different sources of international law are concisely summed up in Article 38 the *Statute of the International Court of Justice*:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is a useful symmetry between the examination of customary practice in international law and the proposal that conventions be considered for constitutional law; both serve as evidence of what are generally considered binding rules. The parallels go even further, with the Supreme Court's acceptance of general constitutional principles. As well, the Court regularly draws from the writings of leading scholars for support in its interpretation and development of constitutional law.[65] In structuring judges' creativity in this way, one may find the limits that critics believe are needed to constrain judges as much as possible within accepted rules. The danger is that judges can otherwise use vague and undefined principles to launch themselves in any direction they wish to fill legal lacunae.

Canadian judges will eventually have to deal more explicitly with the nature of the judicial enforcement already accorded to conventions. The issue may become quite critical in matters regulated by semi-rigid conventions, and especially fundamental conventions. For instance, in 1981 the Supreme Court of Canada answered the reference dealing with the conventions governing an amendment to the constitution because the questions raised "a fundamental issue of constitutionality and legitimacy."[66] I would suggest that such crucial issues are posed whenever these most important conventions are involved. Courts should not shrink from granting these conventions broad enforcement through authoritative declarations of their terms, or from indirect formal enforcement by using these conventions

to extend or define an existing rule of positive law. Furthermore, a court might seriously consider whether formal enforcement should be given to an archaic legal rule that conflicts with a fundamental convention. Rather than resting on legal formalism and declaring simply that the legal rule must prevail, the courts might better fulfill their role of defending the constitution by declaring that conventions have so changed a particular legal rule that, despite being valid law, it may not be actively enforceable. An example of an archaic provision that should not be enforceable is the requirement in s. 56 of the Constitution Act, 1867 that the Governor General send a copy of all bills passed by Parliament to a British Secretary of State. The alternative to judicial recognition of conventions is the enforcement of a very incomplete and often archaic constitutional framework that bears little semblance to our current parliamentary democracy.

A final way to consider the appropriateness of judicial consideration of conventions is to view the question in terms of a basic justiciability. Justice Boris Laskin, at that time of the Ontario Court of Appeal, provided a useful litmus test: "The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament."[67] As the Supreme Court held in the *Canada Assistance Plan* case, "the court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch."[68] While conventions as a general class of rule are political, they should not all be dismissed as the province of politicians. The most fundamental conventions are essential corollaries to the constitutional law they modify and imbue a critical legitimacy to those laws by ensuring they operate only in certain ways, and in some cases not at all. In the absence of those conventions, many provisions of the formal constitution would be simply indefensible in a modern parliamentary democracy, or in our modern federal system.

Canadian constitutional scholars and political actors must come to terms with the way in which our most important conventions are inextricably intertwined with positive law, linked by the basic principles that underlie both the legal and conventional rules of the constitution. That linking must be fully appreciated in order to reconcile the rule of law with the fact that our political system, by necessity, operates in contradiction to much of the "supreme law" of the constitution. Indeed, one could argue that our studied defiance of constitutional law reduces the rule of law to a minor and often ignored principle of the constitution. One way to resolve this conflict between constitutional reality and the positive law of the constitution is to embrace the most important categories of convention as practical manifestations of the unwritten principles already endorsed by the Supreme Court of Canada

as part of the legal fabric of the constitution. Without accommodating the most essential conventions, the rule of law would require the paramountcy of legal rules so antiquated and divorced from constitutional reality that they would amount to a revolution if ever fully enforced.

CONCLUSIONS

Although the particular scheme for classifying conventions suggested here certainly contains ambiguities, it is offered as a means of drawing attention to the distinctions that can be found among particular groups of informal rules operating in the constitution. Discussions about the obligation attached to a particular informal rule of the constitution, the general desirability of codifying conventional rules, or the broad role conventions should play in judicial decisions would be greatly enhanced by recognizing that differences exist among constitutional conventions. While there may be characteristics in common, one can identify significant differences between usage and infra-convention, on the one hand, and true conventions on the other. The most fundamental and semi-rigid conventions merit being separately identified and treated as such. If distinctions are not perceived among the informal rules of the constitution, an understanding of the nature of constitutional conventions is incomplete, and a study of the close relationship between law and convention will be made from an unsatisfactory foundation.

It is important that theories about the nature of constitutional conventions continue to evolve from those first propounded by Dicey a century ago. Even at the time when Dicey wrote that law and convention should be rigidly separated, constitutional conditions in Canada differed from those in Britain. With Canada's constitutionally entrenched provisions and some powers of judicial review, which are foreign to British jurisprudence, there can be more serious consequences in Canada than in Great Britain if outdated legal rules are enforced by the courts without regard for the relevant conventions.

One must recognize the full extent to which the constitution's legal framework has been indirectly, but fundamentally, transformed by conventions. By insisting on a rigid division between law and convention, Canadian jurists may imperil our constitutional system. The political arena gives birth to conventions so that constitutional laws can function acceptably. The most important conventions thus depend on a healthy marriage between law and politics. Any estrangement or divorce between the two would only produce grave consequences.

