

W201 The Individual and the State

Study notes on conventions

Definition

Dicey defined conventions as rules of “constitutional morality”...”not enforced by the courts”.

Another more modern definition is:

- rules of constitutional behaviour
 - considered binding by those who operate the constitution
 - but not enforced by the courts or parliament
- (Marshall & Moodie)

Sources of the constitution

Conventions are an important source but not the only one. Sources include:

Statute and common law	(enforced by the Courts)
Conventions	(political sanction only eg facing the electorate at a general election)
Law and custom of parliament	(enforced by the speaker)
Usage	(not enforceable at all)

examples of sources:

Laws	Bill of Rights 1689, Human Rights Act 1998
Convention	government must resign if defeated on a vote of confidence
Law and custom of parliament	a bill must be read three times in each house
Usage	the Prime Minister lives at No 10 Downing St.

Examples

Conventions operate in different areas of the constitution. The following examples illustrate this.

Controlling royal powers or the prerogative

- by convention the Queen must assent to bills which have passed the Commons and Lords (although legally the Queen can refuse)
- the Queen can only dissolve parliament on the advice of ministers

Making parliamentary government work

- Perhaps the most important convention is that a government that loses a vote of confidence in the Commons must resign or seek a dissolution.
- the Prime Minister must be a member of the Commons (not Lords)
- ministers are individually and collectively responsible to parliament

The independence of the judiciary

- judges shall not be involved in political life
- the executive does not criticise judges

Is there a test for deciding if a convention exists?

Academics have suggested tests from time to time. Professor Jennings test has been adopted by the Supreme Court of Canada in the case of **Reference Re Amendment of the Constitution of Canada** 1982.

Professor Jennings test is :

- 1 What are the precedents?
- 2 Did the actors in the precedents believe they were bound by the rule ?
- 3 Is there a constitutional reason for the rule?

General

The strength (and the weakness) of conventions is that they are flexible. They **supplement** rigid legal rules.

They are not written down (unlike laws) and are able to change over time (eg the requirement that the Prime Minister is a member of the Commons not Lords - in the 19th century most PMs were in the Lords - since 1902 none have been).

There is no legal sanction if they are broken.

Their usefulness is illustrated by the fact that countries with written constitutions have conventions.

They introduce **predictability** into the constitutional behaviour of politicians and monarchs without the **rigidity** of written rules.