# Enforceability of Constitutional Conventions in the United Kingdom

**A thesis submitted for the Degree of Doctor of Philosophy to Brunel Law School**

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**March 2020**

# ABSTRACT

In the United Kingdom, ‘unconstitutional’ can mean contrary to the conventions. But when it is objected that there is a breach of the convention, there is neither a predetermined authority to decide whether a convention was applied as it should be nor the certain consequence of breaking the rule exists. In other words, there is no formal process to deal with an allegation of a breach of a convention. This uncertainty of the rules allows room for politicians to interpret conventions for their personal or political interests in some cases. Further, it might cause that politicians are the judge in their own cause. To minimize this weakness of conventions this thesis addresses the enforceability of conventional rules.

This thesis argues that focusing on the operation mechanism of conventional rules might be the first step to increase the efficiency and enforceability of conventions. It might be easy to identify the convention, but it is not simple to implement in some cases in which there can be an absence of clarity regarding the precise way of application of convention. Details of the operation of conventions are realized when they are broken or threaten to be broken. For example, under the Sewel convention, the UK parliament is not supposed “normally” to legislate for devolved matters without the agreement of the Scottish parliament. However, it is important what normally means and when therefore it is appropriate for the Westminster parliament to pass legislation without consent of Scottish government. This ambiguity creates a need for further clarification to help determine the precise way in which they function. The precise procedure that should be followed should be set out officially. Therefore, the conventions cannot easily be circumvented, if it is openly accessible for everyone how to implement it in different political situations.

This thesis goes further and mainly asks if a disagreement arises, the question that which mechanism or authority should adjudicate whether a convention is properly followed in specific case or not?

When conventions are not respected, different consequences are likely to arise for different conventions or a group of conventions. For instance, a convention may be disregarded without any significant consequences. A broken convention might cause

heavily political concern. Breach of the convention would bring breach of fundamental principle. The thesis argues that achieving clarity of enforceability mechanism of a convention might help to restrain politicians from using conventional rules for political self-dealing.

There is no doubt that leaving the power of adjudgment of some conventional rules in politicians' hands is constitutionally appropriate and even essential for the proper function of some conventions which are in 'political' characteristics and their breach mostly leads to political concerns. For this reason, the non-legal codification of these conventions is deliberately preferred in the UK. Hence, politicians still have considerable freedom to determine the consequences and sanction of breach of these conventions.

Some conventions are too important to be left in the hands of politicians. These conventional rules are essentially high political act and criticism of politics is not enough as the way of forcing the conventions. Breach of these conventions brings the breach of fundamental principle. Usually, a legal safeguard on these conventions was provided or requested to be provided in the case of breach or would-be breach of these conventions. But codification of conventions does not make them judicially enforceable. The legal safeguard mostly remains symbolic. It is therefore suggested that when there is a controversial operation of these vital conventions, competent enforcement mechanisms should be considered. For example, this study will argue for a constitutional committee might become an independent adjudicator of a convention requiring parliamentary approval before engaging a military action.

# DECLARATION

I declare that the work presented in this thesis is my own work and has not been submitted for any other degree or professional qualification.



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# ACKNOWLEDGEMENT

The work presented in this thesis was carried out under the supervision of Dr Gerard Conway. I owe special thanks to Dr Conway for being an outstanding advisor to me, for his endless support and encouragement throughout the completion of this study. I would have never accomplished this research without his very kind cooperation during the last years.

I am also very grateful to my precious parents Mürsel and Yurdagül who give me unconditional love and endless support in every moment in life.

Finally, I would like to thank my husband, Cagatay, for always giving me strength, inspiration, hope, and joie de vivre. The last 2 years were extremely difficult in different aspects of life. However, your encouragement, unconditional love and knowing that you are always there with me, made this dream come true. Above everything else, my son, Memet Alp, I will never forget your patience when I took the time to study while you needed me, and you waited for breast milk. My love and prayers are for ever with you.

# DEDICATION

*To every individual in my country to live on the days that are fair, democratic, and respectful to human rights and rule of law…*

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# Chapter 1 - Introduction

## 1.1 Scope, Aim, and Purpose

Constitutional conventions have long been recognized as important part of the British Constitution. They are the source of many of the significant rules of the British constitution. Ahmed et al. note that 'it is impossible to understand a constitution in the Commonwealth tradition without an appreciation of its conventions.'[1] Similarly, Peter Oliver underlines 'any judge who wishes to understand a constitution in the British tradition must understand constitutional conventions.'[2]

The UK constitution appears in literature as 'flexible', i.e., it can be changed relatively easily, and the flexibility seems as the most important feature of the British Constitution.[3] Constitutional conventions play a critically important role in the functioning of the flexibility of the British constitutional system.

In the UK, the lack of a fully codified constitution makes the rules exceptionally attractive as a means of limiting government.[4] Conventional rules determine the behaviour of political actors without judicial interference in the political process. For example, caretaker conventions provide restraint the power of the political executive until a new government is formed.[5] As Jaconelli notes when conventions are accurately comprehended, they could bring predictability to political actors' behaviour which can structure and put a limit to the discretionary power.[6]

[1] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1151.
[2] Peter C. Oliver, 'Constitutional Conventions in The Canadian Courts' (UK Constitutional Law Association, 2020) <https://ukconstitutionallaw.org/2011/11/04/peter-c-oliver-constitutional-conventions-in-the-canadian-courts/> accessed 15 March 2020.
[3] Andrew Blick, 'Codifying – Or Not Codifying – The UK Constitution: A Literature Review' [2011] For the House of Commons Political and Constitutional Reform Committee 10.
[4] Mark Elliott and Robert Thomas, Public Law (3rd edn, Oxford University Press 2017) 50.
[5] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91.
[6] Joseph Jaconelli, The Proper Roles for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015).

However, despite their significance, these rules are surrounded by uncertainty in terms of their content and enforceability. Traditionally understanding conventions lack precise content and there is no certain mechanism to control the operation of conventions. What it means by the "Operation of convention" is simply that the application of the convention. As widely known, the details of these conventions as (while simple to describe) they are not always straightforward to implement and different interpretations or perspectives of even small details of convention rules might have different political consequences, so can become the subject of controversy. In my research, '*operation of convention'* reflects all uncertainty we face when we apply a convention. This vagueness renders them as vague subject in constitutional law. This lack of attention to convention deficits should be viewed as a serious omission in understanding not only for conventions, but also for British democracy and constitutional development.

Constitutional conventions in the UK are increasingly formulated in official documents. These authoritative documents make conventions more apparent and attractive. Also, proper apllication of conventional rules draw more attention and a claim on breach of a convention creates more political presure for the politicians. For example, during Brexit process many political debates were originated from application and enforceability of conventional rules such as the Sewel convention, conventions related to the royal prerogative, Salisbury convention, collective ministerial responsibility. Blick notes that the production of documents or legal proceedings on conventions makes 'violation of the rules easier to identify and creates a deterrent to abuse.'[7] He continues that 'the publication of the codes brings to potential gain of wider public understanding of rules that might otherwise seem obscure.'[8] This thesis investigates how these critical elements of British constitution are more effective and enforceable. This thesis specifically asks if a disagreement arises about operation mechanism of conventional rules, which mechanism or authority should adjudicate whether a convention is properly applied in a specific case or not? This question is important

[7] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (Eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015).
[8] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (Eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015).

because absence of pre-determined enforcer mechanism and certain sanction of breach of convention lead an executive to police their own behaviour, and lead to frustration when serious violence of fundamental constitutional rules.

The research draws attention that the absence of certain constraint and enforcement mechanism of convention gives politicians the opportunity to use conventional rules to reach their own political targets. Some conventions are too broad, and the reason behind the convention and enforcer in case of breaking a rule is not specified. These ambiguities of convention provide politicians considerable freedom of manoeuvre to reach their target.[9] Even, sometimes while these borders were explicit and the details were clear and conventions were applied routinely for a long time, the perception exists that politicians still attempt to interpret and apply conventional rules for their political advantage. For example, the appointment of peers can be illustrated. The prerogative power to appoint peers officially rests with the monarch but is in practice exercised only on the advice of the Prime Minister. There is no enforceable constraints on how many peers a Prime Minister can appoint to the second chamber of the UK legislature. In theory, The Prime Minister can choose when to appoint, how many to appoint, and what the party balance is among new members. But there was a broad understanding that appointments should be limited, with careful attention to party balance, but the limits on appointment of peer have not been circumstanced strictly nor no enforcement mechanism other than self-restrain.[10] In 2000, A House of Lords Appointment Commission was generated but It can do nothing to control the numbers, or even the broader suitability of the PM's own appointees.[11] More recently, Johnson appointed 36 new peerage was criticised that 'A primary reason that prime ministers appoint to the Lords is to strengthen the position of their own party'[12] Russell draws attention that **'**an oversized membership of the house of lords

[9] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle Add to My Bookmarks Export Citation' (1992) 43 Northern Ireland Legal Quarterly 263.

[10] Meg Russell, 'Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever', The Constitution Unit < Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever | The Constitution Unit Blog (constitution-unit.com) >, Accessed on 10 March 2021.

[11] Meg Russell, 'Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever', The Constitution Unit < Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever | The Constitution Unit Blog (constitution-unit.com) >, Accessed on 10 March 2021.

[12] James Goddard, 'New Lords appointments in July 2020', House of Lords Library https://lordslibrary.parliament.uk/new-lords-appointments-in-july-2020/, Accessed on 11 March 2021.

certainly damages the reputation of the Lords, and of parliament overall, as well as generating inefficiency, reduced effectiveness, and unnecessary public expense'[13]. She concluded that none of this is good for the health of our democracy.[14] Therefore, as this recent example proof that these conventions need to be more clearly defined; in terms of existence, extend, limit and enforcer of conventions. For example, any new legislation should set some explicit limits on the permitted length or purpose of prorogation. Also, it is urgently needed enforceable constraints on how many peers a Prime Minister can appoint to the second chamber of the UK legislature.

Unfortunately, absence of meaningful mechanisms to enforce a conventional rule, are most noticeable when there is a failure of or threat to the functioning of the British constitutional system. For example, before Boris Johnson unlawfully attempt to prorogation parliament, it is almost agreed that there has been no controversy about prorogation in the UK because the power is used routinely and has not been abused.[15] These kinds of improper and unconstitutional use of conventional rules sets dangerous precedents and undermines fundamental principles of British constitution. Hence, it is crucial to bring clarity, stability, and predictability to the exercise of official powers that are rooted in constitutional convention.

This thesis investigates how these critical elements of British constitution can be reinforced in a meaningful way. The thesis argues that the enforcer mechanism for each convention should be certain, deterrent, constructive and should be designed for supporting purpose and rationale behind a convention. The study therefore argues for it being made certain who or which authority would adjudicate if there would be disagreement about operation of convention.

[13] Meg Russell, 'Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever', The Constitution Unit < Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever | The Constitution Unit Blog (constitution-unit.com) >, Accessed on 10 March 2021.
[14] Meg Russell, 'Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever', The Constitution Unit < Boris Johnson's 36 new peerages make the need to constrain prime ministerial appointments to the House of Lords clearer than ever | The Constitution Unit Blog (constitution-unit.com) >, Accessed on 10 March 2021.
[15] Robert Hazell and Bob Morris, 'The Queen at 90: the challenging role of the monarchy, and future challenges' (*The Constitution Unit*), < https://constitution-unit.com/2016/06/10/the-queen-at-90-the-changing-role-of-the-monarchy-and-future-challenges/> accessed 01 January 2021.

While it is remarked that constitutional conventions have a critically different nature, they originate from political practices and thus they are only politically enforceable norms. Researchers have not treated the meaning of political enforceability in much detail. There is no clear picture concerning the enforceability of conventions. They challenge the widely held view that there is no specific and certain mechanism or authority to control their breaches like courts.[16]

Such approaches, however, have failed to address that different classes of constitutional conventions have a different feature and implementation mechanism, the matter of authority which responsible to guard a convention should not be generalized. This study believes that since each convention or group of convention has a different feature and operation mechanism, different consequences are likely to arise for different conventions or group of conventions.[17] For instance, a convention may be disregarded without any significant consequences.[18] Breaking a convention prompts political concerns. Breach of convention would bring breach of fundamental principle.[19] Hence, each group of conventions should be evaluated separately regarding their enforcer. This approach will make conventions more efficient.

This thesis, therefore, begins with concerning the underlying properties that can attach to different classes of constitutional conventions and thus tries to provide different enforcers for a different group of conventions.

There is an increasing effort to clarify their meaning in an official document such as convention requiring parliamentary approval before engaging military action is identified in the British Cabinet Manual.[20] Thus, they apparently reach a system like the law. Conventions are interpreted by the officials and granted them an authoritative statement and therefore, they became more systematized. The thesis classifies conventional rules in three main groups with regards to their clarification way. First, conventions that remain unwritten which existence and scope of convention still are

[16] Hilaire Barnett, Constitutional & Administrative Law (11th edn, Routledge 2016).
[17] Mark Elliott and Robert Thomas, Public Law (3rd edn, Oxford University Press 2017), 57-58.
[18] Mark Elliott and Robert Thomas, Public Law (3rd edn, Oxford University Press 2017), 57-58.
[19] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] (2015).
[20] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011).

not captured in any authorised document yet. Second, meaning of conventional rules were specified in a single document without legal force. The thesis describes this process as its formulation. Third, a convention to be enacted into law.

The thesis emphasizes that different way of clarification for different conventions indicate that not all conventions necessarily have same degree of obligation. If distinctions are drawn between different clarification way of conventions, it is easier to realise the different levels of obligation attached to different conventions and breach of convention brings different result for different convention and thus different enforcement mechanism required for different group of convention.

Some conventions are embodying constitutional principles. Their breach brings along breach of fundamental constitutional principle. Heard describes these conventions as fundamental conventions.[21] He notes that they have a 'high' level of constitutional importance.[22] These rules firmly materialize vital constitutional principles and 'must be continuously respected; any breach or alteration of the terms of these rules would produce significant changes in the operation of the constitution.'[23] In such case, political criticism or pressure is not adequate to safeguard convention and further remedy is required for politicians to recognise mistakes and to reverse them and further to prevent repeating a mistake. In this case, transforming such conventional rules into law is seen as the first thing that comes to mind as solution. It is believed that legislation is the only sure way to remove politicians' unfettered power. A prominent example is the constitutional crisis of 1909–11 where the House of Lords vetoed the financial bills that legislation was subsequently enacted that denied the House of Lords any real role in the enactment of financial legislation Arguably, transferring these conventions into legal form demonstrates how seriously they are taken, and thus politicians might be less likely to feel able to disregard conventional rules when a legal safeguard is provided. In effect, legal safeguarding of conventions is intended to make it harder to breach them.

[21] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-82.
[22] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-82.
[23] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-82.

On the other hand, some conventions are heavily political in nature. Their application depends on range of political factors and breach of these conventions gives rise to political concerns. Heard describes a convention as a meso-convention if a convention is vitally important to the operation of the political system but do not necessarily incorporate those principles closely and there is no agreement over operation of conventions.[24] For example, the principle of ministerial responsibility means that ministers are responsible for the activities of their departments, but operations of this convention are often depending upon range of political factors. Therefore, these groups of conventions in the UK mostly have been formulated in an official document without legal force and the rules still permit some flexibility and thus the details of convention may take form in practice. The thesis calls these group of conventions as a recognised or formulated convention.

After conventional rules are classified in terms of clarification process, the thesis evaluates how enforceability of conventions changes after conventions are written down in an official document.

For this purpose, primarily this study addresses the question that how a convention can be politically enforceable or can be enforceable in some other way? Conventional rules are enforced through political pressure. Conventions are typically enforced through criticism of breaches of the rule. A rule may be enforced simply by drawing a person's attention, and if necessary, the attention of the public, to his/her violation or would-be violation[25]. Once the light is shone on his/her conduct in this way, the person may take it upon herself to either correct his/her behavior or to make amends.

Conventional rules are enforceable by drawing attention to a broken of conventional rules. However, it is not easy to understand when precisely a convention is broken. Absence of clarity and certainty on whether they exist and what they require make possible that different political actors have the opportunity to interpret based on their political interest, and there will be disagreement and potentially stalemate. Even

[24] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-82.
[25] Farrah Ahmed, Richard Albert, and Adam Perry, 'Judging Constitutional Conventions' [2017] *SSRN Electronic Journal* 8.

politicians draw advantages from ambiguities of these rules and thus escape liability from the rule.

It is supposing that when conventions are more obvious and more publicized, a government actor would not easily deny the existence of conventions and problems caused by a refusal to be bound by convention would be politically much more difficult. In a sense, official clarification of convention puts more pressure on politicians to obey convention. Hence, in a broad sense, the formulation of the rule in an official document can be considered a way of political enforcement of conventions.

The thesis reaches a conclusion that the clarification attempt on conventions helps to increase the cost for breaking conventional rules to some extent, but the codification of convention itself is not enough to resolve conventional matters. These authoritative statements on conventions are not completely ensured to enhance neither feeling obliged to conventions nor cost of non-disobedience of conventions. Because these documents mostly captured conventions in general terms. And thus, politicians are able to interpret them for their own political interest. Even sometimes these official documents on constitutional conventions give the impression that only politicians should have a right to say on any allegation about a break of the convention. Hence, constitutional conventions remain in the hands of politicians and thus allow room for political self-dealing.

Moreover, if it is objected that there is a violation of a conventional rule, in some cases, the conventional rule crystallized into a legal rule. A convention is transformed into law and are thus enforced via the imposition of a new legal rule. However, legal safeguard on the convention is usually symbolic. Some conventions replace in statute, but they are still treated as a conventional rule. It therefore might be important to distinguish legally codification of convention which changed a convention into legally binding convention, for example, Parliament act 1911 render the convention legally binding rule from when a convention is described in law but still is treated as convention. This kind of legal codification on convention is like quasi-law. The codification of the Sewel Convention in the Scottish Act is an important example to explain this point. In this

case, the codification of the Sewel Convention was defined differently by scholars,[26],[27] but all these accounts agreed that the passage of the Scotland Act 2016 has not been converted into a legal rule and the Sewel Convention remains a matter purely of convention regardless of any clarification.

The replacing conventional rule to law seems to work as a deterrent in case of breach or would-be breach of the rule. But the study argues legal safeguard on convention, is not a suitable guardian for every convention. The adoption in Miller of this view of enforceability of codified conventions is arguably as significant to support this claim.[28] The Supreme Court sends the conventional matter back to the political world even though the convention is enshrined into a statute. In short, a convention remains a conventional matter despite legal codification of it and thus politicians still have an only voice about them. In a sense, whether these conventions should legally or non-legally codified is needed careful consideration. For example, while some prerogatives may be better dealt with by legislation, that cannot necessarily be said for all of them. It is important to wisely determining which prerogatives to codify in statute and to be very careful as to how this is done, with consideration being given to how other prerogatives may be affected in different scenarios. In some areas, like the armed forces, the prerogative provided flexibility in dealing with exceptional circumstances not covered by statute; in others the prerogative easily covered by statute. For example, the Constitutional Reform and Governance Act 2010 put Ponsonby rule which requiring Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, on to a statutory footing and provides an enforcement mechanism if parliament believes that a treaty should not be ratified. The House of Commons can resolve against ratification and make it unlawful for the government to ratify a treaty.

[26] Joe Atkinson, Parliamentary intent and the Sewel Convention as a Legislative Entrenched Political Convention. (2017). https://ukconstitutionallaw.org/2017/02/10/joe-atkinson-parliamentary-intent-and-the-sewel-convention-as-a-legislatively-entrenched-political-convention/.
[27] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution, and the Sewel Convention, A Gwilym Gibbon Centre for Public Policy Working Paper, (2017) 1-8.
[28] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Reference by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2016] The Supreme Court, [2016] EWHC 2768 (Admin.) and [2016] NIQB 85 (The Supreme Court).

Therefore, the thesis argues that if there is a disagreement on the operation of the convention, the dispute primarily provides a great chance for government actors to reconsider the details and operation of a convention. Details of the operation of conventions mostly become notable when a dispute raises. Although it may be easy to state the meaning of conventions, the implementation of the convention is not straightforward in some circumstances. It is necessary to clarify what constituted *the appropriate practice* of constitutional conventions.

Some might argue that these unspecified details of conventions allow politicians to assess and decide unexpected political issues case by case without the pressure of certain sanctions. The flexibility of conventional rules proves an asset to respond to different political situations. In fact, uncertainty about the operation mechanism of convention gives opportunity for manipulating the rules. Different interpretation on conventions leads to different constitutional consequences. In a sense, the conventions cannot easily be circumvented, if they are openly accessible for how to implement in different political situations. It might help politicians to act properly and constitutionally.

Achieving clarity of operation mechanism of a convention might help to restrain politicians to use conventional rules for political self-dealing. But this further clarification on the operation of conventions cannot fully guarantee to end raising disagreement about the implementation of a convention due to the elusive nature of conventions. If there is a need to apply a conventional rule in unexpected or messy political circumstances, a well-conceived convention might remain incapable of responding to a political crisis. Or even sometimes, a political situation can necessitate to disapply a convention. In a word, there are case-by-case political consequences as well as invariable constitutional result to a convention.
In this case, the question becomes crucial which mechanism or authority should adjudicate whether a convention is properly followed in specific case or not?

Some conventions are heavily political in nature. Ignoring such a rule will cause political grumbling, and dissatisfaction. Of course, leaving the power of adjudicating these conventional rules in the hands of politicians may be constitutionally appropriate, and even essential for the proper function of some conventions, as a breach of such

a convention may produce "substantial practical effects".[29] Ultimately, the electorate will say last word on it. For instance, the convention of collective ministerial responsibility is perhaps a regulation of political convenience, applied by prime ministers who use it when it suits them and reject it when it does not because it is a constitutional convention. Prime minister is responsible for working cabinet members together harmonizingly and concertedly. If a cabinet minister or ministers lost their motivation to support government decisions in public, the prime minister might decide to sack them. If he or she fails to do, political consequences might follow it. In short, the operation of these conventions can be left to political process. For this reason, these groups of conventions are deliberately specified in an official document without legal force. Hence, politicians are still able to enjoy informational advantages in this realm, which put it in a privileged position.

The study underlines that while the political realm is considered as the competent authority to resolve these conventional failures, it is necessary to make certain who, or which authority is particularly responsible for appropriately operating conventions. And if necessary and possible, a more constructive and deterrent way of enforcement of the convention should be provided. For example, the Sovereign appoints the Prime Minister but must appoint that person who is in the best position to receive the support of the majority in the House of Commons. The Cabinet Manual says that in the necessity of discussions on who will form a Government following an election, "The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed."[30]The Cabinet Manual makes clear that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons.[31]

[29] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[30] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011).
[31] Robert Hazell and Bob Morris, 'The Queen at 90: the challenging role of the monarchy, and future challenges' (*The Constitution Unit*), < https://constitution-unit.com/2016/06/10/the-queen-at-90-the-changing-role-of-the-monarchy-and-future-challenges/> accessed 01 January 2021.

However, some conventions or breach of a convention have great importance not to be just left the conscience of politicians or a circumstances of political process. These conventions firmly support crucial constitutional principles, and any breach or substantive alteration of their terms could have significant impact on constitutional processes. These conventional rules are essentially high political acts and criticism of politics is not enough as the way of forcing the conventions. For example, when Boris Johnson unconstitutionally suspect parliament, he defends the decision that the five-week suspension is to allow the Government to set out a new legislative agenda in a Queen's Speech when MPs return to Parliament. Prorogation is a personal prerogative of the Monarch exercised on the advice of Ministers. The convention requires that the Monarch will generally follow the advice given by Ministers when exercising personal prerogative powers. Usually, the Queen will only exercise this power in a politically uncontroversial and predictable manner. Typically, there is no conflict between this convention on prorogation and ministerial advice, as ministerial advice tendered by the government has been uncontroversial and predictable. But, in the case, it was almost universally agreed the prorogation convention was used as a tool to prevent Parliament interfering in the Brexit process. It is obvious that using a prerogative power to effectively eliminate Parliament as a constitutional is a politically unacceptable and an unconscionable abuse of convention. The decision to prorogue Parliament was challenged in both the Scottish and the English courts. In both Cherry[32] and Miller 2[33] it was argued that this prorogation of Parliament was unlawful. The Supreme Court heard appeals from both jurisdictions that this long prorogation significantly conflicts with the constitutional principles of parliamentary sovereignty and parliamentary accountability without a "reasonable justification".[34] Hence, the Court concluded the Government had not provided any justification for the prorogation's length, let alone a "reasonable" one, and accordingly the decision to prorogue was unlawful.[35] Following it is considered about whether prorogation (like dissolution) should be put on a statutory footing so that It establishes explicit legal limits on the prerogative power to

[32] Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), UKSC 2019/0193, [2019] UKSC 41, 24 Sep 2019.
[33] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), UKSC 2019/0192, [2019] UKSC 41, 24 Sep 2019.
[34] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), UKSC 2019/0192, [2019] UKSC 41, 24 Sep 2019.
[35] R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), UKSC 2019/0192, [2019] UKSC 41, 24 Sep 2019.

prorogue and makes it difficult that long periods of prorogation will be adopted in future.[36]

Hence, in such case of breach or would-be breach of these conventions, the rules are being converted into laws. One may claim that sometimes a rule can be enforced by simply drawing a person's or community's attention to a violation or would-be violation. From this perspective, A written account of a convention in an official document probably increases awareness among practitioners and observers of the rules of which it provides accounts, increasing the chances of their being followed. Also, a breach of a convention is easily discernible to the public and invites more debate over whether a rule has been followed or not in a given case, and this invites more public criticism if it is agreed that there has been a breach of a rule. Moreover, attempts to criticize such supposed failures become more viable if there are specific official texts that can be cited as part of a complaint. Therefore, at first glance, the cost of non-compliance can rise if there is a specific text, setting out the rule in question.

However sometimes, codifying conventions in legislation has not resulted in greater clarity, or even it intensifies problems about their use. Disputes are likely to arise about the interpretation of the application of the conditions, courts are likely to become involved in enforcing them, and the delay involved is likely to deepen any political crisis.

This was seen in the Supreme Court judgment in Miller.[37] In this case, the court held that the Sewel Convention remained conventional in nature even though the convention is enshrined in s. 28(8) of the Scotland Act, and thus the political realm should deal with the matter. This case, therefore, shows that politicians may retain power over conventional matters despite conventions being legally codified. Court approach criticized that as the courts have said little about the scope of conventions. The treatment of conventions is somewhat dismissive and fails to properly reflect just

[36] Adam Cygan and Greame Cowie, The prorogation dispute of 2019: one year on, Research Briefing, House of Commons Library, https://commonslibrary.parliament.uk/research-briefings/cbp-9006/ accessed on 01 March 2021.

[37] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).

what conventions mean in the present. In a sense, although it is accepted that a convention has a certain form in practice, not in a written statement, the courts have generally declined to answer the question of how conventions are applied in practice but have not excluded the possibility of doing so and are clearly willing to rule on the limits of prerogative powers (as in *Miller No. 2*) and have at times been willing to review their exercise (*GCHQ*). On the other side, if the Supreme Court had granted legal relevance to the convention, this would have had major political consequences as it might have allowed the Scottish Government to block the Brexit process. In the case court might be blamed to interfere in a political matter.

Indeed, Conventional rules are dynamic and flexible, rather than rigid. Lack of clarity may sometimes enable them to evolve as circumstances change. If content of conventions would be contained in the law, the capacity of conventions to evolve in response to political reality would be reduced or destroyed and this is not desirable.

It therefore can be concluded some of conventional rules might not be suitable for being legally codified. Conventional matters should not be established and enforced through firmly determined rules, as this may undermine the effectiveness of those conventions as instruments of political management, which draws in part on their nature as shared understandings. For this reason, inside of easily enact conventional rule into legal rule, or when there is dispute about convention simply demand legislation of convention, the thesis provides remedy, which is effective, workable, practicable.

It is suggested that proper enforcement mechanisms can be designed to remedy for this dispute. Such a pre-determined enforcer mechanism can clarify whether a conventional rule is properly applied in a case or not. Recognizing or providing them suitable enforcers prevent their using for political self-dealing. Therefore, creating that kind of control mechanism on operation of conventional rules will strengthen these essential conventions and improve the quality of policy decisions and services.

To conclude, conventions serve a good reason which in a sense, these conventional rules give discretional power to politicians so that they are freely able to decide on political issues without fear of judicial interference to improve an effectively working constitutional system (i.e. so they can reflect an appropriate division of political and

judicial power). Hence, the reason behind conventional rules should be supported by a clear operation mechanism and enforcement so that the constitutional system is carried out fairly as well as successfully.

Admittedly, dispelling myths on the enforceability of conventions is not a straightforward task; nor will doing so end controversy. But a conscientious effort to do so may offer some important insights into political nature of constitutional conventions and this will contribute to increasing the efficiency of conventions. If the suggestions are seriously thought and planning is given to all those things, a convention stands a much greater chance of success.

## 1.2 Thesis structure

The thesis argues that capability of conventions to constrain politicians' behaviour depends on the clarity of conventional rules. Constitutional conventions would be more efficient and more successful when they are made clear. When existence of rule was recognised, politicians could not disregard the rule by simply denying existence of the rule. In the same way, clarifying details of operation mechanism of conventional rules can restrain politicians to circumvent these rules to reach their political purposes. The last chapter argues that conventional rules became more efficient if its certain enforcer and the likelihood of political sanctions would clarify in case of the convention is breached.

The organization of the thesis is as follows:

### Chapter 2

Constitutional conventions play critically important role in British constitutional system. Conventions regulate the institutions and functions of most aspects of parliament and responsible government: for example, the role of the Queen, the offices of Prime Minister and Cabinet, the rules for developing government, the dissolution of parliament, the appointment and removal of ministers, ministerial responsibilities, caretaker government, and the chain of accountability involving public services. Therefore, the thesis begins to deeply present the features and functions of some British Constitutional conventions. By doing this, it is stressed that while it may appear

an easy task to recognise an individual convention, there remain uncertainties in relation to its application.

**Chapter 3**

The chapter is devoted to assessing the UK constitutional conventions in three main groups regarding their clarification progress. The first group of conventions is called classical conventions. This group of conventions remain as an unwritten and unsystematic source of the constitution. They are not enforceable by the court. The second group of conventions is described as recognized or stated conventions. The meaning and scope of these conventions is clarified in an official document without legal force. Therefore, the flexibility of conventional rules is protected while the content of the rules is elucidated. The last group of conventions is enshrined into law and their scope and implementation are determined in legal documents. But this codification does not always render conventions into a legal rule. Some codification on conventions is quasi-law. But these legally codified conventions are still treated as convention and thus when a problem is raised about the operation of that kind of conventions, a court still cannot decide whether the convention is properly followed or not. Hence, this kind of conventions is identified as codified conventions. This categorization, firstly, will enhance our understanding of the meaning of codification of convention in the UK. Secondly, it helps to notice that the different levels of obligation attached to different conventions and disregarding of conventions brings different result for different conventions and thus different enforcement mechanisms are required for different group of conventions.

**Chapter 4**

Constitutional conventions are surrounding uncertainty due to their enforceability. There is no clear picture of the failure of a constitutional convention. This vagueness regarding the enforceability of conventions leads to two important results. First, it is hard to determine a breach itself. Second, it is unclear how the rules are enforced if they are not properly applied.

The chapter first considers how conventional rules are enforced. In English law, the ready answer to that question is that a constitutional convention is politically

enforceable. A conventional rule is typically enforced through criticism of breaches of the rule. But conventional rules are unclear. It is not easy to understand and decide when exactly conventional rules are broken due to ambiguity of conventions. This is important because politicians cannot be forced to follow rules through political pressure unless there is a clear declaration or disclosure of a breach or would-be breach of a rule.

The chapter highlights that the ambiguity of conventions allows room to politicians to escape responsibility by denying their existence; or they might interpret the rule in such a way as to evade the responsibility that the conventional rule implies; or they argue that circumstances mean the rule does not apply; or, they might claim that, though a rule exists and their action would be in breach of it, the breach is justified by circumstances.[38] Even if they are correct in their claims, the ambiguous nature of these conventions makes it very difficult to understand. Conventional rules remain in the hands of politicians and the consequences of acting against a convention can be adjusted according to political circumstances. For example, after the general election of May 2010, the Labour Prime Minister, Gordon Brown remaining in office and faced serious attacks that his government lost the election and should get out of 10 Downing Street immediately[39]. But there is no agreement that in interpreting the constitutional conventions on hung Parliaments if the constitutional right of an incumbent Prime Minister is to remain in office or not. Conflicting interpretations of what constitutional convention and practice in hung Parliament situations can make it difficult to understand whether there is a breach of convention or not.

**Chapter 5**

Since convention is strengthened in an official document, these conventional rules become more visible, the allegation of breach of convention attracts more attention and thus allegation on the break of a convention gets politicians into trouble. Hence, the study addresses the following questions that whether these written documents

[38] Rodney Brazier, “The Non-Legal Constitution: Thoughts on Convention, Practice and Principle” 43 N. Ir. Legal Q. 262 (1992) 263.
[39] Nicola Boden, 'From Green-Eyed Chancellor to the 'Squatter Of No10', Gordon Brown Finally Admits He Can't Hang On To Job He Coveted For So Long' (*Mail Online*, 2010) <https://www.dailymail.co.uk/news/election/article-1272278/From-green-eyed-Chancellor-squatter-No10-Gordon-Brown-finally-admits-hang-job-coveted-long.html> accessed 28 January 2020.

about conventional rules help to constrain constitutional behaviours and increase cost of breach of these conventions.

The chapter highlights that codification of meaning of conventional rules in official document make little difference on the enforceability of conventional rules. While these powers sometimes serve to increase the efficiency of conventions, the government still enjoy the flexibility of conventional rules. Conventional rules are determined in general terms. Therefore, recognition of conventions still provides politicians with the opportunity to interpret and change the meaning of conventions in order to reach their political purposes.

**Chapter 6**

While a few conventions are capable of being formulated in precise terms, application of many conventions is surrounded by a range of uncertainty. There is no consensus on the proper operation of some conventions in some circumstances. The details of these conventions may vary within a certain range and thus determining their limits is not a straightforward task.

Nevertheless, conventional rules have their borders, and political process determine where their boundaries lie. In particular, the boundaries of a conventional rules are likely to be determined by a government.

This indeterminate nature of convention permits politicians to consider and resolve on unexpected political issues case by case without the pressure of strict rules. While conventional rules prove to be an advantage to respond to different, complex political situations, there have been occasions where it has been used for other political purposes.

The chapter argues that if the function of conventional rules would be formulated in detail, politicians would not easily be able to use conventional rules to obtain a political advantage. Addressing the details of the operation of conventional rules would not easily be circumvented by politicians if it is clear how to implement in different political situations. While doing this, strict regulation should be avoided on details of conventional rules and thus conventional rules still enable to respond unexpected

political circumstances. Determining limits of conventions is the first step to increase the efficiency and enforceability of a conventional rule. Because it may help understand a breach or would-be breach of a convention. Hence, a violation of a conventional rule can apply political pressure in the early stages and require the convention to be followed properly.

**Chapter 7**

As shown in previous chapters, the uncertainty of the enforcer of conventions and absence of certain sanction for breach of a convention give a chance to an executive to adjudicate their own behaviour. Primarily, it is needed to make certain who or which authority would resolve it if there were to be disagreement about the operation of convention.

When conventions are breached, different consequences are likely to arise.[40] For instance, one convention may be disregarded without any significant consequences,[41] or breaching another convention might cause political concern, grievances; or breach of a convention brings to politicians criticism for breach of a fundamental principle, consequently violating such convention ends up with even more political trouble.[42] As a consequence, the different levels of force or coerciveness is attached to different group of conventions. For example, when Home Secretary, Priti Patel, faced allegations of breaching the ministerial code for bulling allegations across three government departments. Johnson refused to sack Patel despite an inquiry by his adviser Sir Alex Allan that concluded she had broken the ministerial code[43]. In this case, the Prime Minister has paid a political price for his decision to defend her. Boris Johnson has been relentlessly criticised in the media. The wider credibility of the ministerial code was already a matter of considerable debate, to which advisers criticised the decision of PM. Breach of these rules mostly leads to political concerns and brings about political unrest and costs. On the other hand, the Prime Minister's

[40] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.
[41] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.
[42] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.
[43] BBC News, 'Priti Patel: Summary of official report into bullying claims', < Priti Patel: Summary of official report into bullying claims - BBC News>, Accessed 05 March 2021.

advice to the Queen to prorogue the parliament for 5 weeks which had a bigger attention in media was also subject to judicial review.

The chapter therefore stresses that if breach of such a convention produces political concerns, the power of adjudicating these conventional matters in the political process is appropriate, and even essential for the proper function of these conventions. These conventions are usually formulated in official documents without a legal force in the British Constitutional system such as the UK Cabinet Manual or the Ministerial Code, so that these matters are at the discretion of politicians.

On the other hand, some conventional rules embody fundamental constitutional principles and breach, or substantive modification, of their terms could have a significant effect on constitutional processes.[44] Politicians do not have really discretion power on the operation of the rules.

These fundamental conventions are increasingly protected by transforming them into law in the British constitutional system. It is believed that legal safeguarding of conventions puts more pressure on political actors to follow them properly.

The chapter argues that if a suitable *soft enforcement mechanism* were designed, relevant political actors would not be only the decision-makers in relation their own behaviours, nor would there be a constitutional danger that judges would be ill-illustrated or assess a conventional case.

A *soft enforcement mechanism* would provide detailed guidance how a fundamental convention should be applied in a specific case without completely tying a government's hands. With such an enforcement mechanism, the flexibility of these rules will continue to prove valuable; in the meantime, these rules would not be left entirely in politicians' hands.

[44] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science.

## 1.3 Research method and methodology

### 1.3.1 Research Methodology: doctrinal legal methodology

This thesis seeks to contribute to the clarification of the British Constitutional Conventions and their operation mechanism. To do so, the doctrinal legal research methodology is applied which comprises committee reports, legal history, judicial pronouncements, and acts passed by Parliament.

# Chapter 2 - Background to British Constitutional Conventions

## 2.1 Introduction

The United Kingdom (UK) has a constitutional system, with its institutions, as well as the operation of Parliament and government, controlled by various conventions. Each convention has individual features and methods of implementation and therefore this chapter commences by outlining the features and functions of some UK constitutional conventions in practice. It is important to identify the details of these conventions as (while simple to describe) they are not always straightforward to implement and so can become the subject of controversy. This chapter therefore discusses a number of important conventions related to the UK constitutional system.

## 2.2 Convention regulating the exercise of the royal prerogative

In the United Kingdom (UK) the Crown is vested with executive power. Dicey described this prerogative as follows:

> The residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.[45]

On the other hand, Blackstone defined prerogative power excludes the powers of the Crown that have no statutory authority, but are held in common with the Crown's subjects:

> By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and

[45] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (Eight Edition 1982) 281.

> out of the ordinary course of common law, in right of his regal dignity ... it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.[46]

Prerogative powers are inherent to the Crown. Dicey's view that the Crown is able to use these powers without any need for an act of Parliament. Any action of the monarch that are not support by statute accepted under prerogative powers but, according to Blackstone, the prerogative was limited. The prerogative only includes those actions that no other person or institution in the United Kingdom can engage in law.

In the 2017 case of *R (Miller) v Secretary of State for Exiting the European Union*, Supreme Court judges give description the prerogative as including the 'residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation'[47].

The royal prerogative is a concept of some complexity. In 2009, the Ministry of Justice underlined the issue that:

> The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all.[48]

Thus, central government is undertaken in the name of the Crown. Under the terms of the British constitutional monarchy, the Queen forms part of the legislature, i.e., Parliament, which is comprised of the Crown, the Lords, and the Commons. The Queen is considered the fount of justice, with the administration of justice being conducted in the name of the Crown. In addition, the Queen is Head of State when it

[46] Sir William Blackstone, Commentaries on the Laws of England in Four Books, vol. 1 [1753].
[47] Miller Supra Note, Para 47.
[48] Ministry of Justice, Review of the Executive Royal Prerogative Powers: Final Report, 2009, paras 26 &27.

comes to foreign affairs, as well as being the head of executive, while the Crown is also responsible for conferring all honours in the UK.[49]

However, apart from a small number of personal prerogatives related to the Crown, the power of the Queen is currently exercised according to direction from her ministers, in particular the Prime Minister.[50] Brazier termed this general rule the "Cardinal Convention", i.e., mandating that the monarch acts on the advice of ministers.[51] Therefore, as a constitutional monarch, the Queen accepts ministerial advice concerning the use of these powers, whether or not she agrees with that advice. This constitutional position ensures that ministers take responsibility for the use of these powers, ensuring that 'the monarch does not enjoy a free hand in their exercise'.[52] Rather, 'she must exercise them on, and compatibly with, the advice tendered to her by her government.'[53] The indirect democratic imprimatur of ministers is considered sufficient to render the exercise of legal powers vested in a wholly unelected monarch democratically acceptable, provided that they are exercised in line with ministerial advice.

The second general rule of prerogative powers concerns the "Tripartite Convention", described by Bagehot in *The English Constitution* as being the Sovereign's right to 'be consulted, the right to encourage, [and] the right to warn'.[54]

These personal discretionary powers remain in the hand of the Sovereign',[55] including: (1) the right to advise, encourage and warn ministers in private; (2) to appoint the

[49] Hilaire Barnett, Constitutional & Administrative Law (11th edn, Routledge 2016) 98-108.
[50] Hilaire Barnett, Constitutional & Administrative Law (11th edn, Routledge 2016) 97.
[51] Rodney Brazier, Constitutional Practice - The Foundations of British Government (3rd edn, Oxford University Press 1999) 189.
[52] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 15 January 2020.
[53] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 15 January 2020.
[54] Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 185.
[55] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 242.

Prime Minister and other ministers; (3) to assent to legislation; and (4) in the event of a grave constitutional crisis, to act contrary to (or without) ministerial advice.[56]

Like most conventions, these rules have been formed in general terms and are subject to controversial restraints and exceptions.[57] Legal and constitutional opinion on precisely what constitutes the Royal Prerogative is therefore far from clear-cut. The courts play an important role in determining the existence, and lawful use of prerogative powers. But until the 1984 House of Lords case of Council of Civil Service Unions v Minister for the Civil Service16 (the GCHQ case)[58], it was thought that the courts would not review how the prerogative powers were exercised, only whether they existed. The existence and extent of these powers are a matter of common law which can make the courts the final arbiter of whether a particular type of prerogative power can be considered to exist.[59] The courts' silence on questions pertaining to the prerogative persisted until the mid-1980s when, in the seminal *GCHQ* case, the House of Lords held that an instruction made under an order in council could be subject, in principle, to judicial review.[60] Difficulties tend to arise due to the existence of a large number of prerogative powers for which there is a lack of any recent judicial authority or no judicial authority at all. Poole argues that 'The prerogative might now, in principle, be classified as a normal sub statutory source of law for the purposes of judicial review; however, in practice, the courts tend still to approach the prerogative with a caution bordering on outright deference.'[61]

In March 2004, the Public Administration Select Committee (PASC) published a report on the Royal prerogative, emphasizing the need to review the current arrangements, including that all executive powers enjoyed by ministers under the royal prerogative should be enacted.[62] The committee stressed that the prerogative has permitted

[56] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 240.
[57] Rodney Brazier, Royal Assent to Legislation, 129 *Law Quarterly Review* 2013, 184 – 204.
[58] The GCHQ Case – Council of Civil Service Unions v Minister for the Civil Service.
[59] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 115 - 118.
[60] Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 International Journal of Constitutional Law.146-155
[61] Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 International Journal of Constitutional Law, 146-155.
[62] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.

powers to move from the monarch to ministers without Parliament having any say in how they are exercised[63] and that this is longer acceptable to Parliament or the people.[64] The committee concluded that it has been demonstrated how these powers can be constitutionalized (and in particular certain key powers can be anchored in the consent of Parliament) and it is therefore now time for this process to be completed.[65]

The committee specifically called for comprehensive legislation on the prerogative powers of ministers, which have been exercised on the behalf of the sovereign, with ministers taking responsibility for actions undertaken in the name of the Crown. The committee was accompanied by a draft bill focussing on three essential prerogative powers of ministers, related to: (1) armed conflict; (2) the conclusion and ratification of treaties; and (3) the issue and revocation of passports.[66]

The government responded in July 2004, acknowledging the importance of the subject matter and the beneficial work carried out by the committee. However, the committee also demanded more rigorous parliamentary accountability and scrutiny when it came to ministers' exercise of specific prerogative powers.[67] The government noted that these provide much-needed flexibility, as well as being a well-established aspect of the constitution, while ministers require executive powers to react rapidly when faced with potentially complex and dangerous circumstances.[68] Its response also pointed out that ministers are accountable to Parliament for all their actions, including those taken under prerogative powers, and that the use of these powers is subject to scrutiny by Departmental Select Committee. Therefore, the government remained in favour of

[63] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004).7.
[64] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004).7
[65] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 1.2
[66] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 9.
[67] Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).
[68] Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).

continuing to consider changes on a case-by-case basis, without the need for legislation.[69]

The Governance of Britain (2007), and the subsequent Constitutional Reform and Governance Act (2010), provide for parliamentary scrutiny of treaties, as well as establishing a statutory basis for the civil service. In addition, the Fixed-term Parliamentary Act 2011 brought the dissolution of Parliament under statutory authority, thus removing any control from the Crown.[70]

Prerogative powers mostly were exercised without any parliamentary authority. These reforms that put prerogative powers on a statutory footing are usually considered to permanently reduce prerogative power. Therefore, these important areas of government activity which, today as in the past, are essential to the effective operation of the state are used under scrutiny of parliament.

It can therefore be concluded that, despite substantial ministerial prerogative powers having been recently enshrined into law, there remain three major prerogative powers the monarch continues to exercise: (1) the granting of the royal assent to legislation; (2) the appointment of the Prime Minister; and (3) the dismissal of the government. These are discussed in detail below.

## 2.3 Royal Assent for legislation

It is a constitutional convention that, when a bill has passed both Houses of Parliament, "Royal Consent" is required to complete the legislation process.[71] Marshall argued that the affording of assent to legislation having received the approval of the Commons and the House of Lords is, in practice, automatically exercised.[72] Since 1708 when Queen Anne rejected the consent to a Scottish Militia Bill on the advice of ministers no such bill has failed to receive royal assent.[73]

[69] Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).
[70] Fixed-term Parliamentary Act 2011
[71] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 353.
[72] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford.
[73] Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 193.

However, Tomkins stated that 'we should not be deceived by the longevity of the practice that the royal assent is not withheld, into thinking that this is a power the exercise of which is now entirely beyond comprehension'.[74] He also argued that 'power has not been exercised for some time is not necessarily conclusive evidence that the power is no longer available'.[75]

In addition, Elliot noted that the Queen has a constitutional duty to grant royal assent to bills,[76] as enshrined in the convention of royal assent. Furthermore, this convention obeys the principle of parliamentary sovereignty:

> Consistently with the historical context in which it first emerged, the royal assent convention ensures that Parliament enjoys constitutional primacy in matters of law-making and that the monarch's legal power to interfere in such matters by withholding royal assent is effectively neutralized by a convention that requires the granting of such assent. In this way, the royal assent convention is an essential underpinning of the principle of parliamentary sovereignty.[77]

However, this convention can simply identify a Monarch formally granting of royal assent for every legislation that successfully passes both the House of Commons and Lords. This infers that the implementation of the convention can become complex should ministers advise the Queen not to grant royal assent to a given bill. The key aspect is therefore how the conventions of ministerial advice and royal assent are simultaneously applied.

There is no consensus among constitutional scholars whether the monarch can withhold royal assent to a bill if advised to do so by her ministers. Brazier considered that royal consent should never be refused unless on ministerial advice, i.e. the

[74] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 63.
[75] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 64.
[76] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2020) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 15 January 2020.
[77] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2020) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 15 January 2020.

monarch can refuse to grant consent to a bill if so advised by the relevant minister.[78] Moreover, Twomey highlighted a number of examples, primarily originating from Australia, suggesting that the monarch is not obliged to accept any advice of Queen`s ministers to refuse assent.[79] Twomey was of the opinion that royal assent does not form an exception to the general rule that prerogatives are exercised on advice.[80] Tomkins argues that if the monarch was given clear advice by the Prime Minister to withhold assent from a bill 'it seems to be the case that the monarch should follow that advice'.[81] Similarly, Munro asserts that 'the Crown cannot refuse assent except on advice.'[82] Bradley, Ewing and Knight agreed with this view, the Queen's refusal of assent to a bill 'could now only be exercised on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament'.[83]

The interpretation of the convention that the Queen should accept the advice of her ministers conforms to the principle of responsible government.[84] The Queen therefore has generally no discretion when it comes to the exercise of these powers and thus cannot legitimately be criticized for following the advice of a Government in the possession of the confidence of Parliament.[85] In a practical sense, the majority of the Queen's prerogative powers are now exercised on the advice of ministers who are, in turn, accountable to Parliament. All criticism should therefore be directed at her government, which is democratically accountable to Parliament and whose

[78] Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 193.
[79] Anne Twomey, 'Royal Assent – The Business of Parliament or The Executive?' (2016) No. 16/12 Sydney Law School Legal Studies Research Paper 5.
[80] Anne Twomey, 'Royal Assent – The Business of Parliament or The Executive?' (2016) No. 16/12 Sydney Law School Legal Studies Research Paper 15.
[81] Adam Tomkins, *Public Law* (OUP, 2003), 63-4.
[82] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.
[83] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (Pearson, 16th ed, 2015) 207.
[84] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.
[85] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.

constitutional role is to absorb such criticism.[86] This is significant, due to it upholding the principle of democratic government, thus identifying the electorate as justifying the use these powers.[87]

Barber believed that the Queen would be acting unconstitutionally if she refused to give her assent to legislation as advised by her Prime Minister or ministers.[88] He also noted that there is no longer any acceptable purpose behind the convention, specifically focusing on the reasons behind the convention concerning royal assent.[89]

> Now the convention is operating against democratic values, rather than upholding them. Rather than supporting the parliamentary government, it would undermine it. The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law. But just as it would be undemocratic to allow one person (the Monarch) to veto legislation, so too it would be undemocratic to give this power to the Prime Minister.[90]

Thus, should the House of Commons and the House of Lords approve a Bill failing to meet with government approval, the government itself could not prevent such a Bill from becoming law by advising the Queen not to grant royal assent.

This aspect is currently particularly relevant in relation to process of the UK's departure from the European Union, known as "Brexit", including the possibility for Parliament to take control, potentially by legislating to avert a no-deal Brexit. Elliott noted that 'the

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[86] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.

[87] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.

[88] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?', (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.

[89] Nick Barber: Can Royal Assent Be Refused on the Advice of the Prime Minister?" (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.

[90] Nick Barber: Can Royal Assent Be Refused on the Advice of the Prime Minister?" (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.

Ministerial advice convention simply does not apply to the granting of royal assent to Bills[91] (otherwise) the Government had an unqualified veto over legislation'[92] and 'whenever the Government disagreed with legislation approved by both Houses, it could thwart its enactment by advising the Queen to withhold royal assent'.[93] This contradicts the principle of parliamentary sovereignty, which states that it is Parliament, rather than the *government,* that possesses the right to make (or unmake) any law, while the Queen should not withhold her royal assent whenever so directed by the Government.[94] Elliott further stated that 'governments enjoy a very high degree of control over the parliamentary business… as a result, there is very little chance indeed of a Bill succeeding in making its way through the two Houses, unless the Government is willing to support it'.[95]

It is an established constitutional convention that: 'the Royal Assent is not withheld from Bills which have been passed by both Houses of Parliament'. The convention now confirms that 'the Crown must agree to the legislation through the prerogative of Royal Assent'. However, it should be recognized that, although unlikely, there may, in future, be exceptional circumstances in which assent may be refused. Craig pointed out the following:

> The questions connect to the contested status of royal assent and whether it is a legislative power that is triggered by successful passage of a bill through the two Houses, or an executive power effectively in the hands of the government.[96]

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[91] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 December 2019.
[92] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 December 2019.
[93] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 December 2019.
[94] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 December 2019.
[95] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 December 2019.
[96] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-

He therefore concluded that elected politicians must strive to avoid such a scenario from transpiring, with the hope that a negotiated solution can be found in the House of Commons to ensure that a constitutional crisis is avoided.[97]

Thus, it is difficult to imagine that the monarch would withhold royal assent today. The Queen has no effective discretion in deciding to grant royal assent to bills or consent to the introduction of bills.[98] Even, royal consent being viewed by some as an unnecessary procedure (and even a potential threat to democratic governance). The reason behind the reluctance to abolish this convention is the strong symbolic significant of the practice of royal assent in the UK.

## 2.4 Appointment of the Prime Minister

A long-established UK convention states that the Queen may appoint the office of Prime Minister the individual capable of commanding a majority in the House of Commons.[99] The Queen's role in appointing a prime minister is one of her remaining prerogative powers.[100] However, the implementation of this convention can, in some circumstances, prove complex, i.e., if no party has an overall majority or the Prime Minister resigns during his/her term of office as a result of age or illness.[101]

If the government have a majority, it is for the party or parties in government directly electing a new Prime Minister, who must be the individual most likely to command the confidence of the House of Commons. But If a prime minister resigns and the party in government does not hold a majority, it becomes more difficult. According to the Cabinet Manual, "the Sovereign should not be drawn into party politics, and if there is

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craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.

[97] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 16 January 2020.

[98] Robert Hazell and Bob Morris, 'The Queen at 90: the challenging role of the monarchy, and future challenges' (*The Constitution Unit*), < https://constitution-unit.com/2016/06/10/the-queen-at-90-the-changing-role-of-the-monarchy-and-future-challenges/> accessed 01 January 2021.

[99] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011) Para 3.1

[100] Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (*The Institute for Government*, 2019) <https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers> accessed 19 January 2020.

[101] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 64.

doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons".[102]

If a clear alternative is likely to be able to command confidence, then this only needs to be made clear to the Palace. The Queen believes in party leaders deciding among themselves and suggesting to the Queen.[103]

If negotiations over government formation have not made clear as to who can command confidence, then it is expected that political parties will find who is best placed and ensure that the Queen is not involve any disputes. It is the responsibility of the politicians to protect the Queen by determining the eventual outcome.[104]There is a strong constitutional convention that the Queen should be kept out of politics.[105]

This is demonstrated by the way that, following the resignation of Prime Minister Theresa May on June 7th, 2019, Boris Johnson was elected as the new Conservative leader under the existing party rules. In normal circumstances, if the new leader is able to command the confidence of the House of Commons, he or she is immediately called upon by the Queen to form a government and take office as Prime Minister. However, in the case of Boris Johnson, a number of Conservative MPs declared that they would bring a vote of no confidence in a new leader, with Dominic Grieve and Ken Clark already having indicated that they would not be able to support an administration prepared to leave the EU without a deal. After stating his willingness to take such a step, Johnson was warned that he could be prevented from entering

[102] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011) Para 2.28
[103] Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (*The Institute for Government*, 2019) <https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers> accessed 19 January 2020.
[104] Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/> accessed 16 January 2020.
[105] Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (*The Institute for Government*, 2019) <https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers> accessed 19 January 2020.

Downing Street should it become clear he would be unable to command a majority in the House of Commons.[106]

Hazell and Russell pointed out that this scenario is unusual.[107] The Conservative party had a minority government at the time and was also severely divided by issues surrounding Brexit. Hazell and Russell argued that, even if a small number of Conservative MPs refused to support Johnson's administration, this could lead to considerable difficulties, including being unable to command the confidence of the House of Commons, and so being prevented from becoming Prime Minister. In addition, they stressed that, should this take place:

> The Queen might make a provisional appointment, conditional on the new Prime Minister demonstrating confidence. Alternatively, Theresa May could remain in place and facilitate a process in Parliament to demonstrate that the winning candidate – or indeed an alternative candidate – can win a confidence vote, before recommending that person to the Queen.[108]

They concluded that the Cabinet Manual (which covers changes in government) does not address the unusual parliamentary circumstances currently created by the Brexit dilemma.[109]

Despite these constitutional concerns being alleviated when Boris Johnson was appointed as the new Prime Minister, it is important to clarify the existence of this potential uncertainty, in order to improve the process.

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[106] Michael Savage, 'Boris Johnson 'Might Never Enter No 10' If MPs Withdraw Support' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2019/jun/30/boris-johnson-might-never-enter-no-10-if-mps-withdraw-support> accessed 16 January 2020.

[107] Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/> accessed 16 January 2020.

[108] Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/> accessed 16 January 2020.

[109] Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/> accessed 16 January 2020.

## 2.5 Collective ministerial responsibility

The concept of collective responsibility identifies that decisions made by the cabinet are binding on all members of the government. Under the convention, all ministers can express their views in the privacy of cabinet, but (even if they strongly disagree with the final decision) are required to publicly support that decision or remain silent on the issue.[110] The key element of collective responsibility is that ministers may argue for or against a proposal in the privacy of the Cabinet Room, but after a decision is made, they must support the cabinet decision in public even if they were not present when the decision was made. Also, some committees which have the authority to make decisions on behalf of government have the same standing as that of cabinet, and ministers are bound to them.[111] This longstanding convention therefore guarantees that the executive branch of government speaks with one voice in public, so preventing a divided cabinet from losing the respect of backbenchers, who look to government for firm leadership, while opposition parties are prepared to exploit any perceived disunity.[112]

This results in any a minister who does not support a cabinet decision being expected to resign.[113] There have been notable examples of ministerial resignations over disagreements with collective decisions.

