CONVENTIONS AND DEMOCRACY

The purpose of this article is to consider how the introduction of a special Parliamentary select committee could extend democratic influences in the evolution of binding non-legal constitutional practices.[1] Following a consideration of other possible avenues of reform, it will be suggested that whilst political actors should continue both to initiate new conventional practices, and to interpret and to adapt existing ones, an enhanced parliamentary engagement in the scrutiny of conventions would contribute to a more accountable government. There should be a systematic parliamentary participation in the debate surrounding the evolution and interpretation of conventions, which would require the executive to justify and explain constitutional change. A unique kind of select committee having special orders of reference is proposed to fulfil these purposes.

Background and Context

If Constitutions are about resolving the struggle of rival contenders for power, New Labour's claims for its People's Constitution falls to be evaluated in that context. It suggests a radical re-alignment in favour of the regions, local communities and the individual.[2] Devolution for Northern Ireland, Scotland and to a lesser extent in Wales[3], the enactment of the European Convention on Human Rights[4], the abolition of the hereditary peers' right to sit and vote in the Lords[5], new governmental structures for London, including a directly elected mayor, with extensive powers over such matters as transport, police, culture and the environment[6] proclaim a resolve to reunite power with the people. But this is not all. To these proposed measures must be added proposals for the radical reform of local government[7] that promises elected mayors in cities outside London, local referendums, more frequent local elections, an end to

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1 Hereinafter the term conventions will be used.

2 Labour first committed itself to this policy in *Meet the Challenge: Make the Change*, Labour Party, 1989.

3 See the Scotland Act 1998 and the Government of Wales Act 1998.

4 The Human Rights Act 1998.

5 The House of Lords Bill 1999

6 Greater London Authority Bill 1998

7 White Paper, *Modern Local Government: In Touch with the People* Cm 4014.

rate capping, as well as published "best value" audits to replace Compulsory Competitive Tendering.

Central Government will not escape continuing reform designed to enhance the openness and accountability of the administration. The Select Committee on Public Administration is conducting a wide ranging study into how central government can be made effectively and properly accountable to the citizen for the services it provides.[8] This study will consider mechanisms for ensuring accountability, openness, arrangements for appointments to public bodies, as well as ways of democratising the administration by an increased public participation in the design, monitoring and implementation of policy which affects them.

But there are already doubts about the likely achievement of the 'People's Constitution'. Notoriously, the Human Rights Act 1998 does not entitle the courts to disapply any Act of Parliament which might violate human rights. And the bold proposals for the reform of local government seem unlikely to be fully implemented.[9] The devolution of power to the Scottish Parliament does not entirely liberate Scotland from the centralised control of Westminster.[10] And there is a reluctance on the part of government to address the asymmetry of United Kingdom government under which the citizens of the English regions have less autonomy than their Welsh and Scottish counterparts.[11] Moreover, the related but separate question of progress towards reform of the

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8 This was announced in Press Notice No 37 Session 1997-98, 13 November 1998.

9 The Local Government Bill 1999 replaces CCT with a duty to achieve best value in the performance of council services, but many of the other radical proposals of the White Paper have been abandoned.

10 The Scotland Act 1998, s.28 (7) states that the Parliament of the United Kingdom's power to make laws for Scotland is unaffected by the devolution of law making powers to the Scottish Parliament. The Westminster Parliament will also provide resources for the Scottish Parliament.

11 Regional Development Agencies will be created under the Regional Development Agencies Act 1998. They will formulate policies designed *inter alia* to promote the economic development of their area. The Agencies, for which there will one for each region listed in Schedule 1 of the 1998 Act, are to be comprised of between 8 and 15 members appointed by the Secretary of State. By their remit and composition the Agencies fall significantly short of addressing the democratic asymmetry between England on the one hand and Wales and Scotland on the other. Only London will have an elected body. It is true, however, that regional development agencies may be accountable to regional chambers (where they exist in the RDA's jurisdiction) and must take into account the views of the regional chamber (s.8 of the 1998 Act). They can be required by the secretary of state to furnish it with information and answer its questions under s.18 of the 1998 Act. The present government is unwilling to allow the English regions to have that greater autonomy which would allow them to go beyond the remit of the Regional Development Agencies, perhaps by establishing their own Parliaments. This is so notwithstanding that the logic of devolution is towards a federal structure for the UK. Whether this imbalance will prove to be satisfactory will depend in part upon the future reaction to devolution of the English, for whom, at present, the issue seems to be neither live nor controversial.

electoral system seems tardy. Similarly overdue is a Freedom of Information Act.

There are also profoundly undemocratic elements of the constitution which escape the reforming gaze altogether. Principal amongst these is the system of conventions of the constitution which, notwithstanding their profound effects, inhabit the darker almost furtive regions of political consciousness.[12] Conventions have allowed politicians to acquire former monarchical powers ostensibly to create by informal means a system of responsible and accountable government which is still absent in the formal constitution. The formation, adaptation and deletion of conventions is a continuing process which allows the Executive to determine what the constitution is. Rules which have the purpose of limiting autocratic power can now be used by governments to determine their own powers, albeit that this may be subject to the constraints both of public and media pressure and the scrutiny of parliamentary select committees.[13] As we shall see conventions are often established in the absence of the participation of democratic institutions or accountable individuals.

The System of Conventions: Preliminary Remarks

[12] Whilst the general system of conventions has received scant *political* attention, particularly in the context of devolution, the particular conventions of ministerial responsibility, which have proved to be central to the working of the constitution, have been examined in recent years. In particular, the true scope of the principle of individual ministerial responsibility to parliament and the relationship between ministers and civil servants has been subjected to particularly close scrutiny. The Scott Inquiry into arms sales to Iraq (*Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* HC (1995-1996) 115) in which ministers were found to have given inaccurate, incomplete or misleading answers to Parliament, the Nolan Inquiry into Standards in Public Life (1995) as well as in the controversies surrounding such events as the dismissal of the Head of the Prison Services Agency, Derek Lewis, and the Westland affair in 1986 have all been prominent in arousing controversy and criticism as has the major re-structuring of government involving the creation of Executive Agencies. But this criticism has generally been focused on establishing a greater clarity of the scope of ministerial obligations as well as due respect for them. The broader question of the suitability of the present regime for establishing and enforcing standards of behaviour through conventions and the tensions between the stated political imperatives of devolving power and enhancing accountability has not effectively been addressed.