CHAPTER 7

1. A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1924), 24.
2. Ibid., 417.
3. Sir Ivor Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959), 134–6.
4. John P. Mackintosh, *The British Cabinet*, 3rd edn (London: Stevens and Sons, 1977), 20–1.
5. Geoffrey Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), 211.
6. For one example, see the use made of constitutional authorities in Pearson's defence of his refusal to treat the 1968 defeat of a tax bill as a loss of confidence. Hansard, 23 Feb. 1968, 6923.
7. For example, the Supreme Court of Canada referred extensively to academic authorities on the nature of the conventions relating to constitutional amendment in *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1.
8. For a discussion of the importance of viewing conventions as rules of critical morality, see Marshall, *Constitutional Conventions*, 10–12.
9. See the more detailed discussion of the problems of relying on precedent in Chapter 1.
10. [1994] FCJ No. 1001; [1995] 1 FC 158 FCTD at para. 91. One could, of course, say the same thing about common law rules, as many have evolved considerably over time.
11. In the first edition I called these *meso-conventions*, since they can be viewed as lying alongside fundamental conventions. In the second edition, I have changed the labels originally used for meso- and semi-conventions to more accessible and meaningful terms.
12. In the first edition, I called these *semi-conventions*.
13. John T. Saywell, *The Office of Lieutenant Governor* (Toronto: University of Toronto, 1957), ch. 2.
14. Colin Munro, *Studies in Constitutional Law*, 2nd edn (Oxford: Oxford University Press, 2005), 148–9.
15. Your Canada-Your Constitution, "Media Release," at: <ycyc-vcvc.ca/84-of-canadians-want-powers-of-prime-minister-and-premiers-restricted-with-clear-enforceable-written-rules-only-9-disagree>. (23 Jan. 2013)
16. Peter Russell and Cheryl Milne, "Adjusting to a New Era of Parliamentary Government: Report of a Workshop on Constitutional Conventions" (Toronto: Asper Centre, 2011), at: <www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Events+and+Materials/Constitutional+Conventions+Workshop/Final+Report/Workshop+Report.pdf>. (3 Feb. 2012)
17. Peter H. Russell, "The Principles, Rules and Practices of Parliamentary Government: Time for a Written Constitution," *Journal of Parliamentary and Political Law* 6 (2012): 361–2.
18. Ibid., 354–5.
19. See Andrew Heard, 'Just What Is a Vote of Confidence? The Curious Case of May 10, 2005," *Canadian Journal of Political Science* 40 (2007): 395; Peter H. Russell and Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

20. Cheryl Saunders and Ewart Smith, "Identifying Conventions Associated with the Commonwealth Constitution," Australian Constitutional Convention, Standing Committee "D," vol. 2, 1982, 1. Unfortunately, these authors did not attempt this classification or suggest how it might be approached.
21. The two lists of conventional rules remain as informal codifications of Australian constitutional rules. For analyses and lists of the conventional rules recognized by the Australian Constitutional Convention, see Charles Sampford and David Wood, "Codification of Constitutional Conventions in Australia," *Public Law* (1987): 231; Charles Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions," *Oxford Journal of Legal Studies* 7 (1987): 369.
22. Some codified conventions in Caribbean constitutions, however, have been expressly prohibited from being subject to judicial review. Margaret de Merieux, "The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions," *International and Comparative Law Quarterly* 31 (1982): 270–7.
23. J.R. Mallory, *The Structure of Canadian Government*, rev. edn (Toronto: Gage, 1984), 60.
24. Although the Monti cabinet consisted of technocrats who held no parliamentary seats, they still had to seek and maintain the confidence of Parliament. One should also remember that the Dominion of Newfoundland had to abandon responsible government, with the Commission of Government between 1934 and 1949, because of financial mismanagement.
25. New Zealand Cabinet Office, "Cabinet Manual," at: <cabinetmanual.cabinetoffice.govt.nz> (3 Feb. 2013); UK Cabinet Office, "Cabinet Manual," at: <www.cabinetoffice.gov.uk/resource-library/cabinet-manual> (3 Feb. 2013). The New Zealand manual is of many years standing, while the UK manual was first published in 2011. The Australian document is much shorter and limited in scope: Department of the Prime Minister and Cabinet, "Cabinet Handbook," at: <http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf> (5 August, 2013).
26. Privy Council Office (PCO), "Accountable Government: A Guide for Ministers and Ministers of State," 2011, at: <www.pco-bcp.gc.ca/docs/information/publications/ag-gr/2011/docs/ag-gr-eng.pdf>; PCO, "Guidance for Deputy Ministers," 2003, at: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/doc-eng.htm>; PCO, "Notes on the Responsibilities of Public Servants in Relation to Parliamentary Committees," 1990, at: <www.pco-bcp.gc.ca/docs/information/publications/notes/notes-eng.pdf>; PCO, "'Responsibility in the Constitution," at: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table-eng.htm> (All accessed 3 Feb. 2013). It should be noted that the PCO also circulates other guidelines internally within government; for example, confidential guidelines cover the so-called "caretaker convention" that structures government activity during an election period.
27. Dicey, *Introduction to the Study of the Law*, 24.
28. O. Hood Phillips, "Constitutional Conventions: A Conventional Reply," *Journal of the Society of Public Teachers of Law* 8 (1964–5): 68–9; Munro, *Studies in Constitutional Law*, 60–87.
29. Joseph Jaconelli, "The Nature of Constitutional Convention," *Legal Studies* 19 (1999): 34.
30. *Reference re Disallowance and Reservation of Provincial Legislation*, [1938] SCR 71.