1. In August 2014, the then Foreign Minister, Baroness Warsi, resigned due to her conviction that the government of David Cameron was putting insufficient pressure on Israel during the conflict in Gaza.[114] In her resignation letter to the Prime Minister, she stated that:

> (The government's) approach and language during the current crisis in Gaza are morally indefensible, is not in Britain's national interest and will

[110] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.
[111] Patrick Weller, 'Cabinet Government', *Constitutional Conventions in Westminster Systems* (1st edn, Cambridge 2015) 75.
[112] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.
[113] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.
[114] BBC News, 'Warsi Quits as Minister Over Gaza' (*BBC News*, 2014) <https://www.bbc.co.uk/news/uk-politics-28656874> accessed 19 January 2020.

have a long-term detrimental impact on our reputation internationally and domestically.[115]

2. In March 2003, Robin Cook (a former Foreign Secretary in the government of Labour Prime Minister Tony Blair) resigned as Leader of the House of Commons as a result of disagreeing with the government's decision to join the military attack on Iraq.[116]

3. In November 1990, Sir Geoffrey Howe resigned as Deputy Prime Minister over government policy on the European single currency and the general approach to the European Union.[117]

4. In October 1989, Nigel Lawson resigned as the Chancellor of the Exchequer as a result disagreement between the Prime Minister over Alan Walters remains her personal economic adviser.[118]

5. The justice Minister, Phillip Lee has resigned over the Theresa May's approach to Brexit.[119]

6. David Davis, Steve Baker, Boris Johnson, Conor Burns, Chris Green, Robert Court, Scott Mann have quit their role being opposite to the Chequers Agreement.
7. Minister of State for transport, Jo Johnson resigned in opposition to Theresa May's handling Brexit negotiations.[120]
8. Shailesh Vara, Rt Hon Dominic Raab, Rt Hon Esther McVey, Suella Braverman, Anne-Marie Trevelyan, Ranil Jayawardena, Rehman Chishti, Sam Gyimah, Will

[115] BBC News, 'Warsi's Letter and Cameron's Response' (*BBC News*, 2014) <https://www.bbc.co.uk/news/uk-politics-28657623> accessed 19 January 2020.
[116] Matthew Tempest, 'Cook Resigns from Cabinet Over Iraq' (*the Guardian*, 2003) <https://www.theguardian.com/politics/2003/mar/17/labour.uk> accessed 19 January 2020.
[117] BBC News, 'BBC ON THIS DAY | 1 | 1990: Howe Resigns Over Europe Policy' (*News.bbc.co.uk*, 1990) <http://news.bbc.co.uk/onthisday/hi/dates/stories/november/1/newsid_2513000/2513953.stm> accessed 19 January 2020.
[118] Christopher Huhne, Alan Travis and Patrick Wintour, 'Lawson Sparks Reshuffle' (*the Guardian*, 2020) <https://www.theguardian.com/politics/1989/oct/27/past.christopherhuhne> accessed 14 March 2020.
[119] Pippa Crerar and Peter Walker, 'Justice Minister Phillip Lee Resigns Over Brexit Policy' (*the Guardian*, 2020) <https://www.theguardian.com/politics/2018/jun/12/justice-minister-phillip-lee-resign-over-brexit-policy> accessed 14 March 2020.
[120] Grant Costello, 'Just How Many Ministers Have Been Sacked or Quit Theresa May's Government?' (*Scottish National Party*, 2020) <https://www.snp.org/just-how-many-ministers-have-been-sacked-or-quit-theresa-mays-government/> accessed 14 March 2020.

Quince resign their position being disagree to the Withdrawal Agreement and Political Declaration.[121]

These resignations tend to suggest that the convention of collective responsibility remains a significant force in government.

Marshall identified three implications arising from the convention: (1) confidence; (2) unanimity; and (3) confidentiality.[122]

1. **Confidence** implies that a government can remain in office unless it has lost the confidence of the House of Commons.[123]
2. **Unanimity** is considered the most important practical aspect of the convention,[124] in particular in stating that all members of the government obey the convention when they speak and vote in unity in Parliament, apart from when the Prime Minister and the cabinet make an exception, i.e., a free vote or an "agreement to differ".[125]
3. **Confidentiality** recognizes that, as a universally applicable situation, unanimity is a constitutional fiction, but one that must be maintained. In addition, it is believed to enable frank ministerial discussion within cabinet and government.[126]Furthermore, this confidentiality of cabinet discussion is secured by forbidding any revelations by members of cabinet, [127] while the publication of a former cabinet member's memories of his/her political life account must also defer to this cabinet secrecy.[128]

[121] Grant Costello, 'Just How Many Ministers Have Been Sacked or Quit Theresa May's Government?' (*Scottish National Party*, 2020) <https://www.snp.org/just-how-many-ministers-have-been-sacked-or-quit-theresa-mays-government/> accessed 14 March 2020.
[122] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55.
[123] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.
[124] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.
[125] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.
[126] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.
[127] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.
[128] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 55-61.

This aspect was exemplified by the well-known case of Attorney-General v Jonathan Cape Ltd (1976) QB 752[129], which considered the disclosing of details of cabinet discussions.[130] Crossman was a cabinet minister in the Labour government of Harold Wilson in the 1960s, whose diaries (which included accounts of discussions and disagreements at cabinet meetings) were subsequently published. The government sought to bring an injunction to prevent further publication of his diary, but Crossman's publishers argued that the duty of cabinet confidentiality is a convention and therefore cannot be enforced by the courts.[131] This case, which took place in 1975, turned on whether cabinet secrecy was enforceable by the court. The Lord Widgery CJ then considered the nature of collective responsibility as follows:

> I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practiced and equally strong evidence that it is on occasion ignored.[132]

On the question of cabinet confidentiality, the Lord Chief Justice stated that 'the cabinet is at the very centre of national affairs and must be in possession at all times of information which is secret or confidential'. The case therefore accepted the principle of the legal obligation of cabinet secrecy but concluded that its application depended on the legal value given to a constitutional convention. The Lord Chief Justice accepted that ministers owed each other a legally enforceable duty of confidentiality, but that this duty did not derive from the convention turning into law. Instead, the court relied on existing common law to fulfil the ultimate aim of the convention: 'by "stretching" common law principles about confidentiality in respect of other types of relationships, particularly marriage and commercial undertakings'.[133]

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[129] All Answers ltd, 'Attorney-General v Jonathan Cape Ltd' (Lawteacher.net, January 2020) <https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1> accessed 27 January 2020.
[130] All Answers ltd, 'Attorney-General v Jonathan Cape Ltd' (Lawteacher.net, January 2020) <https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1> accessed 27 January 2020.
[131] All Answers ltd, 'Attorney-General v Jonathan Cape Ltd' (Lawteacher.net, January 2020) <https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1> accessed 27 January 2020.
[132] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 228.
[133] Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 9.

All members of government are therefore bound by the doctrine of collective responsibility, except 'where it is explicitly set aside'.[134] The 2016 House of Commons briefing paper on collective responsibility noted that there are two ways to suspend the normal rules of collective responsibility, i.e. (1) free votes or (2) an agreement to differ.[135] A free vote is 'one where there is no stated Government policy on the issue',[136] while an agreement to differ is 'a situation where the Government has adopted a policy but has allowed ministers to dissent publicly from that policy to some degree for a limited period'.[137]

The Prime Minister can formally waive the convention if there are pronounced political disagreements within cabinet, with the Prime Minister then potentially finding it more expedient to suspend the convention, rather than find it breached by members of the cabinet.[138]

Between 1931 and 1932, the coalition government, led by Prime Minister Ramsey MacDonald, disagreed over economic policy, and in particular over the issue of tariff duties. This resulted in MacDonald suspending the convention, and thus allowing cabinet to dissent.[139]

1. In 1975, this was also a measure taken by Labour Prime Minister, Harold Wilson, when he permitted ministers to express their views publicly in relation to the referendum on the UK's continued membership of the European Economic Community.[140]
2. In 2008, the Labour Prime Minister, Gordon Brown, allowed some leeway concerning the Embryology Bill, in order to accommodate the beliefs of Catholic ministers.[141]
3. In 2010, during the coalition government led by David Cameron, there was an inevitable relaxation of the rules on collective responsibility in relation to policy,

[134] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.
[135] Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 8.
[136] Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 11.
[137] Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 14.
[138] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.
[139] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.
[140] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.
[141] Rosa Prince, 'Gordon Brown Allows Free Vote on Embryos' (*Telegraph.co.uk*, 2008) <https://www.telegraph.co.uk/news/politics/labour/1582685/Gordon-Brown-allows-free-vote-on-embryos.html> accessed 19 January 2020.

> in response to political differences between the Conservatives and the Liberal Democrats. More recently, David Cameron also allowed ministers to campaign on different sides of the referendum debate relating to Britain's continued membership of the EU.[142]

It can therefore not be considered that implementation of the conventions remains the responsibility of the Prime Minister, who has the power to force ministers to strictly follow the convention, or he/she can rule that, if circumstances demand, cabinet members need to explain any opposing views. This was exemplified by Tony Blair, as a "New Labour" Prime Minister, needing to appoint John Prescott as Deputy Prime Minister (i.e. as the face of traditional Labour), which extended to Blair omitting to take any action against Prescott when he criticized New Labour's policy of creating academy schools.[143] Furthermore, the UK's entrance into the Iraq War was so controversial it split the Labour Party, leading to Blair not wishing to lose his International Development Secretary, Clare Short, despite her criticism of the way in which the decision was made. On the other hand, Cameron recently reinforced the convention with his statement that ministers should not criticize the government's negotiating position concerning EU reform.[144]

However, it should be noted that Cabinet Collective Responsibility still plays a key role, despite some commentators questioning whether this convention remains applicable for contemporary government.[145] It has been pointed out that a convention that first emerged in the eighteenth century, in order to create and maintain a sense of coherence among disparate ministerial forces in the face of the Monarch: 'is not necessarily appropriate in age, not just of democracy, but of greater and more direct participative democracy'.[146] However, the 2014 report of the House of Lords constitution committees on the Constitutional Implications of Coalition Government

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[142] BBC News, 'Cameron Confirms Free Vote On EU' (*BBC News*, 2016) <https://www.bbc.co.uk/news/av/uk-politics-35236381/eu-referendum-david-cameron-confirms-conservative-mps-will-have-free-vote> accessed 19 January 2020.
[143] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 98-101.
[144] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 98-101.
[145] Michael Everett, 'Collective Responsibility' (House of Commons Library 2016).
[146] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press.

noted that collective responsibility is constitutionally important for two reasons.[147] Firstly, the process of collective decision-making within government makes it more likely that better decisions are reached[148] and secondly, it enables Parliament to hold the government as a whole responsible for its policies, decisions and actions. Hence, 'ministers cannot absolve themselves of responsibility for a policy by claiming other ministers decided it'.[149]

This well-known cabinet convention was reinterpreted in 2010 by the Cabinet Office, which stated that 'all government ministers are bound by the collective decisions of cabinet and cabinet committees, save when it is explicitly set aside'.[150] The Cabinet Manual (2011) also stated that ministers are bound by the collective decision of the cabinet. In practice, this means that any decision of the cabinet (or one of its committees): 'is binding on all members of the government, regardless of whether they were present when the decision was taken or their personal views'.[151] Following, this, the Cabinet Office's Ministerial Code (2019) sets out the ways collective responsibility should work in practice, including that the principle of collective responsibility requires that ministers should be able to express their views frankly in private, while maintaining a united front once decisions have been reached. This, in turn, requires that the privacy of opinions expressed in cabinet and Ministerial Committees are maintained, including in any correspondence.

Most recently, Prime Minister Theresa May's attempts to deliver Brexit have exposed a growing concern that there has been an increased, and very public, weakening of cabinet collective responsibility. This included the significant dissent in cabinet for

[147] HM Government response to the committee's report on the Constitutional Implications of the Coalition Government, 2014.
[148] HM Government response to the committee's report on the Constitutional Implications of the Coalition Government, 2014.
[149] HM Government response to the committee's report on the Constitutional Implications of the Coalition Government, 2014.
[150] The Cabinet Manual, A guide to laws, conventions and rules on the operation of government, (1st edn October 2011). https://www.gov.uk/government/publications/cabinet-manual.
[151] The Cabinet Manual, A guide to laws, conventions and rules on the operation of government, (1st edn October 2011). https://www.gov.uk/government/publications/cabinet-manual.

Theresa May's Brexit plan,[152] with up to eleven cabinet ministers having been believed to have spoken out against the deal.[153]

1. Liz Truss, the Chief Secretary to the Treasury, stated that the members of the cabinet were 'caught between the devil and the deep blue sea'[154] and openly criticized "male macho" cabinet colleagues.[155]
2. The Government's Chief Whip, Julian Smith, criticized an unprecedented breakdown in discipline in cabinet, noting that it was the 'worst example of ill-discipline in a cabinet in British political history'.[156]
3. A number of further cabinet ministers have also opposed the government by abstaining, rather than voting against, a motion to prevent the UK leaving the EU without a deal.[157]

This breakdown of discipline within Theresa May's cabinet has raised several questions concerning the purpose of the Convention, an aspect frequently overlooked in these discussions. Historically speaking, Collective Responsibility was developed in order to protect the government from an interfering Monarch seeking to divide his/her ministers. This means that the Convention had a clear and vital constitutional purpose during the eighteenth century and the early years of the UK's constitutional settlement. However, this is no longer relevant, as the UK is now a constitutional monarchy, whereby the role of the Monarch has been minimized in favour of ministers.

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[152] Heather Stewart, 'Theresa May's Brexit Plan: A Split Cabinet, A Split Party and A Split Nation' (*the Guardian*, 2018) <https://www.theguardian.com/politics/2018/nov/14/theresa-may-wins-cabinet-backing-for-brexit-deal> accessed 16 January 2020.
[153] Heather Stewart, 'Theresa May's Brexit Plan: A Split Cabinet, A Split Party and A Split Nation' (*the Guardian*, 2018) <https://www.theguardian.com/politics/2018/nov/14/theresa-may-wins-cabinet-backing-for-brexit-deal> accessed 16 January 2020.
[154] Heather Stewart, 'Theresa May's Brexit Plan: A Split Cabinet, A Split Party and A Split Nation' (*the Guardian*, 2018) <https://www.theguardian.com/politics/2018/nov/14/theresa-may-wins-cabinet-backing-for-brexit-deal> accessed 27 January 2020.
[155] Rob Merrick, 'Tory Cabinet Descends into Open Warfare as Liz Truss Launches Extraordinary Attack on Michael Gove and 'Macho' Colleagues' (*The Independent*, 2018) <https://www.independent.co.uk/news/uk/politics/liz-truss-cabinet-brexit-tory-michael-gove-defence-spending-nhs-conservative-a8418761.html> accessed 16 January 2020.
[156] Julian Smith, ' Chief whip attacks cabinet\'s post-election Brexit strategy' (BBC 2019) < Chief whip attacks cabinet\'s post-election Brexit strategy> accessed 16/01/2019.
[157] Chiara Giordano and Benjamin Kentish, 'Which Conservative Ministers Abstained on The No-Deal Brexit Vote?' (*The Independent*, 2019) <https://www.independent.co.uk/news/uk/politics/brexit-latest-news-cabinet-conservative-no-deal-abstain-for-against-a8821931.html> accessed 16 January 2020.

Roch Dunin-Wasowicz maintained that:

> It is clear that a breakdown in cabinet discipline during the Brexit process does not signal the demise of Collective Responsibility, but instead shows that the government has simply failed to maintain the standard of solidarity set by it.[158]

He further noted:

> This failure is demonstrated, not mitigated, by the sheer number of ministers who have resigned in accordance with the Convention…Collective Responsibility is still working, although our politics, at least for the time being, might not be.[159] …Even, collective unity alongside confidence and trust in May's administration seen the only way to govern, the lack of unity undermines the leadership of the prime minister.[160]

This therefore leads to the conclusion that there is no set of rules in place to provide rigid structures incapable of being changed. Rather, the practice of convention dictates that the Prime Minister is the principal authorized authority determining the meaning of the convention, and whether and how it should be applied, and when it is convenient to relax (or ignore) normal procedures or willing to bear the costs of ignoring the convention.

## 2.6 Individual ministerial responsibility

The constitutional concept of individual ministerial responsibility is a critical aspect of the "Westminster Model" of Parliamentary democracy, i.e. ministers are responsible

[158] Roch Dunin-Wasowicz, 'Brexit And Collective Cabinet Responsibility: Why the Convention Is Still Working' (*LSE BREXIT*, 2019) <https://blogs.lse.ac.uk/brexit/2019/05/20/brexit-and-collective-responsibility-why-the-convention-is-still-working/> accessed 27 January 2020.
[159] Roch Dunin-Wasowicz, 'Brexit And Collective Cabinet Responsibility: Why the Convention Is Still Working' (*LSE BREXIT*, 2019) <https://blogs.lse.ac.uk/brexit/2019/05/20/brexit-and-collective-responsibility-why-the-convention-is-still-working/> accessed 16 January 2020.
[160] Stephen Clear, 'Theresa May Was Right to Reimpose Collective Ministerial Responsibility – It's the Only Way to Govern' (*The Conversation*, 2018) <https://theconversation.com/theresa-may-was-right-to-reimpose-collective-ministerial-responsibility-its-the-only-way-to-govern-99608> accessed 16 January 2020.

to Parliament for both the operation of their department and their personal conduct in public life.[161] This convention determines a constitutional mechanism setting down the accountability of ministers to Parliament, both for their action and other agencies acting in their departments.[162] The convention, like most conventions, are formed in general terms. Thus, ministers are required to take responsibility for any misconduct in their ministerial departments, including facing the prospect of being asked to resign.[163]

The classic doctrine of individual ministerial responsibility dictates that a minister is responsible for every action of his/her department,[164] with Dicey stating that each minister is legally responsible for every act of the Crown in which he/she takes part,[165] as exemplified by the case of Crichel Down.[166] In 1938, a land at Crichel Down in Dorset had been purchased through power of compulsory acquisition by the Air Ministry from its owners for use for bombing practice by the Royal Air Force. It is promised in parliament that to offer the land back to its former owners, after when it was no longer required for the purpose for which it had been bought. But a claim by one of the former owners an interest in re-acquiring land when it was offered back refused. The land was handed over to the Ministry of Agriculture. The events bring about an official inquiry which reach a conclusion that civil servant in the Ministry of the Agriculture had acted in arbitrary and dishonest manner.[167] As a result of this report and heavy criticism, in Parliament and outside, of the conduct of his department, the minister resigned. He said in the House: 'I, as minister, must accept full responsibility to parliament for any mistakes and inefficiency of officials in my Department, just as, when my officials bring off any successes on my behalf, I take full credit for them'[168]

Marshall argued that this responsibility is employed in the strict sense and thus ministerial resignations are seen as an important tool for accountability in theory, but

[161] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.
[162] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 249-258.
[163] Oonagh Gay and Thomas Powell, 'Individual Ministerial Responsibility- Issues and Examples' (2004) Research Paper 04/31 House of Commons Library.
[164] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[165] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 250.
[166] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[167] Report of public inquiry into the disposal of land at Crichel Down (Cmd 9176/1954) https://api.parliament.uk/historic-hansard/commons/1954/jul/20/crichel-down
[168] Crichel Down, Hansard House of Parliament Debates, HC Deb 20 July 1954 vol 530 cc1178-298.

not necessarily in practice.[169] He stated that, even in the few cases in which the traditional doctrine of individual responsibility can be considered to have operated, (i.e. as in the case of Crichel Down (1954) or the Falklands (1982)), there remain examples of marginal cases in which no resignations took place in the face of a series of scandals.[170] This was exemplified by the following examples:

1. John Strachey refused to offer his resignation following the failure of the West African groundnuts scheme.[171]

2. Lennox-Boyd, the Colonial Secretary in Attlee's administration following the Second World War, failed to resign when brutal treatment and killing of detainees at a prison camp in Kenya was debated in the House of Commons in 1959.[172]

3. In 1964, Julian Amery did not resign when the Ministry of Aviation was found to have made large over-payments to Ferranti Ltd for defence contract work.[173]

4. In 1971, the President of the Board of Trade failed to offer his resignation when the Vehicle and General Insurance Company Collapsed, despite a Tribunal concluding that this was due to negligence on the part of the Board of Trade in exercising its functions.[174]
5. In the 1960s, there were also no resignations following a series of espionage scandals.[175]
6. No resignations were made in response to the uncovering of large-scale miscalculations concerning the cost of the Concorde aircraft development programme.[176]

[169] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 242.
[170] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 62.
[171] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[172] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[173] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[174] Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 251.
[175] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 64.
[176] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 64.

7. In 1982 the then Home Secretary, William Whitelaw, did not resign following the failure to protect the Queen when an intruder was able to break into Buckingham Palace.

Marshall argued that these cases of non-resignation demonstrate that the classic doctrine of individual ministerial responsibility is unworkable in practice.[177] He offered two reasons for ministerial ability to escape responsibility:[178] firstly, ministers are protected by the assumption of collective responsibility[179] and secondly, the chain of command or accountability is extended administratively and ministers are defended by the argument that he/she was unable to foresee and control a specific error.[180]

Woodhouse noted the lack of any ministerial resignations, despite considerable evidence of a series of misjudgements within John Major's government between September 1992 and January 1993.[181] She argued that resignation is considered "a final gesture" or "ultimate punishment", and thus there are only two situations in which resignation is demanded:[182] (1) personal fault (i.e. Parkinson and Mellor resigning following continuing revelations about their private relationships and Nicholls following an arrest for drinking-driving)[183] and (2) the second situation is where a minister knowingly misleads parliament[184] (i.e. the resignations of Carrington and Brittan).[185]

Although political misjudgement requires ministerial responsibility, Woodhouse argued that the issue of departmental misjudgement is ambiguous and depends on

[177] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 222-223.
[178] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 222-223.
[179] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 222-223.
[180] Geoffrey Marshall, Constitutional Conventions: The Rules and the Forms of Political Accountability (1984) Clarendon Press-Oxford 222-223.
[181] Diana Woodhouse, 'Ministerial Responsibility in the 1990S: When Do Ministers Resign?' (1993) 46 Parliamentary Affairs 277.
[182] Diana Woodhouse, 'Ministerial Responsibility in the 1990S: When Do Ministers Resign?' (1993) 46 Parliamentary Affairs 279.
[183] Diana Woodhouse, 'Ministerial Responsibility in the 1990S: When Do Ministers Resign?' (1993) 46 Parliamentary Affairs 279.
[184] Diana Woodhouse, 'Ministerial Responsibility in the 1990S: When Do Ministers Resign?' (1993) 46 Parliamentary Affairs 279.
[185] Diana Woodhouse, 'Ministerial Responsibility in the 1990S: When Do Ministers Resign?' (1993) 46 Parliamentary Affairs 279.

government and party interests.[186] Furthermore, she stated that it is always possible to escape ministerial responsibility[187] due to collective cover offering ministers important protection,[188] thus a minister need not relinquish his/her position if she/he receives clear support from the Prime Minister and his/her cabinet colleagues.[189] Woodhouse highlighted that most Prime Ministers are reluctant to accept ministerial resignations, as these tend to weaken the public credibility of the government and can indicate a lack of control. She noted that the distinction between high level policy and administrative matters can also provide protection for ministers, i.e., the escape of thirty-eight Republican prisoners from the Maze Prison in Northern Ireland in 1983 was seen as an administrative error and therefore James Prior, Secretary of State for Northern Ireland was not required to offer his resignation.[190]

A minister can also reduce his/her responsibility by blaming advisers for incorrect advice or insufficient implementation. Woodhouse noted that a minister is only required to resign over matters of high policy, but (due to this being ambiguous) there are many ways to escape responsivity, leading to a gradual erosion of the convention of individual ministerial responsibility.[191]

However, between 1989 and 2014, there were a number of ministerial resignations over the misconduct of their departments, including the following:

1. In 1989, Edwina Currie offered her resignation over the public alarm caused by her claim that ‘most of the egg production in this country, sadly, is now affected with salmonella’.[192]

[186] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.
[187] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.
[188] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.
[189] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.
[190] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.
[191] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[192] Alan Doig, THE RESIGNATION OF EDWINA CURRIE: A WORD TOO FAR, *Parliamentary Affairs*, Volume 42, Issue 3, July 1989, Pages 317–329, https://doi.org/10.1093/oxfordjournals.pa.a052201.

2. In 1990, Mr. Nicolas Ridley resigned after accepting responsibility for making intemperate remarks about a fellow Member state of the European community.[193]
3. Stephen Byers resigned in 2002 as Secretary of State for Transport, due to shortcomings in his office.[194]
4. In 2002 the Secretary of State for Education offered resignation due to criticism over examinations.[195]
5. In 2005, the Work and Pensions secretary, David Blunkett, resigned for the second time, due to breaching a rule that a former minister should consult the advisory committee on business appointments they intended to take within two years of leaving the office.[196] He had previously been forced to resign as Home Secretary after an e-mail emerged showing a visa application for the nanny of his former lover had been fast-tracked.[197]
6. In 2011, the Defence Secretary, Liam Fox, offered his resignation over disclosures that a close friend, Adam Werritty, after an investigation and report by the Cabinet Secretary, had gained high-level access meetings by representing himself as a Dr. Fox's adviser.[198]
7. In 2014, Mark Harper, the Minister for Immigration, resigned after discovering that his self-employed cleaner did not have permission to work in the UK.[199]

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[193] Mark Fineman, 'British Trade Minister Quits Post to End Furor: Europe: Ridley's Insults Against Germany And France Brought Cries of Protest. Thatcher Replaces Him with A Proponent of Economic Unity.' (*Los Angeles Times*, 1990) <https://www.latimes.com/archives/la-xpm-1990-07-15-mn-257-story.html> accessed 21 January 2020.

[194] BBC News, 'BBC NEWS | Politics | Stephen Byers Quits Government' (*News.bbc.co.uk*, 2002) <http://news.bbc.co.uk/1/hi/uk_politics/2013061.stm> accessed 21 January 2020.

[195] BBC News, 'BBC NEWS | Education | Education Secretary Resigns' (*News.bbc.co.uk*, 2002) <http://news.bbc.co.uk/1/hi/education/2359695.stm> accessed 21 January 2020.

[196] Sarah Left and Tom Happold, 'Blunkett Resigns' (*the Guardian*, 2004) <https://www.theguardian.com/uk/2004/dec/15/davidblunkett.immigrationpolicy1> accessed 21 January 2020.

[197] Sarah Left and Tom Happold, 'Blunkett Resigns' (*the Guardian*, 2004) <https://www.theguardian.com/uk/2004/dec/15/davidblunkett.immigrationpolicy1> accessed 21 January 2020.

[198] Toby Helm, 'Why Liam Fox Had to Resign' (*the Guardian*, 2011) <https://www.theguardian.com/politics/2011/oct/15/liam-fox-resignation-conservatives> accessed 21 January 2020.

[199] Tim Ross, 'Mark Harper Resigns After Hiring Illegal Immigrant' (*Telegraph.co.uk*, 2014) <https://www.telegraph.co.uk/news/politics/conservative/10626150/Mark-Harper-resigns-after-hiring-illegal-immigrant.html> accessed 21 January 2020.

8. The Minister for Culture Media and Sport, Maria Miller, was forced to resign following public anger over allegations concerning her expenses.[200]

The above examples highlight that the acceptance of responsibility has not inevitably led to ministerial resignations in the past, but that, more recently, this seems to have become an effective a tool for controlling individual ministers, particularly when it comes to failures within their departments. In effect, there is no certain and strict rule to determine when (and whether) a minister should resign, and that resignations cannot be seen as an automatic result of any breach of the convention. Like other conventions, this remains an ambiguous and flexible doctrine, open to interpretation, with its relevance decided on a case-by-case basis.[201] Similarly, Doig remarks that individual responsibility is 'relative rather and absolute' and whether to accept responsibility for minister' actions depends range of circumstances.[202] For example, most recently, when Home secretary, Priti Patel, is facing allegations of breaching the ministerial code for bullying allegations across three government departments,[203] Prime minister, Boris Johnson, refused to sack Patel despite an inquiry by his independent adviser Sir Alex Allan that concluded she had broken the ministerial code by bullying allegations across three government departments even if she was not aware she was bullying staff.[204]

This is unusual. Although Boris Johnson faced a lot of criticism, he has decided to keep her in her role by vigorously defending the Home Secretary. Johnson must have thought that he can that bear up any political criticism and media attack on this incident.

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[200] Georgia Graham, 'Maria Miller Resigns as Culture Secretary Over Expenses Claims' (*Telegraph.co.uk*, 2014) <https://www.telegraph.co.uk/news/newstopics/mps-expenses/conservative-mps-expenses/10754010/Maria-Miller-resigns-as-Culture-Secretary-over-expenses-claims.html> accessed 21 January 2020.

[201] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016)

[202] Alan Doig, The Double Whammy: The Resignation of David Mellor, MP[1], *Parliamentary Affairs*, Volume 46, Issue 2, April 1993, Pages 167–178, https://doi.org/10.1093/oxfordjournals.pa.a052410

[203] Rajeed Syal and Heather Stewart, 'Bullying inquiry 'found evidence Priti Patel broke ministerial code'' (The Guardian) https://www.theguardian.com/politics/2020/nov/19/boris-johnson-expected-to-rule-on-priti-patel-bullying-claims-within-weeks accessed 7 February 2021.

[204] Rajeed Syal and Heather Stewart, 'Bullying inquiry 'found evidence Priti Patel broke ministerial code'' (The Guardian) https://www.theguardian.com/politics/2020/nov/19/boris-johnson-expected-to-rule-on-priti-patel-bullying-claims-within-weeks accessed 7 February 2021.

It can, therefore, be said that ministerial responsibility depends on the political values of the day. Finer argued that 'whether a minister is forced to resign depends on three factors; on himself, his Prime Minister and his party'.[205] He noted that minister cannot refuse resignation, 'if the minister is yielding, his Prime Minister unbending, and his party is out for blood.'[206] According to Finer, a minister's fade therefore depends, first, on his or her ability to endure against bitter criticism and in the end turn down in his or her fortunes or, failing that, an opportunity to protect minister career.[207] The second factor, which determines a minister's fate, is the extent to which he or she is supported by the prime minister.[208] The collective responsibility protect ministers from individual responsibility. A minister's fate depends, lastly, on his or her ability to standing with the party.[209] If minister would retain the support of Government Backbenchers, it possible for him to continue in office.

It should be noted that, in relation to the issue of when ministers should resign, a distinction between "responsibility" and "accountability" was drawn up by the Public Service Committee on the individual responsibility of ministers in 1996.[210] Woodhouse noted that *responsibility* implies direct personal involvement in an action or decision and thus taking personal credit or blame for that action or decision, while *accountability* concerns the constitutional necessity for a minister to account to Parliament for his/her departments and agencies.[211] This implies that a minister is *accountable* for all actions and decisions in his/her department, but is not *responsible,* i.e. in the sense of being blamed.[212] Thus, the government has confirmed that this distinction provides clarity, dismissing the traditional concept of ministers being held responsible for all that happens in their department.[213] In addition, it serves an ambiguous constitutional purpose, suggesting that accountability is simply an aspect of responsibility.

[205] S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 393.
[206] S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 394.
[207] S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 386.
[208] S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 386.
[209] S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 377-396.
[210] The Public Service Committee on the individual responsibility of ministers in 1996.
[211] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[212] Diana Woodhouse, 'Ministerial Responsibility: Something OId, Something New' [1997] Public Law 5-6.
[213] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 1-16.

However, Tomkins rejected this approach arguing that the resolution still provides considerable opportunity to escape ministerial responsibility.[214] Because, in his view, the convention was concerned loosely in resolution and thus the convention of ministerial responsibility still is subject to interpretation.[215] Similarly Woodhouse believes that ministers seek to escape liability by narrowing the implementation of the convention, resulting in the distinction between *responsibility* and *accountability* being used a tool to reduce the situations in which ministers can be blamed.[216] This led her to conclude that: 'on this basis, ministers can continue to distance themselves from personal responsibility and the government accepts ministerial responsibility accordingly'[217].

The Public Service Committee Second Report on Ministerial Accountability and Responsibility was published in 1996, noting that:

> It is not possible absolutely to distinguish an area in which a minister is personally responsible, and liable to take the blame, from one in which he is constitutionally accountable. Ministerial responsibility is not composed of two elements which have a clear break between the two.[218]

Further, the committee considered 'proper and rigorous scrutiny and accountability' to be a more important aspect of ministerial responsibility than Parliament's ability to force that minister's resignation.[219]

In July 1996, the committee also recommended that the House of Commons should adopt a resolution on accountability, with the government encouraged to explicitly determine how ministers exercise their responsibilities to Parliament.[220] Furthermore, the parliamentary resolutions of 1997 stated that ministers have a clear obligation to

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[214] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press 148-159.
[215] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press 148-159.
[216] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[217] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[218] Oonagh Gay, 'Questions of Procedure for Ministers' (Home Affairs Section - House Of Commons Library 1996).
[219] Oonagh Gay, 'Questions of Procedure for Ministers' (Home Affairs Section - House of Commons Library 1996).
[220] Oonagh Gay, 'Questions of Procedure for Ministers' (Home Affairs Section - House of Commons Library 1996).

account to Parliament for their departments' policies, decisions, and actions.[221] This implies that ministers should give accurate and truthful information to the House and its Committee and any inadvertent error should be corrected at the earliest opportunity. However, if a minister intentionally misleads the House, he/she will be expected to offer his/her resignation to the Prime Minister.[222] Thus, ministers should be as open as possible with the Parliament.

This resolution has been criticized for simply addressing the obligation to give the Houses of Parliament information concerning their area of responsibility. Woodhouse drew attention to "administration operation" and "policy", arguing that it is possible to see alternatives to the doctrine of individual ministerial responsibility having been developed over recent years.[223] Individual ministerial responsibility was initially viewed as a tool to remove a minister from office, despite unsupported precedents. However, since the turn of the twenty-first century, the convention of ministerial responsibility can be summarized as: firstly, requiring information rather than resignation and secondly, as ministerial "accountability" for all circumstances, but "responsibility" for only some, i.e., if a minister is directly involved in a decision or course of action.[224]

Woodhouse draws attention that the media has become a key factor in determining minister' resignation in twenty-first century.[225] She notes that the media replacing the role of Parliament, which in practice means the party, in holding ministers to account, and even of seizing the role of the Prime Minister.[226]

She underlines that the key factors in the resignations of both Byers and Morris (UK Secretaries of State for Transport and Education, respectively) were the media and

[221] Barry K Winetrobe, 'The Accountability Debate: Ministerial Responsibility' (Home Affairs Section - House of Commons Library 1997).
[222] Barry K Winetrobe, 'The Accountability Debate: Ministerial Responsibility' (Home Affairs Section - House of Commons Library 1997).
[223] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[224] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[225] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[226] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.

the minister.[227] In both cases ministers recognized that they did not successfully fulfil their ministerial role.[228] Each resignation followed sustained criticism of the minister form media and opposition MPs and the ministers buckled under pressures and ultimately fail to endure against harsh criticism.[229]

The media attack ministers unfairly by exposing ministerial errors and misjudgements and, at the very least, it is responsible for keeping such errors in the public eye.[230] It highlights specifically apparent personal failings. As a result, it could be ministers more easily accept their deficiency than previously.[231]

In so doing, she argues that media approach raises the possibility that what are commonly understood as ‘departmental fault’ resignations may be more appropriately included an expanded category of personal fault. Hence, ‘causal responsibility’, with its complication of the policy/operations and accountability/responsibility distinctions, expanding towards ‘role responsibility’. The role responsibility is to be included as a broader category of personal fault. Thus, ministers are accountable for their own actions, as these relate to their private lives, their political judgements, and the way in which they oversee and account for their departments.

Scott emphasises that enforcement of conventional rules depends on broad political acceptance and upon the political pressure brought about by publicity given to violence of the rule.[232] Scott therefore suggests that the mechanism for determining whether ministers had acted according to the requirements of the convention of ministerial responsibility or breached the fundamental rules of accountability should be provided. With his words, ‘Attention needs to be given to machinery whereby the observance by

[227] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[228] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[229] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[230] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[231] Diana Woodhouse, 'UK Ministerial Responsibility In 2002: The Tale of Two Resignations' (2004) 82 Public Administration 1-19.
[232] Sir R Scott, "Ministerial accountability", 1996 Public Law 410-26, 1-13.

government of its obligations of accountability can be enforced, or at least monitored.'[233]

The growth of select committees, and particularly the reforms undertaken in 1979, has had a significant impact on accountability.[234] This included the opportunities afforded for detailed and sustained Parliamentary scrutiny of ministerial and departmental policy, through direct and public questioning of ministers and, in particular, officials, i.e., ministers and officials required to explain their actions and their dealings with each other. A further significant aspect has been government reforms of the civil service and traditional departments, particularly through the creation of the "Next Steps" executive agencies, in which officials have been awarded more direct responsibility for operational issues, resulting in a number of changes to traditional forms of Parliamentary accountability.[235]

Important historical developments in this area concern guidance to ministers. In January 1917, the Secretary to the War Cabinet, Maurice Hankey, circulated a document entitled "Rules of Procedure" to government ministers. Blick considered this document to be the first example of official texts setting out the principles, rules, and practices of the UK governmental system.[236] This was followed in 1945 by "Questions of Procedure for Ministers", which set out information related to the role of ministers. More detailed versions of this document were subsequently published in 1992 and 1997, entitled the "Ministerial Code", with an increased focus on select committees' scrutiny of the implementation of government policy, as well as the development of a twenty-four-hour rolling news culture. This was updated again in 2007. The latest version of the Ministerial Code was published in August 2019.

Barber argued that the need for such guidelines arose from uncertainties concerning the meaning and application of individual ministerial responsibility.[237] This raises the issue of the potential influence of this codification on the nature and function of the convention, including whether it can resolve disagreements concerning the

[233] Sir R Scott, "Ministerial accountability", 1996 Public Law 410-26, 1-13.
[234] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 229-245.
[235] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 229-245.
[236] Andrew Blick, The *Codes of The Constitution* (1st Edn, HART Publishing 2019).
[237] Brazier R, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY 262.

mechanisms required for its application, i.e., whether it is sufficient to understand the nature and implementation of current ministerial responsibility.

Barber noted that 'since its publication in 1992, the code has grown in political strength' and 'was accepted as the source of the relevant constitutional obligation'.[238] Ministers who have more recently been considered guilty of misconduct in their department have been seen to violate the code. Thus, the code has been viewed as creating a new convention, one that places a duty on ministers to follow its rules, with breach resulting in political censure and the potential for the minister to lose his/her position. The code has thus been determined by an established set of rules, which renders it constitutionally obligatory, i.e., it forms an authoritative statement of ministerial responsibility.[239]

The Ministerial Code states that ministers are responsible for interpreting the code, but that, at the same time, they only hold office for so long as they retain the confidence of the Prime Minister, i.e., they are personally responsible for deciding how to act and conduct themselves in the light of the code, as well as for subsequently justifying their actions and conduct to Parliament and the public. However, the Prime Minister remains the ultimate judge of the standards of behaviour expected of a minister, along with responsibility for the consequences of any breach of these standards.[240]

It should also be noted that there have recently been a number of developments in the system of monitoring the conduct of ministers and members of Parliament through the Committee on Standards in Public life, the register of members' interest and the advisory committee on business appointments.[241]

It can be concluded that individual ministerial responsibility convention is essentially political in nature. There is no agreement on its application. Its operation depends on a range of factors. The convention has been evaluated slowly accordance with changing circumstances. Their breach brings political concerns. The functions of

[238] Brazier R, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY 262.
[239] Brazier R, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY 262.
[240] Ministerial Code, Cabinet Office January 2018.
[241] Oonagh Gay and Thomas Powell Individual Ministerial Responsibility- Issues and Examples Research Paper 04/31, 5 April 2004, Parliament and Constitution Centre, House of Commons Library.

conventions often necessitate flexibility.

## 2.7 Caretaker convention

The caretaker convention supports the concept of the accountability of government and is important for managing elections in an effective manner during periods of political and economic uncertainty.[242] This section outlines the features and application of the caretaker conventions in the UK.

The caretaker period continues during the period following a general election, until a new government has been formed capable of commanding the support of the House of Commons. Schleiter and Belu stated that the caretaker period in the UK is relatively short, and transitions and government formulations are easily achieved, due to the plurality of the electoral system generally resulting in single-party majorities and avoids any need for complex coalition negotiations to form a government.[243] The UK rules governing caretaker situations have historically been underdeveloped, due to the existence of very short transition periods and thus only a small risk of contentious arising in relation to the caretaker conventions.[244]

However, Schleiter and Belu noted that caretaker periods are now becoming increasingly likely, due to: (1) changes to the rules governing the election timetable; (2) new restrictions on the executive by the Fixed-term Parliaments Acts (2010); and (3) changes in electoral behaviour. This alteration in the length of caretaker periods demonstrates the need to develop detailed caretaker conventions,[245] as these remain

[242] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91.
[243] Petra Schleiter, Valerie Belu, The Challenge of Periods of Caretaker Government in the UK, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, https://doi.org/10.1093/pa/gsu027
[244] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 5.
[245] Petra Schleiter, Valerie Belu, The Challenge of Periods of Caretaker Government in the UK, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, https://doi.org/10.1093/pa/gsu027

in need of clarification, despite having been recently discussed in detail and now forming part of the Cabinet Manual.[246]

Schleiter and Belu highlighted the need to differentiate between 'caretaker' and 'purdah' periods, along with their relevant rules.[247]

1. The purdah period is one in which a general election has been called and until any new government has been appointed.
2. The 'caretaker period' is that following a general election, until a new government commanding the support of the House of Commons has been formed.

A period of purdah always takes place before an election, with its rules primarily regulating electoral fairness and caretaker periods should the outcome of an election fail to deliver an overall majority.[248] The current caretaker convention has been criticized for not sufficiently clarifying the differentiation between these periods and rules.[249]

The main reason for the restrictions placed on government activity during this purdah period before an election is to ensure electoral fairness. The purdah rules apply during the period in which the government may still command a majority in the outgoing House of Commons, therefore ensuring that it does not obtain an unfair electoral advantage by inappropriately drawing on the resources of public services to support its activities.[250] In addition, this convention imposes restrictions on government publicity, activity, and relationship with the civil service. For example, Hazell noted

[246] Petra Schleiter, Valerie Belu, The Challenge of Periods of Caretaker Government in the UK, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, https://doi.org/10.1093/pa/gsu027

[247] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 The Political Quarterly 454-461.

[248] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 The Political Quarterly 454-461.

[249] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 The Political Quarterly 454-461.

[250] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 93.

that, during local government or European elections, the incumbent government 'should not use the Government publicity machine to generate good news stories for your party.'[251] Likewise, the convention requires that government agencies avoid partisanship during an election period.[252] These restrictions come into force with the announcement of an election and ends with the closing of polls.[253]

During a caretaker period, however, the incumbent government remains in place, although no longer commanding the confidence of Parliament. The caretaker rules provide for continuity and constraint during this transition period, thus preventing the country from being left without a functioning executive.[254] The caretaker convention holds the incumbent government as the "status quo", until the new government is formed,[255] while at the same time protecting the freedom of action of an incoming government.[256] Thus, until the new government takes office, the caretaker government is required to avoid: (1) any major policy decisions; (2) signing major contracts; (3) undertaking important appointments; and (4) employing public servants for election activities.

Schleiter and Belu argued that the current convention presents caretaker conventions as a post-election extension of the "purdah" or pre-election rules, with no differential being made between rules pertaining to electoral fairness and caretaker periods.[257] As a result, the manual states that, following an election and during the period before

[251] Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (*The Constitution Unit Blog*, 2015) <https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/> accessed 27 January 2020.
[252] Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (*The Constitution Unit Blog*, 2015) <https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/> accessed 27 January 2020.
[253] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 The Political Quarterly 454-461.
[254] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 93.
[255] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 92.
[256] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 92.
[257] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

a new government is in place ‘many of the restrictions set out in para 2.27-2.29 would continue to apply’.[258] This thus leaves a lack of clarity when it comes to the rules that remain in force during a caretaker period.[259]

Schleiter and Belu highlighted that the purdah and caretaker periods are clearly distinguishable.[260] They also specified the reasons for government power being restricted during caretaker periods in the Cabinet Manual, i.e., as to ensure greater clarity to ministers, Members of Parliament, civil servants and the public about what should and what should not happen during these periods. Similarly, Hazell stressed that:

> It would help to keep them conceptually and practically distinct if the Cabinet Office could adopt the term 'caretaker convention' to describe the restrictions on government decision making. The 'purdah' rules describe the restrictions on government publicity, which apply during any election, even when the government has a majority.[261]

Caretaker conventions contain two important aspects: firstly, to guarantee the country is never without an acting government and secondly, to protect the freedom of action of the incoming government.

1. To guarantee the country is never without an acting government, the incumbent government should continue with the management of the country during the transition period, carrying out administrative tasks and dealing with any urgent matters.[262]

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[258] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

[259] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

[260] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

[261] Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (*The Constitution Unit Blog*, 2015) <https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/> accessed 27 January 2020.

[262] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 92.

This was demonstrated by the Labour Prime Minister, Gordon Brown remaining in office pending the completion of coalition talks after his government lost its majority following the general election of May 2010. However, his failure to immediately resign led to some controversy, with Brown being criticized in the media as a "squatter" in Downing Street.[263] The Prime Minister then resigned four days after the election, with a House of Commons committee later confirming that this had been the constitutionally appropriate time.[264]

This event prompts consideration of whether there is a duty placed on an incumbent Prime Minister to remain in office until it becomes clear who will be able to form the next government.[265]

The Cabinet Manual noted:

> Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. This precedent needs to be tested by enough practice to be regarded in future as having established a constitutional convention.[266]

This demonstrates a lack of clarity in UK caretaker conventions which prevents a caretaker government from resigning.

Schleiter and Belu stated that 'to ensure effective governance in the transition period, it is essential that the Prime Minister and government do not resign until the next regular government has been formed'.[267] Likewise, Hazell noted that caretaker conventions guarantee that the country is never left without an acting government.

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[263] Nicola Boden, 'From Green-Eyed Chancellor to the 'Squatter of No10', Gordon Brown Finally Admits He Can't Hang on To Job He Coveted For So Long' (*Mail Online*, 2010) <https://www.dailymail.co.uk/news/election/article-1272278/From-green-eyed-Chancellor-squatter-No10-Gordon-Brown-finally-admits-hang-job-coveted-long.html> accessed 28 January 2020.
[264] House of Commons Political and Constitutional Reform Committee 2011; 11.
[265] Parliament UK, 'Operation of the 'Caretaker Convention' (2015).
[266] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. https://www.gov.uk/government/publications/cabinet-manual
[267] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

However, the current caretaker convention in the UK lacks any written rules to prevent a caretaker government from resigning.[268] The Cabinet Manual sets out that:

> These provisions do not explicitly require the incumbent government to remain in office during the caretaker period until the next cabinet is formed, and also the House of Lords' Constitution Committee concluded that an incumbent Prime Minister has no duty to remain in office until it is clear what form an alternative government might take".[269]

A parliamentary report on the need to update the Cabinet Manual concluded that it should clarify the principle that there must always be a government in place,[270] while at the same time recommending that:

> For the benefit of the media and the general public, the Cabinet Secretary should set out clearly, and well in advance of the forthcoming general election, the Government's view of the constitutional principles which underpin the continuance in office or otherwise of administrations following a general election.[271]

This criticism thus requires further consideration, due to the need for political and economic uncertainty to be effectively managed during caretaker periods, as the country cannot be left without a functioning executive.

2. To protect the freedom of action of an incoming government, a caretaker government should avoid major policy decisions, the signing of major contracts, undertaking important appointments or including public servants in election activities until the new government formed. These conventions act to prevent an outgoing

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[268] Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (*The Constitution Unit Blog*, 2015) <https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/> accessed 27 January 2020.

[269] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. https://www.gov.uk/government/publications/cabinet-manual.

[270] 'House of Commons - Government Formation Post-Election - Political and Constitutional Reform' (*Publications.parliament.uk*, 2015) <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm> accessed 16 January 2020.

[271] 'House of Commons - Government Formation Post-Election - Political and Constitutional Reform' (*Publications.parliament.uk*, 2015) <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm> accessed 16 January 2020.

government from forcing an incoming government to follow major new policies, by ensuring a caretaker government is unable to make any decision capable of binding or limiting the incoming government. The Cabinet Manual clarifies that this restraint should not be detrimental to the national interest, or wasteful of public money, and if urgent decisions need to be made, they can be handled by temporary arrangements or following relevant consultation with the opposition parties.[272] Thus, the guidelines state that a caretaker government should refrain from undertaking significant decisions, and any necessary interim measures must only contain a short-term commitment.

Schleiter and Belt argued that the current form of the convention does not effectively clarify the exact identity of a “major policy decision” and thus fails to offer adequate information relating to the caretaker period.[273] They also noted that some Westminster systems have chosen ‘definitions revolving around the monetary value of the contract’ and ‘many have codified the level of appointment [permitted without consultation during the caretaker period] with precision’[274]. Similarly, critical aspects consist of the need to put in place appropriate protocols for the consultation process between the government and the opposition, should these become necessary. Central questions in need of clarification concern firstly, the degree of agreement required between parties before any decision can be taken and secondly, the identity of those participating in any such consultation.

The guidelines devolve responsibility to the caretaker government when it comes to determining which matters are urgent or in need of consultation, although only urgent, routine, non-controversial and reversible decisions are considered appropriate. The caretaker convention, like other conventions, thus follows common sense political practice.

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[272] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. https://www.gov.uk/government/publications/cabinet-manual.

[273] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 93.

[274] Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (*Blogs.lse.ac.uk*, 2015) <https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 27 January 2020.

Finally, the current conventions lack clarity concerning the end of caretaker periods.[275] The Cabinet Manual is indeterminate in its statement that:

> The point at which the restrictions on financial and other commitments should come to an end depends on circumstances but may often be either when a new Prime Minister is appointed by the Sovereign or where a government's ability to command the confidence of the Commons has been tested in the House of Commons.[276]

In practice, the caretaker government *generally* ends when the Queen invites the individual most likely to form a government and command the confidence of the House of Commons. Where the election delivers a clear majority to a single party, this process is straightforward, with the caretaker period coming to an end when the leader of the majority party is invited to form the new government, which generally takes place within a matter of hours. However, this process becomes more complex when an election fails to deliver a decisive result. The Cabinet Manual states that, under these circumstances, an incumbent government should remain in office until the Prime Minister tenders his or her resignation (and that of the government) to the Queen, i.e. when it becomes apparent that another individual is better placed to form an administration commanding the confidence of the House.

This raises the issue of the circumstances under which it becomes apparent that an incumbent government is unlikely to command the confidence of the House, but the composition of the new government has not yet been established. This highlights the need to ensure greater clarity by carefully defining the period in which the caretaker conventions apply, with the specific duration explicitly announced. Hazell stated that:

[275] 'House of Commons - Government Formation Post-Election - Political And Constitutional Reform' (*Publications.parliament.uk*, 2015) <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm> accessed 16 January 2020.
[276] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. https://www.gov.uk/government/publications/cabinet-manual.

‘it should always be clear to politicians, Whitehall, the media and the public whether a government is a caretaker or not.’[277]

The above discussion therefore leads to the conclusion that it is essential to further improve the clarification of these aspects of the convention in order to enhance its effectiveness.

## 2.8 Convention requiring parliamentary approval before engagement in military action

The decision to engage in armed conflict is a prerogative power. According to constitutional convention, the Prime Minister has the power, on behalf of the Crown, to decide to make a declaration of war, with Parliament having little influence over the use of this power, i.e., “at times the role of the Parliament is little beyond a rubber stamp.”[278] The UK government’s decision to seek parliamentary approval before engaging in the Iraq war in 2003 sparked a debate as to whether the government should always undertake this action in future.

It has now been accepted that a new convention has emerged implying that the government is unable to engage military action overseas without a debate in the House of Commons and a subsequent vote on the deployment of armed forces. However, there remains considerable uncertainty concerning the credibility and proper operation mechanism of the British Parliament in the decision to deploy ordinary military troops. This aspect of the implementation mechanism of the convention is discussed in further detail, in a separate part of this thesis (See Chapter 3, Section 3.2 for whether the convention is established or not, See Chapter 6 for the uncertainty of the operation mechanism of the convention).

[277] Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (*The Constitution Unit Blog*, 2015) <https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/> accessed 27 January 2020.
[278] James Strong, 'The War Powers of The British Parliament: What Has Been Established And What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.

## 2.9 Making and ratifying treaties

The making and ratification of treaties is also a prerogative power.[279] Treaties are ratified by the government, acting under the Royal Prerogative, which provides ministers with a free hand to conclude international agreements.[280]

This aspect has led to a number of issues arising from the lack of any formal role played by Parliament in the drawing up of treaties, or in the approval of the text of treaties, except when a treaty would require a change in English law or the grant of public money. The Ponsonby rule states that the government is required to place any treaty before Parliament at least twenty-one days before ratification. However, this is non-statutory, and can be waived if speedy ratification is required. This led to PASC demanding a legal safeguard concerning the Ponsonby rule in March 2004,281 with the Ponsonby rule on the ratification of international treaties being codified in the Constitutional Reform and Governance Act 2010 282 and Parliament being awarded a new statutory role in the ratification of treaties. Parliament now has the legal power to accept or to reject international agreements.

## 2.10 The Salisbury convention

The Salisbury convention regulates the relationship between the House of Commons and the House of Lords. The convention by which the House of Lords gives way to the will of the elected Housed was breached in 1908, when the Lords rejected the Commons' Finance Bill. The budget crisis experienced during this time had raised the issue of whether the unelected House of Lords should have the power to veto legislation passed by Commons, and, if so, whether such power should include the power to veto the budget.

Tomkins stated that 'the events of 1909 - 1910 had shown that the something more solid than informal understanding was now needed if the government was going to

[279] Hillarie Barnett, *Constitutional & Administrative Law* (11th ed., Routledge 2016) 107.
[280] Public Administration Select Committee (PASC).
[281] Public Administration Select Committee (PASC).
[282] Constitutional Reform and Governance Act Chapter 25 2010.

able to conduct its business efficiently'.[283] The then Prime Minister (i.e., Asquith) asked the King to exercise his prerogative power to create between 400-500 new Liberal peers, in order to destroy the inbuilt Conservative majority in the Upper House. Following an impasse between the two Houses, not only were sufficient numbers of peers assigned to secure a majority of the Bill, but the convention was legally safeguarded in the Parliament Bill 1911.[284] This ensured that, from then on, the House of Lords would no longer enjoy equal power to approve or reject legislative proposals, or to delay any legislation limited by time.[285]

The Salisbury doctrine is currently understood to refer to the unelected second chamber abstaining from obstructing a bill stated in the governing party's election manifesto.[286] It has therefore been generally agreed that the Lords still have a valuable role to play and are a revising chamber, being mandated to improve the quality of legislation.[287]

However, the second chamber is not democratically elected and the rationale for the Salisbury convention is therefore to support the principle of democracy, i.e. it would be undemocratic (and therefore unconstitutional, albeit not unlawful), for the unelected House of Lords to table amendments potentially undermining the purpose of the government's manifesto commitments.[288] Elliott emphasized that 'manifesto Bills have a form of democratic legitimacy that can be traced back not just to the *elected chamber* but to the *electorate* itself.'[289]

The ambit of the convention is not easily specified.[290]While it is accepted that the Lords may amend details of a bill for the purposes of improvement, there remain difficulties in differentiating between these and "wrecking amendments", i.e. those capable of altering the bill's intent.[291] The Lords are therefore required to take care not to frustrate

[283] Adam Tomkins, (2003). *Public law*. Oxford: Oxford University Press.
[284] Parliament Act 1911.
[285] Hillarie Barnett, *Constitutional & Administrative Law* (11th ed., Routledge 2016) 363.
[286] Richard Kelly, 'House of Lords: Conventions' (House of Commons 2007) 5.
[287] Glenn Dymond and Hugo Deadman, 'The Salisbury Doctrine' (House of Lords 2006) 2-3.
[288] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[289] Mark Elliott, 'Does the Salisbury Convention Apply During a Hung Parliament?' (*Public Law for Everyone*, 2017) <https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/> accessed 27 January 2020.
[290] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[291] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)

the will of the people.[292] A number of further points of difficulty have arisen due to the election manifestos of political parties being imprecise in their wording and promises, being typically drawn up to allow considerable freedom of manoeuvre in the event that the party wins office.[293] It is therefore unclear what constitutes a manifesto bill, including which amendments are capable of destroying or altering it beyond recognition. Finally, the Salisbury convention is ill-suited to the circumstances of a coalition government, having arisen in the era of one-party rule. This raises the question of whether, in the new political landscape, the convention should only apply if the measure in question was promised in the manifestos of each of the coalition partners, or if it would be sufficient for it to have been mentioned in the manifesto of the "senior partner" to the coalition.[294]

It is generally accepted that the answers to these questions will remain highly subjective, leaving considerable uncertainty concerning how to operate the convention in the political realm. Jaconelli noted that: 'The doctrine, even if it lacks a canonical verbal statement, has functioned tolerably well as a conventional standard of behaviour.'[295] A recent example of this uncertainty was when the House of Lords returned the European Union Withdrawal Bill to the House of Commons, where MPs were required to decide whether to accept or reject the peers' amendments. Many Brexiteers (i.e., those wishing to leave the EU) argued that the House went too far with its amendments and thus violated the Salisbury-Addison Convention. However, it remains generally agreed that, in this case, the peers did not reject the bill outright, and neither did their amendments destroy or alter it beyond all recognition, i.e., even with the peers' amendments, Britain was still able to leave the EU, with the Lords simply asking MPs to think again, which did not form an unconstitutional act.