[13] See e.g., Public Service Committee: First Report, (1996-97), *Ministerial Accountability and Responsibility* HC 234.

The foreigner newly arrived on these shores might well find it quixotic that a government proclaiming the "people's constitution" appeared passive in the face of Vernon Bogdanor's *bon-mot* that it is not Parliament but the government of the day which determines what the constitution is.[14] Brazier has concluded that "(t)here is no British culture which regards the constitution as belonging to everyone, rather than just the Government of the day."[15] Indeed, Hennessy has gone further and argued that the system of conventions is not only the architecture of the executive but also that it is so mysteriously elusive that it is not possible for the citizen even to know what the constitution is, let alone influence its content.[16] And Gladstone's *dictum* that the British Constitution presumes more boldly than any other the good faith of those who work it is hardly compatible with the principle of accountable government upon which the modern constitution is supposed to be founded.[17]

The absence of reflection is regrettable now that the United Kingdom has crossed the threshold of a fundamentally altered constitutional stage under which power has been devolved to Scotland and Wales. This major re-alignment of power will inevitably lead the constitution towards a rich vein of new conventional practices necessary both to manage aspects of the relationship between the devolved institutions and the United Kingdom Parliament and the internal operation of these institutions. The former is particularly important because the legal settlement is not sufficiently comprehensive to solve some of the major questions which remain to be addressed. Future conventional practice may, for example, supply the answer to the question of who should advocate Scottish and Welsh interests in Europe? The same may be true in matters of domestic policy, where a settled practice may evolve as to who should be the appropriate advocate of English interests. Conventions may also come to limit the influence which Scottish and Welsh MPs will have on exclusively English policies. More controversially, conventions may become paramount in preventing conflict between a devolved institution and the United Kingdom Parliament. Although the legal boundaries of the devolved settlements may be statutorily determined it is not impossible to imagine pragmatic future adjustments of power by

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14 V. Bogdanor, quoted in Hennessy, *The Hidden Wiring*, Gollancz, 1995 at p. 26

15 Brazier *New Labour, New Constitution* (1998) 49 NILQ 1, 6.

16 Hennessy, *loc.cit.* esp. at p. 45-6.

17 *Gleanings of Past Years*, vol. 1 (John Murray: 1879), p. 275.

conventional means in order to avoid outright conflict between the two Parliaments or the two legal systems.[18]

The present order under which government of the day is the mid-wife of the conventional practice stands against the logic of devolving power. The question of making constitutional evolution more accountable goes far beyond the devolution question, but it is this issue which, perhaps more than others, most underscores the importance of addressing the democratic deficit in the evolution and re-invention of fundamental aspects of the UK constitution. Can New Labour's People's Constitution be meaningful without a more radical reform including measures to democratise conventions?

(i) The Creation of Conventions

Central to the proposal for reform is the nature of conventions, their source, and the means by which they are established. Conventions are at the kernel of an "insider's constitution".[19] The weakness of Parliament, which has been criticised as a mere mask for party power,[20] has been inadequate to democratise this heartland of our constitution. Scrutiny is compromised where members of parliament behave as partisans rather than as parliamentarians.

First it is necessary to acknowledge the notorious absence of agreement amongst writers of authority about what constitutes a convention.[21] Conventions, as distinguished from mere habits, practices or usages, are generally accepted as prescriptive and mandate certain behaviour as either constitutionally desirable or necessary. The definition offered by Sir Ivor Jennings is widely accepted[22]. He stated that the fulfilment of three tests is

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[18] Perhaps this might arise if the Scottish courts applied an Act of the Scottish Parliament passed in respect of a reserved matter notwithstanding that such a measure would formally be invalid: see Scotland Act 1998, s28 and Schedules 4 and 5.

[19] See generally Hennessy *loc. cit.* at p. 86 who refers to "the enduring golden triangle" of Cabinet Office, No 10 and Buckingham Palace. *Questions of Procedure for Ministers*, dating from at least 1945, is an example of this "inner" process and shows how the Executive has framed and amended rules on accountability for itself. The rules the code contained were established by respective Prime Ministers, not Parliament. Only following the traumas of the Scott Inquiry has Parliament approved part of the new Ministerial Code. See now Ministerial Code, Cabinet Office, July 1997, and the Resolutions of the House of Commons and House of Lords on ministerial accountability (H.C. Debs., vol. 292 cols. 1046-7, March 19th 1997; HL Debs., cols. 1055-62, March 20th 1997).

[20] A Marr, *Ruling Britannia*, Michael Joseph: 1995 pp. 138-9.

[21] See generally Munro, *Studies in Constitutional Law*, Butterworths 1987, and Alder, *Constitutional and Administrative Law* 3rd edition, Macmillan, 1999.

[22] But has been subject to criticism, see e.g., J. Jaconelli, *The Nature of Constitutional Conventions* (1999) 19 Legal Studies 24.

necessary to identify a convention.[23] First, are there any precedents; secondly, do those operating the constitution believe that they are bound by a rule? thirdly, is there a constitutional reason for the convention? This has been accepted by the Canadian courts.[24]

Central to the present argument is to identify who influences the establishment of conventions. Who participates in the process? It appears that conventions often evolve from practices of government, and may only be accorded constitutional status when it is accepted and recognised that the practice prescribes certain behaviour.[25] Agreement that the practice should be obligatory is a self conscious means of creating a convention. Alternatively, a convention may derive from an expectation that an existing practice must be observed. Consent is also important in this second alternative because, in its absence, there would be no expectation that freedom of behaviour is constrained by the need to follow the practice. If that expectation no longer survives the obligation to observe the practice ceases and the convention disappears.[26]

The difficulty which has never satisfactorily been resolved, is to identify whose consent must be forthcoming. Does it depend on the opinion of the community of political actors? If so, who are these? Does it require their unanimity? Is merely a consensus required? The issue is an important one when it has to be decided whether a convention has been either breached or altered or destroyed. The failure to resolve these central questions appears from typical statements of respected authorities. For example, De Smith and Brazier suggest that a convention arises only when the usage is accepted by everyone whom it affects as well as 'authorities' on constitutional affairs who believe that this behaviour is mandatory.[27] This avowal of a plutocratic system is common to many

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23 *Law and the Constitution,* 5th edition, 1959, p.136 .