31. *Auditor General v. Minister of Energy Mines and Resources et al.* (1986), 23 DLR (4th) 210 (FCTD).
32. *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645 at 723.
33. *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty Ltd.* [1958], 100 CLR 597 at 613.
34. *A.G. v. Jonathan Cape Ltd. et al.*, [1975] 2 All ER 484 (QB).
35. *Stopforth v. Goyer* (1978), 20 OR (2d) 262 (Ont. HCJ); this decision was overturned on appeal: (1979), 23 OR (2d) 696 (Ont. CA).
36. *Re Fraser and the Public Service Staff Relations Board* (1986), 23 DLR (4th) 122; *Re Ontario Public Employees' Union et al. v. A.G. for Ontario* (1987), 41 DLR (4th) 1. See also *Grant v. Attorney General (Canada)*, (1995) 1 FC 158, at paras 90–1. The Supreme Court held in a later case, however, that these restrictions on most civil servants infringed the Charter of Rights; see *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69.
37. *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA).
38. *Arseneau v. The Queen*, [1979] 2 SCR 136; *A.G. Quebec v. Blaikie et al.* (no. 2), [1981] 1 SCR 312.
39. *Tunda v. Canada (Minister of Citizenship and Immigration)*, (1999) FCJ No.902, paras 42–4. The case challenged the constitutionality of all parliaments and elections held since Chief Justice Brian Dickson gave royal assent to the Constitution Act, 1985.
40. *British Coal Corp. v. The King*, [1935] AC 500 (JCPC); *Reference re the Disallowance and Reservation of Provincial Legislation*, [1938] SCR 71; *Currie v. MacDonald* (1949), 29 Nfld and PEIR 294 (Nfld CA); *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 (SCC).
41. Ibid.; *A.G. Quebec v. A.G. Canada* (1982), 140 DLR (3d) 385. Another case in which the existence of a convention was addressed is *Conacher v. Prime Minister (Canada)*, 2009 FC 920, affirmed 2010 FCA 131; in this case, however, the court concluded there was no convention.
42. Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd edn (Toronto: Carswell, 2000), 27.
43. T.R.S. Allan, "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case," *Cambridge Law Journal* 45 (1986): 312. See also William R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment," in Peter H. Russell et al., *The Court and the Constitution* (Kingston: Institute of Intergovernmental Relations, 1982), 52.
44. *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54.
45. *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 754.
46. [1985] 1 SCR 721
47. [1986] 2 SCR 56, at para. 29.
48. [1993] 1 SCR 319.
49. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3.
50. Ibid., para. 109
51. [1998] 2 SCR 217 at paras 53–4.
52. Ibid., paras 87–8.
53. Beverley McLachlin, "Unwritten Principles: What Is Going On?" *New Zealand Journal of Public and International Law* 4 (2006): 147.

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54. Alex Schwartz, "The Rule of Unwritten Law: A Cautious Critique of Charkaoui v. Canada," *Review of Constitutional Studies* 13 (2007–8): 179.
55. McLachlin, "Unwritten Principles," 156.
56. Ian Binnie, "Justice Charles Gonthier and the Unwritten Principles of the Constitution," paper presented at the Symposium in Honour of Charles Gonthier, Faculty of Law, McGill University 20–1 May 2011, at: <cisdl.org/gonthier/public/pdfs/papers/Confrence_Charles_D_Gonthier_-_Ian_Binnie.pdf>.
57. See, among others, Hilliar Aronovith, "Seceding the Canadian Way," *Publius* 36 (2006): 541; Michael D. Behiels, "Canada's Supreme Court, Constitutional Principles, and the *1998 Quebec Secession Reference Case*," paper presented at the 8th World Congress of the International Association of Constitutional Law, 8 Dec. 2010, Mexico City; Sujit Choudhry and Robert House, "Constitutional Theory and the Quebec Secession Reference," *Canadian Journal of Law and Jurisprudence* 13, 2 (2000): 145; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles," *Queen's Law Journal* 27 (2001–2): 389; Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec," *Publius* 29 (1999): 135; Hugh Mellon, "Secession and Constitutional Principles: Working with the Supreme Court's Statement of Principles," *British Journal of Canadian Studies* 20 (2007): 187; Patrick J. Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference," *National Journal of Constitutional Law* 11 (1999–2000): 65; Warren J. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada," *Supreme Court Law Review* 14 (2001): 197; Mark D. Walters, "The Common Law Constitution in Canada: Return of *lex non scipta* as Fundamental Law," *University of Toronto Law Journal* 51, 2 (2001): 91; John D. Whyte, "The Secession Reference and the Constitutional Paradox," in D. Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer, 1999); Robert A. Young, "A Most Politic Judgment," *Constitutional Forum* 10, 1 (1998): 14.
58. Peter W. Hogg, *Constitutional Law of Canada*, student edn (Toronto: Carswell, 2012), 15–51. See also his criticism in: Peter W. Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries," in Adam Dodek and Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010), 25–36.
59. Newman, "'Grand Entrance Hall,' Back Door or Foundation Stone?" 197–9; see the list of cases in footnotes 3 and 4, which is impressive for an accounting published in 2001. Many more cases have since been argued.
60. *Lalonde v. Ontario*, (2002) 56 OR (3d) 505 (CA).
61. *Christie v. British Columbia*, 2005 BCCA 631.
62. *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, (2011) FC 1432. In practice the Court's finding had no effect to the government, which simply ignored the outcome of the case.
63. Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*," *Supreme Court Law Review* 54 (2011): 134–8.
64. Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitutional Forum* 19, 1 (2010): 21.

65. Vaughan Black and Nicholas Richter, "Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada, 1985–1990," *Dalhousie Law Journal* 16 (1993): 377; Peter McCormick, "Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship," *University of New Brunswick Law Journal* 45 (1996): 139.
66. *Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 at 88.
67. *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para. 50.
68. *Reference re Canada Assistance Plan*, [1991] SCR 525 at 545.

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CONSTITUTIONAL CONVENTIONS

The Rules and Forms of Political Accountability

Geoffrey Marshall

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they may be mistakenly or heedlessly changed. Sometimes they may be misunderstood or misapplied.