It can therefore be argued that, in this case, the flexibility of the convention proves its value.[296] Similarly, Elliott stated that 'the Salisbury convention, like all constitutional conventions, is an organic phenomenon that acquires its meaning, its status and its

[292] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[293] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[294] Mark Elliott, 'Does the Salisbury Convention Apply During a Hung Parliament?' (*Public Law for Everyone*, 2017) <https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/> accessed 27 January 2020.
[295] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[296] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)

bite from the views that prevail within relevant sections of the political community' and thus 'unduly legalistic analysis of conventions must be avoided.'[297] He further noted that 'whether the House of Lords will feel able to disregard the Salisbury convention during the present Parliament is a question that cannot be determined in isolation from the views of the relevant political actors.'[298]

## 2.11 The Sewel convention

The UK Parliament is sovereign and can change the law in devolved areas. However, since 1999, successive UK Governments have followed the convention that Westminster does not generally seek to interfere in devolved areas without agreement from the devolved legislatures.[299]

The origin of the Sewel convention lies in the statement by Lord Sewel in the House of Lords on 21 July 1998, during the passage of the Scotland Act 198. Lord Sewel, the Scottish Office minister, stated that the government hoped a convention would develop to ensure that Parliament would not normally legislate on devolved matters without the consent of the devolved legislature.[300] The government replied to his demand by establishing a Memorandum of Understanding[301] between the UK government and the devolved governments in December 2001 (Cm 5240). Paragraph 14 of the current Memorandum of Understanding[302], published in October 2013, states:

> The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters, except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement

[297] Mark Elliott, 'Does the Salisbury Convention Apply During a Hung Parliament?' (*Public Law for Everyone*, 2017) <https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/> accessed 27 January 2020.
[298] Mark Elliott, 'Does the Salisbury Convention Apply During a Hung Parliament?' (*Public Law for Everyone*, 2017) <https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/> accessed 27 January 2020.
[299] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 325.
[300] HL Deb, Vol 592, col 791 (21 July 1998).
[301] Memorandum of Understanding and Supplementary Agreements (2013).
[302] Gov. UK, 'Devolution Guidance Notes' (*GOV.UK*, 2019) <https://www.gov.uk/government/publications/devolution-guidance-notes> accessed 20 January 2020.

> as may be required for this purpose on an approach from the UK Government.[303]

Therefore, The Sewel Convention was regulated by the Scottish Executive and the UK Government, rather than between the two Parliaments. This implied that it was a “soft” practice, i.e., that it is not enshrined in statute. Furthermore, it reduces the scope for informed scrutiny of legislation, being simply an official interpretation of Sewel convention.

Alongside the written agreement, The Devolution Guidance Note 10 ("DGN10") has been accepted by both the UK and Scottish Governments and clarifies how the Sewel convention has operated in practice since 1999. DGN 10 forms an extended operation mechanism of the convention, stating that the consent of the Scottish Parliament was generally required both when a UK Bill makes provision for devolved matters and also when it alters the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers, i.e., despite these being reserved matters.[304]

This is now reflected in the Standing Orders of the Scottish Parliament, which have, since November 2005, described a UK Bill requiring the consent of the Scottish Parliament by the Bill previously known as a Sewel motion and now known as a Legislative Consent Motion ("LCM"), which:

> Makes provision …. applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers.*[305]*

The Smith Commission demanded that ‘The Sewel Convention should be put on a statutory footing’.[306] In 2016, the government answered this demand by recognizing

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[303] Department for Constitutional Affairs DGN 10.

[304] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

[305] This is now contained in Rule 9B.1 of the *Standing Orders of the Scottish Parliament* 4th Edition, 9th Revision (30 October 2015).

[306] Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (*Scottishconstitutionalfutures.org*, 2020) <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx> accessed 15 March 2020.

Sewel Convention through section 2 of the Scotland Act 2016, whose subsections (7) and (8) now state:

> (7) This section does not affect the power of the Parliament of the UK to make laws for Scotland.
>
> (8) But it is recognized that the Parliament of the UK will not normally legislate with regards to devolved matters without the consent of the Scottish Parliament.

However, Lord Norton criticized the fact that the UK government had narrowed and undermined the meaning of the Sewel Convention by omitting a practice, and Section 2 refers only to the original scope rather than reflecting its extended scope, i.e. by DGN 10.[307] Furthermore, the UK Government was accused of having deliberately kept Section 2 only narrowly depicted in the order, in order to allow the development of a manoeuvre to escape the need to seek the consent of the Scottish Parliament for any UK Bill, thus altering the definition of devolved competence.[308]

The UK government defended the extension of this convention by stating that DGN 10 was never strictly part of the Sewel Convention, being used only as 'a working arrangement'.[309] DGN10 was described as:

> Not a document which was ever approved by either House of this Parliament but was developed by the Civil Service for the application and operation of what was understood by the Civil Service and everyone else to be the Sewel convention.'[310]

It was thus considered 'not appropriate that it should be enshrined in statute'.[311] In particular, it has been argued that the UK Parliament has retained the power to make laws concerning devolved matters, i.e., Section 28(7) of the Scotland Act 1998 'makes

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[307] HL Deb 24 Feb 2016 col 295

[308] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

[309] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 328.

[310] Department for Constitutional Affairs DGN 10.

[311] Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (*Scottishconstitutionalfutures.org*, 2016) <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx> accessed 27 January 2020.

it clear that the devolution of legislative competence to the Scottish Parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters'.[312]

Jamieson argued that the UK Government has put the Sewel convention on a statutory footing, which, in Section 2, has created many uncertainties.[313] He notes that previously a UK Bill which altered the definition of devolved competence is normally obtained the consent of the Scottish Parliament.[314] He suggests that there would still be a convention to this effect, even although not part of the Sewel convention as described in Section 2.[315] Similarly, McHarg notes that the practice of the convention should be determinative of the scope of that rule.[316]

During the recent Brexit process, one of the most contentious issues has been establishing the circumstances in which the Sewel convention can be applied. Under the convention, the Scottish government demanded that the UK government should seek its consent before triggering Article 50[317], but the UK government insisted that the decision to notify the UK's intention to withdraw from the UK under Article 50 TEU as being purely a matter of foreign affairs which could validly be made under the prerogative.[318] Also they note that even if legislation was required to trigger Article 50, relations with the EU matters was reserved to the UK level and thus the Sewel

[312] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 328.
[313] Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (*Scottishconstitutionalfutures.org*, 2016) <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx> accessed 27 January 2020.
[314] Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (*Scottishconstitutionalfutures.org*, 2016) <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx> accessed 27 January 2020.
[315] Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (*Scottishconstitutionalfutures.org*, 2016) <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx> accessed 27 January 2020.
[316] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502 6.
[317] The Supreme Court, 'Article 50 Brexit Appeal - The Supreme Court' (*Supremecourt.uk*, 2017) <https://www.supremecourt.uk/news/article-50-brexit-appeal.html> accessed 20 January 2020.
[318] The Supreme Court, 'Article 50 Brexit Appeal - The Supreme Court' (*Supremecourt.uk*, 2017) <https://www.supremecourt.uk/news/article-50-brexit-appeal.html> accessed 20 January 2020.

Convention would not be engaged because the reservation of relations with the EU meant that it would not be legislation 'with regard to a devolved matter'.

Westminster believes that the decision to withdraw was one for the UK as union[319].On the other hand, Scottish defence for the adoption of a principle of parallel consent: in other words, for Leave to win the referendum, it would need to secure a majority of votes across the UK *and* in each of the constituent parts of the UK.[320]

Former SNP leader, Alex Salmond noted:

> That's a fundamental attack on the very principle and foundation in the statute of the Scottish Parliament of 1999, which said specifically that anything that wasn't reserved to Westminster should be run in Scotland.[321]

Elliott noted that the act of triggering Article 50 demonstrated the UK Government exercising its prerogative powers to conduct foreign policy, rather than *Parliament* enacting legislation, i.e. Article 50 was invoked without any legislation being enacted by the UK Parliament.[322] Elliot stated that 'it is logically impossible for there to be any requirement for the Scottish Parliament's consent Brexit legislation enacted by Westminster unless, in the first place, the Westminster Parliament is in the process of enacting such legislation.'[323] But, in the Miller case the opposite happened. The Supreme Court ruled that, while the Government can use prerogative power to make and withdraw from international treaties, whenever treaty changes require a change to domestic law, the Government must always "seek the sanction of

[319] Andrew Learmonth, 'Theresa May Accused of Attacking The Foundation Of The Scottish Parliament By Seizing Back Devolved Powers' (The National, 2017) http://www.thenational.scot/news/15133315.Theresa_May_accused_of_attacking_the_foundation_of_the_Scottish_Parliament_by_seizing_back_devolved_powers/?ref=rl&lp=1 accessed 4 March 2017.

[320] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

[321] Chris Green, 'Theresa May: Giving EU Powers To Scotland Could Harm Integrity Of UK' (*Inews.co.uk*, 2017) <https://inews.co.uk/news/politics/theresa-may-much-devolution-fatally-weaken-union-528477> accessed 28 January 2020.

[322] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 19 January 2020.

[323] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 19 January 2020.

Parliament".[324] The Supreme Court therefore ruled that it would not be legal for the Government to use prerogative powers to trigger Article 50: instead, primary legislation was required.[325]

McHarg argues that 'The UK Government's attempt to downplay the significance of the embedding of EU law into the devolution statutes is unconvincing.'[326] She remarks that while *relations with* the EU may be reserved, the implications of Brexit for the devolution settlements real consequences for the ways in which EU law has been implemented and enforced in the devolved territories[327]. Therefore, she believes devolved governments necessarily should be active participants in the removal of the EU tier in devolved areas.[328]

There is no formal process determining whether the Sewel convention applies to any alteration to the powers of the Scottish Parliament. While the Scottish insist that 'legislation authorising withdrawal would require the consent of the devolved legislatures because it would be legislation regarding devolved matters within the meaning of the Sewel convention.'[329] Nonetheless, the UK government concluded that 'legislative consent convention' will apply for provisions which would change the powers of the devolved bodies'. On this basis, the government sought legislative consent for the bill, which includes firstly, the EU Withdrawal Bill (i.e. transposing EU legislation into UK

[324] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).
[325] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).
[326] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502 7.
[327] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502 7.
[328] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502 8.
[329] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.

domestic law) and secondly, the Trade Bill, which gives the UK Government powers to implement future trade deals.

Subsequently, in June 2017, the UK government conceded that the consent of the devolved legislatures would be sought for the Withdrawal Bill. Legislative Consent Motions (LCMs) on the EU Withdrawal Bill were voted on in the Scottish Parliament and Welsh Assembly on Tuesday 15 May. The Scottish Parliament refused to consent to the Withdrawal Bill, raising the issue of whether the Scottish Parliament can "block" UK legislation on Brexit. Elliot argued that the UK Parliament is sovereign and thus the absence of consent from the Scottish Parliament would not legally restrain Westminster from enacting Brexit legislation.[330] because he believes that the "requirement" for consent is ultimately no more than a political expectation that the UK Parliament will respect the constitutional position of the Scottish Parliament by not riding roughshod over it in certain circumstances.[331] Elliott noted that the Scotland Act 2016 is a *law* that *recognizes* a *convention*, but in doing so, the Act does not, through some form of alchemy, *turn* the convention *into* law.'[332]

McHarg argued that Brexit is currently threatening the Sewel convention "almost to destruction" and is seriously undermining the protection it offers for devolved autonomy.[333] She considered that UK government breached the Sewel convention by continuing with the EU Withdrawal Bill without the consent of Holyrood.[334] She also stated that "to make an exception to a rule, what is required is an explanation of why its underlying rationale either does not apply or is overridden by some competing principle'.[335] The UK government can be seen as implying that, so long as it has

[330] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017)
[331] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 19 January 2020.
[332] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 19 January 2020.
[333] Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic> accessed 19 January 2020.
[334] Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic> accessed 19 January 2020.
[335] Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic> accessed 19 January 2020.

attempted to reach an agreement with the Scottish Government, the Convention is satisfied.[336]

McHarg's argument is persuasive, particularly that, despite it being *lawful*, it can be considered *unconstitutional* to proceed with the Withdrawal Bill without the agreement of the devolved legislatures. It can therefore be viewed as a politically inexpedient means for the UK Parliament to treat the Scottish Parliament.[337] However, there have, yet been few ways identified to resolve the unprecedented and contentious situation arising from the Brexit process.

## 2.12 Dissolution of Parliament

The dissolution of Parliament was a prerogative power, with the Crown able to dissolve Parliament at the request of the Prime Minister. Twenty-six dissolutions have taken place in the UK since 1868, not one of which has been refused by the Sovereign, thus highlighting that the Crown is not generally entitled to refuse the Prime Minister's advice to dissolve Parliament.[338]

Although the convention's practical purposes are no longer in place, this power has led to the criticism that this permits the sitting Prime Minister to choose the date of a general election, i.e., when it most favours the existing government. In addition, there can remain doubts as to whether the Sovereign has refused a Prime Minister's advice to dissolve Parliament. The Fixed Term Parliaments Act of 2011 placed the dissolution of Parliament onto a statuary basis and restricted discretion of PM.[339] The Fixed-term Parliaments Act 2011 provides for five-year parliaments, with polling on the first Thursday in May five years after the previous general election; and automatic

[336] Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic> accessed 19 January 2020.
[337] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 19 January 2020.
[338] Hamid A. Ghany, 'The Evolution of The Power of Dissolution: The Ambiguity Of Codifying Westminster Conventions In The Commonwealth Caribbean' (1999) 5 The Journal of Legislative Studies, 55.
[339] The Fixed-term Parliaments Act 2011.

dissolution 17 working days before the election.[340] There is provision for mid-term dissolution in section 2, but again by statute not under the prerogative.[341]

Section 2 allows for a mid-term dissolution in only two circumstances: if two thirds of all MPs vote for an early general election; or if a government loses its support in the House of Commons', and no alternative government which can command confidence is formed within 14 days, the Prime Minister must advise the Queen to dissolve Parliament. The only discretion which remains is the timing of an election following a mid-term dissolution: section 2(7) provides that 'the polling day … is the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister'. The election would normally be held within three to four weeks.[342] Section 3(2) states clearly 'Parliament cannot otherwise be dissolved'.

## 2.13 The Civil Service and the machinery of government

The management of the Civil Service is carried out by ministers under prerogative powers, regulated by Orders in Council that can be amended, supplemented or withdrawn without parliamentary approval. This has led to criticisms that this is no longer an appropriate state of affairs.[343]This has therefore been regarded as a special case among the prerogative powers examined by PASC.[344] The committee found that there was widespread agreement that early action is required to enshrine the values of the service in statutory form.

The government of Gordon Brown comprehensively reviewed the prerogative powers of government, resulting in the Constitutional Reform and Governance Act 2010[345], which codified the conventions on the neutrality of the civil service.

[340] The Fixed-term Parliaments Act 2011.
[341] The Fixed-term Parliaments Act 2011.
[342] The Fixed-term Parliaments Act 2011.
[343] House of Commons Public Administration Select Committee, 'Taming The Prerogative: Strengthening Ministerial Accountability To Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.
[344] House of Commons Public Administration Select Committee, 'Taming The Prerogative: Strengthening Ministerial Accountability To Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.
[345] Constitutional Reform and Governance Act Chapter 25 2010.

## 2.14 Conclusion

This chapter has discussed a number of significant UK constitutional conventions in detail. This has led to the conclusion that, although it may appear a straightforward process to define an individual convention, there remain uncertainties in relation to its implementation. This has led to an urgent need to introduce a detailed application for UK constitutional conventions.

# Chapter 3 - Classification of Constitutional Conventions

## 3.1 Introduction

In the British constitutional system, constitutional conventions are well-known as being unwritten or explicit; there were traditionally no bindingly authoritative texts stating their meaning and scope. Over time, repeated political practice can be formalised as a rule of conduct and developed to become a convention, in a sense. Conventional rules are considered tacit agreements, or beyond expression; however, these rules are increasingly being put into quasi-codified words. The meaning of rules is specified by officials who provide an authoritative statement and, therefore, they became systematised. In other words, these conventions shift from an informal form to a formal form.

An understanding of conventions today requires the evaluation of classic accounts, to consider what forms conventions take in the UK as many of these rules have been publicly interpreted in written form, in official documents. If political actors and observers pay enough attention to this transformation, it is easy to ascertain whether and to what extent a convention loses its political nature after reaching written form; how a court should treat different forms of written conventions; furthermore, the suitability of conventions for some sort of clarification may be more apparent. Hence, this transformation also tells not all conventions necessarily have same degree of obligation. If distinctions are drawn different clarification way of conventions, it is easier to realise the different levels of obligation attached to different conventions and breach of convention brings different result for different convention and thus different enforcement mechanism required for different group of convention.

Different classes of constitutional conventions have received little attention in British constitutional system even importance of constitutional conventions. Much of this discussion, however, has been addressed with clarifying differences between

conventions and other similar kinds of informal rules, such as ‘maxims’, ‘customs’ or ‘usage’[346][347]. The thesis efforts to systematically examine the underlying features common to types of conventions by considering their clarification way.

As Blick notes that ‘codification convention is a challenging task.[348] The description of conventions is a conceptually difficult task.[349] But as he notes codification nonetheless takes place.[350] Hence, it is crucial to understand what precisely does codification mean for conventional rules?

Perry and Tucker discuss the evolution of conventions from being merely a social rule to a written rule.[351] They distinguish two categories of conventions, namely bottom–up and top–down rules.[352] They stress the difference between these conventions as being that “a bottom–up convention is any non-legal rule grounded in social practice and… a top–down convention, which is made by someone with a special kind of power, is any non-legal constitutional rule grounded in a prescription.”[353] However, they do not consider the division between legal and non-legal clarification on convention, and the transformation of conventions into legal rules. Transforming conventions to written rules as law may greatly weaken understanding of the informal rules that shape the British constitution, their flexibility, and operation mechanism and may even eradicate such conventions altogether.[354]

This chapter, therefore, goes further and divides the UK constitutional conventions into three main groups based on their clarification process.

The first group of conventions are labelled ‘classical’ conventions. This group of conventions remain an unwritten and unsystematic source of constitution; they are not

[346] Albert Venn Dicey, Introduction to The Study of The Law of The Constitution (5th ed. Macmillan 1897).
[347] Ivor Jennings, The Law and the Constitution (6th ed., London 1963)
[348] Andrew Blick, The Codes of The Constitution (1st Edn, HART Publishing 2019) 103-116.
[349] Andrew Blick, The Codes of The Constitution (1st Edn, HART Publishing 2019) 103-116.
[350] Andrew Blick, The Codes of The Constitution (1st Edn, HART Publishing 2019) 103-116.
[351] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 766.
[352] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 766.
[353] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 767.
[354] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015).

enforceable by the court. The second group of conventions is recognised or stated conventions. The meaning of these conventions is clarified in an official document, but they still cannot be enforced by courts. These official documents are not legally binding; they simply interpret conventions in a specific way. The last group of conventions is enshrined into law, and their scope and implementation are determined in legal documents. When a problem is raised regarding the operation of these conventions, one would think that a court can decide whether the convention has been properly followed or not. Hence, this kind of convention is identified as a codified convention.

To enhance overall understanding of the transformation of conventional rule from informal to formal, it is needed to ask why some conventions are clarified through law, but some are specified in non-legal documents, or others left unwritten. Heard's typology of conventional rules might help to explain reason to choose different way to make clear conventional rules' meaning.[355] In this chapter, the clarification process is associated with Heard's various types of conventions.[356] He presents three criteria to distinguish the different types of constitutional conventions[357]. First, he suggests that conventions can be distinguished by their constitutional importance. The importance of the principle or reason which lies behind the rule appears to be one of the most crucial factors which vary among the informal rules of the constitution. A second distinction concerns the extent to which there is agreement among key political actors over the existence of the convention or presence of convention highly disputed. Third even existence of convention accepted but frequently generate disputes when applied in specific cases.

Heard utilizes these criteria to classified conventions into five groups.[358] A convention is fundamental when it has a 'high' level of constitutional importance and a 'high' level of agreement at both the principle and practical levels. These rules closely relate vital

[355] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[356] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-81.
[357] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 68-71.
[358] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 71.

constitutional principles.[359] Any breach or alteration of the terms of these rules would produce important changes in the operation of the constitution. These group of conventions are usually legally codified in British Constitutional system. Or there is a high demand to transform these rules into law.

For example, it is highly likely that breach of these rules might raise a more series political concern and public defiance since it will be fundamental to democracy. In such case, if political criticises or pressure is not adequate safeguard on convention and further remedy required for politicians to recognise its mistake and reverse it and further prevent repeat a mistake. In this case, transforming such conventional rules into a law seen as the first thing that comes to mind as solution. it is believed that legislate is the only sure way to remove politicians` unfettered power. A prominent example is the constitutional crisis of 1909–11 where the House of Lords veto the financial bills that legislation was subsequently enacted that denied the House of Lords any real role in the enactment of financial legislation. Or most recently, the unconstitutional attempt to prorogue parliament and the judicial review that followed replacing prerogative and conventions with statute is the Fixed-term Parliaments Act 2011.

Secondly, if some conventions are vitally important to the operation of the political system, and there is a broad agreement on existence of convention, but there is no consensus on the operation of the convention. Heard describes these conventions as a meso-convention[360]. He notes that absence of these rules would significantly alter the operation or character of the constitution, but details of convention might take shape without detriment to the constitution. These groups of conventions in the UK mostly have been formulated in an official document. This thesis calls these group of conventions as a recognised or formulated convention. These group of conventions are heavily political in nature. Their operation depends on a range of political factors and breach of these rules brings political concerns. Hence, these rules are specified in general terms and thus keep their flexibility. For example, it is not always clear how a governor may exercise the rights first formulated by Bagehot-the right to be consulted, to

[359] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 72.
[360] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 72 - 73.

encourage and to warn. Or the Cabinet Manual makes public that the prerogative powers generally exercised by ministers, or by the Sovereign on the advice of ministers, particularly the prime minister 'save in a few exceptional instances.'[361] But it is not specified what these exemptions are. Also, the Cabinet Manual emphasises that 'the sovereign continues to personally exercise some prerogative powers of the Crown, the Manual then states that the monarch 'reserves the right to exercise others in unusual circumstances.[362] But what these 'unusual circumstances' might be open to interpretation, and it does not suggest what might be an appropriate use of these reserve powers in such circumstances.

On the side, sometimes, this group of conventions which are important for the working of constitutional system but there is no agreement on their application, are transferred into law. However, it is believed that these conventions remain in conventional nature despite legal codification. Legal safeguard on convention only plays a deterrent role in case of their breach.

Sewel convention can be illustrative. While it is easy to identify the convention that the Parliament of the United Kingdom will not normally legislate about devolved matters without the consent of the Scottish Parliament, there is a considerable level of ambiguity surrounding the Sewel Convention. The statute draws only a general frame of the convention for the general run of circumstances but is not able to consider how the Sewel convention has been interpreted in detail. First, it is not yet settled what the definition of the term "not normally" means in the Convention: It is therefore unclear under what circumstances the UK Government can proceed with a bill without the devolved legislatures' consent. The term used to keep flexibility to respond to unexpected circumstances. If government used discretionally it can mean whenever it wants to get its way on whatever subject it chooses. Second, one area lacking in clarity as regards the Sewel convention is that when is the right time for consultation with a devolved parliament? When should the process of legislation consultation with devolved governments and seeking consent begin? Third, what is meant by devolved and reserved powers? McHarg notes that 'the distinction between legislation for

[361] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011.
[362] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011.

reserved and devolved purposes is not watertight.[363] Varying the scope of devolved legislative or executive competence is itself a reserved matter yet attracts the requirement of consent.'[364]

On that point, understanding the details of the convention become significant. Different interpretations of or perspectives on the operation mechanism of the Convention reach different answers. Any attempt to specified operation mechanism conventions face difficulty that application of convention dependent upon the circumstances of the occasion and thus political occasions cannot be predictable and adequately describe in advance. But the challenge may be overcome by avoiding strict, cumbersome legal clarification on details of conventional rules and thus enabling respond unexpected political circumstances.

According to Heard, a third group of convention is the semi-convention. Likewise, meso-conventions, there is consensus among political actors over the existence of semi-conventions, but disagreement over how they should be applied in practice. However, semi-conventions also tend to be more prescriptive in their requirements than meso-conventions, although they are less important to the operation of the system. The infra-convention is like the semi-convention, but an infra-convention will be characterised by significant disagreement. Finally, usage refers to a convention-like rule with only minor—or 'trivial'—political significance. Examples of this type include the rules that regulate royal styles and titles and parliaments' ceremonial formalities[365]. Other Heard's classified three groups of convention remain unwritten in the UK constitutional system.

This categorization, firstly, will enhance our understanding of the meaning of codification of convention in the UK. Secondly, it helps to notice that not all conventions necessarily have same degree of obligation. The different levels of obligation attached to different conventions. If distinctions are drawn between different clarification way of

[363] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[364] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[365] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-71.

conventions, it is easier to realise the different levels of obligation attached to different conventions and breach of convention brings different result for different convention and thus different enforcement mechanism is required for different group of convention. Some conventions are quite embodying constitutional principles. Their breach brings along the breach of fundamental constitutional principle. On the other hand, some conventions are heavily political in nature. Their application depends on range of political factors and breach of these conventions gives rise to political concerns.

## 3.2 Traditional Understanding of Constitutional Conventions

The constitutional convention was popularised by Dicey in a work first published in 1885, in which a convention of the constitution was described as consisting of customs, practice, maxims, or precepts which are not enforced or recognised by the courts.[378] In his essay, *Considerations on Representative Government* (1861), John Stuart Mill provided an earlier description of conventional rules, in which the following phrases are used "the constitutional morality of the country"; "the positive political morality of the country"; "unwritten maxims of the Constitution"; "unwritten rules"; and "constitutional maxims".[379] John Stuart Mill further referred to "The unwritten maxims of the Constitution… These unwritten rules, which limit the use of lawful powers…' in his 1861 essay on representative government.[380] Later, in 1872, Edward A. Freeman stated, "by the side of our written Law, there has grown up an unwritten or conventional constitution."[381] Ivor Jennings then wrote that "constitutional conventions provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas."[382] Marshall defines conventions as rules that provide significant rights, powers, and obligations of office holders in the three branches of government, as well as the relations between the different branches or

[378] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (Eight Edition 1982) 277.
[379] John Stuart Mill, Utilitarianism, On Liberty, Considerations on Representative Government (HB Acton ed, JM Dent 1972) 228-29.
[380] John Stuart Mill, Utilitarianism, On Liberty, Considerations on Representative Government (HB Acton ed, JM Dent 1972) 228-29.
[381] Edward A. Freeman, The Growth of the British Constitution from the Earliest Times (London, Macmillan, 1872) 114.
[382] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 81.

office holders.[383] Marshall divided conventions into those that impose duties and those that confer rights, in a monograph on constitutional conventions.[384] For Jaconelli, conventions are social rules of a constitutional character which govern the relations between political parties or the institutions of government, regulating the manner in which government is to be conducted.[385]

Conventional rules are political in nature. They are born and grow from political practice and continue to evolve and operate in the political realm. The feature brings about the significant consequence that traditional constitutional conventions are vague. Marshall is clear on the subject of recognition of conventions that "if a convention is to be a guide to conduct it must be known what course of action it prescribes."[386]. However, Marshall confirms that conventions are limited by their vagueness.[387] Marshall further states that "conventions have a spectrum from clarity to vagueness"[388] that is shared by other behavioural rules, "namely that what they require in some clear cases is known but what they require in more marginal or arguable cases cannot be stated in advance."[389]

Perry and Tucker agree that the vagueness of conventions is similar to the vagueness of social rules:[390]

> As they develop, rules which are made neither intentionally nor expressly are untethered from their creators and their development depends on the behaviour of the current generation of rule-users. And that behaviour is driven by those rule-users' understanding of the contemporary rationale of the rule.[391]

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[383] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984), at 210 [hereinafter "Marshall, *Constitutional Conventions*"].
[384] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 11.
[385] Joseph Jaconelli, The nature of constitutional convention (1999) 19 Legal Studies 24-46.
[386] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984) 211.
[387] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015), p 20.
[388] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984) 211.
[389] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984) 211.
[390] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 783.
[391] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 783.

In order to understand the nature of conventions, it is necessary to first consider how conventional rules occur.

The traditional way of understanding constitutional conventions is not arrived at intentionally.[392] As Perry and Tucker note, “Bottom–up conventions are not made expressly. Bottom–up conventions typically emerge from and exist in people’s behaviour, rather than in and from their words.”[393] They are developed out of political practices, which gradually become well-established conventional rules that can be commonly accepted as constitutional rules.[394] This progression can be understood to occur in three stages; constitutional practice, the emergence of a new convention, and the establishment of the convention.

At the beginning of this process of establishment, actors may consistently tend to follow the same practice in the same circumstances without feeling obliged to do so.[395] For example, since 1924 international treaties have been laid before Parliament at least 21 days before ratification without intent to create a rule. Likewise, the monarch repeatedly accepts and acts on the advice of their ministers, who are responsible to Parliament for that advice or Monarch appoints a majority party` leader in the House of Commons as Prime Minister without attempts to produce a rule. Brazier describes the initial stage of forming a convention as a pre-existing constitutional practice,[396] explaining that if politicians do not follow this political practice, there is no constitutional result[397] as the practice is not yet recognised as binding. Later, though, political actors began to think that the practice ought to be followed because a government institution is more effective in this way.[398] The gradual hardening of practice into a conventional rule is described by Jennings, who explains that government actors develop a behaviour in government as elsewhere and when politicians give place to other government actors, the same practices tend to be followed. He further says that

[392] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 81.
[393] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 782.
[394] Sir Ivor Jennings, *The Law and The* Constitution (1959) Fifth Edition 80.
[395] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 80.
[396] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY 270.
[397] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY 270.
[398] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 80.

‘capacity for invention is limited’, and when institution is works well in way well, change in another is deemed unnecessary.[399] He also notes that, “people begin to think that the practices ought to be followed. It was always done so in the past; they say, why should it not be done so now?”[400]

In these terms, a practice is embodied into conventional rule if it meets two main requirements: recognition of the convention among key political actors, and their acceptance of it as binding. These two aspects are recognised by Sir Kenneth Wheare in *Modern Constitutions*: “By convention is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution.”[401]

Sir Ivor Jennings sets out a more extensive set of requirements that must be met in recognising convention, encapsulated in three questions. First, what are the precedents? Second, did the actors in the precedents believe that they were bound by a rule? Third, is there a reason for the rule?[402] For Jennings, it was important to be able to test whether a non-legal rule has been established: if it passed the test, a convention existed; if it failed, it did not. However, this test has been criticised as contestable.[403] Among the main criticisms are that there are no useful guidelines for how to make this test work,[404] and that the answers to the three questions depend on judgement,[405] where “What counts as ‘enough’ precedents or ‘enough’ actors is left vague.”[406] Also, Jennings is sometimes understood to claim that there is a convention if and only if all three of the questions are answered satisfactorily.[407]

Furthermore, Heard argued that, “Implicit in Jennings’ approach is the belief that a convention cannot be established without a clear historical precedent,”[408] as “A single

[399] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 80.
[400] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 80.
[401] K.C. Wheare, *Modern Constitutions,* Oxford University Press (1951) 27.
[402] Sir Ivor Jennings, The Law and the Constitution (5th ed., London 1959) 136.
[403] Galligan B and Brenton S, “Constitutional Conventions” Constitutional Conventions in Westminster Systems 8, 19.
[404] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] 319-338.
[405] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] 319-338.
[406] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 768.
[407] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 768.
[408] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] 321.

precedent with a good reason may be enough to establish the rule."[409] However, he argues that precedents are not essential to the existence of a constitutional convention.[410] He draws attention that observers have tended to argue that absence of precedents simply demonstrates that no rule exists. He illustrates that:

> the scattered history of ministerial resignations has greatly eroded rules of culpable ministerial responsibility to the point that many observers argue they no longer exist. However, contradictory incidents can be of use if the temptation to view them simply as marks on a scoresheet is resisted[411].

This requirement of a precedent is supported by Eugene Forsey:

> A constitutional convention without a single precedent to support it is a house without any foundation.... [I]ndisputably, at least one precedent is essential. If there is no precedent, there is no convention.[412]

In addition, the Supreme Court of Canada, when it considered constitutional conventions in the *Patriation Reference,* endorsed Jennings approach and strongly emphasised historical precedent.[413] On the other hand, Jennings explained that "A whole string of precedents without such a reason will be of no avail unless it is perfectly certain that the persons concerned regarded themselves as bound by it." Jennings believed that there are some conventions that are not grounded in practice; in this way, "a certain practice is sufficient but unnecessary to ground a convention."[414]

According to the Jennings, it is necessary to ask whether the actors in the precedents believed that they were bound by a rule. However, reliance on the feelings of political actors makes discernment of conventions difficult. Heard notes that there is a practical

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[409] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition 80.
[410] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 71.
[411] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 71.
[412] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 34.
[413] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015), 20.
[414] Sir Ivor Jennings, *The Law and the Constitution* (5th ed., London 1959) 135-136.

problem here in that politicians are not always obliging in providing clear and reliable statements of their beliefs,[415] further explaining that "Political actors can also be ignorant of the rules, and they can be mistaken in their belief about whether a rule exists, or about the details of that rule."[416]

In Jennings' test, the wording of the second question seems like a precondition for the presence of a convention. Waldron argues that the phrase 'binding factor' seems to imply that rules "pull themselves up by their own bootstraps,"[417] since "if they were not accepted by those, they bind they would not be rules at all."[418] If this assumption is accepted, conventions would not exist if government actors clearly declared that they do not feel bound by a convention. Similarly, Perry and Tucker argue that the test misrepresents the attitudinal element because it implies that "a convention is the product of a belief that the rule, that is the convention, already exists, but this belief would necessarily have been mistaken when formed."[419] Hence, the second question is interpreted as having more than just a structural meaning. Perry and Tucker explain this element of the practice that grounds a convention with Hart's theory of social rules,[420] noting that both Jennings and Hart believe that a social rule consists of a behavioural element and an attitudinal element.[421] However, they also note that, unlike Jennings, Hart did not think of the attitudinal element as a belief in a binding rule.[422] Instead, Hart argued that the attitude that helps ground a social rule is a "critical reflective attitude", which he called "acceptance". Similarly, Rodney Brazier stresses that, "The clearest situation in which a constitutional convention can confidently be said to exist… is one in which there is acceptance by all the actors that there is an obligation (albeit a non-legal one) on them to behave in a certain way."[423]

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[415] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] 324.
[416] Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, JOURNAL OF PARLIAMENTARY AND POLITICAL LAW [6 J.P.P.L.] 324.
[417] Jeremy Waldron, The Law, Routledge (1st edition, London 1990) 64.
[418] Jeremy Waldron, The Law, Routledge (1st edition, London 1990) 64.
[419] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 768.
[420] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 769.
[421] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 769.
[422] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 769.
[423] Rodney Brazier, *the non-legal constitution: thoughts on convention, practice and principle,* Northern Ireland Legal Quarterly, Vol. 43, No. 3. 1992. 267.

In another example of a traditional understanding of constitutional conventions, Geoffrey Marshall discusses their binding character, arguing that Wheare's point on obligatory behaviour might conceal the fact that constitutional conventions, as part of the constitutional morality, address not only duties and obligations, but also "confer rights, powers, and duties."[424] In short, Marshall concludes that "No general reason needs to be advanced to account for compliance with duty-imposing conventions beyond the fact that when they are obeyed… they are believed to formulate valid rules of obligation."[425] Having said that a convention requires belief on the part of political actors, that conventions are obligatory rules does not prevent mistaken action.

In response to Jennings' assertion that politicians 'must' believe they are obliged by a rule, Marshall asks, "What kind of obligation does a duty-imposing convention impose?"[426] Marshall's response to this question is that the "critical morality of the Constitution" is preferable to the "positive morality of the Constitution" because critical morality leads one to reason the real behaviour against that "the political actors ought to feel obliged by."[427] Although this aligns with the ideas of Dicey and Jennings, these uncertainties make conventional appreciation "too much a psychological guessing game."[428]

Similarly, Russell argues that "the efficacy of these constitutional conventions has depended very much on their acceptance by the political leaders who play the leading role in operating the institutions of our parliamentary democracy."[429] In a sense, feeling obliged to abide by a convention appears essential to it being practiced as a convention. If constitutional actors, those directly involved in government, accept the practice, there is a convention. The common will of politicians is thus a determiner of a convention's fate. If common political feeling says the practice should be followed in

[424] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984), 7.
[425] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984), 210.
[426] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015), 19.
[427] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984), 11-12.
[428] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015), 20.
[429] Peter H. Russell, *The Need for Agreement on Fundamental Conventions of* Parliamentary *Democracy*, International Journal of Constitutional Law, suppl. Constitutional Update 2009; Scarborough 27 (2009): 205-215 1.

future cases, the convention remains in practice. In short, a convention becomes an established rule if the prevailing opinion believes that the practice should be applied in future similar cases. McHarg explains this with an example relating to the granting of honours:

> For instance, in relation to the granting of honours, in The Governance of Britain, Gordon Brown restates the commitment made by Tony Blair in March 2006 neither to add to nor subtract from the final list of names recommended to him by the main Honours Committee. The decision to continue this practice would appear to stem from more than mere considerations of expediency and, if followed by successive Prime Ministers, it has the potential to develop into a binding convention. However, the important point, as this example illustrates, is that there is no suggestion of laying down a rule that must be followed in the future. As they are usually thought of, conventions develop; they are not made.[430]

The last element of the conventional rule in the Jennings test is the reason for the rule. The reason indicates why some policy or course of action is to be preferred. The first part of the test implies that practice would be enough to form a convention only in combination with a reason. But Jennings further said, 'A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons regarded them as bound by it.'[431] He thought that practice alone could ground a convention if actors agree on it.

From this perspective, Perry and Tucker note that, "whether a rule is supported by a reason is relevant only to the strength of the practice (e.g., the number of precedents) it takes to ground a convention."[432]

[430] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 854.
[431] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition, 130.
[432] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 769.

On the other hand, Barber believes that a good account of a convention would focus on what reason underlies the convention,[433] noting that a good description of a convention should try to identify why the rule is valuable.[434] Barber gives as an example the reason behind a convention granting royal assent on legislation that has passed through Parliament in a proper manner, explaining that, "The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law."[435] However, Barber subsequently concludes that, "Now the convention is operating against democratic values, rather than upholding them. Rather than supporting the parliamentary government, it would undermine it."[436] For this reason, Barber asserts that, when presented with a bill, "the duty of the Monarch is to give assent – irrespective of the advice of her Ministers. There is no room for discretion. On its best interpretation, this is what the convention requires: if the Monarch were to accept the advice of her Prime Minister on this issue, she would be acting unconstitutionally."[437]

In reality, it is often hard to say with certainty when a constitutional practice has come to be accepted as a convention. One can look, for example, at the historical development of the convention requiring parliamentary approval before engaging in military action. It is not clear if and when the convention requiring parliamentary approval before engaging in a military action became constitutional practice, and whether the UK government requires parliamentary approval for the use of military force in the future. To decide whether the convention is established in practice, it is necessary to apply Jennings' test.

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[433] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.
[434] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.
[435] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.
[436] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.
[437] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.

*First, are there any precedents for the convention?* It was not a practice of governments to seek parliamentary approval for decisions on the use of armed force, but in 2003, the UK government thought it necessary to obtain the support of the House of Commons in the Iraq war.[438] The motion was carried. However, following this, the convention was not properly implemented in the period between the Iraq vote in 2003 and the government's actions in March 2011, including the commitment of significant numbers of British forces to Helmand province in Afghanistan in 2006.[439]

The deployment of British military was engaged in various combat situations against Libyan targets without any debate or parliamentary vote, which drew some criticisms in light of the government's earlier assurances and, once again, queries arose regarding the convention's credibility and the deployments that would likely trigger its usage. By 2015, parliament had been provided the opportunity to debate, and vote, on the deployment of British forces on three more occasions.[440] First, was in response to the alleged use of chemical weapons against civilians by the Assad government in Syria in 2013; second was in response to the Islamic State's actions in Iraq in September 2014; third was to seek approval for extending military action against ISIS in Syria in 2015. A motion of the government for deploying military forces in Syria in 2013 was defeated by thirteen votes. The government stated that it would respect the will of parliament, in a move that was widely viewed as an assertation of parliamentary sovereignty and a direct challenge to the "Royal Prerogative" on military matters.[441]

Second, one needs to ask whether relevant actors in the government feel obliged to obey the convention. As Blick points out that 'Their existence depends on their being accepted by those directly engaged in the functioning of the constitution, or who have influence upon it. Moreover, it seems that a major reason that players in political processes chose to act in accordance with conventions-other than their own belief that they are real and ought to be abide by it.'[442] Similarly McHarg remarks that affect ability

[438] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015) 32.
[439] Claire Mills, "Parliamentary Approval for Military Actions", Briefing Paper, 7166, 12 May 2015, House of Commons Library 4.
[440] Fabien Terpan, "Financing Common Security and Defence Policy operations: explaining change and inertia in a fragmented and flexible structure." European security 24, no. 2 (2015): 221-263.
[441] David Cameron, Hansard House of Commons Debates Volume 566, August 2013.
[442] Andrew Blick, The *Codes of The Constitution* (1st Edn, HART Publishing 2019) 103.

of conventions to restrain politician's behaviour depends 'the sense of obligation felt by those actors subject to the convention to follow it'[443]

Britain's War Powers Convention did not apply over military deployments before 2003. Prime Minister Tony Blair granted them a vote on Iraq. Successive governments unintentionally granted parliamentary role over military deployments. A series of independent decisions jointly develop to fundamental change.

2010 and 2015 British military engaged in new deployments in four conflicts: in Libya, Mali, Syria, and Iraq.[444] In early 2013, deployment in Mali was undertaken without any debate or vote in parliament. The Cameron government decided to provide logistical, non-combat support to French forces in Mali without seeking parliamentary approval.[445] As a consequence, some questions were raised regarding the credibility of the convention and what kind of deployments would be likely to trigger its use. Later, when the House convened to debate and vote on the use of military force in Libya, British forces had already been engaged in various combat situations against Libyan targets. Hence, the vote on deployment in Libya is seen by Mello as only ex-post approval of an executive decision because, "the government felt little obligation to arrange for a timely debate and vote" and thus one of the prerequisites for a constitutional convention that actors "believe that they [are] bound by a rule" was not met.[446]

However, in August 2013, parliament assessed and voted to engage in military action against the Assad regime in Syria, and also to respond to the actions of Islamic State (ISIS) in Iraq in September 2014. MPs rejected possible UK military action against Syrian President Bashar al-Assad's government to deter the use of chemical weapons. Prime Minister David Cameron stated that he would respect the will of the House

[443] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

[444] Patrick A. Mello (2016): Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria, West European Politics, DOI: 10.1080/01402382.2016.1240410 80-100.

[445] J. Beale, "Mali Crisis: 330 UK Military Personnel Sent to West Africa" (*BBC News* January 29, 2013) <https://www.bbc.co.uk/news/uk-21240676> accessed July 29, 2019.

[446] Patrick A. Mello (2016): Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria, West European Politics, DOI: 10.1080/01402382.2016.1240410 80-100.

despite the UK government's motion in support of military action in Syria.[447] Cameron said, "It is very clear tonight that, while the House has not passed a motion, it is clear to me that the British parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the government will act accordingly."[448] David Cameron's decision to respect the vote of the House of Commons in 2013 confirms that actors that play a role in forming parliamentary conventions feel obliged to obey them. Therefore, it is not wrong to say that the David Cameron's compliance with the vote of the House of Commons in 2013 helped ensure the convention would survive.[449] Cameron himself called parliament's involvement in military deployments 'a good convention'[450]. Furthermore, Mello highlights that the convention was also successfully applied in a decision on military action in Syria in 2013:

> This occasion marked a powerful precedent for any future government. It also qualifies the understanding of parliamentary war powers in Britain. Hence, parliament can now be considered an informal veto player over decisions on war involvement.[451]

Cameron's Cabinet Manual confirmed that 'the House of Commons should have an opportunity to debate the matter … before troops are] committed'[452]. Such documents cannot ensure their implementation itself. Indeed, Theresa May, the former PM, seem to accept a Convention exists but Theresa May decided to join in military action against the Assad regime in Syria in 2018 without seeking the permission of MPs. What views her successor, Boris Johnson's government, might hold will be important for establishing the existence of a convention. When Boris Johnson was Foreign

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[447] BBC News, "Syria Crisis: Cameron Loses Commons Vote on Syria Action" (*BBC News* August 30, 2013) <https://www.bbc.co.uk/news/uk-politics-23892783> accessed July 29, 2019.
[448] N. Watt, R. Mason and N. Hopkins, "Blow to Cameron's Authority as MPs Rule out British Assault on Syria" (*The Guardian* August 30, 2013) <https://www.theguardian.com/politics/2013/aug/30/cameron-mps-syria> accessed July 29, 2019.
[449] Tanzil Chowdhury, "Does the UK Government Require Parliamentary Approval for the Use of Military Force?" (*The Law of Nations* May 17, 2017) <https://lawofnationsblog.com/2017/05/16/uk-government-require-parliamentary-approval-use-military-force/> accessed July 29, 2019.
[450] David Cameron, (2014) Hansard House of Commons Debates, vol. 585, 26 September.
[451] Patrick A. Mello (2016): Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria, West European Politics, DOI: 10.1080/01402382.2016.1240410.
[452] The Cabinet Manual A guide to laws, conventions, and rules on the operation of government, 2010, 44.

Secretary for example, he declared that the convention 'needs to be tested' during the June 2017 election campaign.[453] In brief, whether a convention has become established in effect depends on the relevant actor's feeling of obligation to follow the rule.

Finally, it is necessary to ask what reason there is for the convention. Although defining what is a 'good enough' reason to establish a rule is a difficult task, the rationale behind the convention can be explained as it provides Parliament with a meaningful role, yet safeguards the Government and military's capacity to act, is paramount.

Hence, the test, which is widely used for identifying conventional rules, indicates that there is indeed a convention relating to engaging in military action. This particular convention emerged in relation to the Iraq war but became firmly established with vote on Syria in 2013 because simply it passed Jennings' three question test. It is thus expected that in the majority of cases relating to military action, the government would seek parliament's approval as, once a practice is recognised as a conventional rule, that behaviour can be expected to continue to recur[454] because, as McHarg stresses, it is "thought to be a morally correct or politically prudent thing to do."[455] Nevertheless, while this convention has emerged, there is currently relatively little empirical evidence of parliament practice to establish the scope of the convention in practice.

## 3.3 Recognised Conventions

Thus far, it has been observed that conventional rules exist without needing a strict written form in the sense that there are no authoritative texts stating their exact content, and no sources with the acknowledged authority to issue such texts. This uncertainty over their content, and even sometimes the ambiguity of their existence, has given rise to various problems. Clearly, constitutional actors do not agree on the

[453] T. McCormack, (2019) British War Powers in Context and Conclusion. In: Britain's War Powers. Palgrave Pivot, Cham.
[454] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2012) 190.
[455] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 854.

interpretations of some basic conventions,[456] and indeed may not care what the true nature of them might be.[457] This means that, in times of constitutional crisis, their content, their effect, and, rarely, their binding force, may be subject to dispute.[458]

For this reason, the urge to codify in the UK has become powerful.[459] The most important impact of codification has been upon constitutional conventions.[460] There has been an attempt to incorporate some conventions into an official document in the UK. Conventions are increasingly being written down in different ways to guide members of the Cabinet, other ministers, and civil servants in the administration of government business.[461] Hence, the content of conventions has come to be stated in statute: in intergovernmental agreements; in the reports of parliamentary committees; and in guidance issued by various branches of government. For example, the Cabinet Manual was produced to provide clarification regarding the roles of party leaders, the Crown, and public services in a 'hung parliament' situation, but also to provide greater transparency in the mechanisms of government.[462]

Before proceeding to discuss the non-legal codification of convention, it is crucial to make a distinction between written conventions. There are fundamentally two ways to make the scope of conventions clear: legal or non-legal determination of the content of conventions. The former is a legislative codification of convention, whereby conventions are identified through legislation, lose their political nature, and, thus, can be enforced by the court. The latter is the production of a written version of a convention that is not a legal codification but is an official description of the convention in a single document, which does not constitute the 'last word' on its meaning and

[456] Rodney Brazier, the non-legal constitution: thoughts on convention, practice and principle, Northern Ireland legal quarterly, Vol. 43, No. 3 262.
[457] Rodney Brazier, the non-legal constitution: thoughts on convention, practice and principle, Northern Ireland legal quarterly, Vol. 43, No. 3 262.
[458] C. J. G. Sampford, ''Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions' (1987) 7 Oxford Journal of Legal Studies 374.
[459] Andrew Blick, Codes of The Constitution (1st edn, HART Publishing 2019) 103.
[460] Andrew Blick, Codes of The Constitution (1st edn, HART Publishing 2019) 103.
[461] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015) 179.
[462] House of Commons Political and Constitutional Reform Committee, Revisiting *the Cabinet Manual*, Fifth Report of Session 2014–15, Published on 2 February 2015, 5.

operation.[463] This can be considered a non-statutory codification of convention; in this way, the meaning of a convention is made clear without legal force and thus the nature, place, and function of the convention are not expected to change, rather it is expected that "they generally play the same role as previously."[464]

The Parliamentary Committee on Conventions is one example of conventions being officially recognised. For example, the joint committee on a convention in 2006 tackled conventions of the UK parliament which regulate the relationship between the House of Lords and the House of Commons.[465] The committee members considered the Salisbury convention on secondary legislation and agreed that greater certainty about the conventions was desirable, but were opposed to statutory codification as they wished to protect the essential flexibility of the convention.[466] Producing a code rather than legislation is a common way of clarifying the meaning of a convention. Such codes have been created by different branches of government, such as the executive, and the judiciary. The judiciary has produced codes to guide judges' behaviour and these codes incorporate conventions.[467] Other important examples are the Ministerial Code and the Civil Service Code. In addition, the UK Cabinet Manual is the latest example of a statement of conventions in non-statutory documentation. The importance of the Cabinet Manual was expressed by Prime Minister David Cameron, who explained that "for the first time the conventions determining how the government operates are transparently set out in one place."[468] In addition, Blick and Hennessy's report on the Cabinet Manual stressed that:

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[463] James W J Bowden, Nicholas A Mac Donald, *Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia*, Practice Notes Sur La Pratique Du Droit, Journal of Parliamentary and Political Law (2011) 372.

[464] C. J. G. Sampford, ''Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions' (1987) 7 Oxford Journal of Legal Studies 374.

[465] Parliament UK, "Joint Committee on Conventions" (*UK Parliament*) <https://www.parliament.uk/business/committees/committees-archive/joint-committee-on-conventions/jcc24052006/> accessed July 30, 2019

[466] Parliament UK, "Joint Committee on Conventions" (*UK Parliament*) <https://www.parliament.uk/business/committees/committees-archive/joint-committee-on-conventions/jcc24052006/> accessed July 30, 2019

[467] Robert Hazell, The United Kingdom – Britain's twenty-year constitutional revolution, in Brian Galligan and Scott Brenton (eds) Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges (Cambridge University Press 2015) 179- 186.

[468] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011.

> The Cabinet Manual intends to provide efficiency, effectiveness, and transparency, which in turn, means communicating with two different audiences: the executive and the wider public. It is its public role that is the most significant feature of the manual.[469]

Therefore, this part of the study asks the question of how codification influences the nature of traditional, well-known constitutional conventions, and if, and to what extent, conventions can be transformed into written forms? It further explores whether these official lists simply record existing conventions, or produce new rules? In addition, it explores what the possible effects of codification might be,[470] and how the capacity for the development of traditional convention could be affected by authoritative statements.[471] Consideration of these issues is critical to understanding how codification affects the political nature of conventions.

Before looking at effect of transformation, it is necessary to consider what type conventions are non-legally codified in UK. It can be answered the question by using Heard's classification of convention.[472] According to him, some convention has a great importance constitutional system and there is great agreement on the existence of convention but there is no consensus on application of convention.[473] He calls these group of conventions as a "*meso convention"*.[474] These group of convention need to maintain their flexible properties to adapt in response to change-events. One example is the convention of individual ministerial responsibility, which holds that ministers are responsible for mismanage within the government department for which they are responsible. The growth in the size of government departments make difficult to hold ministers responsible for all executive conduct in their areas of portfolio

[469] Andrew Blick, Peter Hennessy, The Hidden Wiping Emerges, The Cabinet Manual and The Working of the British Constitution, Institute for Public Policy Research (August 2011)
[470] C J G Sampford, *Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions*, Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press, (1987) 388.
[471] House of Lords, House of Commons, Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005-06 Volume 1
[472] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 72.
[473] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 72.
[474] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 72.

responsibility[475]. The meso-convention has therefore been modified, or 'stretched' over time so ministers are now only expected to resign if they in some way directly contributed to the maladministration that occurred. Similarly, it is not always easy to say how a governor may exercise the rights first formulated by Bagehot - the right to be consulted, to encourage and to warn.[476] In a sense, some convention has great flexibility, and the details of a convention may take shape within a certain range. Hence, this group of conventions are usually specified in general terms without legal force in the UK.

As Perry and Tucker note, unlike traditionally understood conventions, recognized conventions are deliberately and expressly made.[477] They are expressed in words, in a text. This means that they do not arise simply from political practice. Instead, the intention is to produce a rule. Consider, for example, when political actors produced the British Cabinet Manual. These actors were not simply participating in the practices described in the manual; rather, their intention was to give at least some elements binding force to the rules it contained therein.

Therefore, constitutional scholars are primarily concerned with whether conventional rules can be created through an explicit declaration regardless of prior or subsequent constitutional practice. A number of constitutional scholars accept that conventions originate from behaviour; they are not made. For example, Turpin and Tomkins stress that conventions are the "result of a gradual hardening of usage over a period of years or generations."[478] Likewise, Blackburn argues that "a simple declaration of a minister unilaterally" would not be considered sufficient for establishing a convention.[479] On the other hand, others argue that conventions can, in fact, be created purposively without any background in practice. As discussed, according to Jennings, practice is not essential in every case.[480] Similarly, Kenneth Where argues that most conventions

[475] Joseph Jaconelli, 'Continuity and change in constitutional Conventions', in: Q, Matt. (ed.) The British Constitution: Continuity, Change and the Influence of Europe—A Festschrift for Vernon Bogdanor. Oxford, Hart Publishing, (2013) 135-136.
[476] W Bagehot, The English Constitution (Oxford, Oxford University Press, 2001) 64.
[477] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review, 785.
[478] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2012), 190.
[479] Robert Blackburn, 'Constitutional Amendment in The United Kingdom', *Engineering Constitutional Change A Comparative Perspective on Europe, Canada and the USA* (1st edn, Routledge 2013).
[480] Sir Ivor Jennings, *The Law and The Constitution* (1959) Fifth Edition, 136.

arise from political practice excepts a convention may arise deliberatively.[481] For example, there may be agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct; this rule would not have arisen from custom, having no previous history of usage.[482]

On the other hand, it is accepted that recognised conventions are not created explicitly, they simply record existing conventions. Freeman acknowledged the possibility of a convention being expressed in a parliamentary resolution, as a restatement of a pre-existing rule[483]. Jaconelli similarly states that when conventions are written down "the formula *records* rather than *creates,* the conventions,"[484] McHarg notes that many conventions clearly state procedure without the need for constitutionally binding rules, it enough that the government recognizes them.[485] This argument is supported with two examples:

> As far as the war prerogative is concerned, it might even be argued that the commitment to gain parliamentary consent before engaging in armed conflict is simply a confirmation of an existing convention… Similarly, in relation to the Sewel Convention it could be argued that, rather than purporting to create a binding rule, Lord Sewel was simply making a prediction as to future practice regarding the exercise of Westminster's legislative powers in areas devolved to the Scottish Parliament, based on the precedents established during the period of devolution in Northern Ireland between 1922 and 1972.[486]

Perry and Tucker argues a top–down convention is "intensely suspicious."[487] Constitutional conventions are unintentional, implicit, unsystematic, and followed by successive actors from different political parties. These elements "blunt the force of

[481] K.C. Wheare, *Modern Constitutions*, Oxford University Press, (1951), 27.
[482] K.C. Wheare, *Modern Constitutions*, Oxford University Press, (1951), 27.
[483] E Freeman, The Growth of the British Constitution from the Earliest Times (London, Macmillan, 1872) 116.
[484] Joseph Jaconelli, "Do Constitutional Conventions Bind?" (2005) 64 The Cambridge Law Journal, 149-169.
[485] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 861.
[486] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 861.
[487] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 765-789.

the objection from self-regulation and help to explain constitutional lawyers' historical relaxed attitude to the place of self-regulation at the heart of the constitution. In contrast, declared conventions or constitutional standards do not share these protections. Thus, an increase in declared conventions, accompanied by a decline in regulation by historical constitutional conventions, raises the threat of political expediency."[488]

It can therefore be concluded that most scholars believe conventional rules emerge from practice and continue to evolve in the political realm.[489] McHarg argues that "it is subsequent practice, rather than the initial statement, which has determined both the status and the scope of these constitutional norms."[490] McHarg further states that unless they are translated into a consistent and reasonably persistent constitutional practice, the practice would not become a constitutional convention.[491] They cannot be established via the will of government in a single document. No one has the power to unilaterally create binding constitutional rules. In brief, constitutional conventions are socially constructed rather than written down. Hence, a convention takes shape in practice.

Additionally, constitutional scholars approach written conventions with the suspicion that an official document about a convention would not inclusively describe the scope and operating mechanism of the convention. This is because constitutional conventions, like all conventions, are based on social practice, to which written forms are very largely irrelevant; they are instinctively developed through practice. Therefore, it is believed that conventions acquire meaning through operation, for, as Atiyah, correctly observes, "Customs and conventions arise from what people do, not from what they agree or promise,"[492] and nor, as Perry and Tucker add, from what they write down, or what others write down on their behalf.[493] The idea that written forms

[488] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 765-789.
[489] Nicholas Aroney, Mark Elliott, Joseph Jaconelli, Aileen McHarg and Adam Tomkins, among others.
[490] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 859.
[491] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 861.
[492] P.S. Atiyah, *Promises, Morals, and Law* (Clarendon Press 1981) 116.
[493] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 765-789.

can promulgate conventions is misconceived since the latter is rooted in what the relevant actors actually do, not in what they say that they do, still less in what others say that they do. Written forms certainly have a role to play, after a pattern of social practice has emerged, in that they may purport to record that practice. However, once again the idea that the written form possesses any independent 'enactment' force is mistaken. For example, according to Turpin and Tomkins, the status of Ponsboy rule as a convention is doubtful because subsequent practice regarding the laying of treaties has not been wholly consistent with the rule as originally stated.[494] Similarly, when an agreement on the Sewel Convention was reached between Westminster and the Scottish parliament, Munro argued that "it is early to speak of the Sewel Convention" because it has not yet been sufficiently tested by events to determine whether it would be obeyed, despite the desire of Westminster to ignore it.[495] This has proved that Munro's argument is right because of many disagreement on the operation of convention during Brexit. It is imperative that the conventions should evolve once they are applied sufficiently before they reach their maturity or their details or uncertainties in their operation ought to be improved.