24 *Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 125 DLR (3d) 1.

25 The convention that the royal assent should not be refused is an example of this. It is described in De Smith & Brazier, *Constitutional and Administrative Law*, 7th edn (Penguin: 1994).

26 E.g. the Tables Officer has abandoned the previous practice of blocks on parliamentary questions: see the Public Service Committee's 2nd Report on Ministerial Accountability and Responsibility HC 313.

27 De Smith & Brazier, *loc. cit.* p. 41. Andrew Marr's work suggests that the opinions of authoritative and influential political actors carry much weight. See A Marr *loc cit.*

writers of authority.[28] There is no suggestion amongst them that democratic participation is necessary.

One possibility is that conventions can only be created or sustained where there is a *consensus* amongst political actors that a practice has become or should remain binding.[29] If the obligation to observe a practice is only sustained where unanimity is required every breach would destroy the convention since each political actor who might be thought to be bound by a convention could destroy it by a withdrawal of that consent.

If this is correct there remains to be identified the relevant group or groups amongst whom a consensus should be identified. Commentators such as Hennessy,[30] Marr[31] and Horwitz[32] expose a system in which the interpretation of the constitution, and especially of conventional practice, is a matter for ministers, the cabinet office, civil servants and palace officials. These are the individuals who are most likely to have access to information about the precedents, which means that it is they who will interpret and thereby give meaning to the rules. Even De Smith and Brazier conclude that royal counsellors and civil servants are likely to be the custodians of this knowledge which may only be revealed publicly when it is no longer sensitive or controversial.[33]

Sometimes conventions can arise from the actions of merely one of these groups of actors. For example, ministers can create conventions without recourse to Parliament. There are many possible examples, of which two may be offered.[34] In the first of these the Cabinet, without consulting Parliament, probably created a convention in 1946 relating to ministerial memoirs,[35] and

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[28] Sir Kenneth Wheare, for example, defined conventions as "rule(s) of behaviour accepted as obligatory by those concerned in the working of the constitution", *Modern Constitutions,* p. 122. Professor O Hood Phillips, stated that conventions are "rules of political practice which are regarded a binding upon those to whom they apply." *Constitutional and Administrative Law*, 7th edition, 1987, p. 113.

[29] See Jaconelli *supra*.

[30] Hennessy, *The Hidden Wiring*, Gollancz: 1995

[31] A Marr *loc. cit.*

[32] Morton J Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?* [1997] OJLS 551.

[33] De Smith & Brazier *loc. cit* p. 43 point to the significance of political and royal biographies.

[34] *Questions of Procedure for Ministers* (now the *Ministerial Code*) is an example promulgated by the Prime Minister.

[35] See Report of the Radcliffe Committee on Ministers' Memoirs Cmnd 6386 (1976) paras 1 and 2.

purported to do so in 1924 when it resolved that no politically sensitive prosecutions could proceed without Cabinet approval.[36]

This is not to say that the process of creating conventions is altogether impervious to the external influences of public opinion and media campaigns. Public pressure may be relevant in persuading politicians that practices might become conventions, or lose their conventional status. Max Beloff's contribution to *The Times*[37] questioned the practice of almost twenty year's standing (a convention?) which maintained that no new hereditary peers should be created. No doubt Government advisers, attuned to the faintest vibration of public opinion, offered appropriate advice before this important constitutional practice was changed the following year. Interpretational disputes have also been debated in *The Times*, as occurred in 1950 concerning the circumstances in which the sovereign might refuse a dissolution.[38] Nevertheless, the process by which governmental practice becomes constitutional is largely one which takes place in the absence of public scrutiny and debate. The weakness of Parliament in the scrutiny of the executive is both an argument for reform and a a warning about the very substance of it.[39]

(ii) The Purposes of Conventions

Conventions serve a number of purposes not all of which are easy companions of democratic and representative government. At one level it is possible to assert that conventions rather than laws have provided an important evolutionary mechanism for the progress from a monarchical to a democratic constitution without the need for a series of divisive statutes repealing the sovereign's legal powers.[40] Others, including Horwitz, for instance, have argued that conventions were developed as undemocratic devices to reassure the ruling class that constitutional fundamentals would continue to be developed within government largely beyond the influence of the rising middle

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[36] Cabinet Minute of August 6th, 1924, see Parl Debs H.C. vol 179 cols 345-355. Jaconelli *loc. cit.* suggests that an agreement could only become conventional if regular compliance were subsequently observed.

[37] The Times 1st November 1982

[38] The Times 24 April 1950, (Lord Simon, former Lord Chancellor), 26th April 1950 (Roy Jenkins) and 2nd May 1950 (Sir Alan Lascelles, but the letter was published under a pseudonym).

[39] The proposal considered below is that a select committee should be established but that it should be advised by a panel of experts from outside the political process.

[40] A W Bradley and K D Ewing, *Constitutional Law*, 12th edition, (Longman: 1997) at p. 24.

classes following rapid extension of the franchise after the Reform Act 1867.[41] Conventions, according to this interpretation, fortify a class barricade against the triumph of democracy. This makes it all the more surprising that New Labour has omitted reform of conventions from its People's Constitution.[42]

(iii) Conventions as Limits on Governmental Power

If the purpose of a constitution is to impose external controls on government, then conventions which are generated *within* government must invite concern. As we have seen, conventions may be established, abandoned or altered at will by the Executive, often without reference to Parliament. Even those conventions which have the fundamental role of establishing key parts of the constitution of responsible government are not immune from subtle re-definition. Concerns are aroused when such a re-formulation dilutes the obligations of those advocating the change. For example, the conservative government notoriously advocated a supposed distinction between ministerial responsibility and ministerial accountability which was probably intended to limit the then existing conventional obligations of ministers[43] But by what authority do such individuals determine the nature shape and timing of the reforms which conventions introduce?

(iv) Conventions and the Constitution

There is a problem that conventions obscure the constitution. This raises three issues. The first of these is that conventions offer a conception of the constitution that assumes that change and flux are continuous and permanent. At any one time it would be impossible for the scholar to identify which practices have constitutional status as some are falling into desuetude whilst

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41 Morton J Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?* [1997] OJLS 551.