Given these uncertainties it is not surprising that the application of conventions in particular cases has often been a matter of sharp political controversy. In addition their general nature and their relationship to the ordinary law of the land has always been a matter of dispute amongst lawyers and political scientists. Within the United Kingdom the conventions provide a framework of political accountability. Externally, rules of a similar character regulate the relationship of the United Kingdom's political processes to those of other Commonwealth member countries focusing responsibility at the appropriate points regardless of the legal forms. In the following chapters we shall look at both types of convention and consider their character as rules of governmental morality.

I
The Theory of Convention Since Dicey

Constitutional conventions play a central part in the theory of British Government. A variety of names has been given to these non-legal rules of constitutional behaviour. 'Maxims', 'practices', 'customs', 'usages', 'precepts' and 'conventions' are some of them.[1] A concise enumeration of such rules is not easy to make since they shade off into what might be called 'traditions', 'principles' and 'doctrines'. (We might speak, for example, of the traditions of toleration and the rule of law; the principles of judicial independence and freedom of speech; or the doctrines of representative government and the electoral mandate.) There is also a problem of knowing which of a great many non-legal rules of political or official behaviour to treat as relating strictly to the Constitution. Should we, for example, include the rules for electing the leaders of the political parties, or the Standing Orders of the House of Commons, or the Judges' Rules for questioning suspected persons?

In his *Introduction to the Study of the Law of the Constitution* A. V. Dicey picked out a number of rules as being constitutional conventions. They included the rules that the King must assent to any Bill passed by the two Houses of Parliament; that Ministers must resign office when they cease to command the confidence of the House of Commons; and that a Bill must be read a certain number of times before passing. He also mentioned various questions that raise issues of conventional (rather than legal) propriety. What, he asked, are the conventions under which a Ministry may dissolve Parliament? May a large number of Peers be created for the purpose of overruling the Upper House? On what principle may a Cabinet allow of open questions? These last examples

[1] John Stuart Mill wrote of 'the unwritten maxims of the constitution' (*Representative Government* (1861)); E. A. Freeman of 'a whole book of precepts'; Sir William Anson of 'Custom' (*The Law and Custom of the Constitution*); and A. V. Dicey of 'the conventions of the Constitution' (*Introduction to the Study of the Law of the Constitution* 10th edn.).

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appear to be cases in which it cannot be clearly stated what the conventions are, or cases in which the relevant conventions are conflicting or controversial.

Dicey's discussion implied that the conventions of the Constitution relate mainly to the exercise of the Crown's prerogatives and he suggested that their purpose was to ensure that these legal powers, formally in the hands of the Crown, were in practice exercised by Ministers in accordance with the principles of responsible and representative government. But though the conventions do provide the framework of cabinet government and political accountability, and often modify rules of law, they spread more widely than Dicey's description suggests. Besides the conventional rules that govern the powers of the Crown there are many other constitutional relationships between governmental persons or institutions that illustrate the existence of rules of a conventional character. Examples are:

- Relations between the Cabinet and the Prime Minister
- Relations between the Government as a whole and Parliament
- Relations between the two Houses of Parliament
- Relations between Ministers and the Civil Service
- Relations between Ministers and the machinery of justice
- Relations between the United Kingdom and the member countries of the Commonwealth.

Many of these relationships are in part governed by law and in part by convention. The relations between the House of Commons and the House of Lords, for example, are determined partly by the provisions of the Parliament Acts of 1911 and 1949 and partly by conventional usage. Equally, the relationships of the member countries of the Commonwealth are in a number of fundamental ways regulated by the Statute of Westminster, but in other ways rest upon agreements or conventions (some of which are mentioned in the preamble to the Statute).

Amongst the conventions of the Constitution there are some whose formulation is reasonably precise and specific, and others whose formulation is in more general terms. An example of the first kind is the rule that the Queen must assent to Bills that have received the approval of both Houses. An example of the second kind is that the House of Lords

should not obstruct the policy of an elected government with a majority in the House of Commons. Many conventions fall into the second category. This, perhaps, explains why so many questions of constitutional propriety remain unsettled. Might a British Government ever be dismissed by the Crown (comparably with what happened in Australia in 1975)? Is a Prime Minister entitled to dissolve Parliament and hold a General Election whenever he wishes? Can a Government continue in office if its major legislation is defeated in the House of Commons? May a Minister blame his civil servants if mistakes are made in the work of his Department? The answers to all these questions are uncertain because in each case there is a general rule whose limits have not been fully explored; or possibly there may be two rules which are potentially in conflict.

Obedience to Conventions

This may in part account for a certain amount of confusion in the application of the terms 'usage' and 'convention'. In the opening chapter of the *Law of the Constitution* Dicey, in discussing 'the rules that belong to the conventions of the Constitution', remarks that 'some of these maxims are never violated and are universally admitted to be inviolable. Others on the other hand have nothing but a slight amount of custom in their favour and are of disputable validity.'[2] Confusingly, he goes on to explain this difference as one that rests upon the distinction between rules that bring their violators into conflict with the law of the land, and rules 'that may be violated without any other consequence than that of exposing the Minister or other person by whom they were broken to blame or unpopularity'.[3] This does not chime very easily with the thesis that the reason for obedience to all conventions is that breach of the conventions leads more or less directly to a breach of law. Dicey has often been criticized for holding this view, but it seems clear that he did not hold it in relation to *all* conventions. Indeed, it seems an explanation confined to a single contingency, namely

[2] *Law of the Constitution* (10th edn.), at p. 26 n. [3] Ibid.

the possibility that a Government might try to remain in office and raise taxes after losing the confidence of the House of Commons. But Dicey mentions a number of examples in which no illegal consequences would follow a breach of conventional principles. A Government that persuaded the House of Commons to suspend the Habeas Corpus Acts after one reading, or induced the House to alter the rules as to the number of times a Bill should be read would not, he said, come into conflict with the law of the land. Nor indeed would the House of Lords if it rejected a series of Bills passed by the Commons.