In regard to the question of which authority or institutions are entitled to recognise and declare conventions, traditional conventions do not originate from a single authority. Politicians' perspectives – those occupying the same or similar roles but at a different time, with different partisan and personal interests, and in shifting political circumstances – give shape to conventional rules. As Perry and Tucker note, the 'creation of the rule is a collective enterprise; the creative behaviour is not coordinated or part of any kind of joint project."[496] Currently, different government institutions are empowered to depict the meaning of conventions in an official document. For instance, the Parliamentary Committee on Conventions is a notable example of officialization of convention. For example, the joint committee on a convention in 2006 addressed

[494] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2012) 192.
[495] J. Munro, 'Thoughts on the Sewel Convention' 2003 SLT(News) 194. For a similar argument, see M. Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Leg Studs 340, 361.
[496] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 783.

conventions of the UK Parliament that regulate the relationship between the House of Lords and the House of Commons.[497]

In the UK, politicians, specifically executive ones, have the power to determine the meaning of conventions. Politicians, or those socially close to them, shaping conventional rules causes concern regarding impartiality and credibility,[498] and there is a risk of politicians serving their own interests and constitutional conventions becoming "party politicised."[499] This is based on the general assumption that politicians have a strong incentive to be biased in deliberations on important matters and favour their own interests.[500] It is therefore argued that the risk is significantly reduced if conventional rules emerge mainly from the general public rather than from politicians alone. Therefore, new forms of popular participation in constitutional conventions merit to shortly mention.

In regard to the question of whether conventional rules can easily adapt to changing circumstances, classic conventional rules are valued for being flexible and thus able to evolve in altering political situations. The concern is whether written documents restrain the adaptation of conventions to changing situations. One argument against clarification is that conventions become "set in stone" and lose their flexibility in written text.[501] This is based on the assumption that a convention has a substantially different nature, and refers to a different phenomenon, of uncodified, undeclared, unrecognised social rules of political action. Hence, there is a danger that the written conventions, even if initially correct, may become increasingly inaccurate unless regularly revised and brought up to date.[502]

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[497] The convention that the Lords dispatch government business in reasonable time and conventions on the exchange of amendments between the Houses and they particularly discussed the possibility of the turning the conventions into rules.

[498] Andrew Blick, The Cabinet *Manual and the Codification of Conventions,* Parliamentary Affairs (2012) 1-18 15.

[499] Paul Reid: "Time to Give the Sewel Convention Some (Political) Bite?" (*UK Constitutional Law Association* January 26, 2017) <https://ukconstitutionallaw.org/2017/01/26/paul-reid-time-to-give-the-sewel-convention-some-political-bite/> accessed July 30, 2019

[500] Paul Reid: "Time to Give the Sewel Convention Some (Political) Bite?" (*UK Constitutional Law Association* January 26, 2017) <https://ukconstitutionallaw.org/2017/01/26/paul-reid-time-to-give-the-sewel-convention-some-political-bite/> accessed July 30, 2019.

[501] C J G Sampford, *Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions*, Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press, (1987) 401.

[502] Brian Galligan and Scott Brenton, Constitutional Conventions, in Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges (Cambridge University Press 2015) 185.

On the other hand, some have insisted upon the clarification of conventions and argue that this fear is groundless because these conventions can be easily updated if circumstances change. For example, McHarg points out that "...the formulation of the convention does not prevent a possible change in the content of the rules in the future unless circumstances and practices change."[503]

However, it should be emphasised that constitutional conventions can evolve in response to the political needs of the day despite there being a specified code of conduct. Indeed, these documents, to some degree, set out the meaning of a convention. In a sense, then, a convention is framed by the official document. Therefore, if there is disagreement on a convention, politicians may be inclined to refer to the written information contained in the document instead of looking to political practice. For instance, Priti Patel, who held a series of unofficial meetings in Israel with Israel official, was accused of a breach of ministerial convention.[504] The rule against conflicts of ministerial interests is not captured in the text of the Ministerial Code, but a new section of the code added and it states that, when holding meetings overseas with ministers or officials from foreign governments, or at meetings "where official business is likely to be discussed," a private secretary or embassy official should be present. If a minister is at a social event or on holiday and discusses official business without any such official there, "any significant content should be passed back to the department as soon as possible after the event," it adds.[505] Patel resigned after it emerged that she had met more than a dozen Israeli ministers, business people, and a senior lobbyist while on holiday in the country and had not properly informed the department of this. This example clearly shows that whether or not a behaviour is captured in the Ministerial Code[506] is considered important and if the code did not include, an improper behaviour of a minister is described in the code as a breach of convention. The reason behind this, according to Barber, is that there is a "new

[503] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 859.
[504] BBC News, "Priti Patel Quits Cabinet over Israel Meetings Row" (*BBC News* November 8, 2017) <https://www.bbc.co.uk/news/uk-politics-41923007> accessed July 30, 2019.
[505] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011 (The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government).
[506] Ministerial Code, Cabinet Office August 2019.

convention," which imposes "a duty on Ministers to follow the rules set out in the Code."[507]

Next, there is the question of whether the binding force of conventional rules depends on codification, or the obligation arises from the rule itself. McHarg argues that "the binding force of the conventions contained in these codes does not depend upon the fact of their codification, but rather predates it."[508] On the other hand, Perry and Tucker assert that:

> …the obligations which are created by top–down conventions are typically imposed on actors other than the actors who create them. They involve Prime Ministers regulating (in the Ministerial Code) ministers or ministers and civil servants regulating (in the Sewel Convention) the legislature. Thus, top–down conventions are the product of certain constitutional actors imposing binding obligations on others, without regard for role, hierarchy or legitimacy. Again, the Sewel Convention is particularly striking: it was developed by the executive yet binds the democratic legislature.[509]

Lastly, when conventional rules are written down in an authoritative statement, they apparently reach a system like the rule of law and thus become more systematised.[510] Barber seeks to clarify that progress with Hart's rules of recognition,[511] explaining that uncertainties about the meaning and application of individual ministerial responsibility resulted in the creation of the code, which strongly resembles Hart's rule of recognition. Barber concludes that while the code has become steadily more law-like over recent years, "Constitutional conventions and laws are two brands of social rule which differ in the extent of their formalisation."[512]

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[507] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 6.
[508] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 859.
[509] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 784.
[510] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 5.
[511] Nicholas W Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 5.
[512] Nicholas W Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 5.

To conclude, the formulation of conventions in official documents captures and records rather than creates conventions. These recognised conventions remain political in character, and thus serve flexibly working the UK constitutional system.

## 3.4 Codified Conventions

In the British constitution, some constitutional conventions have been crystallised into law. Some examples include the 'Ponsonby rule' on the ratification of international treaties, which was codified in an Act.[513] The Sewel Convention was enacted in section 28 of the Scotland Act 1998 (Acts of the Scottish Parliament),[514] and the Fixed Term Parliaments Act 2011 replaced conventional rules on the dissolution of Parliament.[515] Questions may be raised as to whether the legislated provision is a substitute for the pre-existing convention, when the transition occurs, and whether the convention loses its political nature or remains a convention.

Before beginning the inquiry, the question, it is necessary to ask what type of convention transformed into law? it is crucial to consider why while some of conventions are simply formulated in official documents, some convention need to convert into law? Heard argues that fundamental conventions and meso-conventions are the most likely candidates for this kind of codification 'since they are supported by a clear consensus and can be applied without controversy'[516].

According to him, some conventions are vitally importance working of constitutional system. He describes them as fundamental conventions. These rules embody constitutional principle. According to him, these group of rules must be continuously respected; any breach or alteration of the terms of these rules would produce significant effect in the operation of the constitution.[517]

[513] Robert Hazell, ' The United Kingdom', *Constitutional Conventions in Westminster Systems* (1st edn, Cambridge 2015) 179.
[514] Acts of the Scottish Parliament (1998).
[515] The Fixed-term Parliaments Act 2011.
[516] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 80.
[517] Andrew D. Heard, 'Recognizing The Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 80.

The joint committee on a convention in 2006 clarified the meaning of codification, stating that "Codification may be taken in at least two senses: (i) the broad meaning of an authoritative statement, and (ii) the narrow sense of reduction to a strict code or system."[518] In the general sense, every authoritative statement about conventions is an example of a codified convention. Lord Norton of Louth highlights a different way of clarifying constitutional convention: if conventions are codified in statutory form, this is a "strong codification," and transforms conventions into enforceable rules. Another way to explicitly state what a convention is, is non-legal definition of convention. This is simply listing some specific conventions. Similarly, Professor Bradley sees two possible forms of codification: "Merely summarising past practice or an exercise in formulating rules for future conduct." Bradley argues against the rule-making approach, as "The British system is dynamic and flexible, rather than rigid. He says 'Its lack of clarity may sometimes seem a nuisance, but it enables it to evolve as circumstances change.[519]

It is clear from the above that, to use the term 'codification' properly, a convention should become rule through legislation. Bowden and MacDonald specifically stressed, with regard to what exactly codification means, that "'codification' denotes writing in statutory law or entrenchment in the written constitution, which would remove constitutional conventions from the political realm and render them justiciable in a court of law."[520] This means that codified convention is transferred into law. Also, in the literature, this progress is explained as crystallising into law; it is suggested that conventions can change in nature over time, becoming increasingly law-like until one day they mature into legal rules. In this way, the rule becomes increasingly formalised over time until it looks like the rule of law.[521] But here crystallising conventional rule into law deliberatively chosen not to raise over time. There is a particular moment of crystallising.

[518] House of Lords, House of Commons, Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005-06 Volume 1 72.
[519] House of Lords, House of Commons, Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005-06 Volume 1 72.
[520] James W J Bowden, Nicholas A Mac Donald, *Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia*, Practice Notes Sur La Pratique Du Droit, Journal of Parliamentary and Political Law (2011) 366.
[521] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 1-11.

However, in theory, it can be claimed that if the scope of conventions is legally codified, conventions lose their political nature and, thus, can be enforced by the court. But practice does not reflect this view. For instance, the question of how the Sewel Convention can be applied to Brexit has been the subject of recent discussion in the Miller case.[522] It was argued by the Scottish Government that the Sewel Convention has the potential to be employed with the help of an Act of Parliament prompting the exit of the UK from the European Union. As a result, approval by the Scottish legislature would be required prior to the passing of the withdrawal Act. To address such a claim first requires that the question be answered of whether recent recognition of the Sewel Convention has transformed the convention into a legal rule, and if the convention has ceased to be a convention.

Hence, the Supreme Court's decision in the Miller case is critically important in terms of what it reveals about the Supreme Court's understanding of the codification of convention. The court held that section 28(8) of Scottish act was not a legal rule, but simply the recognition of a convention, and thus that the government intended to protect the political nature of the convention. The court stated that:

> As the Advocate General submitted, by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.[523]

[522] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).

[523] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal*

The court notes that the words “it is recognised” and “will not normally” support that parliament did not intend that a legislative provision should create a justiciable legal rule.

Thus, the government could clearly express that the legislation on Sewel convention would not render it a legal rule. It just simply recognising of the convention. In addition, the government had already acted to preserve the political nature of the Sewel Convention in paragraph two of the Memorandum of Understanding, which explicitly states that it does not create legal obligations. It is, therefore, necessary to ask why the government requires this amendment when the convention is already stated in the original Memorandum of Understanding in December 2001.[524]In brief, it is uncertain how the words “it is recognised” and “will not normally” makes Sewel convention as a political convention.

On the other hand, scholars have explained the provision using different terms. Atkinson, for example, assesses the codification of Sewel Convention in the Act as a new form of constitutional convention, arguing that it “is legislatively enhanced but remains a convention rather than becoming a legal rule.”[525] Likewise, Gallagher argues that “This was declaratory legislation. It did so in terms which recognise the convention’s existence but did not change its status and so give it the force of law enforceable by the courts.”[526] This provision was intended to implement the Smith Commission’s proposal that the Sewel Convention should be placed “on a statutory footing.”[527]

It is important, however, to recognise what the proposed new subsection would and would not do. What it manifestly would not do is to turn the political constraint reflected in the Sewel Convention into a legal restraint: nothing in the proposed new subsection (8) purports to legally disable the Westminster Parliament from legislating for Scotland on devolved matters. Nor could it, for reasons discussed above. What is envisaged,

*(Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).

[524] Memorandum of Understanding and Supplementary Agreements (2013).

[525] Joe Atkinson, Parliamentary intent and the Sewel Convention as a Legislative Entrenched Political Convention. (2017). https://ukconstitutionallaw.org/2017/02/10/joe-atkinson-parliamentary-intent-and-the-sewel-convention-as-a-legislatively-entrenched-political-convention/.

[526] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution, and the Sewel Convention (2017) 1-8.

[527] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention (2017) 1-8.

therefore, is not taking the 'rule' contained in the Sewel Convention and turning it into a statutory, legal rule. Instead, what is proposed is enshrining – or at least acknowledging – the convention in a statute while leaving the convention as a convention.

Constitutional writers ever since Dicey have emphasised that conventions are more than mere habits or customs. Constitutional conventions are described as matters of political morality. For Dicey, they were "a body… of constitutional or political ethics… the morality of the constitution.".[528] Similarly, Lord Wilson of Dinton describes constitutional convention as "the main political principles which regulate relations between the different parts of our constitution and the exercise of power, but which do not have legal force."[529] Due to this point of view, conventional rules continue to be seen as a political ethic regardless of clarification.

It is neither sufficiently clear to say that the validly enacted statute aims to transfer conventional rule into a legal rule in any straightforward way, nor that the convention remains simply as a convention in the statute. However, questions regarding the unusual position of these legally codified conventions prove that codification of conventional rules merits more careful consideration. As can be seen from the Sewel Convention debate, there is the desire and will to protect the political nature of a convention regardless of the clarification method. It is therefore critically important to consider why this political nature is valuable. This part of the chapter will provide four main aspects of the result of being a conventional rule.

While the nature of conventions is primarily associated with not being a legal rule in British law,[530] the conventional rules are strongly political in nature. As Forsey underlines, they originate from political practices: political in their birth, political in their growth and decay, and political in their application and sanctions. In politics, they live and move and have their being.[531]

[528] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (Eight Edition 1982) 277.
[529] Lord Wilson, The robustness of conventions in a time of modernisation and change, 2004 407-408.
[530] Brian Galligan and Scott Brenton, "Constitutional Conventions" Constitutional Conventions in Westminster Systems 8.
[531] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 34.

Conventional rules regulate political issues. Accordingly, they may involve a degree of tacit knowledge which cannot easily be translated into formal, written rules. They are thus "beset with problems of defining their true content."[532] To some degree, these political matters require common political interpretations. Therefore, legally codified conventions give rise to the critical issue that it is not possible and useful to determine the precise content of conventions when conventional rules are transformed into a legal norm. Conventional rules may not be expressed precisely.

The convention of seeking parliamentary approval before engaging in military action overseas is a good example of 'the degree of ineffability of conventional rules'. In an emergency situation, the government can decide to engage military action without seeking parliamentary approval.[533] Here, the question arises of how emergency situations should be interpreted and under what circumstances an emergency can be considered to have occurred. In the House of Lords Constitution Committee's Report on constitutional arrangements for the use of armed forces, emergency situations are determined as those where there is a need to protect a critical British national interest or to prevent a humanitarian catastrophe.[534] However, it is not possible or useful to clearly describe under which circumstances British national interest constrain to applying the parliamentary convention. For instance, military action in Libya was seen as an emergency case, where the new convention did not fully apply because the government initiated military action before gaining parliamentary approval. Others object to the emergency argument because they believe that the planning of military action had been discussed many times as a major topic before the matter eventually went to a vote and, thus, the government should have called a parliamentary vote earlier.[535] It is hard to articulate details of operation of convention , hence, it is better to let the convention flow into the political realm and thus political common wisdom assess and decide on the proper operation of conventions in each specific case.

[532] Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24.
[533] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011.
[534] Claire Mills, "Parliamentary Approval for Military Actions", Briefing Paper, 7166, 12 May 2015, House of Commons Library 4.
[535] Patrick A. Mello (2016): Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria, West European Politics, DOI: 10.1080/01402382.2016.1240410.

The Political and Constitutional Reform Committee 2010–12 discussed whether parliament's role should be placed on a statutory footing to clarify ambiguities of the war power convention, and the committee highlighted the necessity to bring greater clarity to war-making decisions, which is one of the key areas of constitutional decision-making.[536] The report advised that the government should provide a draft detailed parliamentary resolution.[537] It was also recommended that the Cabinet Manual should include a clear reference to parliament's role in the decision to engage in armed conflict overseas. The government responded to this by amending the Cabinet Manual[538] to acknowledge that a convention had developed whereby the House of Commons should have the opportunity to debate conflict decisions. The committee said that this visible action was not sufficient even if the government promised to make a further amendment to the Cabinet Manual so that "it includes a detailed description of the internal arrangements for advising and deciding on the use of armed force." The committee again saw the response as insufficient and failing to address the central issue. The committee went even further in its 2013–14 report[539] and insisted that the only way to guarantee that the government would be required to consult with or seek approval from parliament on conflict decisions would be to put the process on a statutory footing, so that the government is no longer able to exercise prerogative powers relating to conflict decisions without parliament's involvement. In other words, they demanded that parliament's role in conflict decisions should legally be codified, although they believe that a parliamentary resolution on this subject would be useful (see the 2013–14 report). However, the government is against its codification or crystallisation into law.[540] Therefore, parliamentary control over the government in this area will remain a matter of constitutional convention. The government believe that a resolution alone would be sufficient to formulate that convention because a legally established role in approving the deployment of armed forces has caused some

[536] House of Commons Political and Constitutional Reform Committee, "Parliament's role in conflict decision", Eighth Report of Session 2010-12, 10 May 2011, 7.
[537] House of Commons Political and Constitutional Reform Committee, "Parliament's role in conflict decision", Eighth Report of Session 2010-12, 10 May 2011, 7.
[538] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011 (The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government).
[539] House of Commons Political and Constitutional Reform Committee, "Parliament's role in conflict decision: an update", Eighth Report of Session 2013-14.
[540] House of Commons Political and Constitutional Reform Committee, "Parliament's role in conflict decision: an update", Eighth Report of Session 2013-14.

difficulties. The government is concerned that one of the main problems relating to legal codification is how to clearly define conflict decisions that would trigger parliament's involvement. Therefore, although the committee insists on rigidly specifying the detail of the convention, the government keeps these issues flexible to some extent.

Many supporters of a strengthened parliamentary role in conflict decisions insist that these details require further clarification, and even demand a legal safeguard. Otherwise, the government retains considerable discretion on what meets the convention's threshold, thereby making the whole framework potentially open to interpretation and exploitation.[541] However, the lack of a clear threshold for the convention's application is seen as a threat to the parliamentary convention. Clarification these detail of convention should be specified by non-legal form. Hence, the convention` application still able to determined according to practices by politicians without pressure of strict legal rule. Politicians can evaluate and decide on a case-by-case basis, and conventions would not stuck in the written statement.

In addition, it can be argued that conventional rule features a form of practical wisdom that gives politicians the power to adjust conventional matters on a case-by-case basis under the political circumstances of the day. In a sense, these conventional rules give discretional power[542] to politicians so that they can be freely able to decide on political issues without the pressure of firmly stated rules. Turpin and Tomkins note that "…this imprecision makes for flexibility which allows a congruous development of the constitution in response to experience and changes in society."[543]

For example, collective responsibility is able to provide a solution to different political scenarios. If it is regulated with law, the codified convention would only be able to apply to specific cases and would not answer different political issues.

[541] Claire Mills, "Parliamentary Approval for Military Actions", Briefing Paper, 7166, 12 May 2015, House of Commons Library, 4.
[542] James G Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behaviour*, Buffalo Law Review, vol. 40, no. 3 (Fall 1992): 645-738.
[543] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2012) 190.

It can be concluded that there is no generally recognised or binding rule for each situation or crisis. For this reason, it is not possible or useful to predict and express every possible future case in firm legislation. In times of potential crisis, the relevant political actors will at least be able to consult the conventional rules. Otherwise, clear regulation on conventional matters might cause difficulties in preventing politicians from making decisions freely.

Similarly, Jaconelli highlights that:

> While that content can be reproduced quite clearly and without controversy for the general run of circumstances, the existence of extreme situations can pose enormous difficulties for the legal draftsman. Those difficulties exist at two levels: identifying such situations and specifying in advance the appropriate legal response to them.[544]

For example, Jaconelli argues that it is not correct to say that the queen should grant royal assent as a matter of course to a bill that has been duly passed by the House of Commons and the House of Lords in all circumstances.[545] Rather, if the queen is faced with an unacceptable bill that would be oppressive or irregular in some sufficiently serious and indeterminate way, the monarch retains the conventional right to deny assent to that bill.[546] Likewise, Jaconelli explains:

> Although the Monarch has historically acceded to any request by the Prime Minister (or, formerly, the Cabinet) to dissolve Parliament, there could conceivably be situations where, in the interests of fair play or in the national interest, such a request could properly be refused.[547]

Furthermore, the efficacy and purpose of constitutional conventions have needed to keep pace with changing times and political conditions. In the Patriation Reference, the Canadian Supreme Court stated that the main purpose of constitutional conventions is “to ensure that the legal framework of the constitution will be operated

[544] Joseph Jaconelli, “Do Constitutional Conventions Bind?” (2005) 64 The Cambridge Law Journal 149.
[545] Joseph Jaconelli, “Do Constitutional Conventions Bind?” (2005) 64 The Cambridge Law Journal 149.
[546] Joseph Jaconelli, “Do Constitutional Conventions Bind?” (2005) 64 The Cambridge Law Journal 149.
[547] Joseph Jaconelli, “Do Constitutional Conventions Bind?” (2005) 64 The Cambridge Law Journal 149.

in accordance with the prevailing constitutional values or principles of the period."[548] On that account, if the full detail of a convention is firmly interpreted by an official, it may become difficult to enable to adapt it to various political circumstances. The convention cannot evolve in accordance with practices, this is not compatible with the political nature of the convention. Jaconelli outlines the danger that:

> To enact a constitutional convention into statute law is, in a sense, to take a photograph of it at a particular stage in its evolution, and also to arrest its development thereafter.[549]

It is argued that if the content of conventions would be contained in law, the capacity of the conventions to evolve in response to political reality would be reduced or destroyed, and that this is not desirable. Hence, it is essential to strike a balance between clarification and flexibility of constitutional conventions and, thus, convention continues to improve in response to political need.

Similarly, the legal form of the Sewel Convention has proven that legal codification on the convention was not able to reflect how that convention was being applied. The statute draws only a general frame of the convention for the general run of circumstances but is not able to take into account how the Sewel Convention has been interpreted in present practice for example in the exceptional circumstances of Brexit. McHarg notes that the Sewel convention was codified by Lord Sewel's original statement which narrow the scope of the Convention, instead of from the broader practice that had grown up around legislative consent as detailed in DGN 10.[550] According to her 'seeking to distinguish the convention from the practice of the convention was, however, misconceived.'[551] She says, 'While Lord Sewel's statement may be understood as an *attempt to create* a constitutional rule regarding the seeking of devolved consent, it is not determinative of the scope of that rule.'[552]

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[548] The Canadian Patriation case [1981] 1 SCR 753.
[549] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015).
[550] Department for Constitutional Affairs DGN 10.
[551] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[552] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.

It therefore can be concluded that conventional rules are political in nature. They might not be suitable for being legally codified. Conventional matters should not be established and enforced through firmly determined rules, as this may undermine the effectiveness of those conventions as instruments of political management, which draws in part on their nature as shared understandings. For this reason, they should leave as a conventional standard of behaviour to be functioning flexibly and well. Hence, it would not be wrong to say as McHarg remarks that it is necessarily appropriate to use soft law rather than hard law to regulate constitutional behaviour.[553]

## 3.5 Conclusion

Uncertainty about the scope of constitutional conventions has resulted in increased documentation in the United Kingdom. These guidance documents serve one main purpose, which is to provide greater clarification regarding the meaning and implementation of conventions to prevent any undesired consequence of uncertainty.

Constitutional conventions were divided into three main categories based on their clarification process. The first group of conventions was labelled classic conventions, which remain unwritten and unenforceable by a court. The second group of conventions are stated or recognised conventions. Their content is expressed in an official document, but these authoritative documents are not legally binding. These conventions therefore continue to evolve in practice without the pressure of strict rule of law. Finally, some conventions are crystallised into law and thus become potential subjects for legal running. This thesis has called them ‘codified’ conventions.

This different way of capturing of convention indicates not all conventions necessarily have same degree of obligation. If sufficient attention is given to these practical categorizations of conventions, it is easier to understand the different levels of obligation attached to different conventions and breach of convention brings different result for different conventions and thus different enforcement mechanisms are required for different group of conventions.

[553] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853-877.

These different groups of conventions prove that all conventional rules are not necessarily in same nature. There are constitutional and political aspects of all conventions. Some conventions' political aspect of a convention outweighs constitutional aspect. These group of conventions heavily political in nature. Their operation depends on a range of political factors. Their breach usually brings political concerns such as convention of individual ministerial responsibility. In the British Constitutional system, these are heavily in political nature that clarified in non-legal way. Therefore, they keep operate flexible. On the other hand, some of conventional rules are purposely transferred into statute or legal safeguard on them are persistently demanded. But some of these conventions are still treated as a convention despite legal codification. This has raised questions about the benefit of clarifying them legally? Providing legal safeguard on conventions would aim to reduce risk of violating such rules. Ignoring or breach of some conventions in the UK brings serious political trouble to politicians. Because these conventions usually are closely relevant constitutional principles. It is not desired to leave at the mercy of politicians and political process alone. In a sense, legal codification on convention is used as a precaution against violence or would-be violence. This chapter drew attention that it is vital to protect the flexibility of conventional rules so that they can evolve in line with the political values of the day rather than become a solidly specified code of conduct.

# Chapter 4 – Enforceability of Constitutional Conventions

## 4.1 Introduction

Constitutional conventions can be surrounded in uncertainty due to their enforceability and there is no clear picture of the failure of a constitutional convention. This vagueness regarding the enforceability of conventions leads to two important results. First, it is hard to determine a breach itself. Second, it is unclear how the rules are enforced if they are not applied. For instance, there exists a constitutional convention that states that the monarch must automatically grant their approval to the passing of new laws to help preserve democracy. We know of no examples since 1914 when George V apparently contemplated refusing to give assent to Irish Home Rule prior to the First World War.[554] As Tomkins says: 'However, the mere fact that power has not been exercised for some time is not necessarily conclusive evidence that the power is no longer available.'[555] If today the queen refused to give assent to any legislation, no one could provide a clear answer as to who adjudicates or forces the queen to grant consent to complete the legislative process.

Since Dicey made a sharp distinction between law and conventions,[556] the subject of the enforceability of conventions is mainly associated with the relationship between the court and conventions. The traditional approach holds that while courts may and should *recognize* conventions, they may not and should not *enforce* them as laws forming part of the constitution.[557] A key factor of this reluctance is that conventions are inherently legal, and it follows that they cannot be justiciable.[558]

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[554] Adam Tomkins. (2003). *Public law*. Oxford: Oxford University Press 64.
[555] Adam Tomkins. (2003). *Public law*. Oxford: Oxford University Press 63.
[556] Albert Venn Dicey, *Introduction to The Study of The Law of The Constitution (5th ed.* Macmillan 1897) 136.
[557] Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015).
[558] Keir Baker, A Matter of Convention? What can English Constitutional Law learn from the Bundesverfassungsrecht's Treatment of Constitutional Conventions? Constitutional Conventions, AGLJ Vol. 1 2015.

The researcher challenges the widely held view that there is no specific and certain mechanism or authority to control breaches, such as the courts. They cursorily provide a single enforcer for all conventions, such as voters, politicians etc. Such approaches, however, have failed to address the meaning of political enforceability in much detail. Constitutional conventions are critically different in nature, they originate from political practices and are only politically enforceable norms.

The present study, therefore, begins by considering when exactly conventional rules are broken. This is important because politicians cannot be forced to follow rules unless there is a clear declaration or disclosure of a breach or would-be breach of them. This chapter will show that it is not easy to understand and decide on breaches of conventions. For example, after the general election of May 2010, the Labour Prime Minister, Gordon Brown remaining in the office faced to serious attack that his government lost the election and should get out of 10 Downing Street immediately. There is no agreement that in interpreting the constitutional conventions on hung Parliaments is to realise that the constitutional right of an incumbent Prime Minister to remain in office or not. Conflicting interpretations of what constitutional convention and practice in hung Parliament situations was, or what it ought to be make difficult to understand whether there is a breach of convention or not? But a House of Commons committee later confirming that this had been the constitutionally appropriate time.[559]

Then, the second part of this chapter addresses how conventional rules are enforced? In English law, the ready answer to that question is that a constitutional convention is politically enforceable. But this study will investigate this matter more deeply and will start by explaining the meaning of enforceability. It is argued that each convention has different features and implementation mechanisms, and so the matter of what authority is responsible to guard a convention should not be generalized. The main objective of this chapter, therefore, is to paint a broad background picture of the consequences of a breach of each convention or group of conventions.

[559] House of Commons Political and Constitutional Reform Committee 2011; 11.

## 4.2 The Challenge to Determine a Breach of a Convention

As Forsey underlines, constitutional conventions are political: political in their birth, political in their growth and decay, and generally political in their application and sanctions. Politics lives and moves and has its own existence.[560] It means that there is no certain or predetermined mechanism to grow, change and implement conventions. The inherent weaknesses of conventional rules make it hard to disclose breaches of them. Determining whether a constitutional convention exists and what its scope may be is a challenging task. Even more difficult is identifying "precisely when a constitutional amendment by way of a convention has occurred"[561]. As Delaney asks:

> …when political actors do not feel constrained by a convention, is that because of an alteration in the convention itself (perhaps even by "amendment" to the constitutional convention), or because the convention never imparted a sense of obligation to begin with?[562]

In a sense, when a politician acts against a convention, it is not always considered a breach of it. There are three possible reasons to explain why a convention may not be applied in a specific case. A politician may not follow a convention because of the evolution of the convention (amending of a convention), or a convention may not be established yet, or a politician may exercise discretionary power to make the most convenient decision in some cases.

In the first situation, politicians may sometimes not feel obliged because there is no agreement on the existence of the rule. In other words, the existence of a settled conventional rule is a pre-condition to mention a breach of it. On this point, it needs to be clarified when a convention becomes well established and can be commonly accepted as a constitutional rule.

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[560] Eugene A. Forsey, "Courts and the Conventions of the Constitution" 33 U.N.B.L.J. (1984) 11.
[561] Robert Blackburn, 'Constitutional Amendment in The United Kingdom', *Engineering Constitutional Change A Comparative Perspective on Europe, Canada and the USA* (1st edn, Routledge 2013).
[562] Erin F. Delaney, 'Stability in Flexibility: A British Lens on Constitutional Success' [2016] SSRN Electronic Journal 8.

Traditional views of conventions emphasize that conventional rules originate through either time-honoured practice or are created by express agreement.

The traditional understanding of constitutional conventions develops out of political practices.[563] Political practices gradually become conventional rules. While the birth of a convention sometimes goes through an easy process, sometimes it goes through uneasily and trouble process. Hence, in case, it is not easy certainly hold birth of new convention.

At the beginning of this establishing progress, actors may consistently tend to follow the same practice in the same circumstances without feeling obliged to do so. If politicians do not follow this political practice, there is no constitutional result, simply because the practice has not yet been recognized as a convention. Brazier describes the initial stage of a convention as a pre-existing constitutional practice:

> It represents a notion of a kind separate from a constitutional convention and hierarchically inferior to it. It might be termed a constitutional practice. Its features are that the actor usually behaves in a particular way, even though there is no obligation on him to do so, so that no constitutional consequences can flow if, in a given case, he departs from that practice.[564]

Later, political actors begin to think that the practice ought to be followed as long as a government institution works well in this way[565]. As Ahmed et al. note that constitutional actors themselves accepted that they ought to continue to act in that way.[566] To accept that a constitutional actor ought to act in some way is to accept that doing so is legitimate. Thus, conventions reflect the judgment of constitutional actors that certain behaviour is legitimate. They mention the necessity of identifying the practice as a conventional rule. Once a practice is recognized as a conventional rule,

[563] Ivor Jennings, *The Law and The Constitution* ([University of London Press Ltd] 1959) 80.
[564] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43:3 *Northern Ireland Legal Quarterly* 270.
[565] Ivor Jennings, The Law and the Constitution (5th ed., London 1959) 80.
[566] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1157.

a new convention is formed. 'It is necessary that such behaviour must be expected to continue to recur.'[567]

When a constitutional practice is hardened into a constitutional convention, the new convention needs to be tested if it is to settle in practice. Sir Ivor Jennings devised a test to establish the existence of a convention.[568] In this case, three questions, which have been widely accepted for identifying conventional rules, must be asked: First, what are the precedents? Second, did the actors in the precedents believe that they were bound by a rule? And third, is there a reason for the rule?[569] If this new convention passes Jennings' three-part test, the convention becomes a well-established convention and a subject for a breach. For Sir Ivor Jennings, it was important to be able to test whether a non-legal rule has been established: if it passed his test, a convention existed; if it failed that test, it did not.

As the previous chapter provides a detailed account of the development of the convention requiring parliamentary approval before engaging in military action, only some key points will be highlighted here. While it is often hard to say with certainty when a new convention has come to be accepted as incontrovertible. it was shown that in 2003, the UK government thought it right to obtain the support of the House of Commons for the Iraq war. The motion was carried. Therefore, a new convention emerged whereby the government cannot engage in military action overseas without a House of Commons debate and vote on the deployment of armed forces. At that stage, an established convention would be forthcoming. But the convention was not properly applied between the Iraq vote in 2003 and the government's observations in March 2011, including the commitment of significant numbers of British forces to Helmand province in Afghanistan in 2006.[570] In August 2013, Parliament assessed and voted to engage in military action against the Assad regime in Syria and responded to the actions of Islamic State (ISIS) in Iraq in September 2014. But MPs rejected possible UK military action against Syrian President Bashar al-Assad's

[567] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2012) 190.
[568] Ivor Jennings, *The Law and the Constitution* (5th ed., London 1959) 136.
[569] Ivor Jennings, *The Law and the Constitution* (5th ed., London 1959) 136.
[570] Claire Mills, "Parliamentary Approval for Military Actions", Briefing Paper, 7166, 12 May 2015, House of Commons Library 4.

government. Although the Cameron government`s motion was in support of military action in Syria, David Cameron said:

> It is very clear tonight that, while the House has not passed a motion, it is clear to me that the British parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the government will act accordingly.[571]

David Cameron's respect for the vote of the House of Commons in 2013 proves that those actors those play a role in parliamentary conventions feel bound by the convention. It is not wrong to say that if the UK government were to circumvent parliamentary involvement in fresh air strikes on Syria, that would help the convention became established. The government's power to decide to engage in any military action, by that time, was limited; in emerging cases, observers know that, in the majority of military action cases, the government would seek parliament's decision on them.

Therefore, the convention seems to complete its emergence process with the Syria vote in 2013 simply because it passed Jennings' test. The period between the emergence of the constitutional practice and it is becoming settled as a new convention in practice can be defined as the establishment period. During this test period, if a politician does not follow this new convention, this decision cannot be interpreted as a breach of the convention because the new convention is not yet mature. But, if similar circumstances arise after 2013, it cannot be said that the convention has not settled so as to require parliamentary approval for the use of military force in a future case.

Second, constitutional conventions are dynamic rules. In this scenario, politicians may seem to act against a convention, but conventions evolve over time and thus, in fact, politicians might alter or amend them. As Tomkins and Turpin point out that "it is sometimes questionable whether a convention has been broken or has simply

[571] Nicholas Watt, Rowena Mason and Nick Hopkins, 'Blow to Cameron's Authority as MPs Rule Out British Assault On Syria' (*The Guardian*, 2019) <https://www.theguardian.com/politics/2013/aug/30/cameron-mps-syria> accessed 27 July 2019.

changed".[572] Hence, when a politician does not follow a convention, the possibility of alteration of the conventional rules should be considered.

Jaconelli made three-phase lifecycle to explain the evolutionary dynamics of conventions.[573] For Jaconelli[574], such dynamics are characterised by three phases: first, the birth or 'coming into existence' of a convention; secondly, its' adaptation in response to 'changing conditions'; and thirdly, its death or 'ceasing to exist'.[575] As Jaconelli notes in second phase, conventional rules have the capacity to adopt changing conditions.

As Barry et al. note that adaptability of a convention is not stable over time, however, so 'at certain moments a constitution can exhibit an unusual degree of malleability.'[576] They introduce the term 'softening' to describe the process that results in a more malleable constitution.[577] According to them 'constitutional softening as the change in circumstances that makes convention change possible.'[578] Following, they identify five classes of change-event that can lead to constitutional softening, either immediately or over time: constitutional crises; political crises; reform; changing societal norms; and emergencies.[579] They note that:

> a political crisis can be triggered by the dominant coalition of political actors choosing an alternative interpretation of a convention that departs from its dominant, longstanding usage. Such shifts are imposed by political actors and, for whatever reason eventually become accepted

[572] Colin Turpin and Adam Tomkins, *British Government and The Constitution* (Cambridge University Press Textbooks 2011) 192.
[573] Joseph Jaconelli, 'Continuity and change in constitutional Conventions', In: Q, Matt. (ed.) The British Constitution: Continuity, Change and the Influence of Europe—A Festschrift for Vernon Bogdanor. Oxford, Hart Publishing, (2013) 121–140.
[574] Joseph Jaconelli, 'Continuity and change in constitutional Conventions', In: Q, Matt. (ed.) The British Constitution: Continuity, Change and the Influence of Europe—A Festschrift for Vernon Bogdanor. Oxford, Hart Publishing, (2013) 121–140.
[575] Joseph Jaconelli, 'Continuity and change in constitutional Conventions', In: Q, Matt. (ed.) The British Constitution: Continuity, Change and the Influence of Europe—A Festschrift for Vernon Bogdanor. Oxford, Hart Publishing, (2013) 121–140.
[576] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions In Westminster Democracies' (2018) 72 Parliamentary Affairs, 666.
[577] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions In Westminster Democracies' (2018) 72 Parliamentary Affairs, 666.
[578] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions In Westminster Democracies' (2018) 72 Parliamentary Affairs, 666.
[579] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions In Westminster Democracies' (2018) 72 Parliamentary Affairs, 666.

> usage among successive generations of political actors. In other cases, a political crisis, can give rise to a new (nascent) consensus over the meaning and application of an established convention, or the creation of a new conventional rule.[580]

Last, it is worth considering why convention rules are needed and what their role is in the functioning of constitutional systems. Jennings' famous phrase is that 'they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas'.[581] Geoffrey Marshall also suggests that the main purpose of conventions is 'to give effect to the principle of government accountability that constitutes the structure of responsible government'[582]. Galligan and Brenton, in their latest monograph on constitutional conventions, remark that "we see them as political institutions that are core parts of the constitutional system and govern ongoing political practice".[583] For conventions to succeed in their aims, convention rules are not strictly formulated, and restrictions on their application cannot be rigorously determined. This imprecision leaves politicians free to decide a political issue without the pressure of firmly stated rules.

In a sense, a convention allows government actors to assess and decide complex policy issues and unforeseen problems on a case-by-case basis without the pressure of strict rules. Therefore, conventions lead to an expectation that politicians make the convenient decisions by taking advantage of the flexibility of conventions. Political actors have responded to various situations where they thought their actions were the most appropriate regarding their responsibilities and position in government.[584] The Sewel Convention can be taken as an example to illustrate the power of the flexibility of conventions. The Scottish government intervened in the Brexit case to demand that the UK government seek their approval before triggering Article 50. This argument concerns the implementation of the Sewel Convention. The Sewel Convention holds

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[580] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions In Westminster Democracies' (2018) 72 Parliamentary Affairs, 668.
[581] Ivor Jennings, The Law and the Constitution (5th ed., London 1959) 81.
[582] Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (Clarendon Press 1984) 18.
[583] Brian Galligan, Scott Brenton, 'Constitutional conventions', Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges (1st ed., Cambridge University Press 2015) 11.
[584] Thomas A. Koeble, 1995. 'The New Institutionalism in Political Science and Sociology'. *Comparative Politics* 27(2): 231-43.

that the United Kingdom parliament will not normally legislate for Scotland on devolved matters. In this case, devolved administrations do have power over choices to be made about the consequences for devolved subjects and powers. It is therefore expected that the Westminster government will take advantage of the flexibility of this convention and fundamentally reconsider the devolution issue, and thus should arrive at consensus-based policy on the territorial constitution.[585]

Although it is expected that politicians will make the convenient decisions by exercising this discretionary power of conventions, at the same time, there is always a risk that politicians will take advantage of this flexibility for political self-dealing.[586] While it is agreed that if politicians do not follow a convention, undesirable practical consequences may arise from not doing so, there is no clear picture of the result of disobedience to conventions and sanctions for them being violated. Politicians take advantage of this ambiguity over conventions and find ways to elude political trouble when they do not apply a convention. As Peter Madgwick and Diana Woodhouse point out, 'the imprecision, flexibility, and absence of sanctions work to the advantage of those in positions of power, for it becomes difficult to determine and thus appeal to, the constitutional position and constitutional limitations.[587] Brazier also remarks that:

> If politicians are faced with merely the barrier of a non-legal rule between them and their goal, they will know that they have considerable freedom to manoeuvre in order to reach their objective. For they might deny that any such relevant rule exists; or they might accept that one does exist, but deny that it applies in the instant case; or they might, in some circumstances, say that they have agreed to waive its operation for the time being; or they might claim that, while a rule exists and their action

[585] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention, A Gwilym Gibbon Centre Working Paper, (2017).
[586] Erin F. Delaney, 'Stability in Flexibility: A British Lens on Constitutional Success' [2016] *SSRN Electronic Journal*. 1-23
[587] Peter Madgwick and Diana Woodhouse, The law and politics of the constitution of the United Kingdom. (1995) Hemel Hempstead [England]: Harvester Wheatsheaf, - Contemporary political studies 35.

would be in breach of it, such an infringement was justified by circumstances.[588]

Likewise, Delaney points out that “Flexibility can serve as an invitation to political actors for self-dealing or to circumvent consensus-based politics.”[589] For instance, when there is misconduct in ministerial departments, ministers take the blame, and it is expected that ministers should resign. Although ministerial resignations are seen as an important tool for accountability, Marshall provides some examples of marginal cases in which there were no resignations despite a series of scandals in the past.[590] For instance, Mr. John Strachey did not offer his resignation after the failure of the West African groundnuts scheme. In Mr. Attlee’s post-war administration, the Colonial Secretary, Mr. Lennox-Boyd, did not resign when the brutal treatment and killing of detainees at a prison camp in Kenya was debated in the House of Commons in 1959. In 1964, Mr. Julian Amery did not resign when the Ministry of Aviation was found to have made large overpayments to Ferranti Ltd for defence contract work; in 1971, the Vehicle and General insurance company collapsed and a Tribunal of Inquiry found that there had been negligence on the part of the Board of Trade in exercising its functions; but the president of the Broad of Trade did not offer his resignation; after a series of espionage scandals in the 1960s and when large-scale miscalculations were made about the cost of the Concorde aircraft development programme, there were no ministerial resignations; and in 1982, Mr. William Whitelaw, Home Secretary and chairman of police authority for the Metropolitan area, did not resign when failing to protect the queen and the security of Buckingham Palace. He offers two reasons for ministerial manoeuvres to escape responsibility.[591] First, in his view, ministers are protected by the assumption of collective responsibility whereby responsibility is shared by some ministers and thus a particular minister is protected.[592] Second, he believes that the chain of command or accountability is extended administratively, and

[588] R Brazier, “The Non-Legal Constitution: Thoughts on Convention, Practice and Principle” 43 N. Ir. Legal Q. 262 (1992) 263.
[589] Erin F. Delaney, 'Stability in Flexibility: A British Lens on Constitutional Success' [2016] SSRN Electronic Journal 1-23.
[590] Geoffrey Marshall, “Constitutional Conventions The rules of forms of political accountability”, Clarendon Press Oxford, 1984 64.
[591] Geoffrey Marshall, “Constitutional Conventions The rules of forms of political accountability”, Clarendon Press Oxford, 1984 116.
[592] Geoffrey Marshall, “Constitutional Conventions The rules of forms of political accountability”, Clarendon Press Oxford, 1984 117.

so ministers are defended on the ground that they either had not heard or could not have foreseen and averted a mistake.[593]

The Sewel Convention example helps to illustrate the point that although it is expected that an issue may lead to a rebalancing of the UK's territorial constitution, it may result in a political impasse. Prime Minister, Theresa May, insisted that Westminster remains sovereign and has the power to make and unmake any law whatever. In other words, the core principle of UK parliamentary supremacy is untouched.[594]

On the other hand, there is much uncertainty about the scope and implementation mechanism of the convention. There is no pre-determined and certain mechanism to recognize what the convention requires or whether a politician is in breach of any such rule. This deficiency of conventions makes it possible for politicians to use them for their political expediency, thereby diminishing the *enforceability* and effectiveness of conventions. As a result, conventional rules give politicians great discretionary power without fear of judicial enforcement. Therefore, it is not easy to decide whether a politician exercises discretionary power to reach the most convenient decision in a specific case or abuses the flexibility of a convention and thus violates it. This challenge can be briefly illustrated by a convention that the UK government needs parliamentarian approval before engaging in military action overseas. Theresa May decided to join in military action against the Assad regime in Syria in 2018 without seeking the permission of MPs. She faced severe criticism from MPs who had not been given a vote in parliament on UK military action in Syria.[595] On the other hand, Theresa May defended her action, claiming that an urgent response was needed, and so, in this circumstance, there was no alternative to prevent a humanitarian catastrophe in Syria.[596] In that case, it is not clear whether she broke the convention

[593] Geoffrey Marshall, "Constitutional Conventions The rules of forms of political accountability", Clarendon Press Oxford, 1984 118.
[594] Andrew Tickell: 'UK's Promise to Enshrine The Sewel Convention In Law Turned Out To Be False' (The National, 2017) http://www.thenational.scot/news/15045032.Andrew_Ticklell__UK_s_promise_to_enshrine_the_Sewel_convention_in_law_turned_out_to_be_false/?ref=Andrew%20Tickell:%20UK%27s%20Promise%20To%20Enshrine%20The%20Sewel%20Convention%20In%20mrb&lp=2 accessed 4 March 2017.
[595] "Analysis: After May's Speech to Parliament on #SyriaStrikes, Here's the 4 Questions She's Still Not Answered" (*Common Space* April 16, 2018) <https://www.commonspace.scot/articles/12651/analysis-after-mays-speech-parliament-syriastrikes-heres-4-questions-shes-still-not> accessed 31 July 2019.
[596] The Prime Minister (Mrs Theresa May) Hansard House of Parliament Debates Volume 639 16 April 2018. https://hansard.parliament.uk/commons/2018-04-16/debates/92610F86-2B91-4105-AE8B-78D018453D1B/Syria.

or simply responded to an unexpected issue by exercising the flexibility of the convention. Because, if there is an emergency, the convention does not require parliamentary procedure, but how emergency situations should be interpreted and under what circumstances an emergency arises is unclear. Many of the conventions of parliamentary government, like those of individual and collective ministerial responsibility, suffer from vagueness as to their application, though they certainly exist.[597] Thus the absence of clarity in conventions raises issues for the conclusion of any case.

Another example to explain and clarify the operation and mechanism of conventional rules is "collective responsibility", which is a basic convention of the constitution of the UK. According to this, the government is jointly answerable to the upper house for its measures, verdicts and strategies. Judgments made by the cabinet are mandatory for every member of the state government. This indicates that if any policy of the government is not agreed by a minister, he or she still has to support it in public at every turn. If a minister does not agree to follow policy, he or she will be expected to resign in accordance with collective responsibility.[598] In the UK, every member of the government is obliged to follow the principle of “collective responsibility”, apart from where it is clearly put to one side. An official deferment of collective responsibility is commonly called an "agreement to differ". Examples include the tariff policy in 1932, the 1975 vote on the UK’s membership of the European Economic Community, the direct elections to the European Assembly in 1977, several problems within the 2010–15 coalition government, as well as the 2011 referendum on the alternative voting system for general elections, as approved by the 2010 Coalition Agreement, the 2016 referendum on the UK’s membership of the European Union. In 2016, a special arrangement was also developed to permit particular ministers “some flexibility” for their departure from the usual settings including collective responsibility, with reference to the decision of the government on Heathrow expansion. The point that collective responsibility can be put to one side or rejected has allowed a few

[597] Brian Galligan, Scott Brenton, 'Constitutional conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st ed., Cambridge University Press 2015) 73.
[598] Brian Galligan, Scott Brenton, 'Constitutional conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st ed., Cambridge University Press 2015) 72.

researchers to make the argument that this convention is perhaps a regulation of political convenience, applied by prime ministers who use it when it suits them and reject it when it does not because it is a constitutional convention.

Conventional rules can only be enforced when all the political actors reach a consensus how a system or procedure has turned out or should continue to be mandatory. If the requirement of observing a practice is just continued whereby agreement is necessary, then every violation will obliterate the conventional rules as every political player for whom a conventional binding was thought to be necessary could damage it through abandonment of that agreement. If this is accurate, it continues to be acknowledged by the related group or groups, between whom identification of an agreement should be done. A system is exposed by observers like Hennessy[599], Marr[600] and Horwitz,[601] in which clarification regarding the constitution, and particularly regarding practices of conventions, is the concern of ministers, public servants and the cabinet office, along with palace officials. These are the characters who possess the majority of information regarding the examples. This indicates that these personalities are responsible for their interpretation and in this manner provide definitions of the rules. According to De Smith and Brazier, public servants and royal counsellors have the possibility of being the protectors of these rules, which might be exposed in public and then not be open to further discussion or sensitivity anymore.[602]

To conclude, so far it has been highlighted that if it is argued that an act is against a convention, the credibility of convention rules needs primary consideration, including the evolution of conventions or exercising discretion in a particular case. If there are no such possibilities to explain acting against convention rules, breaches of the rules might be predictable or routine. The following section will deal with the consequences of violating a convention.

[599] Peter Hennessy, The Hidden Wiring: Unearthing the British Constitution, Phoenix,1996.
[600] A Marr loc. cit.
[601] Morton J Horwitz, Why is Anglo-American Jurisprudence Unhistorical? [1997] OJLS Pages 551–586.
[602] De Smith & Brazier loc. Cit p. 43 points to the significance of political and royal biographies.

## 4.3 How convention rules are enforced

In the United Kingdom, 'unconstitutional' can mean contrary to convention.[603] As Turpin and Tomkins point out, 'a breach of a constitutional convention is every bit as unconstitutional as a breach of constitutional law'.[604] This is because if a politician acts against a convention, his/her behaviour will be regarded as unconstitutional.

In a broad sense, the enforceability of conventional rule is any mechanism that forces or pressure politicians to follow a constitutional convention. Specifically, Ahmed et al. note that:

> …enforcement of a duty-imposing rule occurs through an act which (i) responds to a violation or a would-be violation of the rule; and (ii) prevents the rule from being violated or violated with impunity.[605]

There are two basic enforcement mechanisms for convention rules which are judicial and political enforcement. Judicial enforcement is enforcement by judges.[606] Political enforcement is typically enforced through political pressure. The chapter will provide a detailed account of both enforcement types.

## 4.4 Judicial enforcement of conventions

There exists a "traditional Westminster approach" to how the courts treat and should treat conventions. The view holds that while courts may and should *recognize* conventions, they may not and should not *enforce* them. It is believed that allowing them to be binding with legal force would be constitutionally unacceptable.[607]

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[603] Eugene A. Forsey, "Courts and the Conventions of the Constitution" 33 U.N.B.L.J. (1984) 11.
[604] Colin Turpin and Adam Tomkins, *British Government and The Constitution* (Cambridge University Press Textbooks 2011) 182.
[605] Farrah Ahmed, Richard Albert, and Adam Perry, 'Judging Constitutional Conventions' [2017] *SSRN Electronic Journal* 8.
[606] Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' [2017] *SSRN Electronic Journal* 8.
[607] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1982) 277.

British commentators, most famously Albert Venn Dicey in the late nineteenth century, made a distinction between constitutional law and constitutional conventions based on judicial enforceability. As Dicey explained, in contrast to the law of constitutions, conventions cannot be recognized and enforced by the courts because conventions are not actually laws.[608] Likewise, Waley argues that "laws" and "conventions" are differentiated. Conventions are non-legal; hence they cannot be subject to specific enforcement by judicial order unless conventions are transferred into legal rules. Similarly, Munro supports Dicey's assertion that:

> …the validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breach of such rules will not be affected by any legal sanction. There are no cases which contradict these propositions. In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises.[609]

Dicey emphasized the idea that conventions were followed because to do otherwise would eventually lead to violations of the law[610], but generally, his idea has not been accepted.[611]

Since Dicey made a sharp distinction between laws and conventions, the traditional approach holds that while courts may and should *recognize* conventions, they may not and should not *enforce* them as laws of the constitution.[612]

This follows the traditional idea underlying many jurists across the world. In *Re Resolution to Amend the Constitution* Canadian supreme Court stresses that there is no judicial remedy that could serve the enforcement of conventions because 'they are generally in conflict with the legal rules which they postulate, and the courts are bound to enforce the legal rules.' [613] The Court underlined that 'unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they

[608] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (8th ed., 1982) 277.
[609] Colin Munro, "Laws and Conventions Distinguished" (1975) 91 Law – (1975) 91 LQR 218, 228. Q. Rev. 218, at 228.
[610] A V Dicey, Introduction to the Study of the Law of the Constitution, (8th ed., 1982) 296.
[611] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 41.
[612] Adrian Vermeule, Conventions in Court, 38 DUBLIN U. L.J. 283, 284 (2015).
[613] In Re Resolution to Amend the Constitution [1981] 1 SCR 774 to 775.

in the nature of statutory commands which it is the function and duty of the courts to obey and enforce.'[614] And thus the Court, "to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.'[615] The majority of judgments seen matter as 'purely political and does not fit for an answer by a court '..The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but will not engage the attention of the courts which are limited to matters of law alone.'[616] Hence, 'it is because the sanctions of convention rest with institutions of government other than courts … or with public opinion and ultimately, the electorate, that it is generally said that they are political.'[617]

In this case, the court concerned the status of the federal government's practice of securing provincial consent before requesting constitutional amendments affecting federal-provincial relations. Could investigate the question that the federal government proceed with the proposed Resolution unilaterally as a matter of constitutional convention? Court discusses on the existence of convention and use Sir Ivor Jennings`s test for recognition of conventions: "first, what are the precedents; secondly, did the actors in the precedents believe that they are bound by a rule; and thirdly, is there a reason for the rule?". The court agreed on the existence of convention that the Government of Canada was constrained by a constitutional convention requiring that the federal government proceed with patriation only with 'a substantial degree of provincial consent.'[618]

The Court's recognizing the existence of this convention of substantial provincial consent indicates while constitutional conventions were political creatures and not subject to enforcement; constitutional conventions are justiciable. Adjudication conventional rules by defining existence and meaning of convention is criticized. For example, Forsey draws attention after the *Patriation Reference* of the grave danger that would ensue with the courts increasingly being called upon to rule on

[614] In Re Resolution to Amend the Constitution [1981] 1 SCR 880.
[615] In Re Resolution to Amend the Constitution [1981] 1 SCR 880.
[616] In Re Resolution to Amend the Constitution [1981] 1 SCR 853.
[617] In Re Resolution to Amend the Constitution [1981] 1 SCR 882-883.
[618] In Re Resolution to Amend the Constitution [1981] 1 SCR 905.

constitutional conventions.[619] Ahmed et al. believe that 'the Court's declaration in the *Patriation Reference* amounted to enforcement.' Because they note that 'the Court's declaration was in response to the violation of the convention. The declaration prevented the convention from being violated with impunity, given the political pressure the declaration placed on political actors, who ultimately tailored their conduct to the convention.'[620]

Similarly, the *Patriation Reference*'s ruling on the justiciability of constitutional conventions criticised by Dodek that in this case 'This distinction between "recognizing" and "enforcing" conventions is artificial and untenable'[621]. He concluded that:

> Courts may need to comment on the existence of constitutional conventions in the course of adjudicating other matters. In this sense, the Supreme Court was correct in stating that courts "recognize" the existence of constitutional conventions. However, the *Patriation Reference* erred by translating this practice of "recognition" into "declaration". Constitutional conventions are dynamic rules of political morality and they should be left to political actors to adjudicate and sanction. The courts are too static to adjudicate conventions matters and they risk doing.[622]

Similarly, in the words of T. R. S. Allan:

> The distinction between law and the convention, derived from Dicey and based on court enforcement, is too dogmatic. It is generally accepted that conventions are 'recognized' by the courts: the many examples of judicial reasoning dependent on the existence and force of conventions are well-known. No water-tight divide exists, however, between

[619] Eugene A. Forsey, "Courts and the Conventions of the Constitution" 33 U.N.B.L.J. 11 (1984) 38.
[620] Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' [2017] *SSRN Electronic Journal* 20.
[621] Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference. *"The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011).
[622] Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference. *"The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011) 141.