42 Some might argue that in this omission Labour identifies its new constituency.

43 See *Taking Forward Continuity and Change* Cm 2748 pp 27-8; see also the *Armstrong Memorandum* of 1st December 1987. The accountability/responsibility distinction was in substance accepted by the Scott Inquiry (*Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* HC (1995-1996) 115 Section K Vol. IV) and Sir Richard Scott writing extra judicially [1996] PL 410. But it has not been universally upheld: see The 2nd Report of the Public Service Committee (1995-6) HC 313, para 21 which rejected the bifurcation of accountability and responsibility and doubted whether in practice the distinction could be made.

others are emerging.[44] This means that there is always a debate about which practices are constitutional. The fundamentally important Prime Ministerial document *Questions of Procedure for Ministers* which governed, inter alia, the scope and meaning of ministerial responsibility to Parliament once inhabited this disputed *terra incognita.* [45]

Second, where fundamental conventional rules are acknowledged, their scope and application is subject to debate. (E.g. the powers of the sovereign to refuse a dissolution). This simply raises the pragmatic problem that in the fog and smoke of a dynamic system the curious surveyor cannot fully delineate the squares and avenues of the constitution, and that this can only properly be the task entrusted to the retrospective gaze of the historian.[46] But there is a third less pragmatic reason why the mystery of the constitution will be impenetrable to contemporary study. This relates to the enduring endemic secrecy of British government and its mistrust of open debate. Hennessy has discovered that it is impossible for the citizen to know what the constitution is, for the answer lies in a file of precedents held in the private office of the Cabinet Secretary.[47] Presumably only the initiates of the civil service and ministers are admitted to behold the contents of the file, and the application of the precedents it contains lies within their exclusive judgment. It is understood that it is not made available to Parliament.

(v) The Frailty of Conventional Principles.

Conventions mean that certain practices of politicians vary legal rules. It is trite law that the Sovereign's legal powers are vastly different in substance from those which she is constitutionally permitted to exercise. There may be historical reasons why this is so, but does it remain necessary to neutralise redundant constitutional law by reference to undemocratic practices? Is it

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44 Baldwin quoted in Ivor Jennings, *Cabinet Government*, Cambridge University Press 1936, p.12.

45 See now *Ministerial Code*, Cabinet Office July 1997, and the Resolutions of the House of Commons and House of Lords on ministerial accountability (H.C. Debs., vol. 292 cols. 1046-7, March 19th 1997; HL Debs., cols. 1055-62, March 20th 1997.

46 This may be so, but it is equally an issue where some laws are concerned. However, the courts provide a mechanism for the interpretation of legal rules. Parliament may deliberately enact laws in which the meaning of statutory words is unclear. This relies on the courts to supply meaning. For example, many questions surrounding the possible meaning of working time in the Working Time Regulations 1998 SI 1998/1833 have deliberately been left to judiciary to determine. The absence of such an institution means that conventions are liable to be interpreted by those who are bound by the rule itself. If a sufficient consensus exists an inconvenient rule can simply be ignored and the constitutional obligation itself destroyed.

47 Hennessy, *loc.cit.* at p.45-6.

possible to adhere to that aspect of the Rule of Law which is concerned with universality of law, that the law as administered is the law as declared? The logic of *R v. Secretary of State for the Home Department ex p Fire Brigades Union*[48] is that government does not possess the power to disapply the law.

Diceyan orthodoxy has it that the defining characteristic of a convention (as opposed to a law) is that it is incapable of judicial enforcement. It is a political question whether breach of a convention attracts a sanction; indeed conventions are so fluid that a breach (where no objection is raised) could destroy the convention breached. Important constitutional values are thus given life in mechanisms which are exceedingly vulnerable. Mass and disciplined political parties enthused by ideological purposes are, when in government, effectively unrestrained by a "flexible" constitution, which may simply dissolve before them. The likely impending confrontation between the government and hereditary peers over the abolition of their voting rights provides one context in which a group with limited democratic credentials may press their agenda in defiance of the elected government, and convention will be inadequate to prevent it. The failure of the former government's conventional relationship with Parliament was also revealed in the Scott Inquiry. This concluded that numerous examples came to light of ministers failing to give full information about the policies, decisions and actions of government regarding arms sales to Iraq[49] and that this undermined the democratic process.[50] Answers to parliamentary questions in the affair had been "designedly uninformative"[51] because of a fear of adverse political consequences if the truth were revealed.

The Future of Conventions

Many scholars have speculated whether the solution to these difficulties lies in converting constitutional practices into legal rules. According to one argument the advantage of this might be to enhance both certainty, and durability, and provide a mechanism for the enforcement of constitutional obligation. This is not without its disadvantages, and this is considered further below. A less

48 [1995] 2 WLR 1. See further, Raz *The Rule of Law and its Virtue* (1977) 93 LQR 195. However, the proposals in this article designed to enhance the democratic legitimacy of conventions do not fully address this problem.

49 *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* HC (1995-1996) 115, K8.1 para 27.

50 *Ibid*. D4.56-D4.58.(D. 3.107).

51 *Ibid.* D. 3.107.

ambitious version of this model for reform posits the familiar suggestion that some individual conventions might "crystallise" into law[52] whereas a comprehensive transposition would constitute the codification of conventions.

Crystallisation

Allan suggests that in recognising a convention the courts may express approval for the principle that underlies it.[53] As he argues, the law/politics dichotomy disintegrates where courts evolve a legal rule which underpins a convention. This is not without precedent and it would seem that the courts can convert important practices into rules of law. Examples of this include *Carltona Ltd v. Commissioner for Works*[54] *R v. Home Secretary ex p Ruddock* [55] and *A-G v. Jonathan Cape Ltd.*[56]

A counter argument to this kind of incorporation, at least if applied to most conventions, is that it poses questions about a court's role under the separation of powers. If courts enforce conventions their existence becomes "fixed" as a matter of law by judges rather than politicians. This recalls the familiar argument that judges may be lead into the political arena. It is also possible to assert that the demands of political morality ought to be a matter of collective decision reached through the medium of politics and so fall outside the proper scope of the judicial function.