Some who have criticized Dicey's supposed explanation for obedience to conventions have suggested alternative reasons. Sir Ivor Jennings argued, for example, that conventions are obeyed 'because of the political difficulties which follow if they are not'.[4] Others[5] have suggested that they are obeyed not because of the probability of a consequential breach of law, but because disregard of convention is likely to induce a change in the law or in the constitutional structure. But it could be objected that in the case of many infringements of convention, legal or structural change would be an unlikely outcome. It may be more illuminating first to remember that widespread breach of political (as of linguistic) convention may itself sometimes lead to a change of convention and secondly that conventions are *not* always obeyed. So although we can sensibly ask what the uses or purposes of conventions are, it may be unnecessary to ask why they are obeyed when they are obeyed, since we pick out and identify as conventions precisely those rules that *are* generally obeyed and generally thought to be obligatory. Those who obey moral or other non-legal rules they believe to be obligatory, characteristically do it because of their belief that they are obligatory, or else from some motive of prudence or expected advantage. Those who disobey them do so because they do not regard them as obligatory, or wish to evade them, or wish to change them. In other words we do not need any special or characteristic explanation for obedience to the rules of governmental morality. Whatever we know about compliance with moral rules generally, will suffice.

[4] *The Law and the Constitution* (5th edn. 1959), p. 134.

[5] e.g. G. Marshall and G. C. Moodie, *Some Problems of the Constitution* (4th edn.), p. 36.

Two Types of Conventions

Sir Kenneth Wheare in *Modern Constitutions* wrote that:

> By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution[.][6]

If this is to serve as a definition it may need some expansion and explanation for the following reason. In recent times a number of practices have been termed conventions of the Constitution, and politicians are sometimes charged with breaking them. The emphasis on *obligatory* behaviour in Sir Kenneth Wheare's definition may obscure the point that the conventions, as a body of constitutional morality, deal not just with obligations but also with rights, powers, and duties. Some familiar and important conventions do not in fact impose obligations or duties but confer rights or entitlements. One such example may be the rule or practice of cabinet secrecy. This is often called a convention, but it is not clear that the maintenance of secrecy about cabinet proceedings is a duty-imposing convention, or that any corresponding right exists (in say Parliament or the Opposition) to have cabinet secrecy maintained. Would there be any violation of such rights if the Cabinet were to make a practice of publishing all cabinet proceedings in full? Of course individual members may have a duty to each other, and the Prime Minister may have a right against them to have confidentiality maintained. But the question is whether the Cabinet collectively owes a duty of secrecy to anybody else. If the foundation of cabinet secrecy rested, as used to be asserted, in a duty to the Crown to maintain the secrecy of the Privy Councillors' oath then it could on that ground be treated as an obligation. But few Cabinet Ministers or Prime Ministers now seem to suppose that they are in breach of any such duty when individually or

[6] *Modern Constitutions* (1951), p. 179.

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collectively leaking the results of cabinet deliberations to the press.[7]

Similar considerations apply to the convention of collective ministerial responsibility, in so far as it relates not to resignation or dissolution after defeat, but to the maintenance of solidarity in speaking and voting by members of the Cabinet or administration as a whole. This is certainly a firmly maintained usage and it might be politically foolish or imprudent of any Prime Minister to dispense with it. But would it represent a breach of any constitutional duty to the House of Commons if freedom to speak or vote against cabinet policy were willingly conceded by the Cabinet to individual Cabinet Ministers? On several occasions (in 1932 and 1975, for example) the rule of collective solidarity has been suspended. In 1975 Mr Harold Wilson's abandonment of the rule in relation to the referendum decision on EEC membership was widely criticized by his opponents as a breach of constitutional convention. But that criticism was misconceived if collective cabinet solidarity is not a constitutional obligation or the object of a duty-imposing rule.

It is useful therefore to separate duty-imposing conventions from entitlement-conferring conventions. That the Queen is (in some circumstances) entitled to refuse a Prime Ministerial request to dissolve Parliament is a further example of the second type of conventional rule. There is of course a well-established usage of compliance with requests for dissolutions and such usages often accompany entitlement-conferring conventions.

Establishing Conventions

It seems to be agreed that conventions may be established in several ways. Frequently they arise from a series of precedents that are agreed to have given rise to a binding rule of behaviour. On the other hand 'a convention may arise

[7] In view of the frequency of this habit it may well be asked what has become of the rule that 'Disclosures of Cabinet discussions are now made only with the permission of the Sovereign; and it is the practice that this permission should be obtained through the intervention of the Prime Minister'? Anson, *Law and Custom of the Constitution* (4th edn., ed. Keith), vol. ii, pt. i, p. 121.

much more quickly than this. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule has not arisen from custom; it has no previous history as a usage.'[8] The conventions that the United Kingdom would not legislate for Commonwealth countries except upon their request and consent, and that any change in the Royal style and titles should require the consent of all the member countries were recorded, for example, in the Balfour Declaration of 1926 and in the preamble to the Statute of Westminster as agreed rules (though against a background of usage).

Thirdly, however, a convention may be formulated on the basis of some acknowledged principle of government which provides a reason or justification for it. Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted conventional rule resting on the principle of constitutionalism and the rule of law. (It illustrates incidentally the fact that many conventions are negative in form and rest upon a practice of refraining from some course of action.)