> 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.[623][624]

Likewise, in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, after the government of the crown colony of Southern Rhodesia in 1965 declared independence, the UK parliament passed the southern Rhodesia Act 1965 to deal with the circumstances arising from this action. In this case, the question arose as to whether the UK parliament could legislate for Southern Rhodesia. The UK government had formally acknowledged that it had become an established convention which applied at that time that the UK parliament would not legislate on matters within the competence of the Legislative Assembly as long as the government of Southern Rhodesia consented to enactment being a subject of jurisdiction.[625] In its judgment delivered by Lord Reid, the Board stated: 'That is a very important convention but it had no legal effect in limiting the legal power of Parliament.'[626] In the case of *Manuel v Attorney General*, Slade LJ stressed that allowing constitutional conventions to become enforceable in law '*would be quite unsustainable in the courts of (England and Wales)* ([1982] EWCA Civ. 4.).[627] Similarly, in the Crossman diaries case – *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752), A Cabinet minister, Richard Crossman, published a book (*Diaries of a Cabinet Minister*) which recorded a dairy of Cabinet discussions and events. The Attorney General argued under the convention of collective responsibility, details of confidential. Cabinet discussions and potential differences should not be open to the public. The Court concerned whether the restraint of publication of this text is in the public interest on the grounds of preserving the doctrine of collective responsibility.

Cabinet discussions should not be disclosed for any point if its' release would impact the doctrine of collective responsibility; given that the Crossman Diaries discuss events from over ten years ago, this information would not breach the convention and

[623] T. R. S. Allan, 1986. 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case'. 45(2) *Cambridge Law Journal* 305, 312-13.
[624] T. R. S. Allan, 1993. Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism. Oxford: Clarendon Press 244.
[625] Madzimbamuto v Lardner-Burke [1968] Judicial Committee of the Privy Council, [1969] AC 645 (Judicial Committee of the Privy Council).
[626] Burke 723.
[627] Manuel v Attorney General [1983] Ch. 77.

thus would no longer be confidential, meaning the Diaries could be published. But the court held that they did retain the power to stop the publication of such information on public policy grounds to include protection for public secrets.

The court did not provide legal enforcement for the convention of collective responsibility, but instead it is being supported by established common law doctrines and thus restricting the release of information from cabinet discussions.

Lord Widgery highlights this distinction by saying in reference to such disclosures by members of parliament one must find that the "obligation is binding in law and not merely in morals."

It is worth to note that, while Lord Widgery made his judgment considering public interest, and not just its protection with reference to a convention, this case can be important example of justiciable of conventional rules in British Constitution.

Besides, the political nature of the Sewel Convention was recognized by Lord Reed in a decision of the Inner House of the Court of Session, *Imperial Tobacco v Lord Advocate* 2012 SC 297, para. 71, and stated that: "Judges, therefore, are neither the parents nor the guardians of political conventions; they are merely observers."[628]

Most recently, the Supreme Court judges put convention matters back in the political realm and reached a conclusion in the Miller appeal that:

> The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.[629]

[628] Imperial Tobacco Limited (Appellant) v The Lord Advocate (Respondent) (Scotland) [2012] The Supreme Court (The Supreme Court).
[629] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) Reference by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2016] The Supreme Court, [2016] EWHC 2768 (Admin.) and [2016] NIQB 85 (The Supreme Court).

These well-known cases are enough to stress that courts do not generally enforce conventions. On the other hand, a court sometimes plays a role in determining the scope and meaning of these unwritten rules. This is because conventions lack exact content; they often suffer from indeterminacy and uncertainty and thus the courts face challenges when they try to deal with them. Sometimes they are even not sure of the existence of a convention.[630] Hence, a court engages in some conventions. The basic form of judicial engagement with conventions is the *recognition* of conventions.[631] It is accepted that at least the courts can recognize constitutional conventions if conventions are to play a meaningful role in answering legal questions to which they are relevant. In that case, a court can take a view on how the convention works and what its scope is.[632] If the convention's existence or scope is uncontroversial, the judicial role in the convention is highly limited and recognition might take the form of a judicial notice.[633] This was the view in *Attorney-General v Jonathan Cape Ltd* in which the court took into account the collective responsibility convention in determining a legal question concerning whether breach of confidence recognition might take the form of a judicial notice. More recently, the political nature of the Sewel Convention was recognized by Lord Reed in a decision of the Inner House of the Court of Session, *Imperial Tobacco v Lord Advocate.*[634] But if there is disagreement about whether a convention exists, the judge will need to consider relevant evidence and reach a *determination* about whether there is a convention and what its scope is.[635] Similarly, in *Evans,* British judges determined the convention's scope for the purpose of answering a legal question.[636] The court was examining whether the public interest favoured disclosure of Prince Charles's 'advocacy correspondence' with ministers. In order to answer the main question, the Upper Tribunal considered a convention concerning the constitutional role of the heir to the throne. The tribunal concluded that while 'the heir to the throne gives a right to be educated in and about the business of

[630] In Re Resolution to Amend the Constitution [1981] 1 SCR 753.
[631] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions". Oxford Legal Studies Research Paper No. 59/2017 1-43.
[632] Colin Munro, "Laws and Conventions Distinguished" (1975) 91 Law – (1975) 91 LQR 218, 228. Q. Rev. 218 228.
[633] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[634] 2012 SC 297, para. 71.
[635] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[636] R (Evans) v Attorney General.

government', the 'education convention' did not include advocating for his personal views, ultimately ordering the letters to be disclosed.[637] Likewise, the Supreme Court in the Miller case considered relevant constitutional conventions to answer legal questions. The main issue in Miller was whether the government required parliament's approval before triggering article 50 of the Treaty on the European Union. Before resolving this main legal question, the Supreme Court needed to consider some relevant conventions, including *The Royal prerogative and Treaties.* In Miller, the Supreme Court held that it did: parliamentary approval was necessary to start the Article 50 process.[638]

But this orthodoxy gradually shifts in attitude and it is increasingly accepted by scholars that on rare occasions the enforcement of conventions by courts is both desirable and constitutional.[639] Ahmed, Albert and Perry approach with suspicion this traditional approach whereby Commonwealth courts refrain from enforcing conventions.[640] They provide the four roles that courts have when it is faced with conventional matter.[641] First, courts can isolate themselves from questions concerning constitutional conventions.[642] Court deliberatively abstains from conventional matters. Judges disengage with constitutional conventions even neither recognize, nor employ these rules. Secondly, court may take role as bystanders. Bystander courts believe that conventional rules should be determined within the political world. Courts should concern themselves the conventional matter only in the context of deciding a legal question. Bystander court therefore are unwilling to declare or legally enforce conventions. They note that the UK Supreme Court in *Miller v. Secretary of State for existing the European Union* played bystander role. The court underlined judges are "neither the parents nor the guardians of political conventions; they are merely observers." The reason that court fear to blame interfering with political issues and thus grab on the powers of democratic institutions in both roles. Third, court give

[637] R (Evans) v Attorney General.
[638] Miller, supra note 4.
[639] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 1-11.
[640] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[641] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[642] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.

advice political actors about conventional matters.[643] Courts see themselves as authorised and competent to advise political actors about conventional disagreements. They argue that In the *Patriation Reference*, Canadian supreme court play advisory role.[644] The main reason courts adopt advisory role, instead of leaving it to political actors to solve for themselves is the question was constitutional in character and thus the Court saw itself as having a responsibility to engage with constitutional issues, even where they were not strictly legal ones.[645]

Finally, courts which see themselves as guardians of the constitution would take an active role when confronted with a question of law involving a constitutional convention. Courts have come to see their role as protecting the constitution from what in their view amounts to endanger or, worse yet, usurpation by other institutions' powers. Courts have given *all* constitutional conventions the force of law. Unlikely bystander role, guardian courts do not hesitate to force conventions.

They go further and argue that the "Commonwealth approach" that conventions are not legally enforceable is mistaken.[646] They suggest that the courts should sometimes enforce only a limited class of conventions. They note that:

> …courts should act as executors of the will and judgment of constitutional actors and limit themselves to enforcing only power-shifting conventions, which transfer power from those who have the legal power to those who can legitimately wield it. This new role of an executor court brings clarity, stability, and predictability to the exercise of official powers that are rooted in constitutional convention rather than constitutional law.[647]

[643] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[644] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[645] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[646] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.
[647] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.

According to Allan, the Canadian Supreme Court[648] does not see the convention as an important constitutional convention, that is why they reject enforcing it.[649] T R S Allan contends that conventions can be enforced by the courts unless conventions play a critical role in maintaining the essential character of the constitutional system, such as the convention of ministerial responsibility to cover the accountability of government. Also, according to Allan, the Crossman Diaries make it possible. The case provides a practical legal remedy for the convention of collective cabinet responsibility. The court decides that collective responsibility should be maintained. In the following sentences, he also claims that the recognition of a convention by a court means acceptance of the convention as a useful rule which is worthy of support, and thus the convention is necessarily "enforced".[650] His view can be criticized in that, although the judges in a well-established case previously stressed the significance of the convention, they rejected giving a legal remedy for a breach of the convention. For example, the Supreme Court in the Miller case notably stay away from Sewel convention` disagreement despite highlighted importance of the Sewel convention.

Although he argues that conventions can be direct sources of legal rights and duties, he does not offer any examples of direct enforcement. As Marshall[651] says, "examples of the direct conversion or acknowledgment of non-legal rules as enforceable rules of law are hard to find". Marshall insists that conventions are not direct sources and legal right and duties.[652] Hence, it can be concluded that the legal enforceability of conventions remains a conceptual possibility.

Although some English constitutional scholars mention the possibility of legal enforcement of conventions in some circumstances, the courts still hold that there should be no feasible legal penalties imposable on those who breach constitutional conventions in practice. A key factor of this reluctance is that conventions are not

[648] *Re Resolution to Amend the Constitution* [1981] Supreme Court of Canada, (Supreme Court of Canada).
[649] T R S Allan, *Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case*, The Cambridge Law Journal, Volume 45 Issue 2 (July 1986) pp. 305-320, 316.
[650] T R S Allan, *Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case*, The Cambridge Law Journal, Volume 45 Issue 2 (July 1986) pp. 305-320, 316.
[651] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 15.
[652] Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 210-11.

inherently political in nature. As Baker notes, ‘Constitutional conventions begin, evolve and disappear organically in a political field alongside the development of society, reflecting the cultural and political *values* of the day.’[653] This is because it is mostly accepted that conventions are considered too politically controversial to be dealt with by an independent judiciary. Forsey supports this idea, holding that:

The Courts have not, nor should they have, the right to decide what the conventions of the Constitution are. If they attempt to do so, the decision has no force at all, legal or other. It is not desirable, or even safe, to have the courts making such decisions. On the contrary, it is most dangerous.[654]

He draws attention to specific problems raised by the justiciability of constitutional conventions. ‘Even if the judges state a convention correctly, there is the danger that they may freeze it, embalm it, petrify it; prevent ‘the political actors’ from modifying it to meet a new situation, or jettisoning it completely because it is no longer relevant or practicable.’[655] If conventions are enforced by the courts, they become "fixed" in the context of law by justices instead of politicians. It would also interfere with the evolution of conventions. This summons up the well-known argument that justices might be led onto a political platform. There is also the possibility of asserting that the requirements of political integrity are supposed to be in relation to joint decisions made within the channel of politics, and so lie beyond the appropriate range of legal function. In a sense, judicial engagement with constitutional conventions seen as a risk restrict flexibility, effectiveness of conventional rules. Dodek also underlines that recognizing Constitutional Conventions by Supreme Court’s has created a dangerous opportunity which political actors might attempt to manipulate the courts into influencing a particular political outcome.[656]

A common assumption, therefore, is that conventional rules are enforced only via moral and political pressure, believing that they apply. Jaconelli describes

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[653] Keir Baker, “A matter of Convention? What can English Constitutional Law learn from the Bundesverfassungrecht’s Treatment of Constitutional Conventions?” (2015) Constitutional Conventions, AGLJ Vol. 1. 2015.
[654] Eugene A. Forsey, “Courts and the Conventions of the Constitution” 33 U.N.B.L.J. 11 (1984).
[655] Eugene A. Forsey, “Courts and the Conventions of the Constitution” 33 U.N.B.L.J. 11 (1984).
[656] Adam M. Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference. "*The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 54. (2011). http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/5

constitutional conventions as a form of social rule. [657] He notes that they involve looking at 'the outward pattern of behaviour as a standard to be followed. Any deviation from the practice attracts criticism and pressure to conform.'[658] Similarly, Lord Wilson argues that 'breach of the conventions is liable to bring political trouble in one form or another'.[659] Example of the application of the Sewel Convention has recently given rise to political dispute between Westminster and Scotland. Most recently, another example is that the current Prime Minister, Boris Johnson suspended parliament in the middle of discussions for Brexit, which resulted political crisis.

## 4.5 Political enforceability

It is commonly acknowledged that the consequences for violations of conventional rules are not generally legal but political. As Forsey opined: "The law of the Constitution is interpreted and enforced by the courts; breach of the law carries legal penalties. The conventions are rarely even mentioned by the courts. Breach of the conventions carries no legal penalties. The sanctions are purely political."[660] Likewise, it is maintained by Taylor that the British constitution heavily depends on conventions so that "government and Parliament may be regulated politically without judicial interference in the political decision-making process", and thus political rather than legal control over the breach of a convention is vital for upholding British political constitutionalism.[661]

However, convention rules can generally only be enforced through political pressure, the consequences then of a breach of a convention are dubious and there has not been much debate on how conventions are enforced politically. Researchers mostly provide a single enforcer for all conventions. Turpin and Tomkins, for example, observe that "their enforcement is political rather than legal and is the responsibility of

[657] Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24.
[658] Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24.
[659] Lord Wilson of Dinton, "The robustness of conventions in a time of modernisation and change" (2004) Public Law 1-15.
[660] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", *supra*, note 6, at 12.
[661] Robert Brett Taylor, 'Foundational and Regulatory Conventions: Exploring the Constitutional Significance of Britain's Dependency upon Conventions', *Public Law*, vol. 2015, pp. 614-632.

political bodies such as the House of Commons".[662] Barnet notes that "it is not possible to offer a single consequence. Much will turn on the particular convention 'broken', the extent of the 'breach' and the political mood of the country at the time."[663] Wilson believes that "The elected branches can sanction those who breached conventions, with voters retaining last words. In other words, certain constitutional wrongs can only be effectively prevented or corrected by the politicians and the voters."[664]

Ahmed, Albert, and Perry note that conventions are social rules, meaning that they emerge from a pattern of compliance with the rules coupled with acceptance in a social group that compliance is appropriate.[665] Social rules are typically enforced through criticism of breaches of the rules. Conventions, too, can be enforced through criticism, and it can be judges who do the criticizing. For example, it is a convention in many jurisdictions that judges do not participate in party politics. If a judge gives a party-political speech, and his or her colleagues reproach the judge, then they "enforce" the convention against the judge.

This chapter efforts to provide how the political realm reacts in the case of a dispute on the operation of a convention. While there is a common view that breach of conventional rules brings political troubles, this chapter intends to show that absence or disrespect of each conventional rules would not bring same degree of political unrest or discomfort. An objection about breach of a convention gives rise to different level of political disturbance; breach of convention might give rise to ordinary, usual political concern or relatively heavy political trouble or even negligible results.

Some conventions are heavily in political nature. There is no widespread agreement on their` application process. Detail of their operation depends on range of political factors. Breach of these conventions mainly bring political concerns. Political realm seen as a competent authority to resolve this kind of conventional matters and cost of breach is determined range of factors.

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[662] Colin Turpin and Adam Tomkins, *British Government and The Constitution* (Cambridge University Press Textbooks 2011) 183.
[663] Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 41.
[664] James G Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behaviour*, Buffalo Law Review, vol. 40, no. 3 (Fall 1992): 645-738.
[665] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 1-43.

The violence of convention of individual ministerial responsibility might be a good example. Failure of policy or management by ministers, directly or through their officials create a political concern. This indicates that the issue of whether the behaviour of a minister in the office such that resignation should be offered by him or her would appear to be a non-legal demand, relying as it does on party assistance, the scheduling of the finding, the backing of the prime minister as well as cabinet, along with its civil consequences. As enforcement of conventions is done within the framework of the political dynamic. There is no doubt that problems like these are complex and pose questions with respect to the very nature of political process.

On the other hand, breach of some convention give rise to more serious political crisis beyond political concerns. Some convention is closely relationship with a fundamental constitutional principle and their breach bring also concern about breach of fundamental constitutional principles. For example, On 28 August 2019, the House of parliament was prorogued by Queen Elizabeth II, upon the advice of prime minister Boris Johnson for five weeks. The parliament suspension was seen by many opposition politicians and political commentators as improper and unconstitutional attempt by the prime minister to prevent parliamentary debate of the Government's Brexit plans and performing its duty in shaping a course for the country.[666]As in this case proof, dispute of application of convention caused serious political trouble. Improper operation of the rule caused violence of fundamental constitutional principle of democracy.

Political criticises or pressure is not adequate safeguard on convention and further remedy required for government to recognise its mistake and reverse it and further prevent repeat a mistake in such case. Political respond to such a breach is generally considering possibility of legal safeguard on the convention. In a sense, transforming such conventional rules into a law seen as the first thing that comes to mind as

[666] BBC News, 'Queen Approves Parliament Suspension' (*BBC News*, 2020) <https://www.bbc.co.uk/news/uk-politics-49493632> accessed 14 March 2020.

solution. Attend to replacing all prerogatives with legislation as a reaction to the recent prorogation controversy might be most recent and striking example.[667]

Lastly, some convention is relatively unimportant and thus their breach might not be attracting attention. This chapter demonstrates that different conventional rules are forces by different ways. In this regard, the different enforcement way on conventions will be explained in the following section.

## 4.6 Reinforcement of Conventions

In the traditional understanding, conventions are unwritten, flexible, and open to interpretation. Conventions therefore suffer from ambiguity and uncertainty. They are criticized and understood only by a few constitutional experts, and thus their interpretation is contingent on circumstances and politicians' interpretations.

In recent decades, there have been consistent calls for the greater entrenchment of conventions in an official document in England. If a convention entered the public domain via official documents, it became 'public property'.[668] It supposes that when conventions are more obvious and more publicized, a government actor would not easily deny the existence of conventions and problems caused by a refusal to be bound by convention would be politically much more difficult. In a sense, official clarification of a convention puts more pressure on politicians to obey it. Hence, in a broad sense, the formulation of rules in an official document can be considered a way of politically enforcing conventions.

Written documents about conventional rules are used as a force to properly follow conventions. It is important to draw attention that if breach of a convention bring more serious, critical political trouble, then the scope and meaning of a convention are reviewed by political actors who sometimes deliberatively restrict the scope of the

[667] Owen Bowcott, Ben Quinn, and Severin Carrell, 'Boris Johnson's Suspension of Parliament Unlawful, Supreme Court Rules' (*the Guardian*, 2020) <https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue> accessed 14 March 2020.
[668] Robert Hazell, ' The United Kingdom', *Constitutional Conventions in Westminster Systems* (1st ed., Cambridge 2015) 185.

convention in statute form. Thus, convention enhancement through a new legal form and constitutional conventions could seemingly have a legal safeguard. As Turpin and Tomkins say, 'on occasion, the response to a breach has been the passage of legislation to give a legal reinforcement to the convention or replace it with legally binding rules.[669] The removal of the House of Lords' power oversupply at the beginning of the 20th century is an example. When the House of Lords rejected the Finance bill of the House in 1908, the convention that the Lords would ultimately give way to the will of the elected House was breached.[670] After an impasse between the two Houses, not only were sufficient peers assigned to secure a majority for the bill, but also the convention was legally safeguarded in the Parliament Bill 1911.[671] Hence, the House of Lords would no longer enjoy equal powers to approve or reject legislative proposals or the power to delay legislation limited by time.[672]

However, the convention is transformed into law and are thus enforced via the imposition of a new legal rule. Some of conventions replace in statute but they are still treated as a conventional rule. it is therefore might be important to distinguish legally codification convention which changed a convention into legally binding convention, for example, Parliament act 1911 render the convention legally binding rule. On the other hand, a convention is described in law but still is treated as convention. this kind of legal codification on convention is like quasi-law. The codification of the Sewel Convention in the Scottish Act is an important example to explain this point. In this case, the codification of the Sewel Convention was defined differently by scholars, but all these accounts agreed that the passage of the Scotland Act 2016 has not been converted into a legal rule and the Sewel Convention remains a matter purely of convention regardless of any clarification. Hence, the issue seems to turn on why legal enactment procedures are preferred to clarify a convention instead of a non-legal determination which would allow a convention to remain political in nature. Mark Elliot explains that the reason behind this legal enactment of the Sewel Convention is the intention not to give the convention legal effect but rather to make a breach of it

669 Colin Turpin and Adam Tomkins, *British Government, and the Constitution: Text and Materials* (Cambridge University Press 2012) 183.
670 Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press, Oxford.
671 Parliament Bill 1911.
672 Hillary Barnett, *Constitutional & Administrative Law* (11th ed., Routledge 2016) 42.

difficult.[673] This is because it is believed that the existence of a certain and predetermined control mechanism like the courts on breaches of conventions might put more pressure on politicians so that they follow the convention properly in future cases. For this reason, when there is an alleged breach of a convention, the necessity for a legal safeguard of this convention becomes a current issue. For example, when Theresa May decided on an airstrike on Syrian without seeking MPs' approval, Mr. Corbyn called for a new War Powers Act, saying the convention that Parliament should be consulted before military action was "broken" and had to be replaced by a "legal obligation" to get the backing of MPs.[674] Demanding to replace all prerogatives with legislation as a reaction to recent unconstitutional and improper prorogation of the parliament in the UK can be another example.[675]

Legislation sometimes simply stresses that a convention is still alive and thus should be followed. For instance, when Southern Rhodesia (as it then was) made a unilateral declaration of independence (UDI) in the 1970s, the UK Parliament put a legal safeguard on their power of legislative control over former colonies.

Sometimes, legislation is preferred if a convention restrict power from one institution to another authority. Hence, it is objected that the previous authority effectively restricted the use of power. For example, the "Ponsonby rule" on the ratification of international treaties was codified in an Act.[676] Thus, in the UK, treaties are ratified by the government, acting under the Royal Prerogative, but now parliament has a new statutory role in the ratification of treaties. The government has a general statutory requirement to publish a treaty that is subject to ratification or its equivalent and lays it before parliament for 21 sitting days.[677] While apparently the 'Ponsonby Rule' was crystallized into a statutory footing, it remained nothing more than a convention. The

[673] Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 27 July 2019.
[674] BBC News, "Syria Air Strikes: Theresa May Says Action 'Moral and Legal'" (*BBC News* April 17, 2018) <https://www.bbc.co.uk/news/uk-politics-43775728> accessed July 31, 2019.
[675] R. Craig, 'Zombie Prerogatives Should Remain Decently Buried: Replacing the Fixed-term Parliaments Act 2011 (Part 1)', U.K. Const. L. Blog (24th May 2017) (available at https://ukconstitutionallaw.org/)
[676] Robert Hazell, ' The United Kingdom', *Constitutional Conventions in Westminster Systems* (1st ed., Cambridge 2015) 179.
[677] Select Committee on Constitution Fifteenth Report, Appendix 5: The Ponsonby Rule, 2.

legislation serves to effectively limit the power of the executive in the ratification of treaties.

Likewise, some of the executive powers which came from conventional rules were curtailed and these powers are transformed by parliament or the prime minister by legislation. In March 2004 the Public Administration Select Committee (PASC) published a report on the Royal prerogative which emphasized that prerogative powers should be put on a statutory basis, and thus parliament should play a more active role in its exercise of the prerogative.[678] The committee specifically called for comprehensive legislation on the prerogative powers of ministers, which are prerogative powers that came to be used by ministers on the sovereign's behalf, and ministers took responsibility for actions done in the name of the Crown. When power shifts deliberatively, a legal form is preferred, because legislation makes power-shifting more serious and firmer.

Alongside legal codification, non-legal codification of conventional rules is used to increase the enforceability of rules. In the traditional understanding, conventions are unwritten and open to interpretation. This inherent weakness of rules allows politicians to use them for their own interest. These non-legal documents on conventions are considered a potential restriction on the meaning and operation mechanism of conventions.[679] It is expected that politicians will no longer interpret convention rules for their own interest. Hence, the non-legal codification of a convention in an authoritative document mostly serves as a disincentive to any attempt to breach a convention.

For example, in 2010 it was predicted that the 2010 general election would result in a "hung parliament", thus it led to the preparation of a cabinet manual like that of New Zealand. The main aim of this effort was to make clear the roles of party leaders, the Crown and public services in the formation of a government in which no party holds a majority of seats in the House of Commons.[680] It is intended to prevent a possible

[678] House of Commons, Public Administration Select Committee (PASC), Taming the Prerogative: Strengthening Ministerial Accountability to Parliament, Fourth Report of Session 2003–04, HC 422 [Incorporating HC 642, Session 2002-03].
[679] Adam Tomkins. (2003). *Public law*. Oxford: Oxford University Press 158.
[680] Peter H. Russell, 'Codifying Conventions', *Constitutional Conventions In Westminster Systems* (1st ed., Cambridge 2015) 233.

crisis by making certain the roles of party leaders in a hung government.[681] A critical and updated example of that is the codification in the cabinet manual of the conventions clarifying the appointment of a prime minister, which would have proved to be of real value, should the 2010 election have resulted in a hung parliament.[682]

One successful example is that of the ministerial code, which is an example of a set of codified conventions published by the government that apply to ministerial responsibility. While long-standing conventions, individual and collective ministerial responsibilities exist, they are flexible and open to interpretation.[683] The ministerial code set out the 'standards of behaviour expected from all those who serve in government'.[684]

It can therefore be concluded that the convention legally or non-legally codified cases of violation or would-be violation of convention rules. Since conventions entered the public domain via official documents, this provides an opportunity for ordinary people and politicians to obtain information easily regarding the generation of government institutions. Hence, improving the accessibility of rules aimed to help increase compliance *with* these rules.

On the other hand, the possibility of judicial enforceability was largely symbolic and the courts' involvement in political matters is seen as undesirable. Hence, the legal codification of conventions does not detract from the political nature of conventions. Politicians are still considered the only authority to have the right to say something on the failure of constitutional conventions, despite conventions being enshrined in law, because convention rules lead to the expectation that politicians make the most convenient decisions by taking advantage of the flexibility of conventions. In this case, it is believed that the Sewel Convention provides an opportunity for the Westminster government to reconsider how it approaches issues relating to devolution as regards

[681] Peter H. Russell, 'Codifying Conventions', in *Constitutional Conventions In Westminster Systems* (1st ed., Cambridge 2015) 234.
[682] Peter H. Russell, 'Codifying Conventions', in *Constitutional Conventions In Westminster Systems* (1st ed., Cambridge 2015) 234.
[683] Brian Galligan, Scott Brenton, 'Constitutional conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st ed., Cambridge University Press 2015) 73.
[684] Brian Galligan, Scott Brenton, 'Constitutional conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st ed., Cambridge University Press 2015) 73.

the Brexit circumstances and produce a consensus-based policy on the territorial constitution.[685]

## 4.7 Declaration

A rule may be enforced simply by drawing a person's attention to it and, if necessary, the attention of the community to her violation or would-be violation[686]. Once a light is shone on her conduct in this way, the person may take it upon herself to either correct her behaviour or make amends. What nonetheless makes this a kind of enforcement is that the person has not been allowed to violate the rule without consequence. If it seems strange to define declaration as a kind of enforcement, consider an example from England and Wales. In both countries, a standard administrative law remedy is a declaration that an administrative act is unlawful. The declaration does not invalidate the act, nor does it lead to damages or the like, nor even does it impose any ongoing obligation. Even so, declarations are often sought by complainants and are considered one of the most important remedies in review proceedings. The reason is that the government almost invariably responds to a declaration by taking steps to avoid a repetition.

A declaration in this way enforces administrative law standards because the government is committed to acting lawfully and because the government treats the court as an authority regarding its legal obligations. A declaration is a form of political enforcement because it is a practice of political actors to settle questions on whether the government has satisfied its political obligations. Conventions can likewise be enforced by judges through declarations. In this regard, the case of Attorney-General v Jonathan Cape Ltd[687] shows that conventions can be lawfully applicable. The case involves a government minister whose personal diaries contained records of meetings of Cabinet that were going to be issued in a few days. The Attorney-General requested an order to prevent issuance of the diaries. It was argued by the Attorney-General that the regulations regarding privacy present in common law declared such publications

[685] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention, A Gwilym Gibbon Centre Working Paper, (2017).
[686] Herbert Lionel Adolphus Hart, and Leslie Green, *The concept of law*. Oxford University Press, 2012.
[687] Attorney-General v Jonathan Cape Ltd [1976] QB 752.

illegal. It was accepted by the judge that the convention of shared ministerial obligation demands the confidentiality of Cabinet meetings.

Suppose there is a general legal duty to comply with conventions. If a constitutional actor breaks a convention, then provided any conditions regarding standing, justiciability and the like were satisfied, a complainant could obtain a declaration of illegality.[688] The declaration would be a form of legal enforcement because it would be an exercise of legal authority. Conventions can also be enforced through declarations as a form of non-legal enforcement. The scenario we have in mind parallels the legal case: the would-be convention violator is committed to complying with her conventional obligations, and the person or body making the declaration is regarded as an authority on what the convention requires. The authority need not be a court. A related decision was also given in the case of Madzimbamuto v Lardner-Burke[689] by the “Judicial Committee of the Privy Council". A claim was presented in this case that the parliament of the UK had taken action regarding a violation of a convention rule by its enforcement of the "Southern Rhodesia Act of 1965", which reaffirmed that the United Kingdom Parliament has the right of legislating on "Southern Rhodesia". It was debated that a convention was present which ordered that legislation by parliament is only applicable for a Commonwealth state and that is also possible when the concerning country gives its approval. The decision was upheld by the Judicial Committee of the Privy according to which “for the declaration of the law”, it was ‘not related to these issues’.[690] As a result, the convention was not a contributing factor in the result of the case.

In the United Kingdom, for example, the ministerial code contains most of the important conventions applicable to ministers.[691] The arbiter of what the code requires is the prime minister, and his decisions are treated by ministers as conclusive. When the prime minister declares that some action would contravene the code, other actors treat the matter as settled, and act accordingly. In this way, the prime minister enforces the code. A declaration is mostly submitted when conventions are signed or when a

[688] Attorney-General v Jonathan Cape Ltd [1976] QB 752.
[689] Madzimbamuto v Lardner-Burke [1969] 1 AC 645.
[690] Madzimbamuto v Lardner-Burke [1969] 1 AC 645. p. 723, per Lord Reid
[691] Friedrich August Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order*. Vol. 1. University of Chicago Press, 1973 1-191.

mechanism of endorsement, official confirmation or consent is submitted. Therefore, it is better that a declaration is authorized by the Crown, head of state or Minister for Foreign Affairs, or an individual who possesses such authority released by the rules.

But of course, a court can also be treated as an authority on conventions.[692] In such a case, a court's declaration that an act is not convention-compliant would be a form of illegal enforcement. Yet, it would be a formal type of judicial enforcement. Declaring that someone's conduct would violate a rule may lead her not to violate it at all. If that occurs, it will be because she chose not to violate the rule, just as, for example, parliament chooses to respect a court's declaration of incompatibility.[693] A "declaration of incompatibility" is a declaration within the constitutional law of the UK that was given by UK justice. According to this, a statute may conflict with the "European Convention of Human Rights" in accordance with section 4 of the "Human Rights Act 1998".[694] This is an essential portion of constitutional law in the UK and the parliament of the UK decides to respect it.[695]

## 4.8 Political harsh treatment

This is probably the most familiar type of enforcement. By "harsh treatment" in everyday language is meant including any evil for the violation of a rule, such as criticism, corporal punishment, fines, and denial of benefits.[696] Harsh treatment is one of the law's main ways of enforcing its rules. The law's "plan A" is usually to impose obligations, but those obligations go unfulfilled. To give an illustration, if someone speeds, she is ordered to pay a fine; but if she fails to pay the fine, the sheriff is authorized to deduct some of her wages, impound her car, or some similar form of

[692] Adam Rutland, and Melanie Killen. "A developmental science approach to reducing prejudice and social exclusion: Intergroup processes, social-cognitive development, and moral reasoning." *Social Issues and Policy Review* 9, no. 1 (2015): 121-154.
[693] Madzimbamuto v Lardner-Burke [1969] 1 AC 645. p. 723, per Lord Reid
[694] Sec 4: Human Rights Act 1998
[695] Tom Hickman, "Bill of Rights reform and the case for going beyond the declaration of incompatibility model." New Zealand Law Review 2015, no. 1 (2015): 35-71.
[696] Michael A. Lewis, and Andrew D. Brown. "How different is professional service operations management?" *Journal of Operations Management* 30, no 1-2 (2012): 1-11.

treatment. Harsh treatment could, in theory, be the law's "plan B" for enforcing legal rules.[697]

Conventions of individual and ministerial responsibility which make the government and its ministers accountable to democratic representatives can be illustrative of political harsh treatment. If it is a dispute over *accountability conventions*, for instance, conventions of individual and ministerial responsibility, the prime minister and the party have the power to force ministers to strictly follow the convention, or the prime minister could ignore his ministers and behave against the conventions if the circumstances suit the exigencies of a situation. For example, when there is misconduct in ministerial departments, ministers take the blame and face loss of office. A recent example includes the resignation of Amber Rudd as Home Secretary on 29 April 2018[698] after a series of revelations that she was aware of targets for removing illegal migrants from Britain and had inadvertently misled parliament.[699] She faced mounting pressure to resign.

Collective ministerial responsibility might be another example of this type of enforcement of conventions. Under this convention, all ministers can express their ideas in the privacy of cabinet, but even if their view is opposite to the final decision, all ministers should support that decision openly or at least say nothing in public.[700] If a minister does not support a cabinet decision in public, he or she is expected to resign. There are notable examples of ministerial resignations over disagreements with collective decisions, even in recent times. In August 2014, Baroness Warsi, who was Foreign Minister in the Cameron government, resigned because she did not think the government was putting enough pressure on Israel during the Gaza conflict in

[697] Friedrich August Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order*. Vol. 1. University of Chicago Press, 2011.
[698] Stewart H, Gentleman A and Hopkins N, "Amber Rudd Resigns Hours after Guardian Publishes Deportation Targets Letter" (*The Guardian* April 30, 2018) <https://www.theguardian.com/politics/2018/apr/29/amber-rudd-resigns-as-home-secretary-after-windrush-scandal?CMP=twt_gu> accessed July 31, 2019.
[699] Stewart H, Gentleman A and Hopkins N, "Amber Rudd Resigns Hours after Guardian Publishes Deportation Targets Letter" (*The Guardian* April 30, 2018) <https://www.theguardian.com/politics/2018/apr/29/amber-rudd-resigns-as-home-secretary-after-windrush-scandal?CMP=twt_gu> accessed July 31, 2019.
[700] Ministerial collective responsibility and agreement to differ recent developments (Ministerial collective responsibility and agreement to differ recent developments).

2014.[701] In her resignation letter to the prime minister, she said the government's "approach and language during the current crisis in Gaza are morally indefensible, is not in Britain's national interest and will have a long-term detrimental impact on our reputation internationally and domestically".[702] Robin Cook, a former Foreign Secretary in the Blair government, resigned as Leader of the House of Commons in March 2003 because he did not support the government's decision over a military attack on Iraq.[703] Sir Geoffrey Howe resigned as Deputy Prime Minister in November 1990 over government policy on the European single currency and its general approach to the European Union.[704] It is important to note that ministers would be expected to resign given their disagreement with government policy.

Hence, these resignations tend to suggest that a harsh political climate remains a significant force in government today. Facing political pressure, even an attrition campaign, is more important than loss of office.

## 4.9 Conclusion

Convention rules are enforceable by drawing attention to a breach of them. However, it is unclear when precisely a convention is broken or what is the result of a breach of a convention. The consequences of acting against a convention can be adjusted according to political circumstances and the courts avoid making legal rulings on the operation or scope of conventions because it is believed that those matters should be determined by means of the political reality. A convention rule is typically enforced through criticism of breaches of the rule.

This chapter has concluded that there is no clear and single picture concerning the enforceability of conventions. To this end, since each convention has different features

[701] BBC News, 'Warsi Quits as Minister Over Gaza' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-28656874> accessed 27 July 2019.
[702] BBC News, 'Warsi Quits as Minister Over Gaza' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-28656874> accessed 27 July 2019.
[703] Matthew Tempest, 'Cook Resigns from Cabinet Over Iraq' (*The Guardian*, 2019) <https://www.theguardian.com/politics/2003/mar/17/labour.uk> accessed 27 July 2019.
[704] The Guardian, 'Geoffrey Howe's Resignation: The Speech That Began Thatcher's Downfall – Video' (*The Guardian*, 2019) <https://www.theguardian.com/politics/video/2015/oct/10/geoffrey-howe-resignation-speech-margaret-thatcher-downfall-video> accessed 27 July 2019.

and operation mechanism, different enforcement mechanisms should be applied for different conventions as explained in the chapter.

# Chapter 5 – Impact of Codification on the Enforceability of Conventions

## 5.1 Introduction

The traditional view is that the rule of law has a system, but conventions lack a system. This system determines whether a rule is part of the legal system or not and has law-making and law-applying bodies such as legislatures and courts. According to Munro, a convention does not have these features; there are no specific criteria to determine their existence, there is no certain way to create a convention, it is also unclear who can really enforce them if politicians do not obey them.[705]

Recently, however, many constitutional conventions have been written down as authoritative statements and thus, apparently, form a system like the law. They are interpreted by officials and recognised as authoritative statements and thus they became more systematized. Barber tries to clarify this progress with Hart's three groups of secondary rules; rules of recognition, change and adjudication.[706][707] Rules of recognition set criteria to identify rules, rules of change entitle bodies to change these rules when circumstances change, and rules of adjudication empower institutions to decide when a convention is breached. In short, Barber[708] draws attention to how the formalizing process clarified by Hart can be observed for officially interpreted constitutional conventions such as ministerial codes. He argues that uncertainties about the meaning and application of individual ministerial responsibility resulted in producing such codes and these strongly resemble Hart`s rules of recognition.[709] In the following sentences, he assesses Hart's other secondary rules, those of change and adjudication. The prime minister has the power to change the code whenever he sees fit, and thus Gordon Brown's first act as prime minister was

[705] Colin R Munro, *Laws and Conventions Distinguished*, (1975) 91 L.Q.R. 218.
[706] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 5.
[707] Professor H. L. A. Hart, "The Concept of Law", Oxford, Oxford University Press (1961).
[708] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 6.
[709] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 7.

to publish a new version of the code. But on rules of adjudication, he is not clear; he sees the prime minister as someone empowered to enforce the code and he also mentions the possibility of an independent investigative entity to decide whether the code has been violated or not.[710]

This vagueness becomes a more serious matter when a convention is strengthened in an official document. As these conventional rules become more visible, allegations of convention breaches attract more attention and thus operation of the convention becomes the current issue, for example application of the following conventions during Brexit period became hotly debated matter; Sewel convention, Salisbury convention, Convention related to prerogative powers, such as giving royal assent to legislation, Prorogation of parliament. Hence, the study addresses the following questions: What will happen if recognized conventions are breached? Are recognized conventions still judicially unenforceable? If the courts cannot provide resolutions to breaches of recognized conventions, who will or should have the last word on disobedience?

While Barber mentions an important point on the enforceability of formulated conventions, he does not tackle the enforcement of recognized conventions in depth. He just sees the prime minister as a single enforcer of individual ministerial responsibility; but as Tomkins notes, in the practical operation of individual ministerial responsibility, political parties, the prime minister and the media may all, in addition to parliament, play important roles in determining ministers' fate in the case of individual responsibility.[711] He does not even touch on the enforcers of other recognized conventions, such as the war power Convention, the Sewel Convention etc. Additionally, he does not differentiate between legal and non-legal determinations of conventions. If distinctions are drawn on statutes and statements of conventions, it might be easier to ascertain whether clarification prescribes a certain adjudicator for a convention; furthermore, how should the courts treat different forms of written conventions?

[710] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 7.
[711] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 142.

As Andrew notes, codification in the UK engages with matters of crucial constitutional significance, and that the results can be complex.[712] It will be addressed whether an official statement on a convention specifies a certain enforcer of conventional rules. The study makes a distinction between the enforceability of legal and non-legal determinations of conventions. Considering this distinction, it seems easy to say that if conventions are clarified through legislation, the courts will be able to safeguard them. Otherwise, conventions can still only be politically enforced. But this study will show that uncertainty over the enforceability of conventions remains an issue in practice. This was seen in the Supreme Court judgment *in Miller.*[713] In this case, *the* court held that the Sewel Convention remained conventional in nature even though the convention is enshrined in s. 28(8) of the Scotland Act, and thus the political realm should deal with the matter. This case, therefore, shows that politicians may retain power over conventional matters through conventions being legally codified. Likewise, the non-legal recognition of conventions still allows politicians to unilaterally determine the nature of conventions. Politicians are now generally entitled to determine, interpret and change the meaning of conventions. While these powers sometimes serve to increase the efficiency of conventions, the government still enjoys the flexibility of conventional rules (i.e., in a way that can undermine their force and legitimacy).

## 5.2 Enforceability of recognized constitutional conventions

The United Kingdom is often used as an example of "complete" flexibility (Elkins, Ginsburg, and Melton 2009, 82).[714] Constitutional conventions are considered vital for the functioning of the British constitution in a flexible manner,[715] because they leave politicians free to decide political issues without the pressure of firmly stated rules. As Turpin and Tomkins note:

[712] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019).
[713] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] (Supreme Court).
[714] Tom Ginsburg, and Zachary Elkins, and James Melton, The Endurance of National Constitutions (2009). Available at SSRN: https://ssrn.com/abstract=2190476 or http://dx.doi.org/10.2139/ssrn.2190476.
[715] Colin Turpin and Adam Tomkins, *British Government, and the Constitution: Text and Materials* (Cambridge University Press 2012).

> There are many conventions which are generally acknowledged to exist, but they are not always precisely formulated, and the limits of their application may be unclear. 'On the other hand, this imprecision makes for flexibility which allows a congruous development of the constitution in response to experience and changes in society.[716]

However, today, critics believe that the British constitution is 'overly flexible'.[717] Erin F. Delaney argues that 'this may be leading to increased partisanship and greater opportunity for expediency and constitutional self-dealing'.[718] Similarly, Sionaidh Douglas-Scott says that:

> British Constitution has long been vaunted for its adaptability and its ability to cope with new circumstances; for its flexibility and enduring nature but an event as momentous as a British withdrawal from the EU reveal the Constitution's 21st century weaknesses. The constitution does not provide determinate answers to most of the questions posed by Brexit.' As a result, we are thrown back onto politics, where the most powerful tend to dominate.[719]

Over the past century, there has been considerable growth in the number of readily accessible codes created about constitutional rules and principles to prevent any possible constitutional crises due to the uncertainty of these rules. Some of their content specifically relates to constitutional conventions, such as the ministerial code, the civil service code and the Cabinet Manual.[720] These official documents do not intend judicial enforcement of conventions. Even the legal effect of conventions is deliberatively hindered.[721] In a sense, they are just reflections of interpretations of

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[716] Colin Turpin and Adam Tomkins, *British Government, and the Constitution: Text and Materials* (Cambridge University Press 2012) 190.
[717] Robert Blackburn, 'Constitutional Amendment in The United Kingdom', *Engineering Constitutional Change A Comparative Perspective on Europe, Canada, and the USA* (1st edn, Routledge 2013) 359.
[718] Erin F. Delaney, 'Stability in Flexibility: A British Lens on Constitutional Success' [2016] SSRN Electronic Journal. 8.
[719] Sionaidh Douglas-Scott, 'Brexit, Article 50 And the Contested British Constitution' (2016) 79 The Modern Law Review 1019-1040.
[720] The Cabinet Manual A guide to laws, conventions, and rules on the operation of government, 2010. Available. at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.
[721] Andrew Blick, *The Codes of the Constitution* (Hart Publishing 2019).

some specific conventions by officials, but they are not the last word on their meaning.[722] Therefore, conventional rules are still maintained and evolve in practice.

As highlighted above, these officially interpreted conventions are not legally systemized by the government. Government just seeks to clarify the meaning and implementation of their fundamentals in publicly available documentation without granting them any legal status. Therefore, the courts still cannot offer any remedies for breaches of these conventions, there are only political solutions and thus the last word about a breach of a convention belongs to politicians.

Nevertheless, it is expected that 'conventional rules function as the same as before'[723], and they are not usually considered as binding documents despite clarification of their meaning in a single document. It is critically important to consider practice to understand how these written conventions impact on the politically enforceability of conventions; whether these statements offer clear and certain enforcement mechanisms for conventions; whether their meaning and effect can become justiciable issues in a court of law; or whether this clarification effect increases the political cost of non-compliance with conventions.

First, one may claim that sometimes a rule can be enforced by simply drawing a person's or community's attention to a violation or would-be violation.[724] A written account of a convention in an official document probably increases awareness of it. Hence, a breach of a convention is immediately discernible to the public and invites more debate over whether a rule has been followed or not in a given case, and this invites more public criticism if it is agreed that there has been a breach of a rule. Moreover, attempts to criticize such supposed failures become more viable if there are specific official texts that can be cited as part of a complaint.

Similarly, Andrew believes that 'Codification can strengthen conventions. it can lead to a heightened awareness among practitioners and observers of the rules of which it

[722] James W. J. Bowden and Nicholas A. MacDonald, "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, The United Kingdom, New Zealand and Australia." Practice Notes, Notes Sur La Pratique Du Droit. Journal of Parliamentary and Political Law, 2011.
[723] C. J. G. Sampford, 'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions, Oxford Journal of Legal Studies Vol 7. No. 3, Oxford University Press 1987, 373.
[724] Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' [2017] SSRN Electronic Journal 1-43.

provides accounts, increasing the chances of their being followed. The cost of non-compliance can rise. Criticism of violation of convention is easier to mount if there is a specific text, setting out the rule in question, that it is possible to cite. It is also possible for politicians under pressure to defend themselves by invoking a text, if they feel it provides validation (i.e. setting a convention down in a document provides a measurable standard) for their actions.'[725] For example, when Theresa May decided to join military action against the Assad regime in Syria in 2018 without seeking the permission of MPs, the question promptly arose of whether she broke a convention whereby the UK government needs parliamentarian approval before engaging in military action overseas.[726] Similarly, the Scottish government intervened in the Brexit progress, demanding that the UK government seek its approval before triggering Article 50. This argument concerns the implementation of the Sewel Convention. Recently, this issue has been highly politically charged.

Second, it is argued that these official documents do not have the last word on conventions. They have not created constitutionally binding rules.[727] Andrew says, 'It is characteristic of codification that the documents involved depict themselves neither as bringing about change, nor as having legal effect.[728] They tend also to resist the idea that they create rather than simply describe rules.' For instance, the British Cabinet Manual is described by the Cabinet Secretary and Head of the Home Civil Service, Sir Gus (now Lord) O'Donnell, as primarily a guide for those working in government, 'recording the current position rather than driving change.' It is not intended to be legally binding or to set issues in stone. 'The Cabinet Manual records rules and practices but it is not intended to be the source of any rule.'[729]

On the other hand, while these documents are meant to regulate and restrict politician's behaviour by clarifying conventional powers, this is not exactly reflected in

[725] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 108.
[726] The Independent, 'Theresa May Avoided A Vote on Syria Because She Knew She Would Lose' (*The Independent*, 2019) <https://www.independent.co.uk/voices/theresa-may-trump-syria-strikes-parliament-vote-britain-russia-chemical-weapons-latest-a8303146.html> accessed 27 July 2019.
[727] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853-877.
[728] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 108.
[729] The Cabinet Manual A guide to laws, conventions, and rules on the operation of government, 2010. Available. at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf.

practice. The main effect of having recognized rules is that authoritative statements become a principal source for a convention. If there is any dispute over conventions, these documents are the first source that comes to mind. Andrew says 'codification can impact upon a convention about which there is disagreement if it is advances a version of it. As an official document, a code`s version of the rules is likely to be regarded as authoritative and accepted as definitive, therefore potentially ignoring other views.'[730] An analysis of an attempt to codify Australian conventions by Sampford argues that recognized rules are substituted for pre-existing conventions which continue to adapt to changing conditions in practice.[731] Barber illustrates how the ministerial code became a primary source of individual ministerial responsibility of the convention.[732] He points out that 'since its publication in 1992, the Code has grown in political strength' and 'The code was accepted as the source of the relevant constitutional obligation'.[733] Thus, now, ministers guilty of misconduct in their departments are blamed for having violated the code. It is suggested that the code develops a new convention which imposes a duty on ministers to follow the rules formulated in the code. Otherwise, breaches of the code will result in political censure and may end with a minister losing his/her position in government. It is a rule which determines an established set of rules and renders them constitutionally obligatory. In other words, the code seems to be an authoritative statement of ministerial responsibility. Besides, Blick foresees that the Cabinet Manual is likely to become a fundamental source often consulted by officials, politicians, academics, journalists and others when seeking an authoritative account of conventions.[734]

Likewise, when a dispute arises because of the content of a convention, a judge will primarily refer to an authoritative statement instead of ascertaining the functioning of the convention in practice. In other words, it operates as soft law and offers a written text that can be more readily used by the courts when there is a disagreement over the operation of a convention. Hence, a convention's meaning is identified according to a judicial role about how the convention works and how its scope is limited, before

[730] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 106.
[731] C J G Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions". Oxford University Press 1987, Oxford Journal of Legal Studies Vol. 7 No. 3.
[732] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 6.
[733] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 6.
[734] Andrew Blick, 'The Cabinet Manual and The Codification of Conventions' (2012) 67 Parliamentary Affairs 191-208.

a court plays a role to determine whether a convention exists or what its scope and extent are vis-à-vis conventions in general. For instance, In *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, the Supreme Court of Canada[735] discusses the existence of conventions, and they use Sir Jennings' test[736] and related historical precedents and heavily emphasise reaching a conclusion about them.

But now the meaning and scope of a convention are easily accessible, both judges and courts, and the public, given the existence of an official list of some conventions, simply cite these authoritative statements as primary sources.[737]

However, although conventions are referred to by judges as fundamental sources of the constitution, this attitude is now criticized as the courts have said little about the scope of conventions. The treatment of conventions is somewhat dismissive and fails to properly reflect just what conventions mean in the present. In a sense, although it is accepted that a convention has a certain form in practice, not in a written statement, the courts generally decline to answer the question of how conventions are applied in practice. This can be observed in the Miller case, where the Supreme Court did not discuss in depth what is understood by and applied due to the Sewel Convention in practice. In this case, the court only referred to the Scottish Act, and it was enunciated by Lord Sewel in the House of Lords that the consent of the Scottish parliament is normally required if Westminster legislates on devolved matters.[738] But the scope of the convention has been extended in practice to legislation affecting devolved legislative or executive competence. This second leg of the convention was not enunciated in parliament by Lord Sewel, but it is followed in practice and set out in Devolution Guidance Notes 10 ("DGN10"), which are, formally speaking, internal guidance from the UK government to its departments.[739] Hence, the Sewel Convention not only applies when Westminster legislation, not just a UK bill, makes provision for devolved matters, but also when it alters the legislative competence of devolved

[735] *Re Resolution to Amend the Constitution* (1981) Supreme Court of Canada, (Supreme Court of Canada) [1981] 1 SCR 753.
[736] Ivor Jennings, *The Law and the Constitution* (5th ed., London 1959) 136.
[737] *Evans v. Information Commissioner*, (2012) UKUT 313, para. 75 (AAC) (UK) ("Evans").
[738] Miller, supra note 4.
[739] The original scope of the Sewel Convention was extended by the Devolution Guidance Note 10 ("DGN10") which was issued by the Department of Constitutional Affairs in 1999.[4] DGN 10 explained how the UK Government operates the convention in practice but it also extended the scope of the convention.

legislature or the executive competence of Scottish ministers, even though these are reserved matters.[740] The practical side of the convention has been followed hundreds of times since 1999 and it has become a central part of how the UK and devolved legislatures interact.[741] The most recent example of the Sewel Convention operating in this way is provided by the Supplementary LCM for Scotland Bill 2016, which the Scottish Government lodged on 1 March 2016[9].[742] The Supreme Court's judgment on this matter was criticized, as the 'the judgment is arguably deficient in two respects. First, the treatment of the convention is somewhat dismissive: it is 'very important' but the judgment does not declare any expectation on the part of the court that it will or should be followed; and secondly – perhaps because the point was not argued before them – it fails to address just what the convention means in the present, unanticipated, set of circumstances.'[743] Similarly, McHarg remarks that:

> In disposing of the issue in this way, the Court articulated a very narrow conception of its constitutional role, and a very traditional understanding of the territorial constitution, in which the pluralist and decentralised accounts of the location of constitutional authority articulated by or on behalf of the devolved institutions operate only as political understandings in the shadow of the Westminster Parliament's legal omnipotence.[744]

Therefore, she reaches conclusion that 'the issue of devolved consent to the process of withdrawing from the EU has only been postponed rather than resolved by *Miller.'*[745]

[740] Department for Constitutional Affairs DGN 10.
[741] Brexit and the Sewel (legislative consent) Convention, <(https://www.instituteforgovernment.org.uk/explainers/brexit-sewel-legislative-consent-convention)> accessed 17 May 2018.
[742] Brexit and the Sewel (legislative consent) Convention, <(https://www.instituteforgovernment.org.uk/explainers/brexit-sewel-legislative-consent-convention)> accessed 17 May 2018.
[743] Jim D. Gallagher, Conventional wisdom: Brexit, devolution and the Sewel convention, Working paper 2017-01.
[744] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502
[745] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

On the other hand, it is said that it is quite dangerous if a judge gives guidance on what the convention requires. Forsey draws attention to there being serious issues with the courts 'recognizing' constitutional conventions and notes that the first problem is institutional capacity.[746] Conventions are often subtle, complex and subject to competing interpretations or applications.[747] Therefore, constitutional conventions have their own place in their own world at the intersection of constitutional history, political science, public administration and law.[748] For this reason, a judge is not seen as a competent authority to deal with the complex convention issue.[749] Many political scientists have dissenting opinions on the Supreme Court's explication of convention as regards the *Patriation Reference*[750][751]. They stress that judges have erroneously 'recognized' a constitutional convention.[752] Their position is supported by Peter Hogg, finding that the Court's 'first foray into political science' did not yield very satisfactory reasoning or conclusion.[753] Likewise, Adam M. Dodek stresses that 'The lasting legacy of the *Patriation Reference* is the justiciability of constitutional conventions. It is also the continuing constitutional danger of the decision. The judges agreed that constitutional conventions are political creatures and not subject to enforcement; however, in the same breath, the justices held that conventions are justiciable, and courts may 'recognize' them. This distinction between 'recognizing' and 'enforcing' conventions is artificial and untenable. Moreover, conventional rules easily adapt to political morality changes and given the rarity of adjudication on constitutional

[746] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.
[747] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.
[748] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.
[749] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.
[750] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", (1984) 33 UNB Law Journal 11.
[751] Adam M. Dodek, Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference, 54 S UP . C T . L. R EV . (2d) 117, 129-30 (2011) 117-142.
[752] In short, they got one wrong. As noted by Forsey, as an example of a constitutional convention, the dissenting opinion on conventions cited the alleged "rule" that after a general election, the Governor General calls upon the leader of the party with the greatest number of seats to form a government. This "rule" has to be distinguished from the widely accepted rule that if a party receives a majority of seats, that party's leader should form a government and an incumbent Prime Minister facing such a situation should resign. But this does not appear to be what the Supreme Court is speaking about in its ruling. Most constitutional experts would strongly dispute the existence of such a rule.

[753] Peter W. Hogg, "Constitutional Law of Canada, 5th Edition" (2007). *Books*. 219. https://digitalcommons.osgoode.yorku.ca/faculty_books/219 1-23.

conventions, the courts are unlikely to be able to keep up with changes to political mores.[754] The courts may not be presented with an opportunity to revisit a constitutional convention in decades. The justifiability of constitutional conventions is therefore destined to rely on conventions frozen at a certain point in time while conventions are in dynamic nature.

They should be left to political actors to adjudicate and sanction. **'**The courts are too static to adjudicate conventions matters and they risk doing more constitutional harm than good. Constitutional conventions should be left in the political arena to evolve, disappear and be replaced by new conventions.'[755]

As a joint committee on conventions noted in 2006, since conventions are often regarded as being, by their nature, prone to development, establishing their exact nature at any given moment in time might consequently be difficult.[756]

However, this is a fundamental question that must be answered should a court wish to give guidance on convention matters, and so the study wants to draw attention to the role of the courts on conventional matter becoming even weaker after enunciating a convention in an official document. The courts' role in convention matters might be regarded as one of mere bystanders. A judicial role regarding how a convention works and what its scope is becomes greatly reduced. The courts now only refer to authoritative statements on convention matters and then send them back to the political realm. It seems that the courts confirm the idea that constitutional conventions belong to the political realm. It can, therefore, be concluded that official clarification on conventions has made it even clearer that the line between the courts, conventions and politicians starts to play a more dominant role in convention matters.

Third, when conventions are more obvious and publicized, it is supposed that a government actor will not easily deny the existence of conventions and so the problems caused by a refusal to be bound by a convention would be politically much

[754] Adam M. Dodek, Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference, 54 S UP . C T . L. R EV . (2d) 117, 129-30 (2011) 117-142.
[755] Adam M. Dodek, Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference, 54 S UP . C T . L. R EV . (2d) 117, 129-30 (2011) 141.
[756] Joint Committee on Conventions (2006) Conventions of the UK Parliament, I. London, Stationery Office.

more difficult.[757] Andrew remarks that 'Codification can draw attention to the existence of a convention, and might make it easier for the party to a proceeding to claim that it exists.'[758] Traditional constitutional conventions that are unwritten are criticized as they lack any precise content and thus their scope and practices cause disputes between lawyers and politicians.[759] This vagueness sometimes serves politicians who breach what had been thought to be a convention to rescue themselves from an unpleasant political result by hushing up their actions with a controversial interpretation of a convention.[760] When they are unwilling to be bound by them, they merely deny their existence. But now there are authoritative texts that state them and sources with acknowledged authority issue such texts. It is therefore expected that conventions are less open to making such manoeuvres to escape an obligation to respect them. Hence, conventions have become more efficient. The intention to codify a convention is also explained by Sampford[761].