To take the example of ministerial responsibility, even if the obligations underpinning this convention were enacted into law, the task of applying and enforcing that obligation would considerably enlarge the judicial function within the present understanding of the separation of powers. The allocation of blame for a policy failure is a political matter not a legal issue. This means that the question whether a minister's conduct in office is such that he or she should resign would seem to be a non-justiciable question, depending as it does on party support, the timing of the discovery, the support of the prime minister and cabinet and the public repercussions of it.[57] As conventions are

[52] T R S Allan, *Law, Liberty and Justice*, Clarendon, 1992. Contrast Munro *loc. cit.* at p. 48 *et seq.*
[53] T R S Allan, *loc.cit.*

[54] [1943] 2 All ER 560.
[55] [1987] 2 All 518.
[56] [1976] QB 752.
[57] But the issue is not so clear if a minister denied an obligation to answer *any* questions in the House of Commons. What would prevent the court granting a declaration that such behaviour was

enforced as a matter of political dynamic, some argue that political flexibility might be curbed if the courts were invited to pronounce on the breach of a conventional obligation (assuming the courts were willing to do so). There are concerns about embroiling the courts in the political process, and it is by no means certain that the courts would exercise a jurisdiction over issues which traditionally have not be seen as justiciable. There is no doubt that issues such as these are sensitive ones posing questions about the very nature of the judicial function.

Codification of Conventions

The case for codification often involves two distinct positions. The first asserts that conventions should both be codified *and* given legal force, perhaps within a written constitution. Alternatively, conventions might be codified within an authoritative text with no legal status and so remain as non legal political practices as at present.[58] The former position is tainted for the reasons discussed above which are concerned with the unsuitability of the judicial process to determine political questions. The latter argument, which represents "soft codification" is essentially a process of elucidation. The conventions so codified would be recognised as and declared as such.[59] This would address the undesirable lack of precision in the scope of some conventions, and it would enable us to say with certainty which usages are and which are not conventional. For example, the present lack of agreement about the conventional powers of the monarch to dissolve Parliament could result in damage to the monarchy by accusations of political partiality if the power were exercised. Establishing the certainty of conventions could safeguard the neutrality of those who apply them. [60]

The first objection to this latter model of codification would be the obvious practical difficulties in systematic codification. It is not possible at any one time to list all practices which have constitutional status. Political

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unconstitutional? It is also the case that conventions on ministerial conflicts of interest exist in parallel with the rule against bias in Administrative law. Arguments such as these suggest that the case against juridification can be over-stated.

[58] Although even under this version, which has been adopted in Australia in relation to 34 constitutional practices, it is likely that Australian courts will cite those conventions which the process recognised and declared. C J G Sampford, *"Recognize and Declare": an Australian Experience in Codifying Constitutional Conventions.* [1987] OJLS 369.

[59] As in Australia. See further below.

[60] This was one purpose of codifying conventions in Australia, see Sampford *loc. cit.* at p. 371.

disagreement about the scope about some conventions might only be overcome by compromise, perhaps entailing an unhelpful lack of clarity in drafting. Soft codification would also place at risk the flexibility of the constitution and inhibit its evolutionary role in maintaining its relationship with contemporary political values.[61] This is of paramount importance in the UK at present because of the constitutional adventure of devolution. As we have seen, future tensions in the relationship between the UK parliament on the one hand, and the devolved institutions of Scotland, Wales and N Ireland on the other are unlikely to be avoided, especially if there are democratically supported pressures for an increase in devolved powers.[62] Solutions to these problems will gradually emerge as the new constitutional structure is made to function. Its creation would not be assisted by any form of codification. Conventions will also be developed within each devolved institution, and there may be conflict between existing UK conventions and those of the devolved institutions.[63]

There are further objections apart from those associated with codification immediately following fundamental constitutional change. As far as those obligations that were *included* in the code were concerned, further evolution might not formally be precluded, but the weight of a codified precedent would surely establish a presumption in favour of continuity. The purpose of elucidating conventions in this manner would be to provide rules which politicians should follow. Although codified practice might in theory be expected to develop, the reality would be that politicians would risk controversy if they departed from an authoritatively declared precedent. By virtue of codification there would *ex hypothesi* be a strong presumption against development and in favour of the status quo. Would we today regard a codified set of early nineteenth century conventions as beneficial?

The subsequent addition of new obligations *outside* the code would remain a real likelihood. The evolution of new conventions surrounding the code and extending it could itself question the value of this model of reform. Finally,

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[61] Although the achievement of conventions in modernising the constitution can be over-emphasised. For example, the application for judicial review rather than the convention of ministerial responsibility might have been a more effective means of making the executive accountable in the twentieth century.

[62] It might become conventional that the UK Parliament would not resist claims for greater autonomy if this were a manifesto commitment supported by a majority of voters in an election. The alternative to this pragmatism might entail conflict with grave consequences.

[63] For example it need not follow that the Scottish Parliament would follow English practice in relation to the conventions of ministerial responsibility. An exclusively Scottish convention might evolve regulating the relationship between Agency Chief Executives and Scottish Ministers.

even codified rules have meaning only according to the interpretation placed upon them. Re-interpretation would not be prevented.

Summary

Thus far consideration has been given to the debate about the form of constitutional practices. This debate contains worthy underlying assumptions, but fails to resolve serious problems. The assumptions are that many of the obligations which are currently conventions (whether or not enacted into law) are worth preserving; that the constitution should evolve efficiently; and that conventions in their current form locate power in the hands of unaccountable and unelected individuals. The unresolved problems are that judicial enforcement of conventions following the crystallisation or hard codification would lead to a new, controversial and probably impossible role for the judges under the separation of powers, as well as other constitutional arrangements.[64] Soft codification (even if possible) would not preclude other non-codified conventions from becoming established. The problem has been to identify a mechanism which will substantially achieve enhanced democratic control without the deficiencies to which reference has been made.

A Role for Parliament[65]?

The undemocratic authorship of constitutional change would be less repugnant if it were subject to more far-reaching scrutiny, challenge and debate. This suggests a role for a parliamentary body in scrutinising the establishment of new conventions. According to this proposal, two fundamental issues need to be separated. The first of these issues touches upon the creation of new conventions, their adaptation, interpretation, application and deletion. This is

64 In the unlikely event that the courts were to develop legal rules in parallel and co-extensive with the convention of ministerial responsibility, they would not have the power to order that a minister who violated those rules be dismissed from office; the matter would be non-justiciable.