Each of these grounds for asserting the existence of a convention was illustrated in the disagreement that surrounded the patriation of the Canadian Constitution in 1980–1. The dispute turned (apart from its legal aspect) on the question whether there existed a constitutional convention that required the consent of the Canadian provinces before the Federal Government could properly request the British Parliament to amend the British North America Act in ways that would affect the powers of the provinces and the federal structure of Canada. By an unusual turn of events the question was resolved by a decision of the Canadian Supreme Court[9] which held that such a convention existed in Canada. It was based on precedent, on specific agreement (the practice having been set out in a White Paper on constitutional amendment in 1965) and on principle (the convention

[8] Sir Kenneth Wheare, *Modern Constitutions* (1951), p. 180.

[9] *Reference re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)* (1982), 125 D.L.R. (3d) 1. (See chap. XI below and App. B.)

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being necessary to maintain the balance of the federal division of powers in Canada).

This episode, however, illustrates precisely why arguments about the existence of conventions are so often unresolved. Each of the possible constituent elements is contentious. Precedents may be read in different ways. In this case it was argued on one side that in relation to the British convention no previous request for a British amending enactment had been rejected — thus establishing a precedent for action. On the other hand it was said that none of the previous enactments had been similar to the one in dispute or had affected provincial powers — thus establishing a precedent for inaction. In relation to specific agreement it was argued that the terms of the Canadian White Paper of 1965 were unclear or that they were in general terms. In relation to any alleged reason or justifying principle there may also be (and was here) the possibility of different and opposite inferences. In 1981 the Canadian Provinces (and the Supreme Court) thought that the Canadian federal principle clearly implied the existence of a convention requiring provincial consent to change the existing federal–provincial balance of powers. The Federal Government, however, asserted that the Canadian federal system did not contain any such implied protection against federal action.

In 1981 the Canadian courts accepted Sir Ivor Jennings's account of the establishment of conventions. Their existence, Sir Ivor wrote, turned on the answer to three questions, namely, Are there any precedents? Did the actors in the precedents believe that they were bound by a rule? Is there a reason for the rule?[10]

Sir Ivor Jennings's tripartite specification suggests, however, that there are some unresolved problems about conventions. These arise partly from the existence of rival tests for their establishment and partly from the disputed connections between convention and law.

Positive or Critical Morality

Most British writers, following Dicey, have emphasized

[10] See *The Law and the Constitution* (5th edn. 1959), chapter III.

the separation of law and convention, and accepted his characterization of conventional rules as 'maxims or practices regulating the ordinary conduct of the Crown, of Ministers and of other persons under the Constitution'. They have, however, gone on to define such rules as being those *believed* by the persons concerned to govern their conduct. So, Sir Kenneth Wheare defined convention as 'a rule of behaviour *accepted as obligatory* by those concerned in the working of the Constitution'.[11] Similarly Professor O. Hood Phillips suggests as a working definition 'rules of political practice *which are regarded as binding* by those to whom they apply'.[12]

This suggests that the primary evidence as to the existence of a convention lies in the beliefs of the persons concerned. This, we remember, was the point to which Jennings's second question relates. 'Did the actors *believe* they were bound by a rule?' But the implication of the other questions ('Are there precedents?' and 'Is there a reason?') is that such beliefs may not be conclusive. Jennings indeed allots some importance to reasons since he says that precedents may not decide the matter and that whilst a number of precedents may not establish a rule, a single precedent with a good reason *can* establish a rule. Equally, he suggests, the conviction of the participants without a good reason may fail to create a convention. When George V appointed Mr Baldwin as Prime Minister in 1923 instead of Lord Curzon he did not, Jennings says, establish a convention against the appointment of Peers as Prime Ministers, since even if the King had thought himself bound to appoint Baldwin 'it might be that he was mistaken in thinking himself so bound'.[13]

We are here faced with two possibilities. One is that conventions are what we might call the positive morality of the Constitution — the beliefs that the major participants in the political process as a matter of fact have about what is required of them. On this view the existence of a convention is a question of historical and sociological fact.

[11] *Modern Constitutions* (1951), p. 129. (Italics added.)

[12] *Constitutional and Administrative Law* (6th edn. 1978), pp. 104–5. (Italics added.)

[13] *The Law and the Constitution* (5th edn.), p. 136.

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The alternative possibility is that conventions are the rules that the political actors *ought* to feel obliged by, if they have considered the precedents and reasons correctly. This permits us to think of conventions as the critical morality of the Constitution.

Though either view is possible, the second seems better. It allows critics and commentators to say that although a rule may appear to be widely or even universally accepted as a convention, the conclusions generally drawn from earlier precedents, or the reasons advanced in justification, are mistaken. This, on some occasions, is what political or academic critics do wish to say. But if the existence of convention were only a question requiring empirical investigations of politicians' beliefs, it would be impossible to say that they wrongly believed a convention to exist.

Conventions and the Courts

Some, including Sir Ivor Jennings, have disputed Dicey's separation of convention and law, holding that 'conventions are rules whose nature does not differ fundamentally from that of the positive law of England'.[14] What Jennings's arguments amount to is that many propositions that are true of law are also true of convention, and that convention is as important and sometimes more important than law. But that need not persuade us that the two are fundamentally the same. What the issue comes to in practice is whether law may be derived from conventions and whether conventions may be applied in courts of law. In the Canadian controversy already referred to, it was argued by some of the Canadian Provinces that the conventions governing amendment of the Constitution should be declared and affirmed by the courts as being basic conventions of the Constitution that had hardened or crystallized into law. If such a claim were admitted by a court, it would make nonsense of Dicey's claim that conventions are distinguishable from law precisely by their non-enforcement in courts of law. In fact in the *Law of the Constitution* Dicey is somewhat unclear. In his opening

[14] *The Law and the Constitution* (5th edn. 1959), p. 74.

chapter he speaks of conventions as 'understandings, habits or practices . . . not *enforced* by the courts'. But in his later discussion he says that they are 'not enforced or *recognised* by the courts'.[15] Some later writers seem, moreover, to have treated these two assertions as identical. Professor Berriedale Keith, for example, spoke of 'conventions, which in themselves are without legal force and of which the law courts *can take no notice*'.[16] Nevertheless the way in which courts do take notice of conventions and in certain senses give legal effect to, or derive legal consequences from, conventions needs some analysis. 'Convention-recognition' may be classified under several separate heads.