> Presumably the intended effect of the statement is to provide such rules more effectively because they were more precisely stated. In times of potential crisis, the relevant political actors will know, or at least be able to consult the rules. They will be expected to follow the rule whether because of agreement with its content or because of their moral belief that they should follow rules agreed in this way, or because breach of such a clearly stated and well-known rule would be too politically damaging to contemplate.

The individual ministerial responsibility convention can be illustrated to assess this assumption. Does the ministerial code, which is an authoritative statement on individual ministerial responsibility, increase their obedience to the rules or do politicians still cover their activity up by interpreting the convention in a different way?

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[757] C J G Sampford, *Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions*, Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press, (1987) 370.
[758] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 104.
[759] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984).
[760] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43:3 NORTHERN IRELAND LEGAL QUARTERLY.
[761] C. J. G. Sampford, "Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions" Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press 1987 373.

The convention was unwritten before 1945.[762] It is believed that if ministers misgovern in their department, they are responsible for any misdeeds and thus should offer their resignation. But it is unclear when and under what circumstances ministers misrule in their departments as the convention was interpreted and applied too flexibly. In a sense, government actors have enjoyed a degree of flexibility when operating under the convention because of its often-vague quality.[763] Marshall provides some examples of marginal cases in which there were no resignations despite a series of scandals in the past.

This ambiguity resulted in producing guidance for ministers to the effect of reducing the discretion available to the executive. In a sense, the text of the ministerial code is considered a potential restriction. But it is difficult to say that this clarification attempt directly influences effective operation of the convention. In the period since the introduction of the ministerial code, a number of scandals have centred on supposed violations by government members of conventions, as set out in this document. For instance, despite evidence of series misjudgements within John Major's government from September 1992 to January 1993, there were still no ministerial resignations, though in a few cases the traditional doctrine of individual responsibility has apparently operated, as in Crichel Down (1954) or the Falklands (1982). In a sense, articulating individual ministerial responsibility in a single document does not directly increase feeling obliged to honour convention rules.

This, therefore, merits considering why the convention still does not operate effectively, as even the convention's meaning is tangibly embodied in an authorized document. Tomkins claims that part of the reason for failings in ministerial responsibility during the 1990s was the fact that the government unilaterally wrote the ministerial code, thus giving the impression that it belongs to the government.[764] In his view, ministers, therefore, had only said they had a right to decide where the dividing line lay between ministerial and civil service responsibility, and concerning the

[762] Geoffrey Marshall, Constitutional Conventions: The Rules and Forms Of Political Accountability (Clarendon Press 1984) 62.
[763] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice And Principle' (1992) 43:3 NORTHERN IRELAND LEGAL QUARTERLY.
[764] Adam Tomkins (2003). Public law. Oxford: Oxford University Press 158.

misleading of Parliament, in ways that suited their own interests.[765] Blick and Hennessy also support the idea that: 'At the same time individuals following certain courses of action which have proved controversial may use the manual and similar codes in attempts to justify themselves as having adhered to conventions.'[766] Likewise, Woodhouse draws attention that while strengthening the structure of accountability in the resolutions is important as a constitutional statement, in practice it may make little difference and its effect is likely to be further limited by parliament's ability to police its operation.[767] In a sense, while the ministerial code was written to avoid the risk of arbitrariness, the existence of such a code appears to strengthen the government`s hand on conventions.

While official documents on conventions seem to be a potential limitation on politicians' behaviour, politicians have still dominated or played a leading role in shaping constitutional conventions. They now have the power to unilaterally establish, interpret and change these documents. In other words, politicians have increased their ownership of these rules. This leads to the suspicion that these official documents were designed to give politicians more political elbow room. Government actors are still able to enjoy increased opportunities for self-interested political manipulation of conventions. It can be said that these official statements on conventions do not put enough pressure on politicians to comply with their rules.

The traditional view of conventions emphasizes that they originate through either time-honoured or express agreement. In other words, the traditional understanding of constitutional conventions developed out of political practices over time.[768] But it seems the government and political elites get more chance to reflect their perspective about the details conventions by producing these official documents. Moreover, new convention rules can be easily established in these documents by the government.[769] In the United Kingdom, producing a code became a common way to clarify a

[765] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press, 158.
[766] Andrew Blick and Peter Hennessy, 2011, The Cabinet Manual and the Working of the British Constitution, The Hidden Wiping Emerges, Institute for Public Policy Research.
[767] Diana Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] Public Law 5-6.
[768] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice And Principle' (1992) 43:3 NORTHERN IRELAND LEGAL QUARTERLY.
[769] Andrew Blick, "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.

convention's meaning.[770] Such codes have been created in different branches of government, such as the executive, the judiciary.[771] One exception is the Guide to Judicial Conduct which guides judges' behaviour, and this code incorporates conventions produced by the Supreme Court (United Kingdom Supreme Court, 2009). The executive plays a crucial role in creating written references on complex constitutional conventions. The UK Cabinet Manual is the latest example of the executive's statement of a convention.[772]

Some scholars approach these official documents with suspicion; for example, Blick observes that 'the Cabinet Manual is avowedly written 'from the view of the Executive'[773] and include 'an arbitrary quality to some decisions';[774] for example, note that 'it is inappropriate for a document approved by the Cabinet to play a part in determining the procedures for government formation following general elections, since any given Cabinet is an interested party'.[775] Blick also draws attention that the cabinet manual has encouraged and suggesting an enlargement in the constitutional role of the Monarch.[776] He remarks that however as Bagehot offered only `three rights` to be consulted, to encourage, to warn, the cabinet Manual extend in constitutional role of the Monarch both to be 'informed' and to 'advise'.[777] Blick also draws attention that the manual takes side and does not even recognise the existence of another view.[778] He notes that after resignation of the Prime Minister, the cabinet manual says 'the sovereign will invite the person who appears most likely to command the confidence of the house to serve as a Prime Minister and to form government.[779] But the manual does not note the existence of this interpretation which is the leader of the largest opposition party should be successor argued by Robert Blackburn. For this

[770] Robert Hazell, ' The United Kingdom', *Constitutional Conventions in Westminster Systems* (1st edn, Cambridge 2015) 181.
[771] Judiciary of England and Wales, *Guide to Judicial Conduct*, (March 2013).
[772] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011).
[773] Andrew Blick "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.
[774] Andrew Blick "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.
[775] Andrew Blick "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.
[776] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 104.
[777] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 104.
[778] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 107.
[779] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011) para. 2.8.

reason, he argues that the domination of the Cabinet Manual and a number of similar documents by the UK executive is constitutionally problematic.[780] This is because, in his view, 'conventions are exceptionally dependent upon what people think of their establishment and sustenance'. From this perspective, he concludes that the executive deliberately used the code to reflect its own understanding of its position and to 'encourage certain patterns of activity'. Likewise, Aileen McHarg describes the process of declaring conventions as 'soft law'. She argues that government intently prefers this way of clarifying conventions so as 'to influence constitutional behaviour and thus the development of new constitutional norms', without introducing formal legislation.[781] All these accounts highlight that the government firmly takes conventions in hand by producing these non-legal documents and this might lead to an increased risk of convention rules becoming more available to use for political self-dealing.

Alongside the role they play in determining the content of conventions, politicians can easily change convention rules by simply updating these documents. Convention rules can sometimes be required to cope with changing circumstances. These rules are usually assumed to be flexible and thus capable of satisfying changing needs.[782] On the other hand, as Sampford points out, alterations to traditional conventions occur over a very long period.[783] In a sense, a change to or development of an unwritten convention is as a result of a slow process of evolution. Collective minister responsibility is a good example of the adaptability of conventions with the progress of time. Convention requires that when decisions are made by the cabinet, all members of the government should support the government`s position in parliament and in public. The modern sense of collective responsibility has been applied by the British government since the late 18th century.[784] But sometimes, disagreements between ministers over a range of policy issues are apparent. In this circumstance, the prime minister finds it more appropriate to suspend the convention than to have it

[780] Andrew Blick, "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.
[781] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" The Modern Law Review, Volume 71, November 2008, No 6 853-877.
[782] Joseph Jaconelli, The Proper Rules for Constitutional Conventions, 38 Dublin U. L.J. 363 (2015)
[783] C J G Sampford, *Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions*, Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press, (1987).
[784] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press, 135.

breached by members of cabinet.[785] The exception called 'agreement to differ' was developed and employed in the twentieth century.[786] In essence, the evolution of the convention occurs with the course of time, not unilaterally by changing any statements in it. Defining them at any given moment might be hard.[787] Their implementation broadens in time. Under Salisbury convention the house of lords would not seek to prevent a government bill implementing a manifesto policy. Initially it applied only to bills introduced in the Commons; but it subsequently seems to have come to have force with respect to government manifesto bills that begin their legislative progress in either house.[788]

While a feature of conventions is that they may develop over time, the government is now able to take a different view on the details of conventions by updating these written documents. Blick stresses that:

> …the texts of acts of Parliament do not change simply because opinions about them alter. On the other hand, a convention can come about, persist or change to a significant extent because of views held about it.[789]

For instance, very recently, Theresa May's government was rocked by a wave of allegations against MPs and some ministers.[790] Nearly 40 MPs, including Cabinet and former Cabinet ministers, have been accused of inappropriate behaviour including sexual harassment.[791] Damian Green was sacked as first secretary of state after a porn allegation.[792] Foreign Secretary Boris Johnson was accused of jeopardizing the

[785] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press, 137.
[786] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press, 137.
[787] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019).
[788] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019).
[789] Andrew Blick, "The Cabinet Manual and the Codification of Conventions", *Parliamentary Affairs*, Volume 67, Issue 1, 1 January 2014, Pages 191–208, https://doi.org/10.1093/pa/gss040.
[790] Sky News, 'Westminster Scandal: Growing Problem for Theresa May' (*Sky News*, 2019) <https://news.sky.com/story/theresa-mays-political-farce-is-deadly-serious-for-crisis-hit-government-11116906> accessed 4 August 2019.
[791] Business Insider, 'Theresa May Under Pressure to Explain What She Knows About Nearly 40 Conservative MPs Accused in Sexual Harassment Scandal' (*Business Insider*, 2019) <http://uk.businessinsider.com/nearly-forty-mps-accused-in-westminster-sexual-harassment-scandal-2017-10> accessed 4 August 2019.
[792] Heather Stewart, 'Damian Green Sacked as First Secretary of State After Porn Allegations' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2017/dec/20/damian-green-resigns-as-first-secretary-of-state-after-porn-allegations> accessed 4 August 2019.

case of a British woman jailed in Iran.[793] Priti Patel, International Development Secretary, revealed that she held unauthorized meetings with Israeli officials, including with the leader of one of Israel's main political parties.[794] Theresa May faced the collapse of her government due to these growing scandals. She updated the ministerial code in 2018 to exit this crisis.[795] A new section in the ministerial code states the types of behaviour that led to their resignations: sexual harassment, improper behaviour, and undisclosed ministerial meetings.[796] This followed the resignation of three ministers: Michael Fallon, Damien Green and Priti Patel.[797] It can be seen from these incidents that it has now become too easy for government to extend conventions to suit their own political convenience.

In this case, it seems that the convention of individual minister responsibility was forced by simply extending a rule. This, therefore, gives the impression that an easy change to the mechanism of a convention helps to increase the enforceability of individual ministerial responsibility. Of course, if the ministerial code is not explicitly stated, these kinds of behaviours require responsibility from ministers, so it is likely that ministers might interpret the convention in a different way to protect their office. As Blick notes that 'While a code, as always noted, might strengthen those conventions it includes, it could also undermine the relative importance of those rules that it omits.'[798] At least, ministers may initially resist calls for resignation but now this change puts more pressure on ministers, and they have no choice but to resign. In fact, ministers have been forced to resign in respect of their private behaviour in the past. For instance, if ministers were embroiled in a sex scandal, they had to leave their office as well.[799] This can be seen in the following cases: Cecil Parkinson, David Mellor

[793] Jessica Elgot and Peter Walker, 'Boris Johnson Remarks 'Had No Impact' On Jailed British-Iranian Woman' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2017/nov/07/boris-johnson-could-have-been-clearer-over-jailed-british-iranian-woman> accessed 4 August 2019.
[794] The Independent, 'Priti Patel Apologises for Official Meetings in Israel While On 'Holiday' (*The Independent*, 2019) <https://www.independent.co.uk/news/uk/politics/priti-patel-israel-family-holiday-politicians-apology-meetings-international-development-secretary-a8040281.html> accessed 4 August 2019.
[795] BBC News, 'New Code Bans Ministers from Bullying' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-42621591> accessed 4 August 2019.
[796] Ministerial Code, Cabinet Office January 2018.
[797] Mikey Smith, 'Here Are All the Ministers Who Have Resigned from Theresa May's Government' (*mirror*, 2019) <https://www.mirror.co.uk/news/politics/ministers-who-resigned-theresa-mays-12883588> accessed 4 August 2019.
[798] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019).
[799] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press 145.

and Tim Yeo, among others.[800] Therefore, the government's recent amendment to the ministerial code gives the impression that a written convention has responded to a political need effectively and thus the cost of the breach of a convention increased. The plain fact is that the government extended ministers' responsibility at its sole discretion.

Equally, politicians should retain power by interpreting the details of conventional rules if required. As is known, conventional rules are difficult to define effectively. It is neither possible nor useful to scrutinize every detail of a convention in a single document, they always need further clarification. In the current situation, politicians only have a right to describe details of the meaning and operation of a convention. It is still possible to remain sceptical that the government might interpret conventions in accordance with its political interest.

The convention whereby there is a requirement to seek parliamentary consent before deploying troops can be taken as illustrative of how recognized conventions still allow much flexibility to politicians to determine the details. The convention was embodied in 2011 such that the House of Commons should have an opportunity to hold a debate before troops are sent on military operations.[801] While there is a wide-ranging consensus on the general need for parliamentary approval, details about the implementation of conventions need further clarification, such as right time to debate and vote on military action or what kinds of military action are exempt from parliamentary approval etc.[802] These particular questions about the implementation of the convention are specified by the government. Mello also emphasized that these details would shape many factors in future cases. "Whether MPs use their informal veto power in future cases will depend on a range of factors, including the preference distribution in parliament and the nature of the proposed deployment."[803]

[800] Adam Tomkins (2003). *Public law*. Oxford: Oxford University Press 145.
[801] United Kingdom Political and Constitutional Reform Committee 2011. Parliament's role in conflict decision, 8th report of session 2010-12 HC 923.
[802] Patrick A. Mello, Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria, West European Politics, (2016) 80-100.
[803] Patrick A. Mello, Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria, West European Politics, (2016) 80-100.

This was seen in a more concrete example when Theresa May decided to join in military action against the Assad regime in Syria in 2018 without seeking the permission of MPs. She faced severe criticism from MPs who were not given a vote in parliament on UK military action in Syria.[804][805] Theresa May defended her action stating that, in that case, an urgent response was needed, and, in the circumstances, there was no alternative to prevent a humanitarian catastrophe in Syria.[806] The convention permits the government to decide on military action against a foreign country if there is an emergency. But how emergency situations should be interpreted and under what circumstances an emergency arises is unclear. In that case, the government itself decided under what circumstances an emergency arose. Therefore, it is not clear whether she broke the convention or simply responded to an unexpected issue by exercising the flexibility of the convention. This arouses a suspicion that vagueness makes political self-dealing possible.

On the other hand, it can be claimed that the efficacy and purpose of constitutional conventions have depended on their flexibility. If the full details of a convention are firmly interpreted by official documents, it may become difficult to adapt to various political circumstances. In practice it means that the government is entitled to assess and decide complex policy issues and unforeseen problems on a case-by-case basis according to conventional rules. Viewed from this perspective, the prime minister has a right to interpret and decide on emergencies. On the other hand, the reasoning behind this rule considering the prime minister's power to define the details raises doubts, because parliament's right to debate and approve military action is a check on executive abuses of power.[807] But the power to interpret the details of a convention allows the government to still find room to manoeuvre to reach their target. In a sense, tension exists between the role played by the government in determining the details of a convention and the purpose of a constitutional convention. For this reason, it is

[804] BBC News, 'Syrian Strikes Moral and Legal, Says PM' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-43775728> accessed 4 August 2019.
[805] The Prime Minister (Mrs Theresa May), Syria, 16 April 2018, Volume 639, https://hansard.parliament.uk/commons/2018-04-16/debates/92610F86-2B91-4105-AE8B-78D018453D1B/Syria.
[806] BBC News, 'Syrian Strikes Moral and Legal, Says PM' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-43775728> accessed 4 August 2019.
[807] C.R.G. Murray and Aoife O 'Donoghue, (2016) Towards Unilateralism? House of Commons Oversight of the Use of Force, International and comparative law quarterly, 65 (2), 305-341.

difficult to confidently argue that clarification of the convention would directly affect its enforceability and that a clear official statement about the convention suffices to put enough pressure on the government to arrange for a timely debate and vote before engaging in military action overseas. This part of the study is not only intended to show that official clarification about conventions now puts more pressure on politicians than the traditional understanding of conventions to some extent, but its goal is also to highlight that officially clarified conventions still allow room for self-interested political manipulation of them. Of course, creating an official list of conventions intends to make them public but, as a matter of fact, constitutional conventions still continue to belong to politicians. The political elite still only has a voice about the scope and implementation of conventions. More specifically, the government is entitled to say more about their creation, alteration, and interpretation. This raises a doubt that politicians deliberately leave the door open to exploit these non-legal rules for their own interest. In McHarg's word, '...the preference for constitutional soft law is attributable more to the executive's desire to resist real external control over its activities, than to a concern to ensure elective regulation'.[808] Likewise, Andrew argues that codification is not a means of achieving complete control over conventions.[809] rather it is a way of impacting upon the general landscape within which conventions form and operate.[810] For this reason, the difficulties that arise due to their enforceability remain an issue.

## 5.3 Enforceability of Legally Codified Conventions

Marshall identified several facts about conventions. He says that conventions can become a part of the law or can be used in legal arguments.[811] In practice, there are cases where the content of a convention might be specifically put into law. For example, the relations between the House of Lords and the House of Commons in the UK Parliament, which had previously been a conventional matter, were formalized by the UK Parliament Act 1911, also by Constitutional Reform and Governance Act 2010.

[808] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853-877.
[809] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 110.
[810] Andrew Blick, *Codes of The Constitution* (1st edn, HART Publishing 2019) 110.
[811] Geoffrey Marshall, 1984. Constitutional Conventions: The Rules and Forms of Political Accountability, 1st edn. Oxford: Clarendon Press. 14-15.

Similarly, in the nineteenth century, Dicey made the distinction that 'in the strictest sense 'law' is enforceable by the courts, but conventions are not in reality laws at all since they are not enforced by the courts'.[812] A convention rule has been distinguished from the law since he made his sharp distinction between laws and conventions.

Orthodox theory readily holds that the courts may not and should not *enforce* conventions as laws under the constitution.[813] A key factor of this reluctance is that conventions are not inherently legal, and it follows that they cannot be justiciable.[814] Authors who support the classic distinction between laws and conventions refer to Hart`s rule of recognition theory and hold that conventions do not count among the sources of constitutional law. Rules of recognition specify criteria for determining which rules are to count as rules of the system.[815][816] Professor Hart highlighted that in a sophisticated legal system, rules of recognition are not simple and he explained the "sources of law" idea whereby the criteria for legal validity may take one or a variety of forms, such as references to authoritative texts, to legislative enactment, to past decisions, to customary practice or to general declarations of a specified person. In other words, in a modern legal system, rules of recognition identify the rules of the system by reference to some general characteristics possessed by primary rules. This may be the fact of them having been enacted by a specific body, or their long customary practice or their relation to judicial decisions[817]. According to this theory, in the Commonwealth, legislation and judicial decisions determine sources of law. The current rules of recognition do not include a traditional understanding of conventions because they do not derive from any of these sources.

Viewed from this perspective, it is easy to say that if a convention is enshrined as a legal rule, legally codified conventions could become justiciable issues in a court of law. But current practice does not appear to reflect this view, the recent controversy surrounding the Sewel Convention might be an important example to understand the

[812] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (8th edn 1982) 234.
[813] Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015) 1-32.
[814] Keir Baker, A Matter of Convention? What can English Constitutional Law learn from the Bundesverfassungsrecht's Treatment of Constitutional Conventions? AGLJ Vol. 1 (2015) 71-89.
[815] Robert S. Summers, Professor H.L.A. Hart's Concept of Law, 1963 *Duke Law Journal* 629-670 (1963).
[816] Professor H. L. A. Hart, "The Concept of Law", Oxford, Oxford University Press (1961).
[817] Professor H. L. A. Hart, "The Concept of Law", Oxford, Oxford University Press (1961).

practical meaning of the codification of conventions. The Scottish government intervened in the Brexit progress to demand that the UK government seek their approval before triggering Article 50 due to the Sewel Convention. The Lord Advocate published his written case, which includes the argument that the Scottish parliament's consent should be sought before legislation is passed.[818] This argument concerns the implementation of the Sewel Convention, which states that the UK Parliament does not normally legislate for Scotland on devolved matters, as these relate to Holyrood's powers which cover such areas as health, education and family law, or alter the competence of the Scottish parliament or the responsibilities of the Scottish government without the Scottish parliament's consent.[819] But going beyond that, if Westminster legislation would expand or contract the powers of the Scottish parliament or its ministers, this too "normally" requires written consent from Edinburgh.

The convention was put into law in the Scotland Act 2016, which amended the Scotland act 1998. But, the Supreme Court, in Miller, ruled, in 2017, that the Sewel Convention[820] had not become a legal rule despite being embodied in the statute. The court is clear: any gripe must be "determined within the political world" rather than the courtroom. The reasoning is that both the "nature of the content" and the wording of s.2 indicate that Parliament was "not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognizing the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement … the purpose of the legislative recognition of the convention was to entrench it as a convention"[821].

This means that there was no legal requirement to seek the consent of devolved legislatures to an EU withdrawal bill.

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[818] Aileen McHarg and James Mitchell, Brexit and Scotland, The British Journal of Politics and International Relations, 2017, Vol.19(3) 512-526. https://doi.org/10.1177/1369148117711674.

[819] Andrew Tickell: 'UK's Promise to Enshrine The Sewel Convention In Law Turned Out To Be False' (The National, 2017) http://www.thenational.scot/news/15045032.Andrew_Ticklell__UK_s_promise_to_enshrine_the_Sewel_convention_in_law_turned_out_to_be_false/?ref=Andrew%20Tickell:%20UK%27s%20Promise%20To%20Enshrine%20The%20Sewel%20Convention%20In%20mrb&lp=2 accessed 4 March 2017.

[820] Scotland Act 2016 (*Legislation.gov.uk*, 2019) <http://www.legislation.gov.uk/ukpga/2016/11/section/2/enacted> accessed 4 August 2019.

[821] ([2017] UKSC 5 at paras 148–149).

While the court holds that the government intends to protect the political nature of the matter because it uses “normal” words when codifying the content of the convention, it can be simply argued that any validly enacted legislative provision *is* intended by parliament to create a legal rule, unless the statute clearly and expressly states otherwise. If the government desires to secure its conventional nature, it can clearly state its intention. Parliament is accountable to the electorate, not to the judiciary. We do not accept any role for the judiciary in these matters. Nor have we received any evidence which would lead us to conclude that there is or should be any role for the courts in the matter of relations between the two Houses.”[822] Also, someone might ask why the government needs this amendment when the convention is already stated in the Memorandum of Understanding.[823] The government protected the political nature of the Sewel Convention in para. 2 of the Memorandum of Understanding, where it is explicitly said that it does not create any legal obligations.[824] This suggests that the government deliberately chose legal codification of it. Otherwise, the government could act again if it wanted the Sewel Convention to cease being a convention. Second, it can simply be said that the convention was clarified by amending an act (see s. 28(8) Scotland Act[825]), so it is clear to say that the convention becomes a legal rule and thus the courts do have the right to enforce legal sanctions for breaches of the convention. There is no need to check the intention of the government.

Besides, some scholars describe legally codified conventions in a different way. Atkinson, for example, assesses the Sewel Convention in the act as a new form of constitutional convention.[826] He argues it is “one that is legislatively enhanced but remains a convention rather than becoming a legal rule”.[827] Likewise, Gallagher argues that ‘This was declaratory legislation. It did so in terms which recognize the

[822] House of Lords, House of Commons, Joint Committee on Conventions, *Conventions of the UK Parliament*, Report of Session 2005-06 Volume 1.
[823] Memorandum of Understanding and Supplementary Agreements (2013).
[824] Memorandum of Understanding and Supplementary Agreements (2013).
[825] Scotland Act 2016 (*Legislation.gov.uk*, 2019) <http://www.legislation.gov.uk/ukpga/2016/11/section/2/enacted> accessed 4 August 2019
[826] Joe Atkinson, Parliamentary intent and the Sewel Convention as a Legislative Entrenched Political Convention. (2017). https://ukconstitutionallaw.org/2017/02/10/joe-atkinson-parliamentary-intent-and-the-sewel-convention-as-a-legislatively-entrenched-political-convention/.
[827] Joe Atkinson, Parliamentary intent and the Sewel Convention as a Legislative Entrenched Political Convention. (2017). https://ukconstitutionallaw.org/2017/02/10/joe-atkinson-parliamentary-intent-and-the-sewel-convention-as-a-legislatively-entrenched-political-convention/.

convention's existence but did not change its status and so give it the force of law enforceable by the courts.'[828]

While codification of the Sewel Convention is defined differently by different scholars, most of these accounts agree that the passage of the Scotland Act 2016 has not converted the Sewel Convention into a legal rule and so it remains a matter purely of convention regardless of the form of clarification. Hence, the issue seems to turn on why legal enactment procedures are preferred to clarify a convention instead of non-legal determination which allows a convention to remain political in nature. Mark Elliot explains that the reason behind this legal enactment of the Sewel Convention is not to give the convention legal effect but rather to make a breach of the convention difficult,[829] because it is believed that the existence of a certain and predetermined control mechanism, such as a court, for breaches of conventions might put more pressure on politicians so that they follow conventions properly in the future. For this reason, when there is an alleged break of a convention, the necessity for a legal safeguard becomes a current issue. Most recently, when Theresa May decided on an airstrike on Syrian without seeking MPs' approval, Mr. Corbyn called for a new War Powers Act, saying the convention that parliament should be consulted before military action was "broken" and had to be replaced by a "legal obligation" to get the backing of MPs.

Legislation sometimes simply stresses that a convention is still active and thus should be followed. For instance, when Southern Rhodesia (as it then was) made a unilateral declaration of independence in the 1970s, the UK parliament put a legal safeguard on their power of legislative control over former colonies. Besides, legislation is preferred if a convention transfers power from one institution to another authority. Hence, it was objected that previous authority effectively restricted use of this power. For example, the "Ponsonby rule" on the ratification of international treaties was codified in the Constitutional Reform and Governance Act.[830][831] Thus, in the UK, treaties are ratified

[828] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention (2017).
[829] 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/> accessed 4 August 2019.
[830] Constitutional Reform and Governance Act 2010.
[831] Robert Hazell, ' The United Kingdom', *Constitutional Conventions in Westminster Systems* (1st edn, Cambridge 2015) 179.

by the government, acting under the Royal Prerogative, but now parliament has a new statutory role in the ratification of treaties. The government has a general statutory requirement to publish a treaty that is subject to ratification or its equivalent and lay it before parliament for 21 sitting days.[832] While apparently the 'Ponsonby Rule' crystallized into a statutory footing, it remained nothing more than a convention. The legislation serves to effectively limit the power of the executive in the ratification of treaties.

It can therefore be concluded that a convention is legally codified in the case of a violation or would-be violation of a convention rule. On the other hand, the possibility of judicial enforceability is largely symbolic and the courts' involvement in political matters is seen as undesirable. Barry et al. underline that:

> the importance of these conventions means that it may be desirable to codify them to reduce the risk that they will be violated. In such cases, the aim is not to fundamentally alter the constitutional pillars of the system but to protect them and, in some cases, to render them less ambiguous.[833]

Hence, the legal codification of a convention does not detract from its political nature. Politicians are still considered the only authority to have a right to say something about the failure of a constitutional convention despite a convention being enshrined in law, because convention rules lead to an expectation that politicians make the most convenient decisions by taking advantage of the flexibility of conventions. In this case, it is believed that the Sewel Convention provides an opportunity for the Westminster government to reconsider how it approaches issues relating to devolution in the Brexit circumstances and produces a consensus-based policy on the territorial constitution.[834]

It is therefore important to consider whether politicians alone should deal with the issues raised by the Sewel Convention. First, the issues are highly politically charged, the UK government held that no requirement for devolved consent arose. The prime

[832] Select Committee on Constitution Fifteenth Report, *Appendix 5: The Ponsonby Rule*, 2.
[833] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions in Westminster Democracies' (2018) 72 Parliamentary Affairs 664-683.
[834] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention (2017).

minister, Theresa May, said “she couldn’t allow the devolved assemblies to undermine what was best for the country”.[835] She believes the union is ‘precious’. In the orthodox UK constitutional tradition, Westminster remains sovereign and has the power to make and unmake any law it wishes. In other words, the core principle of UK parliamentary – supremacy – is untouched.[836] Moreover, she accused the SNP of being obsessed with constitutional affairs.[837] On the other hand, the Scottish reply to the UK government was: “That is a fundamental attack on the very principle and foundation in the statute of the Scottish Parliament of 1999, which said specifically that anything that wasn’t reserved to Westminster should be run in Scotland. This is a Prime Minister who is attacking the very foundations of the Scottish Parliament, and she’ll do it to her cost.” Former SNP leader Alex Salmond stated that: “In those circumstances, we have a duty to stand up for Scotland, and to have a plan in place to protect our vital national interests.” Even worse, the Scottish Labour leader, Kezia Dugdale, said: “Theresa May has created the deep divisions in our society that the SNP thrives upon. As a result, building a cross-party consensus on further devolution to Scotland did not give a result and Article 50 has been triggered without seeking the consent of the Scottish Government on 29th March.” Scottish First Minister, Nicola Sturgeon, reacting to Article 50 being triggered, said that “Scotland didn't vote for it and our voice has been ignored."[838] Consequently, there are no clear consequences of an objection to breaking the convention.

This case has shown that if convention matters are left only to politicians, there is a greater risk of arbitrariness and bias associated with the imposition of political sanctions. As Reid points out, “If policing it is to be left to the politicians (as the general

[835] Andrew Learmonth, 'Theresa May Accused of Attacking The Foundation Of The Scottish Parliament By Seizing Back Devolved Powers' (The National, 2017) http://www.thenational.scot/news/15133315.Theresa_May_accused_of_attacking_the_foundation_of_the_Scottish_Parliament_by_seizing_back_devolved_powers/?ref=rl&lp=1 accessed 4 March 2017.
[836] Andrew Tickell: 'UK’s Promise to Enshrine The Sewel Convention In Law Turned Out To Be False' (The National, 2017) http://www.thenational.scot/news/15045032.Andrew_Ticklell__UK_s_promise_to_enshrine_the_Sewel_convention_in_law_turned_out_to_be_false/?ref=Andrew%20Tickell:%20UK%27s%20Promise%20To%20Enshrine%20The%20Sewel%20Convention%20In%20mrb&lp=2 accessed 4 March 2017.
[837] Andrew Learmonth, 'Theresa May Accused of Attacking The Foundation Of The Scottish Parliament By Seizing Back Devolved Powers' (The National, 2017) http://www.thenational.scot/news/15133315.Theresa_May_accused_of_attacking_the_foundation_of_the_Scottish_Parliament_by_seizing_back_devolved_powers/?ref=rl&lp=1 accessed 4 March 2017.
[838] BBC News, “In Quotes: Reaction to Article 50 Being Triggered” (*BBC News* March 29, 2017) <http://www.bbc.co.uk/news/uk-politics-39431645> accessed 4 August 2019.

orthodoxy would have suggested even before the Supreme Court's decision), then the current dispute suggests that the convention should be armed with some other political teeth."[839]

This can be explained by the flexibility of conventions. Convention rules are valued for their flexible nature, which allows assessing and deciding on complex political issues case by case. But in the meantime, they include a risk that politicians might take advantage of the flexibility of conventions for political self-dealing. Delaney remarks that 'Flexibility can serve as an invitation to political actors for self-dealing or to circumvent consensus-based politics'[840]. He writes: 'a danger of excessive flexibility lies in expanded opportunities for political self-dealing and the concomitant risk to the broader constitutional consensus.'[841] Specifically, Gallagher draws attention to how the flexibility of the Sewel Convention can be used to either rebuild constitutional territory or for *self-interested political manipulation* on the part of politicians. In the words of Gallagher, "Sewel cannot mean that the devolved administrations can veto Brexit, nor therefore legislation which is essential for it to happen. But they do have powers over the choices to be made about the consequences for devolved subjects and powers. This presents risks and opportunities: on the one hand, grandstanding met by obduracy, leading to political instability; or, on the other, constructive engagement on both sides leading to a rebalancing of the UK's territorial constitution. how to set legislative boundaries." In a sense, the efficiency of convention rules firmly depends on how the flexibility of conventions is used, whether the flexibility of conventions serves to able to reply to unexpected political circumstances without the firm pressure of strict rules or for political self-dealing.

To conclude, the absence of a safe mechanism to control the implementation of conventions lead to the legal codification of convention rules, because it is believed that providing legal safeguards in the form of convention rules might put more pressure

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[839] Paul Reid, Time to Give the Sewel Convention Some (Political) Bite? https://ukconstitutionallaw.org/2017/01/26/paul-reid-time-to-give-the-sewel-convention-some-political-bite/

[840] Erin F Delaney, Stability in Flexibility: A British Lens on Constitutional Success, In Assessing Constitutional Performance, North-western University School of Law, Public Law and Legal Theory Series, No. 16-12, 1-23.

[841] Erin F Delaney, Stability in Flexibility: A British Lens on Constitutional Success, In Assessing Constitutional Performance, North-western University School of Law, Public Law and Legal Theory Series, No. 16-12, 1-23.

on politicians to comply with these rules. But it is difficult to say that fear of judicial intervention by the courts in constitutional issues is a remedy for the failure of constitutional conventions. In fact, the presence of such an act from the UK parliament covering convention rules may have no impact on the political nature of the rules. In practice it means that legal codification does not provide a stronger incentive to comply with constitution rules and convention rules remain only in politicians' hands.

The main guardians of caretaker conventions in the United Kingdom are permanent secretaries blowing the whistle as accounting officers. Public officials have become the interpreters and enforcers of caretaker conventions.

How are conventions enforced? Dicey's answer is not because of political consensus or the power of public, rather 'nothing else than the force of law … Breach of conventions will almost bring immediately bring the offender into conflict with courts and the law of the land.'[842] Dicey's perspective influences the enforceability of convention rules.

The role it plays in determining the content of conventions in these official documents overshadows the impartiality of documents. For example, Blick approaches the Cabinet Manual with suspicion. He argues that the domination of production of the Cabinet Manual and a number of similar documents by the UK executive is constitutionally problematic.[843] This is because, in his view, 'conventions are exceptionally dependent upon what people think of their establishment and sustenance'. From this perspective, he concludes that the executive deliberately used the code to reflect its own 'understanding of the position' and to 'encourage certain patterns of activity.' Likewise, Aileen McHarg describes the process of declaring conventions as 'soft law'. She argues that the government clearly prefers this way of clarification of conventions, wishing 'to influence constitutional behaviour and thus the development of new constitutional norms', without introducing formal legislation.[844]

[842] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (8th edn 1982) 445.
[843] Andrew Blick, 'The Cabinet Manual and The Codification of Conventions' (2012) 67 Parliamentary Affairs 191-208.
[844] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" The Modern Law Review, Volume 71, November 2008, No 6 853-877.

The Public Administration Select Committee (PASC) made a suggestion in 2000 that parliament should have a say in formulation of the Ministerial Code. The government in its response refused the possibility of parliamentary approval for the Code: The Ministerial Code is the prime minister's guidance to his ministers on how he expects them to undertake their official duties. It is for the prime minister to determine the terms of the code. The government notes the committee's concern that there is no requirement for the ministerial code to be published. It is, however, normal practice for the ministerial code to be updated after an election, and since 1992, each revision has been published. The prime minister undertakes to continue to publish the code and any revisions to it on this basis. In short, in the current situation, the executive retains the power to revise the meaning of and border of the conventions in the United Kingdom. They have a chance to reflect their own perspective on the convention. Most recently, Boris Johnson revised the ministerial code as he became the new prime minister. They also consider replacing convention related to prerogative power with statue is the Fixed-term Parliament Act 2011[845].

Of course, the UK parliament retains the power in each of the devolution statutes to legislate in relation to devolved matters; however, the Sewel Convention requires that it should normally do so only with the consent of the relevant devolved legislature. That now finds statutory expression in section 2 of the Scotland Act 2016 (which adds a new subsection 28(8) to the Scotland Act 1998), and section 2 of the Wales Act 2017 (adding subsection 107(6) to the Government of Wales Act 2006). I have previously written about the Sewel Convention in this blog, arguing that it should be understood as having more than a symbolic effect. In the *Miller* case, of course, the UK Supreme Court decided that even in its statutory form, the Sewel Convention was a political convention, apparently without legal substance (see Lord Neuberger, paras 148, 150-1).

In retrospect, it is perhaps unfortunate that the Sewel Convention issue appears to have been approached as secondary in *Miller,* because it is plain that the point is very much live at this stage of the withdrawal process. If, as the Supreme Court has held, the issue of the convention’s operation is not a legal one, it is not evident that clear

[845] Fixed-term Parliament Act 2011.

political guidance has yet emerged for the management of legislative consent and its absence in circumstances of political controversy and direct opposition from the consulted devolved legislature. It is difficult to disagree with Mark Elliott's observation that it would be a gross understatement to describe pressing on with legislation in the absence of consent in this context as 'political folly'.

There is no doubt that, as a strict matter of law, Westminster could go ahead and take back the powers anyway. The UK Supreme Court, in the Miller case, on the role of parliament in Brexit, insisted that the Sewel Convention is not legally enforceable. In fact, we knew this already. The more relevant question is the status of Sewel in our unwritten constitution and in underpinning the institutional balance of devolution. Much of the UK constitution is based on conventions. These are not, as the Supreme Court suggested, mere matters of political convenience but are part of the rules of the political game. From this perspective, the conventions around legislative consent are the equivalent, in our unwritten constitution, of those provisions that elsewhere prevent central government changing the rules of the game unilaterally. They are what distinguishes devolved national legislatures, established by referendum, from mere local authorities and give the UK constitution a federal spirit. From this perspective, the fact that it might be complicated and difficult to leave powers at the devolved level during Brexit, or that the devolved legislatures are already restricted by EU laws which the UK will merely replace, is irrelevant.

Russell also supports the idea that if citizens play a part in making convention progress, it will prevent a constitutional convention becoming party politicized. She suggests that: "Given the complexity of the constitutional issues now facing the UK, and the vested interests of the main political parties, a convention involving citizens could help to avoid deadlock, and even to curb calls of 'constitutional crisis' over the English question post-2015."[846]

Even though it was intended to overcome the uncertainties of conventions by means of writing down traditional conventions, to some extent they retain their uncertainties.

[846] Meg Russell, The Constitution Unit, "An English Constitutional Convention Could Benefit Both Main Parties in the Face of the UKIP Threat" (*The Constitution Unit Blog* February 20, 2016) <https://constitution-unit.com/2014/10/17/an-english-constitutional-convention-could-benefit-both-main-parties-in-the-face-of-the-ukip-threat/> accessed 4 August 2019.

However, these uncertainties continue not because traditional conventions are social rules but because of the uncertainties of written rules.

Hence, it can be concluded that while this official documentation strengthens the role and effectiveness of conventions, they keep their uncertainties to some extent. This is due to the lack of an operation mechanism.

> Again, one upshot of these two features of top-down conventions is best appreciated by considering them together. Top-down conventions are vague, but they are vague in a different way to bottom-up conventions. Their meaning is tethered to the intentions of their creators, and the language which those creators use to express the rule. In other words, theirs is the vagueness of written rules rather than of social rules.[847]

Fourth, Elliott argues that some constitutional conventions may gain legal force and cease to be merely conventional in status after a sufficiently long period of observance.[848] Jonelle raises an objection to that hypothesis **–** an objection based on considerations of the rule of law itself. The requirements of the rule of law are well known that legal norms should be clear, that they be prospective in scope, and so on. What is not acknowledged (because, to the best of my knowledge, the issue has not hitherto presented itself) is that the same standards should apply not merely to individual laws, but also to what *counts as* law, i.e. the sources of law themselves. Herein exists a particular difficulty for Elliott's thesis. For it would mean that a norm that has long been observed as a conventional will, one day and without any warning to those concerned, attain legal status with all the accompanying features of legal enforcement flowing from transgression at that moment in time (the invalidation of actions, liability to damages etc). The ensuing subversion of people's expectations would clearly be very undesirable, especially when a further reservation is added. Would any useful purpose be served by such a metamorphosis from constitutional convention to constitutional law when the very fact of long compliance with the

[847] Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81 The Modern Law Review 766.
[848] Mark Elliott, “Parliamentary Sovereignty and the New Constitutional Order” (2002) 22 L.S. 340.

conventional standard will have demonstrated that, for practical purposes, legal enforcement would be otiose?

The Sewel Convention is an illustrative example. The existence of the Sewel Convention is recognized by the Scotland Act 2016.[849] As noted above, the Supreme Court highlighted the ‘political nature' of the "Sewel Convention". Nevertheless, ‘law courts do not possess the right of enforcement of a political convention’. In addition, law courts cannot even make legitimate decisions or judgments on its process or capacity, as these issues are solved within the political arena. The point that a statute recognizes the Sewel Convention does not make any difference. In the perspective of the Supreme Court of the UK, conventions are not just unenforceable, but also (seemingly) non-legitimate, so not suitable for legal resolution. The Sewel Convention was criticized due to this non-validity in the Miller case,[850] too, in which the perspective of the Supreme Court regarding the part taken by the Sewel Convention, noted above, constituted a significant section of the verdict[851].

While in this case, the court abstained from deciding whether the UK government should seek the Scottish government’s consent to leave the EU or not, it is a constitutional risk that, in the future, any case in which a court might intervene is a political matter embodied in a statute. Besides, as McHarg mentions, if a crucial decision had to be based in law, this would open up scope for the argument that politicians had unlawfully decided, with the result that they could face judicial charges.

## 5.4 Conclusion

This chapter has highlighted that constitutional conventions suffer from uncertainty due to their enforceability. This weakness of convention rules may be decreased by documents such as the UK Cabinet Manual and, at least, awareness of constitutional conventions may be heightened. But in practice, politicians remain the only authority to have a voice about the operation of conventions. The study has highlighted that if

[849] The Scotland Act 2016.
[850] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, 2 WLR 583
[851] Jim D. Gallagher, Conventional wisdom: Brexit, Devolution and the Sewel Convention (2017).

convention matters are only left in politicians' hands, this may result in political manipulation of these rules.

The reasoning behind this view can be explained by the flexibility of the rules. Constitutional conventions serve to constrain political actors to assess and decide unexpected political issues case by case without the pressure of certain sanction. On the other hand, the absence of a predetermined enforcer mechanism fosters arbitrariness. In a sense, the rules allow room for political self-dealing. Therefore, the essay has highlighted the urgent need for a third independent mechanism for each convention to minimalize arbitrariness without damaging flexibility of convention rules.

Therefore, it is expected that in times of crisis, clearly stated and well-known rules would prevent any possible constitutional crisis.[852] However, this did not prevent a crisis in the Sewel case because while a convention was written, its operation mechanism was not sufficiently clarified.

[852] C J G Sampford, *Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions*, Oxford Journal of Legal Studies Vol. 7 No. 3, Oxford University Press, (1987) 399.

# Chapter 6 – The need for clarification of the operational mechanism of the constitutional convention

## 6.1 Introduction

Although it may usually be easy to recognize and express the meaning of conventions, the implementation of a convention may not be straightforward in some circumstances.[853] A convention becomes more contentious and the details proper operation of a mechanism of convention is needed to clarify it more than ever in such cases, because different interpretations or perspectives of even small details of convention rules might have different political consequences. Unfortunately, details of the operation of conventions are most noticeable when they fail or threaten to malfunction.[854] It is becoming essential to clarify what constitutes appropriate practice for constitutional conventions. As Ahmed et al note:

> when political actors are motivated to follow conventions, they may not know what the relevant conventions are, and where they begin and end. Individual political actors may think they know the answers to these questions, but when their interpretations differ, there will be disagreement and potentially stalemate[855].

Some might argue that these unspecified, undetermined details of conventions are essential for the flexibility of the rules. Conventional rules generally political in nature. They are born, evolve and disappeared over time in political realm and their application

[853] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st Edn 2003) 142.
[854] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (Eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 253.
[855] Farrah Ahmed, Richard Albert and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law.

depends upon a range of factors. This indeterminate nature of convention necessitates some flexibility**.** The flexibility therefore allows politicians to assess and decide on unexpected political issues case by case without the pressure of certain sanctions. In a sense, the flexibility of convention rules proves to be an asset to respond to different, complex political situations. For example, Jaconelli believes that Salisbury convention will continue function well as a conventional standard of behaviour despite there are uncertain details of application of the convention.[856]

On the other hand, Britain lacks a formal constitution. In place of this, political power in Britain is limited through an informal patchwork of written laws and unwritten conventions.[857] They can and do constrain politician's behaviour, but conventional powers remain unclear in some cases. Conventional rules do not always set clear limits on legitimate political conduct. Uncertainty over the existence of conventions and observable shifts in practice is accepted as a weakening of conventions. Some might argue that conventional rules allow the executive for determine the boundaries of their own behaviours and thus "this may be leading to increased partisanship and greater opportunity for expediency and constitutional self-dealing."[858] The decision on the prorogation of the British parliament for five weeks might prove that the vagueness of conventional rules is sometimes exploited by politicians. They interpret and implement conventions to reach their own political targets. For example, when prime minister Boris Johnson advised Queen to prorogue British parliament for five weeks.[859] Johnson had faced criticism that he attends to prevent parliamentary scrutiny of the Government's Brexit plans in final weeks existing European union.[860] *The looser prerogative power* presents a chance to Boris to exploit the rule to reach his own political aim. Hence, the suspension of parliament is seen as improper,

[856] Joseph Jaconelli, The Proper Roles for Constitutional Conventions, 38 Dublin U. L.J. (2015) 363-385.
[857] W Bagehot, The English Constitution (Oxford, Oxford University Press, 2001) 178–199.
[858] Erin F. Delaney, 'Stability in Flexibility: A British Lens on Constitutional Success' [2016] *SSRN Electronic Journal* 8.
[859] Robert Brett Taylor, 'The Prorogation Ruling Has Strengthened the Political Accountability of Those in Power' (*LSE BREXIT*, 2020) <https://blogs.lse.ac.uk/brexit/2019/09/26/the-prorogation-ruling-has-strengthened-the-political-accountability-of-those-in-power/> accessed 24 March 2020.
[860] Meg Russell, Alan Renwick, and Robert Hazell, 'This Prorogation Is Improper: The Government Should Reverse It' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/09/03/this-prorogation-is-improper-the-government-should-reverse-it/> accessed 24 March 2020.

unconstitutional, and unprecedented.[861] Whether the Queen should approve the Prime minister's advice in the case of power abuse which the prorogation intentionally deprives Parliament of any ability to fulfil its deliberative and legislative function about Brexit is another question. Prorogation is a personal prerogative of the Monarch exercised on the advice of Ministers. Under Cardinal convention, it can be simply said that Queen makes her decision based on Prime Minister's advice. But the unexpected case, two different views are discussed.

First, this cardinal convention on ministerial advice would appear to suggest that the Monarch is tightly bound to acts on the advice of ministers on prorogation, despite a prorogation of Parliament under these circumstances is unconstitutional. Because the government is ultimately accountable to Parliament the exercise of the power. the ministerial advice convention is applying to promote constitutional principles of democracy and responsible and representative government. In this sense, the predictable and politically uncontroversial exercise is designed at least in part to prevent abuses of power by the government and consolidate Parliament's relevance as a constitutional actor.

Second view is that the Monarch should disregard it as a matter of constitutional convention. Because Cabinet Manual makes public that the prerogative powers generally exercised by ministers, or by the Sovereign on the advice of ministers, particularly the prime minister 'save in a few exceptional instances.'[862] Such an unlawful use of prerogative power creates an exceptional, unexpected situation. That is why, it is appropriate if the queen would not follow advice of Prime Minister about prorogation parliament. Otherwise, would in effect grant the Prime Minister unconstitutional veto over parliament, leaving the government in an illegitimate position of power over the sovereign Parliament. Such an outcome would fundamentally undermine British parliamentary democracy, especially principles of democracy and representative and responsible government. Otherwise, using a

[861] Meg Russell, Alan Renwick, and Robert Hazell, 'This Prorogation Is Improper: The Government Should Reverse It' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/09/03/this-prorogation-is-improper-the-government-should-reverse-it/> accessed 24 March 2020

[862] The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011.

prerogative power to effectively eliminate Parliament as a constitutional is a politically unacceptable and an unconscionable abuse of convention.

Theil reach conclusion that:

> Parliament is a deliberative body and coming to a majority decision through compromise and debate are core to its constitutional and institutional roles. If preventing a debate and vote on bills amounted to constitutionally permissible grounds for prorogation, then Parliament's role and relative strength in the constitutional framework would be greatly diminished in favour of an overpowering executive. The government could and certainly would veto legislation whenever it pleases and in time use the threat of prorogation to whip backbench and opposition MPs into submission. The better view is therefore that the Monarch should reject ministerial advice on prorogation under exceptional circumstances such as these and thus uphold the primacy of Parliament in the British constitution.[863]

However, in this case, ministerial advice is used as a tool to deprive Parliament of any ability to fulfil its deliberative and legislative function and prorogation power lack any crucial safeguard. It is not acceptable that the Monarch should reject ministerial advice on prorogation under exceptional circumstances.

Crucially, a stronger role of ministerial advice on any political issue conflicts fundamental principle of modern, democratic constitutional system. It would be undemocratic that to expect one person – the Monarch –being responsible and authorized with a strong duty to protect the parliamentary government. Otherwise, it would in the words of Barber (speaking on royal assent) '(…) operate against democratic values rather than upholding them. Rather than supporting parliamentary government, it would undermine it.'[864]

[863] Stefan Theil, 'Unconstitutional Prorogation', (UK Constitutional Law Association), <Stefan Theil: Unconstitutional Prorogation – UK Constitutional Law Association> accessed 01 March 2021.
[864] Nick Barber: Can Royal Assent Be Refused on the Advice of the Prime Minister?" (*UK Constitutional Law Association* September 26, 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed July 29, 2019.

In short when any advice provided from PM or Ministers, the duty of the Monarch is to follow on advice without exception and irrespective of the advice of her Ministers. There is no room for discretion. On its best interpretation, this is what the convention requires: if the Monarch were to accept the advice of her Prime Minister on any issue, she would be acting constitutionally. Although an unconstitutional recommendation has been given, other control mechanisms should be put into action such as court. Or It can be establishing clearer limit on the prerogative power to prorogue so that politicians would not use these rules for their own interest.

It is crucial to strike a balance the needs of flexibility with some level or clarifying operation mechanism of conventions to make conventions meaningful constrains. The aim of this chapter is to explore how to minimize the risk of interpreting convention rules to reach political aims without damaging the flexibility of convention rules. Any attempt to specified operation mechanism conventions face difficulty that application of convention dependent upon the circumstances of the occasion and thus political occasions cannot be predictable and adequately describe in advance. But the challenge may be overcome by avoiding strict, cumbersome legal clarification on details of conventional rules and thus enabling respond unexpected political circumstances.

As known, all conventions exist to support the effective working of a constitutional system. The reasons for convention rules should be supported by a clear operation mechanism. Clarification of the operation of convention rules would help to ensure that the process is carried out both smoothly and successfully. In a sense, a convention cannot easily be circumvented, if it is clear how to implement it in different political situations. It may help politicians to act correctly, properly and constitutionally. Also, as Andrew says that 'when a convention became clearer, in difficult circumstances, under public scrutiny, relevant political actors in conventional rule can act with confidence that they are behaving appropriately.'[865] He further notes that:

> Cabinet manuals are well placed to fulfil this objective. In the immediate wake of the 2010 general election in the United Kingdom, constitutional

[865] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (Eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 253.

> commentators found the text helpful when providing accounts to the media about how the government-formation system operated.[866]

This chapter will argue that creating formalities for the implementation of conventions is the first step to increase the efficiency and enforceability of a convention rule. It may help to understand a breach or would-be breach of a convention. Hence, a violation of a convention rule can apply political pressure in the early stages and require the convention to be followed properly.

## 6.2 Convention rules' main problem lies in their proper operation mechanism

Before beginning to consider the operation mechanism of conventions, it is important to emphasize that some conventions are more complex than others. Heard suggests that conventions can be distinguished existence of dispute about application of convention. He draws attention that some conventions are more precisely formulated than others.[867] According to him fundamental convention which importance of the principle or reason which lies behind has a great agreement both their existence and application such as a convention that a governor must appoint as prime minister the individual who can command a majority in the legislature.[868] But some convention which are as well important but there is no consensus on their operation.[869] He notes that 'it is not always clear how a governor may exercise the rights first formulated by Bagehot-the right to be consulted, to encourage and to warn.'[870] Certainly, the opportunities to exercise these rights have varied tremendously over the years for Canadian governors.' Or there is agreement that a government must maintain the confidence of the legislature, if a government loses that confidence then a government

[866] Farrah Ahmed, Richard Albert and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law.
[867] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[868] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[869] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[870] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.

which loses a vote of confidence must either resign or advise an election. As he says what precisely constitutes a loss of confidence is unclear**.**[871] He calls these conventions as meso convention.[872] The details of these convention may vary within a certain range. Similarly, Barry et al. note that while many conventions surrounding the range of blunder, a number are capable of being formulated in clear, exact terms which would enjoy a wide base of support.[873] They note that it is unanimously agreed that individual ministers are only appointed and removed on the prime minister's advice, that the governor general may not reserve bills for the Queen's pleasure.[874]

Some conventions are well established and long-standing. These conventions have become entrenched by testing different political situations. On the other hand, some conventions are newly emerging. Hence, they are under-tested by different political circumstances. The existence of operation mechanisms for newly emerging conventions is less clear than for others. For example, when comparing collective or individual ministerial responsibility for caretaker conventions, it is generally agreed that collective and individual ministerial responsibility conventions are long-standing ones. On the other hand, caretaker conventions are newly emerging ones. The caretaker period continues in the period after a general election until a new Government that commands the support of the House of Commons has been formed. According to Petra Schleiter and Valerie Belu, the caretaker period is relatively short and the rules governing caretaker situations have historically been underdeveloped due to the very short transition periods in the UK, and thus there has been little risk of contentious issues regarding caretaker conventions arising.[875] They note that if complex coalition negotiations are needed to form a Government,[876] conventions become more important. But Petra Schleiter and Valerie Belu highlight that the United Kingdom still

[871] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[872] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[873] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions in Westminster Democracies' (2018) 72 Parliamentary Affairs, 664-683.
[874] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Dynamics of Constitutional Conventions in Westminster Democracies' (2018) 72 Parliamentary Affairs, 664-683.
[875] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 *The Political Quarterly 454-461.*
[876] Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 *The Political Quarterly 454-461.*

lacks adequate rules to govern caretaker situations, i.e., the UK's caretaker conventions are inadequate.

Risks of uncertainty over caretaker conventions, as stressed by Petra Schleiter and Valerie Belu, include:

> Inadequate caretaker conventions give rise to considerable costs and risks. As the 'squatter in Downing Street' episode illustrates, they can generate high-profile political controversy. As a result, parties were forced into unwisely frantic government formation negotiations in 2010, under tremendous public and media pressure. Moreover, poorly specified caretaker conventions can cause serious economic instability when they fail to ensure that the normal process of government continues largely unhampered.[877]

Therefore, they suggest that 'policymakers should act now to develop more adequate caretaker rules. They must ensure that the media, the markets, and the public understand that adequate conventions allow the normal processes of government to continue largely unhampered while a new government is negotiated.'[878]

The importance of the details of a caretaker convention is most noticeable when it fails or threatens to malfunction.[879] It is realized how much clarification is needed of the details of a convention when faced with a complex political situation. For example, after Boris Johnson was appointed Prime Minister, Russell and Hazell argued that if the next government lost a vote of no confidence in the autumn and an election followed, the new Prime Minister would be constitutionally obliged to apply to the EU for an Article 50 extension. They argued that this was because a no-deal exit would

[877] Democratic UK, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election' (*Democratic Audit*, 2019), available at: <http://www.democraticaudit.com/2015/02/07/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 8 September 2019.

[878] Democratic UK, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election' (*Democratic Audit*, 2019) <http://www.democraticaudit.com/2015/02/07/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/> accessed 8 September 2019.

[879] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (Eds), Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges (Cambridge University Press 2015) 249.

constitute a ‘major policy decision’, which the Cabinet Manual says should not be initiated during an election period.[880]

The correct application of the convention is not so obvious here. At a minimum, reasonable people may hold different views on this question. Some argue that ‘As a general election takes at least seven weeks, the effective deadline for a vote of no confidence that would enable a new government to stop a no-deal Brexit is early September.’ On the other hand, it was argued that if the new government lost a vote of no confidence, it would be for the new Prime Minister to decide whether it was his duty to apply to the EU for an Article 50 extension.[881] In the end, it would be a matter for the Prime Minister to decide where his duty lay.’[882]

Notwithstanding that, sometimes a long-standing or well-established convention`s implementation becomes a complicated matter in a situation never experienced or considered before, e.g., the convention that when a bill has passed both Houses of Parliament, “Royal Consent” is required to complete the legislation process.[883] However, this convention only identifies that the House of Commons must discuss the Crown’s granting of royal assent for every piece of legislation. This implies that implementation of the convention can become complex should ministers advise the Queen not to grant royal assent to a given bill. There is no consensus on how the convention operates when these kinds of exceptional circumstances occur.