65 The following discussion concerns the Westminster Parliament. The Scottish Parliament and Welsh Assembly will undoubtedly also wish to evaluate and adapt the conventions which will emerge within their own jurisdictions, as well as those which will come to regulate the relationship between Westminster and the devolved institutions. In the former case, for example, Scottish conventions might emerge governing the appointment of the Scottish First Minister. In the latter category, there will be conventions regulating the circumstances in which the Westminster Parliament might resist a Scottish Bill receiving the Royal Assent where this Scottish Bill ran counter to Westminster's policies.

essentially a matter of identifying the constitutional structure, and monitoring whether constitutional principles are respected and applied. The second issue concerns the enforcement of those conventions which exist for the time being. At present each of these issues is merely a matter of political judgment.

It is proposed that the evolution of new conventions, the re-forming and adaptation of existing conventions, their application or deletion should continue, as at present, to be a matter for those political actors who operate the constitution. Their conclusions would, however, be subject to the scrutiny of a select committee which would be of a new kind having power to make recommendations affecting these issues. The committee would also have the power to suggest possible reform to conventions, either by their re-interpretation, their abolition or by the creation of new conventions. It might propose such reforms, but it could not require their implementation. The question whether conventions are applied would also fall within its inquiry. It would also address the further need to examine not only individual practices, but also the relationships between practices within a more fundamental theory of the constitution, posing such questions as: How should the constitution function? What purposes should conventions serve? [66] The Committee would have a permanent existence and present its report and recommendations annually to Parliament. The enforcement of conventions would remain as at present, a matter for the political process beyond the scrutiny of the Committee.

The reasons for this proposal and the means by which it might work are considered below, but it is first necessary to consider its jurisdiction.

Jurisdiction

A significant problem would be the opacity of conventional change. It may be a matter of concern that the constitution develops in a manner which is largely invisible to the general public - and, in part, deliberately kept secret from us- but it is all the more disconcerting to find that senior civil servants are not clear

[66] As Brazier observes, there are currently no conventions which require popular approval even for fundamental constitutional change, and no special majorities are required for constitutional Bills. Issues such as these which touch upon the democratic legitimacy of the constitution, are matters which the Committee might usefully examine, along with the question as to whether constitutional reform ought to proceed only on a multi-party basis. See Brazier *New Labour, New Constitution* (1998) 49 NILQ 1, 8.

themselves whether certain practices are conventions.[67] This exposes a problem of jurisdiction: if the committee were to have orders of reference requiring it to consider the conventions of the constitution, it begs questions of definition. First there must be agreement about what is a convention.[68] But even if this matter is settled there will be problems in identifying which constitutional practices are accepted as binding because this may be a matter of genuine dispute. However, the significance of the lack of agreement as to what constitutes a convention can be overstated. The proposed committee ought to concern itself in all non-legal practices which are relevant to the constitution. Since this is itself an indeterminate issue the select committee should investigate and consider any practices which, in its opinion, might have constitutional significance.

Reasons for the Proposal

The Role of the Select Committee.

It would be important to preserve the advantages of the present system whilst allowing for democratic participation. The executive should have, as at present, the power to initiate and propose changes to conventions, but it is important to ensure that the constitution for the time being is not determined by the executive in the absence of parliamentary participation. The *initiation* of possible constitutional change and the *interpretation* of the scope of constitutional practices would thus be as at present. The proper scope and meaning of the constitution ought to be a matter which engages a democratic process. This would in part be achieved by the composition of the committee as well as its annual report to Parliament, which Parliament may choose to debate.

This power of initiation would preserve the adaptability of the constitution, which is one of the key advantages afforded by conventions. Conventions permit modernisation notwithstanding the deficiencies in the formal constitution. Those who are daily engaged in the business of government are those most likely to identify the need for change and be in a position to propose

[67] This can be seen in the exchange between Sir Robin Butler and Peter Hennessy concerning what the document then known as Questions of Procedure for Ministers. This is described by Hennessy in *The Hidden Wiring, loc.cit.* at pp. 37 *et seq.*

[68] See above.

solutions which, in their opinion, at least, meet the exigencies of the situation. To remove this initiating power from the practitioners to some other body not intimately engaged in the continuous working of the constitution would threaten the capacity for spontaneous invention without necessarily ensuring the appropriateness of the solution to constitutional difficulties.

The select committee should also examine the interrpetation of conventional obligations. The power to interpret a rule is the very power which gives the rule its life this should not be a power within the final determination of the executive, which may itself be bound by that interpretation.

In a system of permanent evolution the select committee would require the outcomes of this process of change to be justified. The explanation of change would expose the inner workings of government to more robust questioning; where changes might appear self-serving, or otherwise ill-advised, the reasons would have to be explained and defended. This committee could offer a profound impact on the current conventional system by ensuring wider influences over and reflection on the evolutionary process.

The committee would also have the fundamentally important power of commenting on the extent to which political actors have respected particular conventional obligations. It would have the power to inquire into the reasons for certain behaviour which may have breached a convention and to comment in its annual report to parliament on this. However, three difficulties in this role are envisaged:

(a) How is the committee to be informed of breaches of convention and otherwise gain access to relevant information? (b) How will the committee comprised of partisan politicians reach consensus? (c) What will be its relationship with ministers and civil servants?

(a) Information

The operation of the constitution is a subtle process the details of which will not always be apparent to the interested outsider. The committee will not routinely be informed of the exchanges between civil servants, or Palace, Cabinet Office and No. 10. It would be impossible to expect its members to search into every governmental action which might have conventional

significance.[69] It would in practice largely be reactive to complaints and suggestions, although it would not be prevented from acting of its own initiative. Any MP, civil servant, or even a member of the public might invite the select committee to inquire into a particular matter. The committee would not be bound to act on each complaint, but it could determine which it would investigate.[70] In practice it would be likely to concentrate only on the most constitutionally significant issues.