First, there are cases in which it may be recognized or noted by a court that a convention has been enacted, in more or less the same terms, into law, and that the law is in that sense based on a convention. The United Kingdom Parliament Act of 1911, for example, formalized relations between the two Houses of Parliament that had formerly been matters of convention. The Statute of Westminster gave legislative force to a number of conventions that had previously governed the behaviour of the member countries of the Commonwealth. The conventions were stated in the preamble, though it may be noted that not all were embodied in the Statute (for example the convention about common assent to a change in the succession to the throne, or the changing of the Royal Style and Titles). These facts may be noted in decisions and used in various ways. For example in *Copyright Owners Reproduction Society Ltd.* v. *E.M.I. (Australia) Pty. Ltd.*[17] the convention that was embodied in s. 4 of the Statute of Westminster was identified as the source of a rule of construction to be applied in the Australian courts.

Secondly, some conventions (especially those of responsible government) may be incorporated by name or reference into a constitutional instrument, as British conventions or the rules of British Parliamentary privilege were in some Commonwealth constitutions. The British North America

[15] *Law of the Constitution* (10th edn.), p. 417.
[16] *The Governments of the British Empire* (1935), p. 6.
[17] (1958) 100 C.L.R. 597.

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Act, for example, declared that Canada should be federally united 'with a Constitution similar in principle to that of the United Kingdom,' thus importing by reference a number of Parliamentary conventions. In Nigeria the convention governing the holding of office by the Prime Minister and its relation to the confidence of the legislature was incorporated in the Constitution. Its meaning had to be elucidated by the Privy Council in *Adegbenro* v. *Akintola*.[18]

Thirdly, conventions may be the subject of enquiry in the course of statutory construction. The consideration of convention in *British Coal Corporation* v. *the King*[19] could be considered in this light. It led to the conclusion that in passing the Judicial Committee Act of 1833, Parliament had had a particular intention, namely to treat the Committee as being a judicial body because of the firmly established convention as to the way in which its advice was accepted by the Crown.

Many cases in administrative law illustrate this derivation of legal consequences indirectly from constitutional practice. The convention of ministerial responsibility to Parliament has frequently been relied upon as evidence for the assertion that Parliament had intended a particular result in enacting provisions about Ministers' powers – for example that it had not intended them to be subject to judicial review. Cases such as *Robinson* v. *Minister of Town and Country Planning*[20] or *Liversidge* v. *Anderson*[21] provide instances.

Fourthly, an occasion on which particular weight and lengthy consideration was given to the doctrine of collective responsibility of Ministers and the confidentiality of cabinet proceedings was *Attorney-General* v. *Jonathan Cape Ltd.*[22] An indirect legal effect was given to those conventional principles in that the confidentiality of cabinet proceedings

[18] [1963] A.C. 614. Reference to United Kingdom conventions was also inserted in the constitutional instruments of Ceylon, Ghana, and the Central African Federation.

[19] [1935] A.C. 500.

[20] [1947] K.B. 702 at 717, 723.

[21] [1942] A.C. 206. Cf. *R.* v. *Secretary of State ex parte Hosenball*, [1977] 1 W.L.R. 776. This point and connections between law and convention generally are discussed in S. A. de Smith, *Constitutional and Administrative Law* (4th edn., eds. Harry Street and Rodney Brazier), at pp. 41, 48–50.

[22] [1976] Q.B. 752. (See App. A.)

was held to fall within the ambit of the existing law restraining breaches of confidence in general.

Nevertheless all the above cases, with the possible exception of the Australian *Copyright Owners'*[23] case, might be said to be instances in which the courts did not apply or enforce conventions in the sense of treating them as direct sources of law distinct from legislative enactment or previous common law decisions. It might be said here that the courts were applying law not convention and that the notice taken of the conventions merely helped to clarify what the existing law was in various ways. For example:

1. By being a part of the material that was enacted into law.
2. By helping to elucidate the background against which legislation took place, thus providing guidance as to the intention of the legislature where the meaning of a statute had come into question.
3. By constituting a practice or set of facts that fell under an existing legal doctrine.

A distinction can be seen, therefore, between using conventions in this way and directly applying them or enforcing them as law. What would constitute a clear case of the direct application of convention would be a recognition that rules that were clearly conventional had changed or congealed or hardened into rules of law.

There is no doubt that in times past the common law has incorporated into itself rules of constitutional propriety. Many of the cases in which the limits of the Crown's prerogative powers were set, remain as evidence of this process and quite modern cases often hark back to these principles.[24] But modern examples of direct conversion or acknowledgement of non-legal rules as enforceable rules of law are hard to find.

The nearest approaches to what might be called judicial recognition and enforcement of conventions may be observed from time to time at a high constitutional level. One such instance occurred in South Africa in 1937 when the convention that the United Kingdom Parliament could not legislate

[23] (1958) 100 C.L.R. 597.

[24] e.g. *A.-G.* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508; *Burmah Oil Co.* v. *Lord Advocate* [1965] A.C. 85; and *Malone* v. *Metropolitan Police Commissioner (No. 2)* [1979] 2 W.L.R. 700.