The power to refuse consent for legislation depending on a minister’s advice is considered highly unlikely because members of the Royal Family usually remain neutral on political affairs.[884] But with Brexit, and such unexpected or complex political

[880] Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/> accessed 11 September 2019.
[881] Richard Craig and Richard Craig, 'Why the Queen Should Appoint Johnson Or Hunt as PM | Coffee House' (*Coffee House*, 2019) <https://blogs.spectator.co.uk/2019/07/why-the-queen-should-appoint-johnson-or-hunt-as-pm/)> accessed 8 September 2019.
[882] Richard Craig and Richard Craig, 'Why the Queen Should Appoint Johnson Or Hunt as PM | Coffee House' (*Coffee House*, 2019) <https://blogs.spectator.co.uk/2019/07/why-the-queen-should-appoint-johnson-or-hunt-as-pm/)> accessed 8 September 2019.
[883] A Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st Edition 2003)63.
[884] Kate Whitfield, 'How the QUEEN Could SAVE Brexit: Will the Queen Step In To HALT Brexit Amendments?' (*Express.co.uk*, 2019) <https://www.express.co.uk/news/uk/1076768/the-queen-brexit-royal-assent-brexit-amendments-latest-news> accessed 8 September 2019.

circumstances, the possibility of the Queen refusing to give royal assent depending on ministerial advice was brought into question.[885] Some argued that if the House of Commons and the House of Lords were to approve a bill that did not meet with the Government's approval, the Government could prevent such a bill from becoming law by advising the Queen not to grant it royal assent. Sir Stephen said the Queen could be asked to be the "ultimate referee" and could withhold royal assent for a Brexit bill – something which has not happened in more than 300 years.[886]

Elliott suggests that royal assent cannot be refused on ministerial advice.[887] He underlines that:

> …any Government that advised the Queen not to grant royal assent to a duly enacted Bill would not only be playing with political fire — it would be subverting fundamental constitutional principle. As such, if any Government were ever foolish enough to furnish the Queen with such advice, she would be constitutionally entitled — and required — to disregard it.[888]

There is no consensus on what the Queen should do constitutionally in such circumstances. Some academics believe that in such a situation, the Queen must follow ministerial advice and refuses to give assent. Craig supports the argument that: 'The Queen could not legitimately be criticized for following the advice of a Government that has the confidence of Parliament. All criticism ought to be directed at her Government which is democratically accountable to Parliament and whose

[885] Amalie Henden, 'No Deal Brexit Bill PASSED: Only Queen Can Save No Deal Now -Could She Block Royal Assent?' (*Express.co.uk*, 2019) <https://www.express.co.uk/news/politics/1174847/no-deal-brexit-bill-house-of-lords-can-queen-block-brexit-bill-royal-assent-explained> accessed 8 September 2019.
[886] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 September 2019.
[887] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 11 September 2019.
[888] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 8 September 2019.

constitutional role is to absorb such criticism instead of the monarch.'[889] As in these examples, such unlikely or extreme situations can mean politicians are caught unprepared. There is a risk that such uncertainty over the operation of convention rules gives politicians a chance to interpret details of the rules according to their own political interests. As Brazier underlines, if politicians are faced with the barrier of a non-legal rule between them and their goal, they know that they have considerable freedom of manoeuvre to reach their target.[890] He, therefore, suggests that the non-legal parts of the British constitution should be systematically formulated so that politicians cannot use them for political self-dealing.[891]

Many convention rules are increasingly being written down in official documents in the UK, such as the Cabinet Manual, the ministerial code or other legal documents, but there is still an ongoing discussion about the implementation of conventions. Recognizing or even legally codifying particular conventions has not brought to end this debate. Sometimes, recognizing their existence remains insufficient to deal with a political impasse. For example, proper operation mechanism of Sewel convention give rise to disagreement between devolved and Westminster government during Brexit process. As Blick notes that disagreement about operation of the rules can produce demands for further clarification or interpretation[892]. Even the more clarification on the conventional rules that was published, the more was demanded.[893] Because, convention rules' main problem lies with their true implementation mechanism. Blick argues that replacing convention by legislation can create a need for further conventions to help determine the precise way in which they function. He said the Fixed-term Parliaments Act 2011 codifies how the House of Commons can pass a no-confidence motion, but the Act does not explain the precise procedure that should be followed during two-week period set out in the act, after which if no government has

[889] Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent To A Backbench Bill?' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/> accessed 24 November 2019.
[890] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle Add to My Bookmarks Export Citation' (1992) 43 Northern Ireland Legal Quarterly 263.
[891] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle Add to My Bookmarks Export Citation' (1992) 43 Northern Ireland Legal Quarterly.
[892] Andrew Blick, The *Codes of The Constitution* (1st Edn, HART Publishing 2019) 73.
[893] Andrew Blick, The *Codes of The Constitution* (1st Edn, HART Publishing 2019) 73.

won a confidence vote.[894] Blick draws attention that the Cabinet Manual makes public that the prerogative powers generally exercised by ministers, or by the Sovereign on the advice of ministers, particularly the prime minister 'save in a few exceptional instances.'[895] But as Blick notes that it is not specified what these exemptions are.[896] Similarly, the Cabinet Manual emphasises that 'the sovereign continues to exercise personally some prerogative powers of the Crown, the Manual then states that the monarch 'reserves the right to exercise others in unusual circumstances.'[897] He notes that 'It does not give any guide as to what these 'unusual circumstances' might be, and it does not suggest what might be an appropriate use of these reserve powers in such circumstances.'[898]

The Sewel Convention is an important example, it states that the UK Parliament will not "*normally*" legislate for Scotland on devolved matters or alter the competence of the Scottish Parliament or responsibilities of the Scottish Government, without the Scottish Parliament's consent.[899] The convention is legally codified in section 28 of the Scotland Act 1998.[900]

The convention has been highly political charged on several occasions since the very beginning of Brexit. This situation has arisen in the following way. The Scottish Government has intervened in the Brexit progress to demand that Westminster does not trigger Article 50 without its consent.[901] The Supreme Court held in Miller that those matters should be answered in the political realm.[902] Westminster stated that the consent sought for the EU withdrawal bill did not trigger the process for leaving the EU.

After the European Union (Withdrawal) Bill was published and received its First Reading in the House of Commons on 13 July 2017, in their initial Legislative Consent

[894] Andrew Blick, The *Codes of The Constitution* (1st edn, HART Publishing 2019) 105.
[895] The Cabinet Manual, A guide to laws, conventions and rules on the operation of government, (1st edn October 2011). https://www.gov.uk/government/publications/cabinet-manual.
[896] Andrew Blick, The *Codes of The Constitution* (1st edn, HART Publishing 2019) 104.
[897] The Cabinet Manual, A guide to laws, conventions and rules on the operation of government, (1st edn October 2011). https://www.gov.uk/government/publications/cabinet-manual.
[898] Andrew Blick, The *Codes of The Constitution* (1st edn, HART Publishing 2019) 104.
[899] Scotland Act 1998.
[900] Scotland Act 1998.
[901] Miller, supra note 4.
[902] Miller, supra note 4.

Memorandums, both the Scottish and Welsh Governments supported the purpose and intent of the Bill, although they declined to give legislative consent to it at that early stage.

After extensive negotiations with the devolved administrations in Scotland and Wales, the UK Government introduced amendments to the European Union (Withdrawal) Bill; and parallel assurances, in the form of an inter-governmental agreement, was enough to reassure the Welsh Government, and the National Assembly for Wales gave legislative consent. These amendments and assurances were, however, not sufficient for the Scottish Government. The Scottish Parliament asserted that the Westminster EU Withdrawal Bill (as it then was) was incompatible with the devolution settlement and so declined to give legislative consent for it. Nonetheless, Westminster pressed on, and the EUWA became law on 26 June 2018. For the Scottish Government, this was a "power grab" that violated devolution.[903] The UK Government acted unconstitutionally in proceeding without the Scottish Parliament`s consent. They stated that the Bill did not deliver on the UK Government's promise to return legislative powers from the EU to the devolved administrations, but rather returned those powers to the UK Government and Parliament, thus imposing new restrictions on the devolved legislatures.[904]

Consequently, this led the Scottish Government to adopt its own version of the European Union Withdrawal Bill, the Scottish Continuity Bill, to prepare for Brexit and preserve its devolved powers from appropriation by the UK Government. The UK Government argued that the Scottish Bill is incompatible with both the EUWA and the Scotland Act 1998, as it legislates on matters reserved to the UK overall.[905] It is stressed that according to section 29(2)(b)of the 1998 Act, the Scottish Parliament lacks the competence to enact legislation that relates to reserved matters.[906] However,

[903] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[904] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[905] Mark Elliott, 'The Supreme Court's Judgment in The Scottish Continuity Bill Case' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 13 September 2019.
[906] Mark Elliott, 'The Supreme Court's Judgment in The Scottish Continuity Bill Case' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 13 September 2019.

the Court rejected that argument because a number of provisions were outside the Scottish Parliament's competence and were, therefore, as section 29(1) of the Scotland Act puts it, "not law".[907]

The Court said that the limits on the Scottish Parliament's powers set out in section 29 of the Scotland Act 1998 were not exhaustive of the grounds on which its enactments could be judicially reviewed.

The European Union (Withdrawal) Act 2018 (EUWA) amended the Scotland Act 1998. It added itself to the list of legislation that the Scottish Parliament was unable to modify. The Scottish Continuity Bill contained provisions which contradicted the European Union (Withdrawal) Act 1998. These provisions were ruled to be beyond the powers of the Scottish Parliament.

These events initiated a discussion on the validity and future of the Sewel Convention. It is highlighted that Convention rules' main problem resides in the absence of a proper operation mechanism. The correct application of the Convention is not so obvious. This is evidenced by disagreement raised between Westminster and the devolved Government. Paul Reid draws attention to the fact that 'The current controversy surrounding the Sewel Convention does not detract from the sound rationale for its existence and that is reflected in its hitherto unqualified acceptance in both London and Edinburgh.'[908] He argues that the lack of a formal process for the UK Parliament to consider questions of devolved consent and to justify a decision to breach the Convention caused the dispute.[909] Likewise, McCorkindale highlights that 'The avoidance of conflict between legislatures, through mechanisms of co-operation and

[907] Mark Elliott, 'The Supreme Court's Judgment in The Scottish Continuity Bill Case' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 13 September 2019.
[908] Paul Reid, "Time to Give the Sewel Convention Some (Political) Bite?" (UK Constitutional Law Association January 26, 2017) <https://ukconstitutionallaw.org/2017/01/26/paul-reid-time-to-give-the-sewel-convention-some-political-bite/> accessed July 30, 2019.
[909] Paul Reid, "Time to Give the Sewel Convention Some (Political) Bite?" (UK Constitutional Law Association January 26, 2017) <https://ukconstitutionallaw.org/2017/01/26/paul-reid-time-to-give-the-sewel-convention-some-political-bite/> accessed July 30, 2019.

consultation, has therefore been the dynamic driving the operation of the Convention.'[910]

Similarly, a recent Parliamentary report on Legislative Consent and The European Union (Withdrawal) Bill (2017-19) essentially highlights that that 'there is a considerable level of ambiguity surrounding the Sewel Convention'.

> It is clear that, while the Sewel Convention was entrenched in statute by the UK Parliament through the Scotland Act 2016 and the Wales Act 2017, no corresponding parliamentary procedures have been established to recognize the Convention in the legislative process. Nor has thought been given to how the devolved legislatures might more effectively communicate their legislative consent decisions and have the officially taken account of as a Bill progresses through the UK Parliament.[911]

Indeed, the operation mechanism of the Convention is surrounded by ambiguity because the Convention is not well-established. It has not yet been tested enough by different political situations. The Brexit process is a challenging test. Hence, the details of the Convention should be considered in depth.

First, it is not yet settled what the definition of the term "not normally" means in the Convention: "Westminster would *not normally* legislate about devolved matters in Scotland without the consent of the Scottish Parliament." McHarg draws attention that the existence of *exceptions* to the Convention is unclear.[912] She says, 'it is unclear for what reasons it might be legitimate either to dispense with the requirement to seek

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[910] Chris Mccorkindale, 'Echo Chamber: The 2015 General Election at Holyrood – A Word on Sewel' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/05/13/chris-mccorkindale-echo-chamber-the-2015-general-election-at-holyrood-a-word-on-sewel/> accessed 11 September 2019.

[911] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

[912] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.

consent or to ignore a refusal of consent.'[913] She argues that the wording of *normally* must be understood in normative rather than purely descriptive terms.[914]

Some may now argue that Sewel being placed on a statutory footing recognizes how serious the UK Parliament is about respecting the rule. But using the words 'not normally' give the impression that the Westminster government intends to hold power in its hands to some extent. Otherwise, the Convention could mean that **'**the UK Government should never legislate without the consent of a devolved legislature'. The Minister was also very clear that the UK Government was not willing to give the Scottish or any devolved government any kind of veto power. Hence, the UK Parliament would not *normally* legislate, but that does not mean that it *will not*, nor does it mean that it *cannot*. It is therefore unclear under what circumstances the UK Government can proceed with a bill without the devolved legislatures' consent.

The question here might turn on what purpose lies behind using the term 'not normally'. One could argue that the term is used to respond to unexpected circumstances.[915] Westminster argues that leaving the EU creates "a quite exceptional circumstance" and as such these "are not normal times".[916] Lord Sewel has also acknowledged that "these are not normal times".[917]

Michael Russell MSP states:

> Not normally has not been defined but has been understood to mean extreme circumstances that would be clear and obvious to all. However, the current UK Government is changing that definition, too. Now it means whenever it wants to get its way on whatever subject it chooses—nothing more or less. "Normal" is what the UK Government says it is, and

[913] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502
[914] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502
[915] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[916] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[917] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

> disagreement with the UK Government is “not normal”. That is not how devolution was designed, or how it is meant to operate.[918]

A committee on Legislative Consent and The European Union (Withdrawal) Bill (2017-19) considers the details and the difficulties caused by the term “not normally’ and described the term as “clearly problematic”.[919] It recommended that, either the circumstances under which the UK Parliament can legislate on matters covered by the Convention without the consent of the Scottish Parliament be set out in detail, or that a requirement be made for a minister to set out the reasons for legislating without consent of the Scottish Parliament.

The same committee also recommended that in case of failure to provide consent if a UK Minister lays a draft without the consent of a devolved legislature, an explanatory statement would be required.[920] Therefore, in effect, this is the power to delay and highlight a disagreement, not of veto.[921]

Second, one area lacking in clarity as regards the Sewel Convention is that there is no formal procedure to guarantee earlier and perfectly adequate consultation with the devolved government on legislation. When is the right time for consultation with a devolved parliament? When should the process of legislation consultation with devolved governments and seeking consent begin?

In practice, this involves officials within United Kingdom government departments consulting with their counterparts in the Scottish Government on all policy proposals that affect devolved areas and approaching the Scottish Government to gain consent for legislation from the Scottish Parliament where this is deemed to be necessary. As

[918] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[919] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[920] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[921] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

Chris Mccorkindale notes, 'whilst we talk loosely of *legislative* consent, this is very much an *executive*-led process, with limited opportunities for parliamentary input'.[922]

It is argued that there was little deliberation with devolved Governments in advance of the publication of the European Union (Withdrawal) Bill.[923] Only a fortnight before the European Union (Withdrawal) Bill's publication were the devolved administrations in Scotland and Wales shown the Bill. Michael Russell MSP, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe, said that this was not the draft of a Bill for consultation, but rather a finalized Bill.[924] There was no prior consultation on this Bill.[925]

Thomson, Scottish Government Director-General for Constitution and External Affairs, said this lack of constructive dialogue was not in line with the established Convention that when the UK Government is contemplating legislation that impacts on a devolved area, it will share the legislation in draft and work through any issues over a period of many months.[926] This process is designed to ensure that, by the time a Bill is published, the Westminster and devolved governments have reached an agreement, and devolved Ministers are able to recommend legislative consent.[927]

A committee report on Legislative Consent and The European Union (Withdrawal) Bill (2017-19), stresses that allowing adequate time to debate the legislation could have avoided much of the constitutional mess that was created between the UK Government and the devolved governments.[928] When the UK Government is considering legislation that falls within devolved competence, draft legislation should

[922] Chris Mccorkindale, 'Echo Chamber: The 2015 General Election at Holyrood – A Word On Sewel' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/05/13/chris-mccorkindale-echo-chamber-the-2015-general-election-at-holyrood-a-word-on-sewel/> accessed 11 September 2019.
[923] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[924] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[925] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[926] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[927] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[928] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

preferably be shared far enough in advance for devolved governments to identify and work through any issues in the legislation with the UK Government.[929]

It is recommended that there be a requirement for the UK Government to "consult" with relevant devolved legislatures before passing regulations. Rather than just a duty to consult, UK Minsters would have to share draft regulations with the devolved governments and would not be able to lay regulations before the UK Parliament until the devolved legislatures had made a decision on whether to give consent, or 40 days had lapsed.[930]

Third, DGN 10 (on *Post-Devolution Primary Legislation Affecting Scotland*) provides that the consent of the Scottish Parliament is normally required for legislation which 'contains provisions applying to Scotland and which are for devolved purposes' *or* 'which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers'. McHarg draws attention that:

> under the convention, consent is not required for legislation affecting Scotland which is for reserved purposes, but which makes 'incidental or consequential changes to Scots law on non-reserved matters' even though it recognises that such effects might in some cases be significant.[931]

The extent of the reserved area caused disagreement for the Continuity Bill. Westminster argues that the Scottish Parliament does not have unlimited legislative competence, Holyrood legislation must not intrude on matters reserved to the UK.[932] McHarg notes that 'the distinction between legislation for reserved and devolved purposes is not watertight. Varying the scope of devolved legislative or executive competence is

[929] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[930] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[931] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502
[932] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

itself a reserved matter yet attracts the requirement of consent.'[933]The Scottish side held that Scottish devolution rests on a "reserved powers" model, meaning any area not specifically reserved to the UK in the Scotland Act is taken to be devolved, and thus within Scotland's competence.

Adam Tomkins MSP, Shadow Cabinet Secretary for the Constitution, Communities, Social Security and Equalities, argued that:

> It is one of the founding principles of devolution in Scotland and has been since 1999—and now also in Wales—is that everything is devolved apart from that which is expressly reserved under the schedules to the Scotland Act 1998. The effect of the original clause 11 was, unfortunately, to turn that around. The amendments published by the Government last week reverse that.[934]

Lastly, it is worth underlining that all these uncertainties over the operation mechanism of the Convention give rise to the difficulty of precisely detecting breaches of the convention, too. In the current situation, it is unclear whether enactment of EUWA in the absence of legislative consent breaches the Convention or not. On that point, understanding the details of the Convention become significant. Different interpretations of or perspectives on the operation mechanism of the Convention reach different answers.

There is indeed a persuasive argument that to proceed with the bill without consent, while lawful, would be constitutionally doubtful.[935] EU withdrawal is likely to be a very testing time for many reasons that foster resentment across the territories of the UK, and thus make the task that much harder.[936] More importantly, the Committee underlined that 'there had been a significant erosion of trust between the UK

[933] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502

[934] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

[935] Stephen Tierney, 'The European Union (Withdrawal) Bill: Legal Implications for Devolution' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/> accessed 11 September 2019.

[936] Stephen Tierney, 'The European Union (Withdrawal) Bill: Legal Implications for Devolution' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/> accessed 11 September 2019.

Government and the devolved administrations. The UK Government and the devolved administrations would be unable to resolve their differences through "mature political debate", as had been envisaged by Lord Sewel during the passage of the Scotland Act 1998.'

In this case, there is a disagreement over the operation of the fundamental Convention, the dispute provides a great chance for government actors to reconsider the operation of the Convention. If necessary, ambiguities about the details of the Convention must be clarified, rather than leaving it to politicians alone to solve or fail to solve conventional matters.

The Committee on Legislative Consent and The European Union (Withdrawal) Bill (2017-19), also underlines that it is necessary to provide a more constructive way of implementing the Convention. The Committee more specifically underlines that: The House of Commons and the House of Lords should consider establishing a procedure to acknowledge more clearly that a Bill is in an area that requires legislative consent and whether that consent has been given by a devolved legislature; and where such consent cannot be obtained, what procedures should follow.'[937]

A further Parliamentary report recommends that:

> The Government sets out a clear statement of circumstances under which legislative consent is not required by the Sewel Convention in future in both the Devolution Policy for the Union that we have recommended it should state and in the Memorandum of Understanding between the UK Government and the devolved institutions.[938]

It can therefore be concluded that recognising existence of Sewel convention in legal or non-legal documents provides some basic guidance and describe them in general terms. Proper operation mechanism of the convention still waiting for clarity due to

[937] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[938] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

amorphousness of conventional rules. Further clarification about application of conventional rules needed. if details of the convention carefully are taken into consideration, the convention grows and becomes strong.

A convention requiring parliamentary approval before engaging in military action might be another example to deeply understand how uncertainties surrounding convention' implementation. The current convention is fundamentally a statement of intent on the part of Government relating to consulting Parliament on military force deployment, and there is no formal process for ensuring that it is followed. Parliament has no legally established role and the Government is under no legal obligation with respect to its conduct, including keeping Parliament informed. In practice, however, successive governments have consulted and informed the House of Commons about decisions to use force and the progress of military campaigns, although there has been little consistency in how that has been achieved. Nor is the Government under any constitutional obligation to abide by the result of any parliamentary vote on military action, although it would in practice be politically difficult to engage in military action without Parliamentary support.

In a sense, while there is a widely accepted that Parliament has a voice in decisions on war involvement,[939] the convention suffers uncertainty in terms of both credibility and an operation mechanism.[940] Strong notes that although the notion that some sort of British War Powers Convention exists is reasonably well established, much about it remains unclear.[941]

Specifically, the Government did face a lot of criticism due to the lack of involvement of Parliament in the approval of the deployment process for the armed forces. It is demanded that the Government provide Parliament with a statutory-based and formal role.[942] From 2003 to 2007, three different member bills were introduced, but only one of them, namely, the Armed Conflict Bill relating to parliamentary approval, was

[939] Patrick A. Mello, Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria, West European Politics, (2016) 80-100.
[940] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[941] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[942] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.

debated. A committee report published in July 2006 concluded that the Royal Prerogative exercise related to the deployment of British military outside the UK is old and outdated.[943] It requires modifications, as the prerogative is considered ineffective from the perspective of contemporary democracy. It was stated that Parliament's authority to challenge decisions made without its consent should be safeguarded as per the aspects of contemporary democracy. It was highlighted that the deployment authority of government bodies should be enhanced, and the role of Parliament should be strengthened in order to provide it with the authority to decide.[944]

In April 2016, the Government announced that it would no longer seek to table legislation codifying Parliament's role in deployment of the armed forces.

At the time, the Government declared that it would no longer seek to legislate on the problem so as to retain its and future Governments' control over the armed forces role to protect the interests and security of the United Kingdom in situations that might not be predicted, and to avoid these decisions becoming subject to lawful action.[945]

The Defence Secretary Michael Fallon stated that:

> We cannot predict the situations that the UK and its armed forces may face in the future. If we were to attempt to clarify more precisely circumstances in which we would consult Parliament before taking military action, we would constrain the operational flexibility of the armed forces and prejudice the capability, effectiveness or security of those forces, or be accused of acting in bad faith if unexpected developments were to require us to act differently.[946]

He further stated:

> After careful consideration, the Government have decided that it will not be codifying the convention in law or by resolution of the House in order to retain the ability of this and future Governments and the armed forces

[943] HOUSE OF LORDS Select Committee on the Constitution 15th Report of Session 2005–06 Waging war: Parliament's role and responsibility Volume I: Report
[944] HOUSE OF LORDS Select Committee on the Constitution 15th Report of Session 2005–06 Waging war: Parliament's role and responsibility Volume I: Report
[945] Brian Galligan, and Scott Brenton, eds. Constitutional conventions in Westminster systems. Cambridge University Press, 2015.
[946] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.

> to protect the security and interests of the UK in circumstances that we cannot predict, and to avoid such decisions becoming subject to legal action. We will continue to ensure that Parliament is kept informed of significant major operations and deployments of the armed forces.[947]

After the Government's failure to consult Parliament before taking military action in Syria in April 2018, a War Powers Act became a current matter and Theresa May, the Prime Minister, responded to the demand, saying:

> By contrast, a war powers Act would remove that capability from a Prime Minister and remove the vital flexibility from the convention that has been established, for it would not be possible to enshrine a convention in a way that is strong and meaningful but none the less flexible enough to deal with what are, by definition, unpredictable circumstances […].[948]

The Government opposed legal codification of the convention on the ground that is rife with problems and might raise yet more questions rather than resolving the issue.[949] It is not useful or possible to formulate the details of a convention in a strict law.[950] Therefore, parliamentary control over the Government in this area remains a matter of constitutional convention. It is suggested that a resolution will be enough to secure that convention because a legally established role to approve deployment of the armed forces causes some difficulties. The Government is concerned that one of the main problems in legal codification is how to define conflict decisions that would trigger Parliament's involvement. Therefore, although the committee insists on rigidly specified details of the convention, the Government rightly keep these issues flexible to some extent.[951]

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[947] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[948] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[949] Esra Cuhadar, Juliet Kaarbo, Baris Kesgin, and Binnur Ozkececi-Taner. "Examining leaders' orientations to structural constraints: Turkey's 1991 and 2003 Iraq war decisions." Journal of International Relations and Development 20, no. 1 (2017): 29-54.
[950] Esra Cuhadar, Juliet Kaarbo, Baris Kesgin, and Binnur Ozkececi-Taner. "Examining leaders' orientations to structural constraints: Turkey's 1991 and 2003 Iraq war decisions." Journal of International Relations and Development 20, no. 1 (2017): 29-54.
[951] Government response to the Constitution, Political and Constitutional Reform and Public Administration committees' reports session 2010 to 2012.

Indeed, there is a considerable level of ambiguity surrounding the convention. Clarity over use of the convention has not yet been achieved. There are ambiguities, such as the right time to debate and vote on military action, or what kinds of military action are exempt from parliamentary approval? Similarly, when is the right time to convene the House of Commons to have a 'proper debate' about military action? Or what kinds of military action need parliamentary approval before their initiation? This lack of clarity about properly implementing the convention creates room for the Government for self-dealing. It is crucial to address these uncertainties about the operation of the convention.

Also, the same argument is supported by Mello, stating that:

> …despite a wide-ranging consensus on the general need for parliamentary approval, the case studies show that parts of the convention remain indeterminate and thus open to contestation. Crucially, this concerns the timing of substantive votes, the kind of military operations that fall under the purview of parliamentary approval, and questions of parliamentary procedure, such as the right to recall from recess, which currently favours the executive.[952]

First, the House of Commons was divided between "in an offensive capacity" and "premeditated military action", and military action, which is taken to "prevent a humanitarian catastrophe" and "to protect a critical national interest". The report suggests that based on recent military operations, prior approval is now required for the first kind of military action and retrospective approval for the second situation.[953] Thus a government responding to an emergency is not obliged to seek the Commons' consent on military action. But the Government will also come to the House retrospectively in situations of emergency, where there was a need to protect critical interests of the British nation or prevent a "humanitarian catastrophe".[954] If the House is dissolved, the Government will also come to Parliament as early as possible to

[952] Patrick A. Mello, Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria, West European Politics, (2016) 80-100.
[953] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[954] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.

debate the matter there.[955] A convention does not openly commit a government to a vote in these types of circumstances, merely an opportunity to debate the problem.[956]

While it is easy to say the convention would not seek a parliamentary procedure if there is an emergency, it is not straightforward to specify under what circumstances an emergency might arise. As Andrew notes, a precise definition of the circumstances that would give rise to such an exemption is still lacking and might be difficult to provide.[957] Emergency situations arise when there is a need to protect a critical British national interest or to prevent a humanitarian catastrophe, but it is argued that British national interests can be interpreted broadly.[958] Similarly, the House of Commons report on parliamentary approval for military action in 2018 notes that as several commentators have experienced, the spectrum of potential operations by the military is massive and 'critical national interest' can be widely interpreted.[959] For that reason, the absence of any established description continues to cause unease and it is argued that the Government has considerable discretion on what meets the threshold of the convention, thus leaving the complete framework potentially open to exploitation and interpretation.[960]

Certainly, the military action taken on 14 April 2018 against the Syrian regime's chemical weapons facilities was done without recourse to Parliament.[961] The Government justified its action on humanitarian grounds. In a Statement to the House on 16 April 2018, the Prime Minister described the decision to act without the previous approval of Parliament, recommending that MPs be provided with an opportunity to debate the problem at the first opportunity. However, a retrospective vote to approve

[955] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[956] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[957] Andrew Blick, The Cabinet *Manual and the Codification of Conventions,* Parliamentary Affairs (2012) 1-18 15.
[958] Claire Mills, "Parliamentary Approval for Military Actions", Briefing Paper, 7166, 12 May 2015, House of Commons Library.
[959] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[960] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[961] Wolfgang Wagner, "Is there a parliamentary peace? Parliamentary veto power and military interventions from Kosovo to Daesh." The British Journal of Politics and International Relations 20, no. 1 (2018): 121-134.

the action of the military was not imminent. unlike the Libya campaign in 2011, the latest airstrikes were not the start of a sustained campaign by the military, they were described by the Government as “limited, effective and targeted strikes with appropriate boundaries”. A vote was taken at the end of the following debate on the emergency in Syria, though that vote was taken on the SNP’s question: “That this House has considered the present situation in Syria and the approach of the United Kingdom Government.”[962]

The deployment of force was not approved. For numerous reasons, the subsequent debate and statement on 16 April 2018 arguably completes the commitments of the Government according to the convention. For others, though, it is an initial direct challenge of the credibility of the convention and has thus reignited the longstanding debate over placing the role of Parliament on a formal statutory footing.[963]

The Libya conflict (2011) is another example that demonstrate the difficulty of recognizing an emergency case. Military action in Libya was an “emergency case”, where the new convention did not properly apply because the Government initiated military action before getting parliamentary approval. But others object to the emergency argument because they believe that planning for military action had been discussed many times as a major topic before the matter was eventually voted on and thus the Government should have called on Parliament to vote sooner.[964]

Due to the difficulties in defining emergency situations, the debate turns to the credibility of the convention. Irrespective of the significance of the convention, there a few concerns were still raised as to whether the parliamentary convention should be developed or not. During the period of the Iraq vote in 2003, and the observations made by the Government in 2011, a lack of debates and statements was noted regarding military deployment outside the territory of the United Kingdom.[965] The aspects debated before the deployment of armed forces in Afghanistan only included

[962] E. Remi Aiyede, "Democratic security sector governance and military reform in Nigeria." 2015.
[963] Juliet Kaarbo, and Daniel Kenealy. "Precedents, parliaments, and foreign policy: historical analogy in the House of Commons vote on Syria." West European Politics 40, no. 1 (2017): 62-79.
[964] Patrick A. Mello (2016): Curbing the royal prerogative to use military force: the British House of Commons and the conflicts in Libya and Syria, West European Politics, DOI: 10.1080/01402382.2016.1240410 80-100.
[965] Adrian Vermeule, "Conventions of Agency Independence." Colum. L. Rev. 113 (2013): 1163.

coalition action that was required against globalized terrorism, and not the deployment aspects of the armed forces. The deployment of military force in Afghanistan and information about that was sent to Parliament through various ministerial statements and written press releases. Constitutional conventions were needed as per the requirement of contemporary democracy to make Parliament strong enough to undo any decisions related to deployment that could lead to possible conflict. The first ever deployment act was observed during action by the armed forces in Libya after the Liberal Democrat Party, in coalition government with the Conservative Party, was observed to take charge of the region. Irrespective of the fact that the deployment process occurred with the consent of the Government and acknowledged the convention, no debate or vote on this topic occurred before the deployment, which highlighted the importance of having a constitutional convention.[966]

Second, there has been a concern over whether votes on military commitments should be free or whipped.[967] White notes that a whipped vote is inevitable in political reality.[968] However, it is expected that MPs will voting on such matters on conscience rather than party policy.[969] Hooper also notes that parliamentary approval of conflict can still be a concern for some reasons.[970] She notes that to discuss intelligence and security issues in the House of Commons is seen as a potential threat to the public interest. Hence parliamentarians are not freely able to discuss national security matters.[971] She exemplifies that when they disclose more details about a security issue, they are warned to be careful about what they say, or that a Minister may refuse to answer a question on public interest grounds. According to her argument, another barrier to proper implementation of the consultation convention is that not all parliamentarians can access information relating to intelligence and national security

[966] Adrian Vermeule, "Conventions of Agency Independence." Colum. L. Rev. 113 (2013): 1163.
[967] Joel Reland, 'Does Parliament Get A Vote on Military Intervention?' (*Full Fact*, 2019) <https://fullfact.org/law/parliament-vote-military-intervention/> accessed 13 September 2019.
[968] Joel Reland, 'Does Parliament Get A Vote on Military Intervention?' (*Full Fact*, 2019) <https://fullfact.org/law/parliament-vote-military-intervention/> accessed 13 September 2019.
[969] Hayley J. Hooper, 'Voting on Military Action in Syria: Part II' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/12/01/hayley-j-hooper-voting-on-military-action-in-syria-part-ii/> accessed 13 September 2019.
[970] Hayley J. Hooper, 'Voting on Military Action in Syria: Part II' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/12/01/hayley-j-hooper-voting-on-military-action-in-syria-part-ii/> accessed 13 September 2019.
[971] Hayley J. Hooper, 'Voting on Military Action in Syria: Part II' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/12/01/hayley-j-hooper-voting-on-military-action-in-syria-part-ii/> accessed 13 September 2019.

issues.[972] Even if such information is available before deciding, the Government does not set it out in detail. Hence, Parliament's access to information, consisting of intelligence and legal advice, before making a decision will also require to be handled carefully.[973]

Last, it is worth mentioning that military force is not always deployed in an offensive capacity. Deployments for logistical assistance, humanitarian aid or training will not meet the threshold criteria. If an existing non-combat operation changes so that offensive action is imagined, it might then be the case that the threshold is reached, and fresh approval will be required from Parliament.[974] McCormack notes that the Convention that the government acknowledges is one that applies to a very narrow type of military action.[975] McCormack says the events of April 2018 is that the scope of the convention needs to be much broader. The current government wishes to argue that the convention only applies in very limited circumstances, whereas the far more common ways in which successive governments have intervened militarily are excluded.[976]

McCormack explains that:

> The idea that launching airstrikes against another state (or sending drones or special forces or funding opposition militants for that matter) should be excluded from such authorisation because engaging in airstrikes is not an act of war is not tenable[977].

McCormack draws attention that 'the current vague convention that essentially leaves it entirely to the discretion of the government to decide if and when the

[972] Hayley J. Hooper, 'Voting on Military Action in Syria: Part II' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/12/01/hayley-j-hooper-voting-on-military-action-in-syria-part-ii/> accessed 13 September 2019.
[973] Hayley J. Hooper, 'Voting on Military Action in Syria: Part II' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2015/12/01/hayley-j-hooper-voting-on-military-action-in-syria-part-ii/> accessed 13 September 2019.
[974] Alexander Bolt, "The 'Convention' to Consult Parliament on Decisions to Deploy the Military: A Political Mirage?" The Crown and Parliament (2015): 145-72.
[975] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.
[976] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.
[977] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.

convention applies'[978]. He concludes that '… Parliament certainly should be authorising such actions as sending special forces, regardless of the invitation, and the executive forces to explain its rational and strategy and final goals'[979].

All these uncertainties concerning the operation mechanism of the convention create vagueness over the enforceability of constitutional conventions too. No situation has been observed in which a constitutional convention was found to be unsuccessful. Politicians are left as the only power to speak for the actions of conventions and there is no mechanism to hold politicians to account for their words and conduct. Hence, it is difficult to decide whether a convention is operating efficiently or has been breached. For instance, when Theresa May decided to join military action against Syria without seeking parliamentary approval, she faced severe criticism that she engaged in military action without parliamentary approval. No one can say with certainty whether the convention was applied properly or not in this specific case, because the correct procedure to be followed when deciding to engage in military action against a foreign country is surrounded by uncertainty and there is no official procedure for any assurances to be obeyed.

It may be surminsed that political manoeuvring of conventions will occur if convention material is put under the control of politicians. This risk can be reduced by officially formalizing the operation mechanism of a convention.

One can argue that the purpose that is served by conventional rules is to make decisions regarding unpredicted political problems on an ad hoc basis without the stress of specific restrictions. For this reason, it is not suitable to regulate political decisions with laws because there is the risk that these will be ill-suited to some circumstances and raise problems of justifiability and the possibility of lawful challenges in the courts.[980] Of course, it is not realistic to expect that the full details of constitution conventions can be adequately established in single documentation. Convention rules give politicians a chance to assess and decide convention matters

[978] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.
[979] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain's War Power, Palgrave Pivot, Cham.
[980] Wood-Donnelly, Corine. "The Arctic search and rescue agreement: Text, framing and logics." The Yearbook of Polar Law Online 5, no. 1 (2013): 299-318.

on a case-by-case basis. Besides, a convention does not evolve by depending upon written statements. As Mello emphasizes, these details will take shape depending on many factors in future cases.

> Whether MPs use their informal veto power in future cases will depend on a range of factors, including the preference distribution in parliament (Mello 2012) and the nature of the proposed deployment.[981]

Strong concludes that 'future British governments will probably permit and win parliamentary votes before launching major combat operations, but that some uncertainty is unavoidable. Both conclusions have implications for Britain's broader security stance.'[982]

But at least all these uncertainties about the proper implementation of the convention can be considered very carefully without legal force. Otherwise, the Government retains considerable discretion over what meets the convention's threshold, thereby making the whole framework potentially open to interpretation and exploitation.[983] The Government should not avoid specifying the operation mechanism of the convention by coming up with an unsuitable legal codification of it. In other words, the Government should not avoid seeking parliamentary approval by flexibly interpreting the details of conventions.

Each contribution included detail to help understanding of what the British War Powers Convention means. Also, committee reports play an important role to enhance the clarity of conventions. House of Lords Constitution Committee report 2013–14 concluded that 'The Government should amend the Cabinet Manual so that it includes a detailed description of their internal arrangements for advising and deciding on the use of armed force.'[984] After the evaluation of certain aspects, a committee makes various recommendations that include development of the convention in order to strengthen the role of Parliament while making decisions about deployment.

[981] Patrick A. Mello, "Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria." West European Politics 40, no. 1 (2017): 80-100.
[982] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[983] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[984] 'Constitutional Arrangements for The Use of Armed Force' (Authority of the House of Lords 2013).

Specifically, the committee highlights that the convention should encompass the following characteristics:

(1) The Government should seek parliamentary approval (for example, in the House of Commons, by laying down a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;

(2) In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;

(3) If for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days of its commencement or as soon as it is feasible, at which point the process in (1) should be followed;

(4) The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly, it should seek a renewal of approval.[985]

The convention would also assist in providing authority to Parliament to intervene in circumstances where they think that military action could lead to severe conflict. Furthermore, various other recommendations were also made by the committee, including that the Government must make sure that Parliament has a say and is involved during the deployment of armed forces outside British territory. The Government is also held responsible for highlighting the motives and objectives behind military deployment.[986]

The Government has been reluctant to specify more precisely the details of the operation mechanism of the convention. In its November 2006 response to an inquiry, the then Government commented:

> The Government is not presently persuaded of the case for […] establishing a new convention determining the role of Parliament in the deployment of the armed forces. The existing legal and constitutional

[985] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[986] Elizabeth K. Spahn, "Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention." Va. J. Int'l L. 53 (2012): 1.

> convention is that it must be the Government which takes the decision in accordance with its own assessment of the position. That is one of the key responsibilities for which it has been elected. But the matter needs to be kept under review. The ability of the executive to take decisions flexibly and quickly using prerogative powers remains an important cornerstone of our democracy. However, it is important to note that when exercising these powers, Ministers remain accountable to Parliament.[987]

In February 2007, the Committee reiterated:

> Irrespective of the response we received, we consider that a cross-party political consensus appears to be emerging that the current arrangements are unsustainable. Accordingly, we are optimistic that our recommendations will be revisited in the very near future. We hope that this vitally important constitutional issue will then be addressed in a more satisfactory manner and we look forward to playing our part in that debate.[988]

Numerous commentators, including members of the Committee, called for an interim resolution of Parliament to clarify a few ambiguities which exist within the present arrangements. According to Yoo (2012), the recommendation that a resolution alone will address the problem of formalization avoids some of the complexities linked to legislation.[989] But the Government desires to retain the power to decide on whether to engage in military action.

It can be concluded that when involving Parliament in decisions about military action it is important to democratize a decision to go to war.[990] When there is a lack of debate on a government decision, a democratic deficit occurs.[991] This parliamentary practice

[987] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[988] Claire Mills, Parliamentary approval for military action, Briefing Paper, CBP 7166, 8 May 2018, House of Commons Library.
[989] John Yoo, 'Constitutional War and The Political Process', *Patriots Debate: Contemporary Issues in National Security Law* (2012).
[990] Peter E. Mulherin (2019) Going to war democratically: lessons for Australia from Canada and the UK, Australian Journal of International Affairs, 73:4, 357-375, DOI: 10.1080/10357718.2019.1613634
[991] Peter E. Mulherin (2019) Going to war democratically: lessons for Australia from Canada and the UK, Australian Journal of International Affairs, 73:4, 357-375, DOI: 10.1080/10357718.2019.1613634

may prevent governments from entering wars that are not supported by the public.[992] At least, it will compel governments to engage more thoroughly in public debate about their proposed policies, and justify their decisions to the nation.[993] In other words, the convention is too valuable to be left only in the hands of politicians. It is crucial to ensure that Parliament uses its power to decide on military action safely. The price that the country may pay for any misjudged decision on engaging in military action is potentially high. If the UK is to be well prepared for the details of conventions, then the Government cannot find room to reach its own political target to make such important decisions without parliamentary approval.

In brief, the chapter underlined that absence of clear borders of convention gives politicians the opportunity to use conventional rules to reach their own political targets. Some conventions are too broad and the limit and extend of convention, and the reason behind the convention is not specified. This ambiguity lets politicians to use the rule for reach their political aims. Even worse, sometimes while these borders were explicit and the details were clear and conventions were applied un-controversially for a long time, the politicians still attempt to interpret and apply conventional rules for their political advantage in the eyes of people. An example of a political crisis giving rise to recent prologue of parliament in United Kingdom is illustrative. Boris Johnson's advice to the Queen that parliament should be prorogued for five weeks. It is objected that ordinarily prorogation is for a short period, uncontroversial, and necessary for preparation Queen's speech for a new legislative programme.[994] The routine and procedure of prorogation is set out clearly in a briefing form the House of Commons Library.[995] While Johnson's government insisted that this is absolutely a standard procedure, the House of Lord's library shows that a five-week prorogation is the longest since 1930.[996]

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[992] Peter E. Mulherin (2019) Going to war democratically: lessons for Australia from Canada and the UK, Australian Journal of International Affairs, 73:4, 357-375, DOI: 10.1080/10357718.2019.1613634.
[993] Peter E. Mulherin (2019) Going to war democratically: lessons for Australia from Canada and the UK, Australian Journal of International Affairs, 73:4, 357-375, DOI: 10.1080/10357718.2019.1613634.
[994] Graeme Cowie, "Prorogation of Parliament" Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[995] Graeme Cowie, "Prorogation of Parliament" Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[996] Mark Bridge, 'Longest Prorogation of Parliament In Recent History' (*Thetimes.co.uk*, 2020) <https://www.thetimes.co.uk/article/longest-prorogation-of-parliament-in-recent-history-bzfn20q39> accessed 24 March 2020.

In the case, prorogation deliberately had the effect of undermine parliament from performing its constitutional role the UK leaving of the EU on 31 October.[997] Lord Pannick, on behalf of campaigner Gina Miller, who is appealing against the High Court ruling, said: "The exceptional length of the prorogation in this case is strong evidence that the Prime Minister's motive was to silence Parliament for that period because he sees Parliament as an obstacle to the furtherance of his political aims."[998]

Meg Russell, Alan Renwick and Robert Hazell argue that the decision to suspend parliament for five weeks was an improper use of executive power, sets dangerous precedents, and undermines fundamental principles of our constitution.[999] The precedents set if the prorogation goes ahead would hence be dangerous for UK democracy.

Twomey agreed that the power of prorogation parliament was exercised by taking political advantage. She also draws attention, more importantly, this decision taken by a government which did not received a vote of confidence of the parliament.[1000] Under the Fixed-term Parliaments Act[1001], a vote of no confidence is followed by a 14-day period during which an alternative government can be sought. But the prorogation cuts across that, i.e., parliament would not be sitting for most of the 14 days.

She suggests that:

> limit improper purposes of using the power to prorogue to only those purposes that involve a breach of constitutional principle, such as the

[997] Nicholas Mairs, 'Boris Johnson Suspended Parliament To 'Silence' Mps Over Brexit, Supreme Court Told' (*PoliticsHome.com*, 2020) <https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/106608/boris-johnson-suspended-parliament-'silence'-mps-over> accessed 16 March 2020.
[998] Nicholas Mairs, 'Boris Johnson Suspended Parliament To 'Silence' Mps Over Brexit, Supreme Court Told' (*PoliticsHome.com*, 2020) <https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/106608/boris-johnson-suspended-parliament-'silence'-mps-over> accessed 16 March 2020.
[999] Meg Russell, Alan Renwick, and Robert Hazell, The Constitution Unit, 'This Prorogation Is Improper: The Government Should Reverse It' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/09/03/this-prorogation-is-improper-the-government-should-reverse-it/> accessed 24 March 2020.
[1000] Ros Taylor, 'When Is Prorogation 'Improper'?' (*LSE BREXIT*, 2020) <https://blogs.lse.ac.uk/brexit/2019/09/19/when-is-prorogation-improper/> accessed 24 March 2020.
[1001] Fixed-term Parliaments Act 2011.

> exercise of prorogation when the government has lost the confidence of the House or is seeking to avoid a vote of no confidence against it.[1002]

A different perspective or interpretation of the details of rules might make a huge difference. Uncertainties over the implementation of convention rules might be seen as a way of keeping the power in politician's hands. If people, as well as ordered political parties which are motivated by philosophical resolutions when coming into power, are unrestricted in an effective way because of a "flexible" constitutional rule, then that might be simply abolished ahead of them.[1005] In other words, flexibility is partly for the benefit of those who are in power due to difficulties in describing power limitations, thereby making it easier for those in power to preserve their power. Additional clarification and improvement of the operation mechanisms of these rules will act as a check on government power.

An opposite view is that clarification of the details of rules might adversely affect Constitution growth. A Constitution might be said to carry risks that determine if it must place restrictions on a government or create parameters within government operations that might be used by the Government and can eventually create problems for the Government. With a constitution, the mere fact of it being written as a formal constitution can prevent or hinder rational or timely change.[1006]

This chapter, therefore, argues that constitutional conventions are effective in so far as all major parties agree on their interpretation of general principles and accept cross-partisan responsibility for their maintenance and observance. A convention will be successful if it provides certainty and consistency. For example, Geoffrey Marshall stresses that the main difficulty for the efficiency of conventions takes its source from vagueness as to their application. According to him, the majority of fundamental conventions concerning parliamentary government, like those with shared as well as separate ministerial responsibility, are subject to uncertainty and vagueness in relation to their application, even though they may without doubt work.[1007] Since Marshall

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[1002] Ros Taylor, 'When Is Prorogation 'Improper'?' (*LSE BREXIT*, 2020) <https://blogs.lse.ac.uk/brexit/2019/09/19/when-is-prorogation-improper/> accessed 24 March 2020.
[1005] Rodney Brazier, 'Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NORTHERN IRELAND LEGAL QUARTERLY.
[1006] Andrew Beale, *Essential constitutional law*. Routledge-Cavendish, 2013.
[1007] Geoffrey Marshall, Constitutional Conventions (Clarendon Press 1984), 210.

complains about the uncertainty surrounding the implementation of accountability conventions, these conventions may proceed and develop notably ,even though there are still some deficiencies in the working of accountability conventions.

At the outset, it was not specified which behaviours of ministers are inappropriate and required ministerial responsibility. The uncertainty over the scope of conventions resulted in producing a Ministerial Code which set out the ‘standards of behaviour expected from all those who serve in Government’. But specifying the extent of the convention did not ensure the convention being successful from the outset. Politicians still have great flexibility to interpret whether their actions breach the convention or not. Eventually, it is not wrong to say that clarification of the scope and operation mechanism of the convention have come a long way.

Ambiguity of the operation mechanisms of some conventions have not been made clear and are extremely weak and open to risk. The application of these conventions would become disputed in political crisis.

There should not be any place for fear to think about the details, application, and implementation of conventions. Because the conventions will improve by means of opinions of a wider community and a wider point of view on their details and operations.

As Heard stresses that:

> The consensus which supports both the principle behind a convention and its details should not be restricted to only the political actors directly involved, but should also encompass the academic community, judges and the concerned public. Constitutional authorities have played a major role in synthesizing precedent and politicians' beliefs as part of their task of determining where the consensus of opinion lies and what principles are at stake in a particular situation.[1008]

He further notes that:

[1008] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.

> In order for conventions to operate most effectively as rules of critical morality, rather than as the private mores of the particular politicians involved in a given incident, it appears that the consensus which supports a rule should be drawn from as wide a range of interested individuals as possible.[1009]

Last, it is worth mentioning that conventions are not legal laws and guidelines which can be enforced by the courts like laws. Disobeying the rules often results in political criticism. Yet, understanding how to circumvent the rules is a prerequisite before putting political pressure on politicians who apply the rules. Primarily, it is necessary to reveal whether a conventional rule is applied appropriately in a particular case. To do this, the operation mechanism of the convention should be clear and understandable. Agreement is needed on the interpretation of the details of the rules.

While it is argued that the last words on the matter should belong to the electorate, as the public is considered the ultimate enforcer of conventions, in the current situation it cannot be said that the electorate directly and effectively takes part in decisions. As things stand, the people do not know how the Government takes decisions related to public issues;[1010] for that reason, the need for clarification of this convention and constitution is rising among the public. People do not know much about the decision-makers responsible for these conventions.

Improvement in the operation mechanisms of conventions would allow the media and the public to better understand such matters with regard to conventions and they could make conventions work efficiently via the political pressure they can apply. Therefore, it can be said that improving the operation mechanisms of conventions will also improve their enforceability.

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[1009] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.

[1010] Leo G. Michel, "NATO decision-making: the ‘consensus rule’ endures despite challenges." In NATO’s Post-Cold War Politics, pp. 107-123. Palgrave Macmillan, London, 2014.

## 6.3 Conclusion

A constitutional convention is an informal procedural agreement followed by state institutions. The main challenge to current conventions is uncertainty over their operation mechanisms rather than their existence. While a convention may seem clear-cut, it becomes complicated to apply it in some circumstances.

Vagueness in the operation mechanism of a convention might in some way weaken its efficiency. Sometimes these uncertainties may even make room for political self-dealing. Politicians can avoid properly applying the rules by interpreting or defining the detail of conventions according to the whims of executive action. For this reason, this chapter has argued that these details should be formulated as much as possible by political common sense without legal force. At this point, it is essential to note that political and constitutional committees play an important role in showing the vagueness of conventions and the Government should consider the suggestions made by committees carefully. In that way, certainty can be improved, and constitutional law can be made available without difficulty.

Conventions are generally admitted as being difficult to enforce**.** The premier need for the conventions illustrated here is to set out more precisely the extent of the details of their operation mechanisms to increase their efficiency and enforceability. When the operation mechanism of a convention is made according to a broad consensus, a breach or would-be of breach of the convention is easily disclosed. Therefore, if UK politicians attempt to break convention rules, they will be forced to face the political price of such decisions and explain them at the earliest stage. Hence, clarification of the operation mechanism of a convention improves its enforceability. These rules can be enforced by drawing attention to violence or would-be violence.

The main argument in the chapter is that if the operation mechanism of convention rules is clarified, it becomes easy to determine and thus ascertain a breach of the rules. Therefore, it gets easier to force politicians to comply with these rules.

# Chapter 7 – Recommendations and Conclusions

## 7.1 Introduction

The thesis argues that the ability of conventions to effectively restrain constitutional behaviour depends upon clarity of these rules. Constitutional conventions have been becoming more efficient when they are clear. The clarification of convention is three-step process. First simply recognising the existence of a conventional rule. When existence of convention was determined in an official document, politicians would not easily disregard the convention by simply denying the presence of convention. The first step has been fulfilled through codification of conventions in the British conventions. Although it may be easy to recognize the meaning of conventions, the implementation of a convention may not be straightforward in some circumstances. Lack of clarity on details of the operation mechanism of a convention provide a chance politician to interpret the rule for their own political expediency in some cases. The second step should be clarifying operation mechanism of conventional rules if necessary. Achieving clarity regarding the operational mechanism of a convention might help to restrain politicians from using conventional rules for political self-dealing.

On the other hand, this further clarification on the operation of conventions cannot fully guarantee an end to disagreement about the implementation of a convention, due to the ambiguous nature of conventions. Conventional rules continue to improve, to be modified, and to change. At any time, there may be a need to apply a conventional rule in unexpected or messy political circumstances, and even a well-conceived convention might be incapable of resolving the issue. On some occasions, a political situation can even necessitate the disapplication of a convention. In a word, a convention has both case-by-case political consequences as well as invariable

constitutional consequences.[1011] In this case, the question of which mechanism or authority should adjudicate whether a convention is properly followed in specific cases, becomes crucial. In the current situation, when a disagreement on a convention arises, actors, politicians, and constitutional and political committees directly engage with the scope, consequences, and rationale of the convention. However, the matter of the enforceability of the rules has not received sufficient attention. The failure of constitutional conventions overshadows what could otherwise by simple solutions (codification of the convention) or effect unfeasibility or judicial remedy when immune to a judicial review. As a result, sometimes objection about a breach of convention remain unanswered.

The thesis therefore argues that last step to increasing the efficiency and enforceability of conventions should be clear determination of the enforcer of conventions. As the thesis shows the absence of pre-determined enforcer mechanism and certain sanction of breach of convention lead an executive to police their own behaviour. Primarily, it is needed to make certain who or which authority would adjudicate if there would be disagreement about operation of convention.

As the thesis underlined that each convention is peculiar and has a unique function. Likewise, when different conventions or groups of conventions are not respected, different consequences are likely to arise.[1012] For instance, one convention may be disregarded without any significant consequences,[1013] A good reason behind a convention may not exist for these conventions. Barber notes that 'Some conventions may just be mistakes; rules that are followed, but which would be better to be ignored.'[1014] Breaking another convention might create significant political concern, or breach of a convention brings a breach of fundamental principle.[1015] Similarly, Andrew remarks that different groups of constitutional conventions have different degrees of force. Some conventions are fundamental, and their breach would overturn the basic

[1011] Mark Elliot, 'Does the Salisbury Convention Apply During a Hung Parliament?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/> accessed 23 November 2019.
[1012] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.
[1013] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.
[1014] Nicholas W. Barber, Laws and Constitutional Conventions (2009). (2009) 125 Law Quarterly Review 294. Available at SSRN: https://ssrn.com/abstract=2764739.
[1015] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 57-58.

principles of the constitution.[1016] Application of some conventions needs more flexibility. Their operation undergo change as occasion requires and thus political realm considered as a competent to solve disagreement about their application. There are other conventions which are of less importance and merely indicate that certain usages are inadvisable or improper.[1017]

Conventional rules undergo transformation to written form in the British constitutional system. The thesis therefore addresses the transformation process [two main ways of clarification the meaning of convention: recognising convention or legally codified convention] and underlined that different clarification process on conventions could help greatly in understanding the different levels of obligation attached to different group of convention.

Some conventional rules are heavily political in nature. The details of operation mechanism of these rules depend on range of political factors. Their application therefore needs some flexibility. They are typically run by political actors only. Breach of these rules leads to political concerns and brings about political consequence and costs. Fear of incurring political costs might be sufficient to force politicians to abide by a conventional rule. The thesis demonstrated that meaning of these conventions usually captured in official document without legal force in the British Constitutional system. such as the UK Cabinet Manual or the Ministerial Code, so that these matters are at the discretion of politicians. In a sense, political realm is seen as a competent authority to solve conventional disputes.

There is no doubt that leaving the power of adjudicating these conventional rules in the hands of politicians is constitutionally appropriate, and even essential for the proper function of some conventions, as a breach of such a convention may produce “substantial practical effects”.[1018] For example, the question when a minister should resign for administrative blunders should be answer in the political process. The responsibility for the application as well as enforcement of these rules is highly political in nature. Hence, political enforceability, such as political pressure or criticism, might

[1016] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[1017] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[1018] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.

be enough to apply conventional rules. If a convention is not enforced due to political pressure, the final determination about whether a rule has been broken should be given to indirectly through the electoral process.

While political realm is considered as competent authority to resolve these conventional failures, it is necessary to specify who, or which authority is particularly responsible for the appropriate operation of conventions. The caretaker conventions provide an example in the de-politicisation of conventions by means of emerging guardianship by the public servants. Menzies and Tiernan draw attention that officials are guardians of caretaker conventions.[1019] Public officials have stated that they are the authoritative interpreters of the caretaker convention by means of presenting detailed guidance on how to 'behave' during election campaign. This allowed them to shift the obligation onus to abide 'by conventions from the ministry to the public service'.[1020] When dispute raised about application of the caretaker conventions, public officials stated their concerns to their political masters and were prompted to a course of action they did not agree with. Then, they found themselves in a position to 'plug the hole' by amending the guidance by including additional material to deal with that particular case.[1021]

However, it is a mistake to think that all conventional disagreements can be remediated only by the politicians who play a direct role in the operation of the relevant convention. Some conventions are too important to be left in the hands of politicians. In addition, some conventional rules are highly political, and yet also pertinent to constitutional principles. Andrew describes this category of conventions as vital-fundamental conventions.[1022] According to Andrew, these conventions incorporate crucial constitutional principles and breach, or substantive alteration, of their terms

[1019] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91-111
[1020] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91-111
[1021] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91-111
[1022] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science.

could have a significant effect on constitutional processes.[1023] In a sense, the convention seen as essence to the constitution and must be continuously obeyed. Politicians not really discretion power on operation of the rules. Similarly, Perry remarks that 'at least in theory, there can be norms which are both principles and conventions. Call them *conventional principles*.'[1024] He argues that 'the Court enforced a principle, and it enforced a convention; it enforced a conventional principle.'[1025] He notes in the UKSC in *Miller (No 2) the* court did enforce a convention, in virtue of enforcing 'principle of Parliamentary accountability' without mentioning a constitutional convention.[1026]

The question here is which conventions are considered to represent the fundamental conventions of the constitution in the British Constitutional system. The thesis underlines that clarification convention in legal rules in the UK are based on the significance of the convention. Conventions that have already transferred into law, or which have persistently demanded legal safeguards, should be considered fundamental conventions in the UK. Or a convention which is applied automatically and routinely, can become very important in such circumstance. For example, when Boris Johnson suspended the parliament, whether the Queen will act based on his advice becomes very essential. Cardinal convention is another example to this. Prorogation is a personal prerogative of the Monarch exercised on the advice of Ministers. In practice, it can be simply said that Queen makes her decision based on Prime Minister's advice. However, what Queen could do when the Prime Minister prorogues the parliament because of his own political interest? In this circumstance the Cardinal convention becomes very critical when such undemocratic scenario, which no one can expect, occurs.