(b) Adversarial parties

One of the well-rehearsed limitations of select committees is that members recruited from the majority party are notoriously reluctant to criticise the decisions of their own government. The *beau ideal* of the committee system is that its members behave as parliamentarians rather than as party loyalists, although this expectation is an unrealistic one. The problem of partisanship could be an acute issue where the committee were looking at non-obedience to a particular convention in a concrete factual setting which was politically sensitive. Questions of loyalty to party, hopes of advancement and all the other pressures of back-bench life could compromise the neutrality of the committee's work. The solution to this problem might be to give particular weight to the opinion of an appointed panel of non partisan experts. This is considered further below.

(c) Relationship with Ministers and Civil Servants

The third issue concerns the workings of the committee in identifying whether a breach has occurred. It would be necessary to receive information from ministers and civil servants. In the past there have been well rehearsed problems in ensuring that this information has been forthcoming, and that the principle of accountability is respected.[71] This issue has in part been addressed

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[69] This would not be without definitional complexity to which reference has already been made.

[70] This is consistent with the present system for select committees under SO 152.

[71] There remains a problem of an "accountability gap". The dichotomy between responsibility and accountability which limits ministerial responsibility to Parliament means that accountability can be problematic where a minister blames a civil servant for some failure and subsequently directs that individual not to appear before a select committee. This is permitted under the Cabinet Office document *Departmental Evidence and Response to Select Committees* (1997) which replaced the so called "Osmotherly Rules". Notoriously, the Secretary of State for Trade and Industry refused to allow the civil servants involved in aspects of the Westland affair to appear before the Commons Defence Select Committee (see HC 519 (1985-6) Cmnd 9916 (1986). This problem has in part been addressed in the Parliamentary Resolutions (see above n. 45). Although civil servants still give evidence to select committees under the direction of ministers, the minister must impress civil servants to be as helpful as

following the report of Sir Richard Scott into the sale of arms to Iraq and the Nolan Inquiry into Standards in Public Life.[72] The obligations in the new Ministerial Code [73] and the Code of Practice on Access to Government Information[74] require ministers to be as open as possible with Parliament and to withhold information only when permitted under the common standards of the Code of Practice. Ministers also have a duty to require civil servants giving evidence on their behalf to parliamentary committees to be as helpful as possible. These obligations create a presumption in favour of openness, although the scope for withholding information is still considerable.[75]

Enforcement

The remaining issue, it will be recalled, concerns the application and enforcement of conventions. Individual conventions vary in their significance, and the consequences of a breach of any one convention can differ so much that enforcement should remain a matter for the ordinary political process and not for the Select Committee. For example, the judgment of whether a minister who leaks cabinet information to the press should resign depends on the broad interplay of party politics, the breadth of support for the minister, as well as the sensitivity of the information divulged.[76] Questions of confidence and of party support are more accurately identified in the Commons and the party beyond it rather than a more narrowly composed select committee. Whilst the Committee might properly hold an opinion on whether a convention had been respected, it could not impose a sanction if it were breached.

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possible in providing accurate, truthful and full information. (HC resolution para (iv)). Ultimately, however, Parliament still lacks power to compel Ministers to answer questions and cannot require civil servants to give evidence to select committees.

72 See the Scott Report n.12 above. The First Report of the Committee on Standards in Public Life cm 2850 (1995) (the Nolan Report).

73 Cabinet Office, July 1997

74 2nd edition, January 1997

75 A detailed analysis is beyond the scope of this article, but it is noteworthy that the Code was originally introduced in 1994 and revised in 1997 to make more explicit the presumption in favour of disclosure. The Code is available on the worldwide web: http://www.open.gov.uk/. A future Freedom of Information Act may also have a profound impact on this issue.

76 See, for example, para 24 of the First Report of the Public Service Committee: "Ministerial Accountability and Responsibility". HC 234 Session 1996-1997.

The committee could not have a power to order that a particular convention be obeyed or a penalty be imposed for its breach without, in substance, juridifying the system of conventions. Only following a trial to establish guilt could the committee consider the exercise of a compulsory power, for example an order that a minister be dismissed. It would alter our understanding both of conventions and select committees if an opinion of a select committee were to have a priority over the wider political process. The committee armed with coercive power would in substance be a court, and conventions would acquire inflexible characteristics previously unknown in our constitution. For these reasons the committee's work should be confined to examining both the structure of the constitution and whether the rules are respected, without venturing into the difficult political issues surrounding the sanction which might be applied for a particular breach.

Conventions and the Select Committee[77]

The impact of the Committee on constitutional conventions would depend upon the esteem in which political actors held the committee. Its authority would depend both upon the reputation of the members who comprised it and that of the experts by whom it would be advised. If political actors accepted that a group of expert MPs consulting widely amongst lay expertise was an effective forum to pronounce upon constitutional practices the opinions of the committee would be accepted as authoritative. Manipulation and re-interpretation of conventions could become less straightforward than at present.

At least this ought to be so where the committee's recommendations were supported by a clear majority of the members of the committee. Some difficulties might arise where the committee was unable to arrive at a consensus on a particular constitutional practice. Much would depend on the reasons why this were so, but it might suggest that a fatal absence of the necessary acceptance that the practice is binding.[78] It might signal the

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77 Sampford *loc. cit.* ventures similar conclusions to those that follow about the Australian experiment in codifying conventions. Since this was achieved there appears to have been little controversy about the meaning and application of those conventions "recognised and declared". It may be too early to appreciate the full long terms effects of the experiment.

78 The question concerning the definition of a convention which is again posed by this issue has been discussed above.

weakness of the practice as a convention thereby creating an opportunity for politicians to abandon or modify it.

Disagreement along party lines would simply weaken any recommendation the committee might make. However, the possibility of this ought to be minimised provided that considerable importance were attached to consensus amongst the panel of experts from outside parliament who are *hors de combat* (see below).

As in Australia the recommendations of an authoritative committee avoiding partisanship could have the effect of recognising certain conventions and declaring their scope. Its views would carry weight so that if subsequently politicians suggested a modified interpretation of the convention the recommendation of the committee would often be preferred. It would be less easy to deny the existence of a particular convention. There would be no higher alternative source to cite to oppose the committee. Politicians would tend to ensure their behaviour fell within the ambit of the recognised rule. Compliance would be enhanced by virtue of the political consequences which might punish disobedience.