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so as to repeal the Status of the Union Act or the Statute of Westminster, appeared to be treated as an established rule of law in *Ndlwana* v. *Hofmeyr*.[25] ('Freedom once conferred', it was held, 'cannot be revoked.') It may also happen if ever the British courts accept the practice of not legislating inconsistently with the rules of the European Declaration of Human Rights as having created a rule of law to which they will give effect in litigation.

In *Madzimbamuto* v. *Lardner-Burke* however, the Privy Council drew as firm a line as Dicey ever did between law and convention. In considering Rhodesia's self-proclaimed independence they showed no inclination to recognize established conventional relationships or conventions as capable of creating or modifying law. They were not entitled, they said, to take account of the conventions that might have regulated the relations of the British and Rhodesian legislatures. ('Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.'[26])

In Canada also the Supreme Court has firmly rejected the thesis that constitutional conventions may be directly enforced or may harden into law.

> The proposition was advanced . . . that a convention may crystallise into law. In our view this is not so. No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention as political in inception and as depending on a consistent course of political recognition . . . is inconsistent with its legal enforcement.[27]

Since a majority of the court found as a matter of fact that a disputed constitutional convention existed, some have seen in this decision an acknowledgement that conventions may in principle merit judicial recognition.[28] That perhaps goes too far. The Canadian courts only felt able to declare the existence of the convention because under widely drawn

[25] (1937) A.D. 229 at 237. Such a conclusion may however be derived independently from law rather than convention. See Chapter XII below and cf. P. W. Hogg, *Constitutional Law of Canada* (1977), p. 8 and 60 *Canadian Bar Rev.* 307 at 329–30.

[26] [1969] A.C. 645 at 723.

[27] *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1982), 125 D.L.R. (3d)1 at 22.

[28] R. Brazier and St. John Robilliard, 'Constitutional Conventions: The Canadian Supreme Court's Views Reviewed', (1982) *Public Law* 28.

provincial and federal statutes providing for the furnishing of advisory opinions, they were specifically authorized to give such opinions on questions either of law or fact. The power to recognize the conventions derived therefore from statute. Where such statutes exist the law will treat the existence of a convention as simply a question of fact – though not a simple question of fact – since the conclusion may need to be established by a complex process involving both argument and historical exegesis (with politicians providing expert factual evidence). It may occur in some jurisdictions and not in others.

Force and Purpose of Conventions

But what then, one might ask (remembering Dicey's definition of convention), is the status of a non-legal rule that has been declared to exist by a court of law? Does that declaration in any sense change the character or increase the obligation or binding nature of the convention? The answer would seem to be that it does not. In so far as a convention defines duties or obligations they remain morally and politically, but not legally, binding. Nevertheless in one way a court decision may decisively change the situation since politicians' doubts about what ought to be done may stem not from uncertainty about whether duty-imposing conventions are morally binding but from disagreement as to whether a particular convention does or does not exist. Since opposed politicians are rarely likely to convince each other on this point an advisory jurisdiction, selectively used, seems a useful device in any political system where important constitutional rules are conventional and uncodified. The decision of a court may be accepted as decisively settling a political argument about the existence of a conventional rule.

The establishment of such a judicial arbitration may complicate but it does not controvert Dicey's separation of law and convention. The distinction made by Dicey is clear enough and worth maintaining. The evidence for the existence of law and convention is in standard cases characteristically different, whether the evidence is assessed by judges or by politicians.

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Dicey's instinct was also right about the purpose of the conventions. Although conventions cover a wider area than that mentioned in *The law of the Constitution*, and although they do not always modify legal powers, the major purpose of the domestic conventions is to give effect to the principles of governmental accountability that constitute the structure of responsible government. The main external conventions have the comparable purpose of seeing that responsible government is shared equally by all the member states of the Commonwealth, and that accountability is allocated in accordance with political reality rather than legal form.

II
The Uses of the Queen

It is convention rather than law that fixes the practical role of the Crown – or what Walter Bagehot in *The English Constitution*, more precisely called 'the use of the Queen'.[1] By convention the Queen's prerogative powers are exercised on ministerial advice. The advice is either that of ministers collectively or of particular ministers. So, when Bagehot goes on to tell us that the Queen can do many things without consulting Parliament – that she can sell off the navy, declare war, dismiss civil servants, create peers and pardon offenders[2] – we are to understand that it is Ministers who authorize and carry out these actions.

But the conventional rule, like most of the major conventions, is framed in general terms and is subject to controversial limitations and exceptions. In Bagehot's description of the powers of the Crown there is an unexplained potential contradiction between two theories. One is implied by his assertion, often quoted, that the Sovereign has three rights only – the right to be consulted, the right to encourage, and the right to warn.[3] This, on the face of it, suggests that the Queen has no independent power of action or decision at all but only a power to decide and to act as Ministers – after consultation, warning, and possible discouragement – advise her to act. But compare this with Bagehot's remark that the Sovereign has a power 'for extreme use on a critical occasion but which he can in law use on any occasion'. In the exercise of this power 'He can dissolve; he can say to his ministers in fact if not in words, This Parliament sent you here, but I will see if I cannot get another Parliament to send someone else here.'[4] Bagehot's contrast between the legality of exercising such a power on any occasion and its

[1] *The English Constitution* (Oxford Pocket Classics edn.), p. 30. 'The use of the Queen, in a dignified capacity is incalculable. Without her in England the present English Government would fail and pass away.'

[2] Ibid., at p. 287.

[3] Ibid., at p. 111.

[4] Ibid., at p. 114.