[1023] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science.
[1024] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.
[1025] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.
[1026] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.

Usually, the Queen will only exercise this power in a politically uncontroversial and predictable manner. Typically, there is no conflict between this convention on prorogation and ministerial advice, as ministerial advice tendered by the government has been uncontroversial and predictable. In this case, the application of cardinal convention, which is mandating that the Monarch will follow the advice given by Ministers when exercising personal prerogative powers[1027].

These conventions are key elements of the British Constitution and represent high-level political decisions. Hence, these conventions are either legally codified or there is high demand for them to be legally codified, to make it difficult to violate these rules. Elliott and Thomas argue that, "If the underlying principle is so important as to warrant legal protection, breach of the convention in question should be extremely unlikely in the first place".[1028] However, in some circumstances, it may be practically desirable or politically expedient – to place a given convention on legal grounding.'[1029] A prominent example is the constitutional crisis of 1909–11 where the House of Lords veto the financial bills that legislation was subsequently enacted that denied the House of Lords any real role in the enactment of financial legislation.[1030]

Breach of any of these 'fundamental' conventions amounts to a breach of a fundamental constitutional principle. It is highly likely that breach of these rules might cause public defiance since it will be detrimental to democracy. It is therefore argued that these fundamental rules should not be left vulnerable, defenceless, and unguarded. For this reason, such rules have either been legally codified or there are continual demands for legal safeguarding. Legal safeguarding of conventions usually is intended to make it harder to breach them; but does not allow for judicial enforceability. Arguably, transferring these conventions into legal form demonstrates how seriously they are taken, and thus politicians might be less likely to feel able to disregard conventional rules when a legal safeguard is provided. However, the Sewel Convention proves that this does not always work. Legal safeguards on Sewel convention were not an effective protect mechanism. Transforming these basic

[1027] Rodney Brazier, Constitutional Practice - The Foundations Of British Government (3rd edn, Oxford University Press 1999) 189.
[1028] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1029] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1030] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.

conventions into law is not always increase their effectiveness and enforceability. Each fundamental convention should be considered individually about their enforcer and if necessary soft enforcer mechanism should be designed and provided.

Therefore, because there are different types of enforcement, the thesis has highlighted the necessity of pertinent enforcement mechanisms to make rules more effective. If a suitable soft enforcement mechanism were created, relevant political actors would not be only the decision-makers in relation their own behaviours, nor would there be a risk that judges would be institutionally ill-placed to assess a case. For example, if it were claimed that there had been a breach of war power convention, in the current situation, the Government itself has a say on this issue. Yet, this can make the Government the judge of its own behaviours, since Parliament's response may be contingent upon many particular circumstances at a given point in time. Since the courts' involvement in the decision process is not desirable, a *soft enforcement mechanism* for these fundamental conventions should be designed to protect these from political self-dealing. A *soft enforcement mechanism* in this case would create opportunities to influence executive policies even when they do not completely tie a government's hands. With such an enforcement mechanism, the flexibility of these rules will continue to prove valuable; in the meantime, these rules would not be left entirely in politicians' hands. Politicians will be more careful in applying the convention because they will know they cannot easily manoeuvre these rules.

Of course, the Government would be reluctant to tie its own hands by providing such an enforcement on an important convention. Thus, such a mechanism would not exclude politicians entirely; they would be involved in this mechanism, which would help to clarify whether a convention has been properly applied in a specific case or not. Therefore, such a mechanism will also help the Government to avoid any blame for breach of these rules because, in some cases, it might be necessary to disapply a convention, or a convention might be changed or modified, or circumstances might necessitate that a rule is ignored. In these cases, politicians are unduly blamed for breaking convention. As in the example of such situations, certain enforcement mechanisms would help to clarify situations in more detail [i.e., they could be beneficial from the perspective of political actors by clarifying what is expected of them and heling them avoid unwarranted criticism].

## 7.2 Enforcer of traditionally understanding conventional rules

Many crucial constitutional matters are regulated by conventional rules. Some of rules are still unwritten and judicially unenforceable. However, immunity from judicial remedy does not mean the relevant people are, in practice, free to do as they please. As Elliott and Thomas note, "legal freedom is constrained by political precedent".[1031] In short, traditionally, conventions have existed as the 'unwritten rules of the game' by which all parties implicitly agree to abide.

However, unwritten conventions are likely to be vague and ambiguous, which renders them liable to exploitation and manipulation.[1032] If politicians encounter a constraint that comes from a conventional rule itself, they have considerable freedom to ignore that rule to achieve their goal. Politicians sometimes manipulate these unwritten rules by denying their existence; or they might interpret the rule in such a way as to escape the responsibility that the conventional rule implies; or they argue that circumstances mean the rule does not apply; or, they might claim that, though a rule exists and their action would be in breach of it, the breach is justified by circumstances.[1033] Even if they are correct in their claims, the ambiguous nature of these conventions makes it very difficult to understand it. Therefore, these conventions need to be more clearly defined; more enforceable; indeed, some should be eradicated altogether, with the rules they prescribe being instead placed on a different constitutional footing.[1034]

Conventions related to the Queen's prerogative powers are illustrative of this point. There is no clear answer as to what the result of any unconstitutional abuse of the Queen's personal prerogative powers would be. For example, the Crown is obligated to give its assent automatically for the enactment of new legislation to assist in preserving the democratic system. If, at the present time, the monarch refused to give approval to any such law or act, no one could be confident about who it is that imposes

[1031] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 49.
[1032] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 49.
[1033] Rodney Brazier, "The Non-Legal Constitution: Thoughts on Convention, Practice and Principle" 43 N. Ir. Legal Q. 262 (1992) 263.
[1034] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (eds) Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges (Cambridge University Press 2015) 253.

the requirement on the Monarch to give approval for the completion of the law-making procedure.

It is mostly believed that the likelihood of this scenario occurring is only remote, as it is difficult to envisage a situation where Queen must intervene in political issues.[1035] Historically, her unbiased approach to political matters may give countenance to this view. There is, therefore, a strong argument that the consequence of advising refusal of assent by a government that is the Government shoots itself in the foot.[1036] It would not only be a constitutionally dubious thing to do but would also be politically ill-advised.[1037] In short, it is agreed that Parliament is a democratic institution; it would be fundamentally undemocratic for an unelected monarch to thwart the wishes of the elected legislature.[1038]

While there are no modern examples of monarchs exercising these powers of their own accord, or refusing to exercise them when advised to do so by the Government,[1039] Tomkins highlights that the fact that "power has not been exercised for some time is not necessarily conclusive evidence that the power is no longer available".[1040] Tomkins further stated that, "we should not be deceived by the longevity of the practice that the royal assent is not withheld, into thinking that this is a power the exercise of which is now entirely beyond comprehension".[1041] Indeed, the possibility of a breach of this convention has become a relevant concern in regard to the political issue of Brexit, where there is a risk of conventions being used for an improper purpose, namely, to prevent Parliament from obstructing the Government's plans to move forward with Brexit. Whether a UK government could procure from the monarch a veto of any bill passed by both Houses of Parliament is an example. In this case, it is accepted that the Queen will *not be* thrown into the political arena, nor any

[1035] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 56-58.
[1036] Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen To Withhold Royal Assent?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/> accessed 25 January 2020.
[1037] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017).
[1038] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 43.
[1039] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 43.
[1040] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st Edition 2003) 64.
[1041] Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st Edition 2003) 64.

court would enjoin the Queen to give her assent to a bill. There is no consensus on what would happen should such exceptional circumstances occur.

Most recently, for example, Prime Minister Boris Johnson asked the Queen to prorogue Parliament for five weeks, between 9 September until 14 October. The prorogation of Parliament remains a prerogative power of the Crown, but the Queen would “always act on the advice of the Government of the day” as to setting the first meeting of a Parliament.[1042] Prorogation normally is for a limited period, uncontroversial, and necessary to end the parliamentary session.[1043] But the decision to prorogue - just weeks before the UK's scheduled departure from the EU. It is criticised that prorogation was an attempt by the government to preventing parliament from performing its constitutional role at a time when the UK was about to undergo a fundamental and irreversible constitutional change.[1044] The government defended its action, saying it had nothing to do with Brexit. It argued prorogation was a "proceeding in Parliament" to allow the PM to outline plans for domestic policies, like NHS funding.

The limits on the power of prorogation have not been circumscribed strictly, nor enforcer of the prerogative power in case of breach are not specified by any authorise documents. *The looser prerogative power* provide a chance Boris exploited the rule to reach his own political aim. The supreme court support the view and ruled the prorogation unlawful.[1045] The court found that the Prime Minister had raised no good reason for this interference and had, consequently, strayed beyond the bounds of the prorogation.[1046]The Court's president, Lady Hale, said: ‘The effect on the fundamentals of our democracy was extreme.’[1047]

[1042] Graeme Cowie, “Prorogation of Parliament” Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[1043] Graeme Cowie, “Prorogation of Parliament” Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[1044] Graeme Cowie, “Prorogation of Parliament” Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[1045] Graeme Cowie, “Prorogation of Parliament” Briefing Paper, No: 8589, 11 June 2019, House of Commons Library.
[1046] [2019] UKSC 41 On appeals from: [2019] EWHC 2381 (QB) and [2019] CSIH 49.
[1047] [2019] UKSC 41 On appeals from: [2019] EWHC 2381 (QB) and [2019] CSIH 49

Twomey points out 'in *Miller No 2*, this might be the exceptional kind of case, where a strict timing imperative is involved, which permits judicial intervention.'[1048] But The majority accepted that the question of whether a prerogative power apply properly was largely a political question into which courts should not interfere. Therefore, as this recent example proof that these remain unwritten conventions need to be more clearly defined; in terms of existence, extend and enforcer of conventions. They need properly to scrutinise; indeed, some should be extinguished altogether, with the rules they circumscribed being instead placed on a different constitutional footing.[1049] Of course, setting out the existing power in legislation or a written constitution does not, of itself, completely a remedy for ambiguity or interpretative discretion of these convention, but at least politicians would not easily circumvent these rules if written document already clearly constrain them.

One option for avoiding the risk of misuse or breach of convention might be abolishing the prerogative power convention entirely, as there is no benefit of this convention to the constitution, and it is contrary to democracy. Heard presents that conventions can be distinguished by their constitutional importance.[1050] The importance of the principle or reason which lies behind the rule appears to be one of the most crucial factors which vary among the informal rules of the constitution.[1051] According to him, the fundamental importance of a principle should be measured by the degree to which the constitution would function differently in the absence of that principle.[1052] He says:

> by this measurement, the monarchic element of the constitution does not appear as important as the other four groups of principles mentioned; the actual powers of the head of state are determined by the nature of

[1048] Anne Twomey, 'Should We Codify the Royal Prerogative?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 15 March 2020.
[1049] Andrew Blick, Constitutional Reform, in Brian Galligan and Scott Brenton (eds) Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges (Cambridge University Press 2015) 253.
[1050] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[1051] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[1052] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.

> parliamentary government and would remain much the same if Canada abolished its ties to the monarchy.[1053]

But, in effect abolishing the keystone personal prerogative powers can hardly be considered a radical move. Rather these rules clearly specified in an official document. Indeed, it is needed not only confers upon the existence of convention, it also delineates the extend, limits and enforcer of conventions. The recent controversy about the unlawful attempt to prorogue parliament and the judicial review that followed replacing prerogative and conventions with statute is the Fixed-term Parliaments Act 2011.

But whether these conventions should legally or non-legally codified is another issue. Twomey draws attention that sometimes, codifying prerogatives in legislation has not resulted in greater clarity, or even it exacerbates problems about their use.[1054] Disputes are likely to arise about the interpretation of the application of the conditions, courts are likely to become involved in enforcing them, and the delay involved in litigation is likely to exacerbate any political crisis.[1055] She therefore argues that While some prerogatives may be better dealt with by legislation, that cannot necessarily be said for all of them.[1056] It is important to be discerning in determining which prerogatives to codify in statute and to be very careful as to how this is done, with consideration being given to how other prerogatives may be affected in different scenarios.[1057]

The thesis agrees with her argument. Each unwritten convention should carefully consider whether they would clarify with legal or non-legal codification. For example, the convention related to personal royal prerogative power can be codified in such a

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[1053] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science, 63-81.
[1054] Anne Twomey, 'Should We Codify the Royal Prerogative?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 15 March 2020.
[1055] Anne Twomey, 'Should We Codify the Royal Prerogative?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 15 March 2020.
[1056] Anne Twomey, 'Should We Codify the Royal Prerogative?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 15 March 2020.
[1057] Anne Twomey, 'Should We Codify the Royal Prerogative?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2019/11/01/should-we-codify-the-royal-prerogative/> accessed 15 March 2020.

way that it becomes merely a symbolic convention. This would demonstrate that the Queen no longer has discretionary power. Specifically, in order to remove the possibility of exploiting the government legislative process that is triggered by successful passage of a bill through the two Houses, the convention that Queen must give royal assent to a bill that passes both the House of Commons and the House of Lords must be codified. Similarly, Cardinal convention should be codified that the Sovereign must follow the advice of ministers without any exemptions. There is no room for discretion. Likewise, any new legislation should set some explicit limits on the permitted length or purpose of prorogation. Also, it is urgently needed enforceable constraints on how many peers a Prime Minister can appoint to the second chamber of the UK legislature.

## 7.3 Enforcement of non-legal codification of conventions

As the thesis stresses that traditionally, conventions are vague and ambiguous both in terms of their content and enforceability, which renders them liable to exploitation and manipulation. For this reason, some conventional rules are recorded in an official document. These documents aim to provide certainty as to constitutional requirements.

Clarifying the meaning of the convention may help those directly involved in the working of the constitution. This means that, in difficult circumstances, they can act with no doubt that their behaviour is appropriate and will be acceptable to the public. It also eases the procedure of deciding when conventional rules have been neglected and provides a deterrent for breach of these rules.

However, documentation helps to increase the enforceability of conventions, and the potential consequences of failure to comply with conventions, or sanctions that might be applied, will often depend upon a range of political factors, such as how much political pressure is applied by the opposition parties against the government minister, what went wrong, who was responsible for the error, the strength of the minister's response to the criticism, how the story could be spun by the Government to the media, the media's own reaction and the views of the public toward the Government. Because

these conventions remain heavily political,[1058] and breaking any of this group of conventions will have political consequences.

Hence, these constitutional conventions continue to belong to the realm of politicians. More specifically, the Government is entitled to communicate more about their creation, alteration, and interpretation. However, this leaves room for doubt that politicians might deliberately leave room to exploit these non-legal rules for their own interest. According to McHarg, "...the preference for constitutional soft law is attributable more to the executive's desire to resist real external control over its activities, than to a concern to ensure elective regulation".[1059] Clear and pre-determined enforcement mechanisms should be demanded by the rules. The thesis argues that such a mechanism would introduce additional means of ensuring adherence to conventions, which might lead to better effectiveness.

Conventions on minister responsibility are illustrative of this point. Breach of the rule leads to political concerns and brings about political consequence and costs. The potential consequences of failure to comply with conventions, or sanctions that might be applied, will often depend upon a range of political factors, such as how much political pressure is applied by the opposition parties against the government minister, what went wrong, who was responsible for the error, the strength of the minister's response to the criticism, how the story could be spun by the Government to the media, the media's own reaction and the views of the public toward the Government. Because these conventions remain heavily political,[1060] and breaking any of this group of conventions will have political consequences.

Ahmed, Albert, and Perry argue that:

> consider accountability conventions, which make some institution or actor accountable to some other institution or actor, for instance conventions of individual and ministerial responsibility, which make the government and its ministers accountable to our democratic

[1058] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 51.
[1059] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review.
[1060] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 51.

> representatives. For the conventions to succeed in that aim, political actors must be the ones to hold the government to account, by raising our concerns, rebuking failures, prosecuting grievances, and otherwise making public the government's shortcomings. If judges do these things instead, then it is judges, not our democratic representatives, who hold the government to account. Judicial enforcement of accountability conventions would frustrate their purpose.[1061]

But sometimes fear of incurring political costs might not be enough to force politicians to abide by the conventional rule. it is crucially considered how else ministers can be held to account for their words and conduct. Hence, investigating a breach of the convention of ministerial responsibility could be formulated. A proper mechanism is required for ensuring accountability and transparency, but the question remains regarding what kind of mechanism could support the purpose of the convention.

The Ministerial Code, which was updated in August 2019, includes detailed guidance for ministers; it is also stated in the Code that, in the case of a breach of the Ministerial Code, the Prime Minister has the right to determine how the matter must be investigated and which consequences should be implemented.

In para 1.4 of the Ministerial Code, it is stated:

> If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary, feels that it warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the Independent Adviser on Ministers' Interests.[1062]

It is confirmed in the 2019 Code:

> Ministers only remain in office if they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected

[1061] Farrah Ahmed, Richard Albert, Adam Perry, "Judging Constitutional Conventions" Oxford Legal Studies Research Paper No. 59/2017 32.
[1062] Cabinet Office, *Ministerial Code*, August 2019, para 1.4.

> of a Minister and the appropriate consequences of a breach of those standards.[1063]

If there is any claim that threatens the rules of conduct of the Ministers of the Parliament, the Code confirms that the ultimate judge of the standards of ministerial behaviour is the Prime Minister. Even though the Independent Adviser on Ministers' Interests has been appointed, the Independent Adviser may not undertake investigations unless the Prime Minister has instructed them to do so. The independent adviser did not conduct any investigations in 2016 or 2017[1064]. When Damian Green breached the Ministerial Code in 2017 with being accused of making "unwanted advances" against a journalist, as well as his denial about having pornographic material found on his office computer, no investigation was done by Sir Alex Allan[1065].When the Home Secretary Amber Rudd resigned because of misleading a parliamentary select committee concerning the existence of deportation targets in 2018, the independent adviser did not investigate the Minister's conduct[1066].

Nevertheless, some insist that whatever the process, the consequences of such investigations should be still decided by the Prime Minister.[1067] Therefore, the current system is criticised on the grounds that a great deal of flexibility is provided to the Prime Minister. When it is alleged that there has been a breach of the Ministerial Code, it is the Prime Minister who can decide to involve an Independent Adviser for the Minister who is under investigation for breach of ministerial standards, or simply ask the Cabinet Secretary to perform the investigation; however, there is no specific, clear requirement to follow any process. There is also no guidance on what happens following this, but the report determines whether the Minister retains the confidence of the Prime Minister. This is because the Ministerial Code is considered an inappropriate

[1063] Cabinet Office, *Ministerial Code*, August 2019, para 1.6.
[1064] Mike Gordon, 'Priti Patel, the Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1065] Mike Gordon, 'Priti Patel, the Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1066] Mike Gordon, 'Priti Patel, the Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1067] Daniel Thornton, 'Rising Expectations of The Ministerial Code' (*The Institute for Government*, 2018) <https://www.instituteforgovernment.org.uk/blog/rising-expectations-ministerial-code> accessed 23 November 2019.

mechanism for assuring transparency and accountability of those who see 'the UK Constitution' as detached from daily political issues. For example, when Prime Minister, Boris Johnson, decided Patel *had not* breached the code and she should not resign, despite an inquiry by his adviser Sir Alex Allan that concluded she had broken the ministerial code, following bullying allegations across three government departments.[1068] Johnson`s refusing to sack Patel has raised serious questions about whether the prime minister should maintain sole discretion over both to trigger investigations into wrongdoing by ministers, and to decide on what action, if any, to take.[1069] Mike Gordon stresses that Boris Johnson has failed to demand high standards of conduct or accountability from his minister by defending the home secretary and keeping her in her role. . He notes that 'it appears that rules of ministerial irresponsibility are decisively shaping practice in our system of government and this increasingly undermines the constitutional significance of the Ministerial Code.[1070] Likewise, Catherine Haddon underlines that the Ministerial Code and its status are designed to provide a level of accountability that was more public and more rigorous than a purely backroom political decision. But the process of Patel's inquiry has consequences far beyond Patel's future. It has damaged the Code and a process that has become very politicised. That is an impossible situation for a code of conduct that is highly dependent on principle.[1071] This case demonstrates the inadequacy of the current informal system of independent advice on standards of ministerial conduct.

A former minister, Garnier, argues in a recent Ministers Reflect Interview that a clearer structure and more legal protections should be constituted in Code investigations,[1072]

[1068] Mike Gordon, 'Priti Patel, the Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1069] Mike Gordon, 'Priti Patel, The Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1070] Mike Gordon, 'Priti Patel, The Independent Adviser, and Ministerial Irresponsibility' (UK Constitutional Law Association) <https://ukconstitutionallaw.org/2020/11/23/mike-gordon-priti-patel-the-independent-adviser-and-minister> accessed 01 January 2021.
[1071] Catherine Haddon, 'The handling of the Priti Patel bullying inquiry has fatally undermined the Ministerial Code' (The Institute for Government, 2020) < https://www.instituteforgovernment.org.uk/blog/priti-patel-bullying-inquiry-undermined-ministerial-code > accessed 01 January 2021.
[1072] Daniel Thornton, 'Rising Expectations of The Ministerial Code' (*The Institute for Government*, 2018) <https://www.instituteforgovernment.org.uk/blog/rising-expectations-ministerial-code> accessed 23 November 2019.

and, further, that the ministers that are investigated should be allowed to see their reports and should have a right to call witnesses and have advocates.[1073]

Due to this lack of a clearly established procedure, those involved in an investigation might be dissatisfied with the investigating process, while being under significant pressure from political opponents and the media, together with fears regarding their own privacy and the probable consequences for their families.[1074]

It was recommended by the Public Administration Select Committee (PASC) that the Independent Adviser should be allowed to initiate inquiries on their own initiative to improve the process. The PASC also recommended that the Code should be updated to enable the Independent Adviser to undertake shorter inquiries so that they can establish the salient facts of a case. The appointment of the Independent Adviser on Ministers' Interests is "entirely a personal choice of the Prime Minister of the day".[1075] The role is not based on statutory requirements and is not subject to open recruitment or a pre-appointment hearing. A government should show particular diligence to not compromise the impartiality of the adviser.

Furthermore, the application of any convention is subject to the influence of the political climate. The Prime Minister must be flexible, to some degree, in factoring political considerations into their decisions, because whether a minister resigns depends upon several factors.[1076] First, there is the severity of the wrongdoing that has occurred and how visible it is, the minister's own personal feelings, whether the minister has the support of the Prime Minister, and the mood of the political party. All these factors can be further affected by the media.[1077] Once the media becomes aware of possible ministerial misconduct, intense pressure is applied, and today it is commonplace for ministers to resign within a matter of hours or days.[1078] For this

[1073] Daniel Thornton, 'Rising Expectations of The Ministerial Code' (*The Institute for Government*, 2018) <https://www.instituteforgovernment.org.uk/blog/rising-expectations-ministerial-code> accessed 23 November 2019.
[1074] Mark Garnier 'Ministers Reflect' (*Instituteforgovernment.org.uk*, 2018) <https://www.instituteforgovernment.org.uk/ministers-reflect/person/mark-garnier/> accessed 25 January 2020.
[1075] Q9 HC 1761 2010-12.
[1076] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 411.
[1077] Diana Woodhouse 'UK ministerial resignations in 2002; the tale of two resignations' 2004 82.
[1078] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 411.

reason, the Prime Minister's ability to assess and decide who is fit to serve in their cabinet must be flexible, to some extent.

On the other hand, there should be a clear operational mechanism through which ministers are given greater clarity about what the possible consequences of an investigation might be. If there is a clear mechanism, it will both protect the ministers and give the Prime Minister the right to assess their own ministers. Therefore, the development of the process for investigating a breach of individual ministerial responsibility helps to increase the cost of a breach of the convention.

Burton highlights that:

> The Prime Minister is right to suggest that the Ministerial Code requires amendment but tinkering with the language has little effect while it lacks any teeth. If the idea of an accountable Government is to mean anything, the Prime Minister must commit to strengthening the enforcement mechanisms within the Code itself.[1079]

In conclusion, individual ministerial responsibility is an important example to demonstrate that while dispute about these of convention is resolved in political process pre-determined formal investigation processes for the operation of conventional rules might help to enforce those rules effectively. A formal process will help to more easily determine whether the convention applies in a specific case.

Similarly, under collective responsibility, the Government is jointly answerable to the House of Commons in regard to its measures, verdicts, and strategies. Abiding by judgements given by the Cabinet is mandatory for every member of the Government. This indicates that if a minister does not approve of a particular Government policy, he or she must nevertheless support it in public. If a minister does not agree to follow the policy, he or she will be expected to give their resignation in accordance with collective responsibility. In the UK, every member of the Government is obliged to follow the

[1079] Matthew Burton, 'The Events of The Last Few Weeks Show the Weakness of The Ministerial Code | The Political Studies Association (PSA)' (*The events of the last few weeks show the weakness of the ministerial code | The Political Studies Association (PSA)*, 2019) <https://www.psa.ac.uk/psa/news/events-last-few-weeks-show-weakness-ministerial-code> accessed 23 November 2019.

principle of 'collective responsibility', except where it is clearly set aside.[1080] However, the idea that collective responsibility can be put to one side or rejected leads to argument that this convention is somewhat a regulation of political convenience, applied by prime ministers when it is helpful for them and rejected when it is not. If a prime minister fails to manage his or her cabinet successfully, he or she could lose the confidence of the House and the breach of such conventions might have negative consequences at the next general election.[1081]

To this end, the non-legal codification of conventions is preferred in the UK for some conventions that have 'political' characteristics, and where their breach will lead to primarily political concerns. Hence, when a convention is ignored, the consequences or sanctions for this are determined in accordance with political circumstances. Increasing and improving the documentation about the meaning and proper implementation of a convention might help to enhance their enforceability; however, it is difficult to say that this would be sufficient to eliminate ambiguity about their enforceability. Hence, a more specific and pre-determined mechanism is still required to make these conventions more efficient.

## 7.4 Enforcement of legally codified conventions

In the British constitution, some constitutional conventions have been transformed into law. However, the judicial enforceability of these conventions is largely symbolic and the courts' direct involvement in these conventional matters would not always or often be desirable. This is due to the desire to maintain the flexibility of conventional rules, a crucial feature which provides an opportunity for politicians to assess unexpected political circumstances without the pressure of strict rule. For example, it is widely believed that the Scotland Act 2016 does not treat the Sewel Convention as a legal rule. The legislative form and language can be decisive. As Elliott points out, the "Sewel Convention has given legal effect. This provision merely signals Parliament's acknowledgement of (what remains) a convention."[1082] The UK Supreme Court held

[1080] The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011), 3.20.
[1081] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1082] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.

in *Miller* that the Sewel Convention is not *legally* enforceable, it is only a convention, despite the Sewel Convention's legislative expression in s2 Scotland Act 2016.[1083]

Sometimes, a convention is legally codified in the case of a would-be violation of a convention rule. For example, in the year 1909, the House of Lords did not agree to approve a money bill that was accepted to be a breach of convention. Elliott says that 'This act resulted in legitimate as well as political violence and aggression.'[1084] Therefore, in the year 1911, an Act of Parliament was introduced to impose in law what had previously existed as a convention. If any convention is observed to cause severe effects when it is violated, undertaking its codification would be a sensible decision.[1085]

Crystallisation of convention into law provides an indication of how seriously codified convention is taken. This tells politicians that a convention is essential and thus should be followed carefully. Nevertheless, the risk of political criticism remains incapable of enforcing an important convention in some cases. It is possible judicial enforceability of a convention will place additional pressure on politicians and thus they would be more likely to heed and apply the convention. Arguably, transferring these conventions into legal form demonstrates how seriously they are taken, and thus politicians might be less likely to feel able to disregard conventional rules when a legal safeguard is provided. In summary, it can be said that convention is turned into law as a deterrent in the case of unenforceability of a convention.

The question here is why conventions are legally codified in the British Constitutional system although the codification usually did not render them legal rule. Conventions that have already transferred into law, or which have persistently demanded legal safeguards, should be considered fundamental conventions in the UK. These conventions are key elements of the British Constitution and represent high-level political decisions. Breach of any of these 'fundamental' conventions amounts to a breach of a fundamental constitutional principle. Heard describes this category of

[1083] Miller, supra note 4.
[1084] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017).
[1085] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017).

conventions as vital-fundamental conventions.[1086] According to Heard, these conventions incorporate crucial constitutional principles and breach, or substantive alteration, of their terms could have a significant effect on constitutional processes.[1087]

It is highly likely that breach of these rules might cause public defiance since it will be detrimental to democracy. It is therefore argued that these fundamental rules should not be left vulnerable, defenceless, and unguarded. For this reason, such rules have either been legally codified or there are continual demands for legal safeguarding. Moreover, Legal safeguarding of conventions is intended to make it harder to breach them; but does not allow for judicial enforceability. Hence, these conventions are either legally codified or there is high demand for them to be legally codified, to make it difficult to violate these rules. Elliott argues that, "If the underlying principle is so important as to warrant legal protection, breach of the convention in question should be extremely unlikely in the first place".[1088] However, in some circumstances, it may be practically desirable or politically expedient – to place a given convention on legal grounding.'[1089] A prominent example is the constitutional crisis of 1909–11 where the House of Lords veto the financial bills that legislation was subsequently enacted that denied the House of Lords any real role in the enactment of financial legislation.[1090]

However, it has been suggested that, on rare occasions, a court can be safeguarding the conventions. Perry remarks that 'at least in theory, there can be norms which are both principles and conventions. Call them *conventional principles*.'[1091] He argues that 'the Court enforced a principle and it enforced a convention; it enforced a conventional principle.'[1092] He notes in the UKSC in *Miller (No 2) the court* the court did enforce a

[1086] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-81.
[1087] Andrew D. Heard, 'Recognizing the Variety Among Constitutional Conventions' (1989) 22 Canadian Journal of Political Science 63-81.
[1088] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1089] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1090] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017), 58.
[1091] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.
[1092] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.

convention, in virtue of enforcing 'principle of Parliamentary accountability'.[1093] Similarly, Elliott holds that the courts to render some conventions legally binding even though there is no legal rule entitling them to make this change if the convention is implemented a sufficiently long period in practice[1094]. Elliott defenses stronger role for conventions if they are shaping and developing constitutional law.[1095] He says conventions reflect, or are generated by, underling constitutional values. He contends that judges could properly transform at least some of these convention into legal limitations on parliament.[1096] Likewise, T.R.S Allan holds that the recognition of a convention by a court indicates an acknowledgement of the convention and signify an approval that the convention is an appearance of a constitutional principle which ought to be ascribed 'the dignity of law'.[1097] For Allan conventions express 'conclusions of political principles, and so cannot, be distinguished from the law. In further he writes 'In matters of constitutional significance, legal doctrine and political principle are inevitably interdepend and intertwined.'[1098] T R S Allan contends that conventions can be enforced by a court unless conventions play a critical role in maintaining the essential character of the constitutional system. According to Allan, the Canadian Supreme Court[1099] does not see the convention as an important constitutional convention that is why they reject to force the convention.[1100].Also, according to Allan, Crossman Diaries make it possible. The case provides a practical legal remedy for the convention of collective cabinet responsibility. The court decides that collective responsibility should be maintained. In the following sentences, he also claims that recognition of convention by a court means acceptance of convention as a useful rule

[1093] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 25 January 2020.
[1094] Mark Elliott, 'Parliamentary Sovereignty and The New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340-375.
[1095] Mark Elliott, 'Parliamentary Sovereignty and The New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340-375.
[1096] Mark Elliott, 'Parliamentary Sovereignty and The New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340-375.
[1097] Allan, Trevor 1993. Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism. Oxford: Clarendon Press 244.
[1098] Allan, Trevor 1993. Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism. Oxford: Clarendon Press 244.
[1099] Supreme Court of Canada, Resolution to amend the Constitution, [1981] 1 S.C.R. 753 (1981-09-28).
[1100] T R S Allan, *Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case*, The Cambridge Law Journal, Volume 45 Issue 2 (July 1986) pp 305-320, 316.

which is worthy of support and thus the convention is necessarily "enforced".[1101] His view can be criticized that although the judges, in well-establish case, previously stresses the significance of convention, they rejected to give a legal remedy on breach of convention. Barber also supports the argument that for conventions to 'become laws through judicial intervention' and that they 'can crystallize' into laws over time by becoming increasingly formalized.'[1102] In his view, a court does not specifically decide to give a convention legal force, but a convention gain this status step by step.

Most recently, Ahmed et al. argue that some conventions can be judicially enforced by court.[1103] Judicial enforcement is necessary and possible for only for power shifting conventions.[1104] They describe power shift convention that 'transfer power from those who have legal power to those who can legitimately wield it.'[1105] In the face of dispute about a constitutional convention that transfer power between constitutional actors, court can uphold the legitimate allocation of power. They provide the Sewel Convention, as a power shifting convention. Under the Sewel convention Scotland now have a voice over legislation which alters the devolution arrangements. Similarly, they note that the prerogative power of the Queen such as deploy the armed forces, sack ministers, free prisoners, and abolish government departments, can give just a few examples. Because the "cardinal convention" of the British Constitution says that the monarch uses these powers by her ministers advise.

They argue that constitutional actors decide who can legitimately wield power; judges execute their decisions. judges act as *executors* of the will and judgment of constitutional actors.[1106] In playing this role, judges confirm the legitimate allocation of power—legitimate, not according to judges but according to constitutional actors themselves.[1107] They therefore believe to enforce the convention would not frustrate

[1101] T R S Allan, *Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case*, The Cambridge Law Journal, Volume 45 Issue 2 (July 1986) pp 305-320, 316.
[1102] N W Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 294.
[1103] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1157.
[1104] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.
[1105] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.
[1106] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.
[1107] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.

that purpose of convention because judges would uphold, rather than disrupt, the constitutional allocation of power.[1108] They provide illustrative example that when the monarch to make important decisions contrary to ministerial advice. By enforcing the convention that the monarch must follow ministerial guidance, judges ensure that only those who can legitimately wield power do so[1109].

However, the authors argue that on rare occasions the enforcement of conventions by courts is both desirable and constitutional[1110]. Courts should not have the right to enforce the conventions of the Constitution. It is not desirable, or even safe, to have the courts making such decisions. Because, firstly, judicial engagement with constitutional conventions is seen as risking or restricting flexibility, effectiveness of conventional rules. if the judges justify a convention, there is a dangerous opportunity which the courts interfering in a particular political outcome.

This was seen in the Supreme Court judgment in Miller. Supreme Court approach in Miller case criticized that as the courts have said little about the scope of conventions. The courts generally decline to answer the question of what conventions mean in the present and how conventions are applied in the case. On the other side, if the Supreme Court had granted legal relevance to the convention, this would have had major political consequences as it might have allowed the Scottish Government to block the Brexit process. In the case court might be blamed to interfere political matter. For this reason, the thesis has highlighted the necessity of pertinent enforcement mechanisms to make such a convention which is important to the operation of the political system but there is no agreement over operation of conventions more effective. If a suitable *soft enforcement mechanism* were created, relevant political actors would not be only the decision-makers in relation their own behaviours, nor would there be a risk that judges would be institutionally ill-placed to assess a case. For example, if it were claimed that there had been a breach of war power convention, in the current situation, the Government itself has a say on this issue. Yet, this makes the Government the judge of its own behaviours. Since the courts' involvement in the decision process is

[1108] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.
[1109] Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1146-1165.
[1110] Nicholas W. Barber, *Laws and constitutional conventions*, Law Quarterly Review (2009) 294.

not desirable, a soft enforcement mechanism for these fundamental conventions should be designed to protect these from political self-dealing. A soft enforcement mechanism in this case would create opportunities to influence executive policies even when they do not completely tie a government's hands. With such an enforcement mechanism, the flexibility of these rules will continue to prove valuable; in the meantime, these rules would not be left entirely in politicians' hands. Politicians will be more careful in applying the convention because they will know they cannot easily manoeuvre these rules.

Of course, the Government would be reluctant to tie its own hands by providing such an enforcement on an important convention. Thus, such a mechanism would not exclude politicians entirely; they would be involved in this mechanism, which would help to clarify whether a convention has been properly applied in a specific case or not. Therefore, such a mechanism will also help the Government to avoid any blame for breach of these rules because, in some cases, it might be necessary to disapply a convention, or a convention might be changed or modified, or circumstances might necessitate that a rule is ignored. In these cases, politicians are unduly blamed for breaking convention. As in the example of such situations, certain enforcement mechanisms would help to clarify situations in more detail.

Therefore, constitutional conventions no longer belong to only the political elite; but should also involve wider constitutional actors such as the academic community, judges and the concerned public. Different constitutional and political actors have become concerned about their meaning and implementation. All the efforts and progress made in clarification is intended to make conventions more understandable for the public.

It is important here to explain the *soft enforcement mechanism* for important conventions which are protected, or would be protected, by a legal safeguard with examples. The Sewel Convention had been considered a fundamental constitutional convention and an important feature of the devolution settlement since devolution to Scotland in 1998. In *Miller (No 1)* the UK Supreme Court holds that the Sewel Convention plays an "important role in facilitating harmonious relationships between

the UK Parliament and the devolved legislatures".[1111] Likewise, Young notes that "Sewel Convention has great constitutional significance, it is fragile in nature. It requires politicians to accept its importance to ensure good relations between Westminster and the devolved nations".[1112] Furthermore, Briefing Paper No. 08275 states that "the application of the convention gave the Scottish Parliament a voice as well as a vote"[1113] and thus that "it is not just a political agreement either. Conventions are the basis for our constitution".[1114]

However, despite the importance of the convention, under the current political climate, there is no mechanism to deal with an allegation of a breach of the convention. Hence, an executive maintains the right to police the boundaries of their own behaviours, in dialogue with parliament. In relation to the issue of Brexit, it has been claimed that the Sewel Convention has been breached in the course of several different events. Broadly, there is a strong feeling that devolved interests are being extenuated by Westminster in the Brexit process. It is argued that,

"In the EU referendum, the UK as whole voted to leave. However, 62 percent of Scotland's voting electorate voted to remain, and the Scottish Government remains opposed to Brexit. Yet, unlike federal states, devolved nations have no legal rights to protect their differing perspectives. They have no formal role in Article 50 negotiations and were not able to carry their desired amendments when the European Union (Withdrawal) Act went through Westminster."

More specifically, the Scottish Government and Parliament wishes to withhold legislative consent for the European Union (Withdrawal) Bill. Enactment of European Union (Withdrawal) Act in the absence of legislative consent from Edinburgh, is seen as a violation of the convention.[1115] When the UK Parliament continued to pass the European Union (Withdrawal) Act 2018, without the consent of the Scottish

[1111] Miller, supra note 4.
[1112] Alison Young, 'How Key Legal Decisions Have Shaped the Politics of Brexit - UK In A Changing Europe' (*UK in a changing Europe*, 2019) <https://ukandeu.ac.uk/how-key-legal-decisions-have-shaped-the-politics-of-brexit/> accessed 23 November 2019.
[1113] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1114] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1115] European Union (Withdrawal) Act 2018 2018.

Parliament, Michael Russell MSP described it as a 'direct breach of the Sewel Convention'.[1116] He argued that the Sewel Convention was intended to ensure that Scotland could not be ignored and that the concerns of the Scottish Parliament would be heeded.[1117] The devolved side accused Westminster Government's approach of being "constitutionally insensitive"[1118]. Westminster, however, argued that the issue is not unfolding in "normal times", and that, in this unexpected circumstance, Westminster should not allow a devolved parliament such veto power.[1119]

Both sides have responded to the allegation that the Sewel Convention has been violated from their own perspective. As Sionaidh Douglas-Scott notes that 'Brexit process is rendered highly problematic by the lack of any coherent conception of the British Constitution. Different parties settle on interpretations of constitutional law that support their case, but often there is no determinative answer.'[1120] On the other side, there is a persuasive argument that ignoring the refusal to grant consent for withdrawal is nonetheless unconstitutional, if not unlawful behaviour. Similarly, the committee report about Legislative Consent and The European Union (Withdrawal) Bill (2017-19) stated that, though it would be legally correct, it would also be "wholly undemocratic".[1121] Worse still, these disagreements have caused a further breakdown of trust between the two governments and have resulted in many discussions about the effectiveness and future use of the Sewel Convention.[1122]

However, there is no formal mechanism to answer these allegations of a breach of the convention. it is mostly agreed that it represents a purely political matter, and the court has left it in the hands of political actors. As a result, these actors have been forced to confront the issue and engage with each other to find a solution. It is expected that a negotiated solution can be found between Westminster and the devolved parliament

[1116] European Union (Withdrawal) Act 2018 2018.
[1117] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1118] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1119] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1120] Sionaidh Douglas-Scott, 'Brexit, Article 50 And the Contested British Constitution' (2016) 79 The Modern Law Review.
[1121] Greami Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.
[1122] Greami Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

to ensure that even the possibility of a genuine constitutional crisis is avoided. However, in practice, unless there is a mechanism that forces politicians to come to an agreement on conventional matters, the political actors involved are not willing to negotiate a compromise on a conventional disagreement.

The failure of this constitutional convention, therefore, demonstrates the necessity of the function of conventions in preventing political self-dealing. This situation is ensured if there is a control mechanism in place to enable the convention to function more effectively and to prevent any breach. According to McHarg the absence of protection for conventional rules does tend to undermine the significance of these conventional rule.[1123] Such a mechanism might ensure that devolved legislatures are not overruled and do not have legislation imposed upon them from London. if there is no apparent constitutional mechanism in this sphere, the convention is ultimately stultified.

When such a mechanism is considered, it is important to identify the purpose behind the convention. The rationale for the Sewel Convention is simply to provide a pragmatic balance between the diverse union states.[1124] The convention functions to restrain Westminster in the exercise of its law-making power in devolved areas by creating a space for (in Lord Sewel's words) "political dialogue" between the respective governments.[1125] The avoidance of conflict between the legislatures, through mechanisms of co-operation and consultation, has therefore been the dynamic driving the operation of the convention.[1126] As the committee highlighted, "If problems did arise between the Scottish Executive (Government) and the UK Government, the intention would be to resolve such matters through mature political dialogue."[1127] The briefing paper on Legislative Consent and The European Union (Withdrawal) Bill (2017-19) reached the conclusion that:

[1123] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[1124] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[1125] (HL Deb 21 July 1998, c791).
[1126] C. McCorkindale: 'Echo Chamber: the 2015 General Election at Holyrood – a word on Sewel' U.K. Const. L. Blog (13th May 2015) (available at http://ukconstitutionallaw.org).
[1127] Graeme Cowie, Legislative Consent and The European Union (Withdrawal) Bill (2017-19), Briefing Paper, No 08275, 23 May 2018, House of Commons Library.

> The experience of the Scotland and the Welfare Reform Bills demonstrates that, as well as pragmatic conciliation, the Sewel Convention can also provide a site of productive *conflict* between the two legislatures, to be resolved by way of political dialogue either in anticipation of the need for legislative consent, or as a result of the process as it unfolds.[1128]

Similarly, According to McHarg the convention performs a facilitative function. She says:

> ...the convention enables co-operation between the UK and devolved governments over the achievement of their policy goals, either where a UK-wide approach is considered desirable notwithstanding devolution, or where competence constraints might inhibit the effective realisation of devolved policy aims.[1129]

In short, effective *political dialogue* between Westminster and the devolved governments will be crucial to ensuring the effective working of the convention. If a disagreement arises about the operation of the convention, there are no imperative formal mechanisms for *political dialogue* to solve the disagreement. Hence, for the successes of *the Sewel Convention,* there should be a formal mechanism to enhance the political dialogue between the UK and devolved governments. Facilitating *political dialogue* will consolidate respect for the Sewel Convention. It is also useful to clarify what happens in the case that an agreement cannot be reached. It should be clear, in cases of disagreement, whether the UK Parliament should legislate without the consent of the relevant devolved legislature or not or possibly a delaying power.

Another illustrative example of a crucial convention is that requiring parliamentary approval before launching combat operations abroad. The British War Powers Convention exists, but it is not yet well established. Uncertainty about both the

[1128] European Union (Withdrawal) Act 2018 2018.
[1129] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.

operational mechanism and the enforceability of the convention, remain, and are subject to debate at every turn.[1130]

According to McHarg there are two main factors which affect ability of conventions to restrain politician's behaviour; first 'the sense of obligation felt by those actors subject to the convention to follow it'[1131]; and second 'the likelihood of political sanctions if the convention is breached.'[1132] Like other conventional powers, the functioning of this convention depends on a range of specific political circumstances.[1133] Strong summarises these political situations.[1134] First, it depends on the Prime Minister.[1135] Different leaders hold different beliefs about whether they should consult others before using force abroad.[1136] In 2013, David Cameron asked Parliament for authorisation for British airstrikes in Syria. Parliament rejected to possible UK military action against the Syrian government in response to the use of chemical weapons.[1137] In 2015, Parliament voted to authorise British participation in coalition airstrikes against ISIS in Syria. Yet in April 2018, when faced with exactly the same circumstances as Cameron in 2013 and proposing exactly the same action, Theresa May did not seek Parliament approval. Rather, she argued that the military action did not meet the criteria for the Parliamentary convention. One main difference may well be that Cameron certainly expected to win the vote, he was very surprised that Parliament did not choose to authorise the airstrikes in 2013[1138]. Strong argues that, May, coming after Cameron's experience, well have worried that she would not win any vote given the similar

[1130] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[1131] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[1132] Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), The UK Constitution After Miller (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3108502.
[1133] Patrick A. Mello, "Curbing the royal prerogative to use military force: The British House of Commons and the conflicts in Libya and Syria." West European Politics 40, no. 1 (2017): 80-100.
[1134] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1135] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1136] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1137] BBC News, 'MPs' Vote Halts UK Action Over Syria' (*BBC News*, 2013) <https://www.bbc.co.uk/news/uk-politics-23892783> accessed 25 January 2020.
[1138] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.

circumstances.[1139] Second, the working of the convention depends on the type of deployment proposed. Third, the decision to seek parliamentary approval depends on (a) whether the Government feels able to win a vote, and (b) whether it is willing to bear the costs of bypassing Parliament.[1140]

The executive continues to keep he power in the hands and thus the executive has been able to circumvent the legislature in deploying troops due to political nature of the convention. Even when parliaments enjoy participatory competences, governments can seek to exclude them from concrete decisions.[1141] Hence, the executive benefits from the flexibility of the convention. Indeed, there have been cases in which governments have successfully excluded parliamentarians from decision-making even where the parliament was arguably entitled to participate.

A hope for establishing the convention on a statutory footing would be that the government would be forced to consider any military action in depth before the event. It is argued by the Government that decisions regarding troop deployment "are political decisions for Parliament, not legal decisions for the courts".[1142] Turning the convention into legal rule would not be an appropriate solution to restrain Government's power in decisions on military action. The legislation would not necessarily improve, and might even weaken, Parliament's position. It is not desirable for judges to revisit decisions already made by MPs.[1143] McHarg argues that it is thus difficult to see how judicial enforcement of Parliament's right could amount to an illegitimate usurpation of its constitutional function.[1144] In short, there is a potential, and thus difficulty, that it raises more questions than it resolves regarding the enforceability issue. Hence, a government could ignore the convention without fear of a judicial response.

[1139] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1140] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1141] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 853-877.
[1142] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 853-877.
[1143] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 853-877.
[1144] Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 Modern Law Review 853-877.

On the other hand, considering the convention's political enforceability, this crucial convention can be manipulated by an executive if this is required by Government's political interests, because a government will be aware that it is unlikely to face serious consequences for disapplying the convention. As Strong remarks, bypassing MPs would be disproportionately costly, but this may not always be the case.[1145] Government, therefore, envisages that it can bear the possible political costs of ignoring the War Powers Convention. It is remarked by McCormack that 'Constitutional and legislative constraints on executive behaviour are only as good as the political will to uphold them.'[1146] McCormack further notes that:

> The failure to even retrospectively criticise the government's refusal to recall Parliament in April 2018 suggests Parliament does not seem willing to hold the government to account about this MPs did not punish the government for failing to consult Parliament in advance of military action despite the flimsiness of May's justifications, MPs chose to support the government. MPs failed to understand or to take seriously, that there is a fundamental political question of legitimacy at stake.[1147]

Mello remarks that the lack of interest in parliaments' role in security reflects a traditional view that regards parliaments as inconsequential actors in this policy field and their involvement in decision-making as inappropriate or unnecessary for several reasons.[1148] But he argues that When parliaments become involved in security policy contribute to the politicisation of security policy so that security policy becomes a 'normal' political issue.[1149] He argues that constitutional or legal rules affect the ability of parliaments to constrain or influence governments. The House of Commons of the United Kingdom against military involvement in Syria in August 2013 British MPs not only influenced government policy but even changed the rules of parliamentary

[1145] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1146] T. McCormack, (2019) British War Powers in Context and Conclusion. In: Britain's War Powers. Palgrave Pivot, Cham.
[1147] T. McCormack, (2019) British War Powers in Context and Conclusion. In: Britain's War Powers. Palgrave Pivot, Cham.
[1148] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations 3-18.
[1149] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations 3-18.

involvement for the future.[1150] It contributed to the establishing of the new convention, albeit that the convention remains less established than others.

The decision to deploy military forces is a crucial decision that sometimes has important political and economic consequences. The convention is too important to be left at the mercy of Government. Strong remarks that, “Compared to constitutional democracies, Britain’s War Powers Convention looks very weak, and argues that, while operation of the convention depends on circumstances, it can be strong enough to constrain executive action.[1151] He goes further and provide some examples of working of war power in the other countries.[1152]

> In Germany, for example, several smaller military deployments have been retroactively ruled improper by the constitutional court because the executive did not hold a vote in the Bundestag before authorising operations. In the United States, the conflict between the President and Congress about the legal status of the War Powers Resolution also illustrates the ability of governments to constrain parliamentary participation in decision-making. In Spain, the government has repeatedly circumvented Parliament when prolonging or modifying the mandate of ongoing operations, which has sparked protests by parliamentarians. Furthermore, Österdahl (2011) notes that, in Sweden, Parliament may be formally involved in decisions on the use of force, but parliamentary procedures often amount merely to the execution of policies ‘formed elsewhere[1153].

The current convention in the UK also requires safeguards. Mello draws attention that parliaments constrain government in matters of using the deployment of armed forces in a variety of different ways[1154] He suggests that in the unexpected circumstances,

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[1150] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations 3-18.
[1151] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations19-34.
[1152] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1153] James Strong, 'The War Powers of The British Parliament: What Has Been Established and What Remains Unclear?' (2018) 20 The British Journal of Politics and International Relations 19-34.
[1154] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations 3-18.

MPs can demand the ‘nuclear option’ of a confidence vote. Hence, at least some government MPs voting their own party out of office, it looks remote possibility.[1155] He further says:

> In less extreme circumstances, MPs can attempt to assert control of the parliamentary timetable. A number of days are reserved in each parliamentary session for debates on issues chosen by the opposition. These can be used to consider security policy, as, for example, happened in January 2014 when MPs debated the government’s response to the Syrian refugee crisis. MPs can also organise special debates in Westminster Hall, although these do not involve formal votes. Most dramatically, during the summer of 2002, a group of back benchers successfully forced the Blair government to recall parliament from its summer recess to debate on Iraq by arranging an ‘unofficial’ Commons sitting that risked embarrassing ministers.[1156]

But democratic authority is not just exercised through rules and regulations whether constitutional or statutory, but also through Parliament holding the government to account by exercising its authority over the executive.[1157] The latest episode in the rise and fall of the Parliamentary Convention reveals a democratic deficit at the centre of the most important policy realm of any state. Not only a formal democratic deficit, in that the convention can be ignored at will, but a more profound democratic deficit in that Parliament allowed it to happen and did not exercise even retrospective disapproval. It can be doubted that while the sovereign Parliament cannot enforce a convention, how a soft mechanism could work in this context. However, a quick and effective committee assessment report on the properly operation of the convention can be a guidance for both the parliamentarians and the government. If it is considered that a convention is not rooted yet, such clear guidance reports from a soft mechanism put pressure on the government to seek the parliamentary approval. Also, such a

[1155] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations.
[1156] Patrick A Mello and Dirk Peters, 'Parliaments in Security Policy: Involvement, Politicisation, And Influence' (2018) 20 The British Journal of Politics and International Relations 3-18.
[1157] T. McCormack (2019) British War Powers in Context and Conclusion. In: Britain’s War Powers. Palgrave Pivot, Cham.

report strengthens parliamentarians' hands while forcing the discussion on this matter in the parliament.

There should be certain pre-determined mechanisms to put pressure on a government to abstain from political self-dealing while making such important decisions. Such an enforcer in the UK aims precisely at ensuring parliamentarians discuss possible military action comprehensively and make their voices heard in public before taking such an important decision.

Of course, without a profound political will for it, the provision of an enforcer of the convention that is acceptable to all and will allow the continuation of the current convention, is unlikely. The executive is reluctant to allow any institutions or authorities to adjudicate such an important decision. For this reason, the enforcement mechanism should allow both MPs to succeed in translating it into tangible involvement and influence, and Government to assess and decide on troop deployment decisions in certain circumstances. In summary, flexibility of the convention should be protected but, at the same time, limitations on the application of the rule should be provided. Furthermore, such a mechanism should be feasible and practicable. Thus, a clear and well-designed safeguard on the convention can eliminate weakness of the rule to enable democracy to flourish. Otherwise, the current convention leaves democracy vulnerable.

This study has provided a picture of a possible future where the current Constitution Committee might become an effective guardian and independent adjudicator of the convention. In the UK constitutional system, the Constitution Committee's reports on conventions play an essential role in reassessing how to approach issues relating to conventional matters. The committee endeavours to understand conventional rules, focusing on the sources of uncertainty regarding conventions and recommending that the UK Government reconsider these as 'inadequate' and make them clearer.

This thesis argues that the committee can go further and, if it is objected that the war power convention has been broken, the committee can be tasked with dealing with specific cases. The Constitution Committee can address the disagreement in depth and draw an objective conclusion on whether or not the convention has been breached. Different options for breaking the deadlock on conventional disagreement

can be embraced by the committee. For example, it was concluded by a House of Commons committee that "Gordon Brown resigned at a constitutionally appropriate time. He did not have a constitutional obligation to remain in office for longer, nor to resign sooner".[1158] However, uncertainties on the matters that determine appropriate practice in the period post-election also uncover a lack of understanding of caretaker principles in the UK that does not have a written constitution. In this circumstance, the Committee provided clear guidance on caretaker conventions.[1159] Likewise, if the Committee is recognised as the enforcer of a convention, Government cannot easily ignore the rule. The committee offers an opportunity to clearly highlight a problem in depth and, thus, academics, experts, and politicians can together contribute their own deliberations and judgements to the issue directly, rather than leaving it to politicians alone to solve (or fail to solve) conventional matters. Although currently the committee seems to be doing this, it is important that it provides quick, clearer, and effective resolutions on the matters – not after military engagement take place. The committee usually works after the government already decided and engaged with military action. However, if the committee is able to assess the decision on the possibility of military action earlier at the beginning of the discussions and provides a conclusion. If the committee could clearly highlight that this matter should be discussed in the parliament, this would put pressure on the government and parliamentarians would be determined to discuss such delicate matters in the parliament. The purpose of the committee is not to make an evaluation on the necessity or legitimacy of the military action but to play a strong role to force the government to seek approval of the parliament.

After committee publishes a prompt assessment before engaging military action and then the committee should make another evaluation whether the government takes its advice. If the government did not seek the approval of the parliament, the committee will clearly identify whether this breaches the convention or not. Therefore, the committee will be a more effective mechanism than its current position.

[1158] House of Commons Political and Constitutional Reform Committee 2011:11.
[1159] Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 108.

This will help to improve the meaning and operation of the convention, making it clearer and more precise, and will help to keep recommendations politically realistic.

To conclude, in the current British Constitution, it cannot be said that each convention has a particular enforcement mechanism. Some conventions are still lacking such a safeguard, and there is no mechanism to conclude allegations about a break of convention. Ultimately, this means that the issue is left to politicians, which makes politicians the judges of their own case.

Some conventions are highly in political nature, and violation of these conventions brings about political concerns. The consequences of and sanctions for a breach of these rules are determined by a range of political circumstances. Resolving a dispute about conventional rules is left to the politicians themselves; for this reason, these groups of conventions are deliberately detailed in an official document without legal force. Hence, politicians are able to enjoy informational advantages in this realm, which puts them in a privileged position.

On the other hand, disrespecting some conventions also cause crucial constitutional principles to be violated. In the case of a breach or would-be breach of these conventions, the rules are converted into laws. Nevertheless, legal safeguards of conventional rules remain symbolic. It is therefore suggested that when there is a controversial operation of these vital conventions, an appropriate enforcement mechanism would provide a remedy for such a dispute. A pre-determined enforcement mechanism clarifies whether a conventional rule has been properly applied in a particular case. Recognising or providing a suitable enforcer will prevent their use (or rather misuse) for political self-dealing. Therefore, creating that kind of control mechanism on the operation of conventional rules will strengthen essential conventions and improve the quality of policy decisions and services.

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