There might, however, be instances in which politicians might have *bona fide* reasons for departing from the practice as declared. But in this case also the Opposition, armed with an authoritative contrary view, would find it easier to call the government to account, and the onus would be on the latter to defend and justify its position. Textual exegesis would not be as important in this debate as it might have been if conventions were codified, since the report of a committee would be unlikely to have been drafted as a quasi legislative measure.[79] Moreover, politics and not the committee would be the ultimate arbiter. But the political debate would perhaps focus more on the scope of the declared rules, their purposes and their exceptions rather than questioning the existence of the rule. Admittedly, there would be exceptional cases in which political actors, perhaps with the support of large parliamentary majorities, might not always be restrained by the committee's views. But the Opposition would be better armed to meet such a challenge.

The Panel of Experts

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[79] Sampford *loc. cit.*

The Select Committee should be able to draw upon the widest possible constitutional expertise. This might be achieved through its membership, the witnesses which it chose to examine, and through the assistance of constitutional experts outside Parliament. This would allow the committee to consult and to receive informed opinion in a manner which would not be possible by the exclusive means of calling witnesses. It might also permit the influence of more critical and informed opinion drawn from outside the constitutional machine. [80]

The power to appoint such expertise is already promulgated under SO 152. Specialist advisers can be appointed either to supply information not readily available or to elucidate matters of complexity within a committee's orders of reference. However, the role of this panel of expert advisers would go beyond this and this make the select committee unique. There would be a presumption (which might itself develop as a convention) that if a consensus of opinion were established amongst the members of the panel, the select committee should not depart from it without sufficient and clearly stated reasons. If the committee did wish to differ, the panel's views should be published in the committee's annual report to Parliament. If the select committee simply divided along party lines, the opinion of the panel and not that of the committee might be accepted as more authoritative. The conflict of opinion might conceivably engage public debate. The identification of appropriate constitutional behaviour would then be a matter for political actors to determine by drawing upon the views of panel and committee respectively, as well as any public discussion which of these divided opinions generated.

The form of the Select Committee

According to one view, the proposed select committee would not be constituted in the same manner as a departmental select committee, since its work would not be associated with a department of state. Departmental select committees have not usually been required to produce "constitutional"

[80] Academics participated in the Australian Constitutional Convention which lead to the codification of some conventions: see Sampford, *loc. cit.*

reports.[81] Also, the special reliance upon the panel of experts locates the proposed committee's composition and role outside the existing structure.

An alternative possibility would simply be to adapt the select committee system to accommodate the new function. According to this view one possibility might be to extend and adapt the role of Select Committee on Public Administration so that it could (under revised orders of reference) become suited to fulfil the task of scrutinising conventions. Its current terms of reference are to examine the reports of the Parliamentary Ombudsmen, and to consider matters relating to the quality and standards of administration provided by Civil Service departments, and other matters relating to the Civil Service. At present the Committee receives and scrutinises[82] reports from the Parliamentary Commissioner for Administration, as well as reports from the Health Service Commissioners for England, Scotland & Wales. It also examines the quality of administration within the civil service. Its role embraces that formerly undertaken by the Public Service Committee. Although it may take evidence from experts outside Parliament, it is not advised by a permanently appointed panel of experts.

However, the difficulty with this possibility is that its terms of reference are already extensive. Any further expansion in the role of the Committee would unreasonably overload its membership and weaken its impact. We need not look beyond the burdens of its current major review of public service accountability to appreciate its lack of suitability for the additional and extensive task of scrutinising conventions. For this reason it has been proposed to establish a new and distinct select committee rather than to adapt an existing one. This new *sui generis* select committee, like the departmental select committees, would have a permanent existence.

Conclusion

Conventions are prescriptive of constitutional behaviour, but there is neither a body to declare their existence, nor to interpret them nor to elucidate their meaning, nor to impose a sanction for their breach. They are created by political insiders and operated within the exigencies and limitations of

[81] This conclusion is supported by Brazier, *New Labour, New Constitution* (1998) 49 NILQ 1, 6. However, he concedes that some of their reports have been constitutionally significant.
[82] SO 146.

adversarial politics. Conventions may be adapted to suit the interests of the government of the day. They are the "handmaiden" of the party in power[83] yet they are the means by which an unsatisfactory and hopelessly archaic formal constitution has been adapted to modern political values. They can be re-cast by those whom they are supposed to control, deleted when they become inconvenient, and ignored when they are embarrassing. They are but chaff before the heavy armour of a government with a large parliamentary majority. But any attempt comprehensively to juridify them would ultimately fail, and attempts at codification, even if practicable, would tend to fossilise a system in which fluid mutability is its chief virtue as much as it is its frailty. And crystallisation must be a limited venture within current conceptions of the role of the judiciary within the separation of powers.

The buttressing in the nineteenth century of the undemocratic control of a major lever of constitutional change as a conservative reaction to the extension of the franchise requires review. This is particularly timely now that Labour appears to place an increased emphasis upon addressing the democratic deficit in the UK constitution. The UK has just crossed the threshold of major constitutional re-alignment following devolution. This will provide a major accelerant to the growth of new conventions to regulate and relationship between Westminster and the devolved institutions.

Accordingly it has been argued that within a system of accountable government the democratic supervision of conventions could be achieved by Parliament. There should be a more reflective, inclusive and transparent deliberation on the evolution and application of conventions. It has been proposed that a new and distinct select committee be established which will scrutinise the development, interpretation and abandonment of conventions. It will be advised by a panel of experts and will make an annual report to Parliament. This will provide an authoritative body whose work will have the effect of recognising and declaring conventions and exposing those who breach them to public obloquy. The merits of this proposal are that parliamentary scrutiny is established without sacrificing the flexibility of the constitution and thus its ability to accommodate change. The Committee will have no power to impose a sanction but whilst it recognises that conventions are prescriptive it also meets the objection that they must be capable of evolution. At its heart is the

[83] This follows *a fortiori* from Brazier, *loc. cit.* who uses this term in relation to the Constitution itself.

principle that constitutionally significant behaviour must be justified to Parliament. This would be achieved in a more systematic and reflective manner than at present. If this were achieved it would significantly contribute to New Labour's "People's Constitution".

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