TITLE:

THE NORMATIVITY OF CONSTITUTIONAL CONVENTIONS, WITH SPECIAL REFERENCES TO THE UK, USA AND GREECE

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COLLEGE: ORIEL

DEGREE: DPHIL IN LAW

TRINITY 2020

ABSTRACT

This thesis answers a twofold question regarding the nature and normativity of constitutional conventions, making special references to three jurisdictions, the UK, US and Greece. Conventions are political rules that regulate the constitutional edifice. The normativity of conventions is based on the coordination of political actors toward the principal goal of enhancing democratic accountability. They are a species of the genus of constitutional norms, with their distinguishing characteristic being non-enforceability in court, a quality that safeguards an area of autonomy for political actors. Thus, issues arising out of conventional rules are resolved in political fora, like the electorate and the Parliament.

The analysis begins with the theoretical positions regarding conventions in the three jurisdictions in order to examine the influence of academic tradition: Greek and UK scholarship represent opposite approaches on the issue of conventions, while in the US conventions have received relatively little attention from theorists. Next, conventions are shown to be normative. They guide the conduct of political actors, either limiting or enabling their action, and involving negative consequences—'political difficulties'—for those who breach the rules. The *genus*, constitutional norms, and *differentia*, non-enforceability of conventions, are explained, associating the latter with the choice of a political *forum* for the resolution of the relevant issues. Conventions and the UK 'political constitution' are closely connected; conventions are the central case of political constitutional regulation through a normative, Aristotelean view of politics. The reason behind the normativity of conventions is not content-free coordination but rather coordination towards a purpose, that of enhancing democratic accountability. This is why conventions retain their importance today. The reason for their existence is of particular importance for dealing with new challenges, allowing flexible regulation of new areas of constitutional activity and providing essential support for the democratic coexistence of political and constitutional actors.

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INTRODUCTION

> *'ὅτι ταῦτ' ἔστιν πάντα, ὅσα νῦν διεξερχόμεθα, τὰ καλούμενα ὑπὸ τῶν πολλῶν ἄγραφα νόμιμα: καὶ οὓς πατρίους νόμους ἐπονομάζουσιν, οὐκ ἄλλα ἐστὶν ἢ τὰ τοιαῦτα σύμπαντα. καὶ ἔτι γε ὁ νυνδὴ λόγος ἡμῖν ἐπιχυθείς, ὡς οὔτε νόμους δεῖ προσαγορεύειν αὐτὰ οὔτε ἄρρητα ἐᾶν, εἴρηται καλῶς: δεσμοὶ γὰρ οὗτοι πάσης εἰσὶν πολιτείας, μεταξὺ πάντων ὄντες τῶν ἐν γράμμασιν τεθέντων τε καὶ κειμένων καὶ τῶν ἔτι θησομένων, ἀτεχνῶς οἷον πάτρια καὶ παντάπασιν ἀρχαῖα νόμιμα, ἃ καλῶς μὲν τεθέντα καὶ ἐθισθέντα πάσῃ σωτηρίᾳ περικαλύψαντα ἔχει τοὺς τότε γραφέντας νόμους…'*
>
> *Πλάτωνος, Νόμοι 7.793 α, δ*
>
> 'All these matters we are now discussing are called unwritten customs by many: and those that are called laws of our ancestors are all of similar nature. And the observation we made earlier, that we should neither call them laws nor avoid mention of them is correct; they are indeed the bonds of the whole state because they lie between all the written laws which have been enacted or exist or will be enacted in the future—in this they are like other ancestral and antique customs, which, if rightly ordered and made habitual, preserve and save the existing written laws…'
>
> Plato, *Laws* 7.793 a, d

Plato was neither the first nor of course the last to speak about the unwritten norms of a polity. Nevertheless, this extract from the *Laws* serves as a good starting point for this thesis. Firstly, it is indicative of the fact that discourse on the subject has existed for approximately 2400 years. Furthermore, regarding the substance of his views, Plato seems to touch upon aspects of the subjects that serve as leitmotifs of the academic literature in modern times. It is worth focusing on three points of Plato's analysis: first, the so called 'unwritten customs' do not constitute laws; second, we should not avoid discussing them; in other words, ignoring them is not a proper stance. Third, Plato emphasises the fact that

respect toward customs is a prerequisite for the preservation of the legal and political edifice of the city-state.

This thesis aspires to shed light on a particular category of unwritten norms, namely constitutional conventions. This creates *prima facie* a paradox; it is unusual for a thesis in law to deal with a subject that does not constitute part of the *genus* of law. Dicey wrote about transferring this topic to either Jurisprudence,[1] which deals with the 'oddities or the outlying positions of legal science' or International law.[2] His thoughts, albeit rhetorical, indicate the *sui generis* character of conventions as a field of study. Nevertheless, the solution does not lie in shifting the focus of analysis of conventions towards, for example, political theory, as suggested in a relatively recent article;[3] it lies in theorising about the constitution as something comprising not just a single written document or a number of statutes, but of a plurality of norms forming a constitutional edifice, along with practices and their implementation in the political life of the state. Therefore, the study of conventions provides constitutional lawyers not only with a better insight into the functioning of the polity but with a richer account of the constitution as well.

The last observation is particularly important for continental jurisdictions, where conventions are to a large extent under-theorised. Among them, Greece, which happens to be my home country, constitutes an extreme case. Greek constitutional literature tends to

[1] Dicey, Albert Venn, *Lectures introductory to the study of the law of the constitution* (Macmillan 1885) 23.

[2] Ibid.

[3] Galligan Brian and Brenton Scott, 'The Political Theory of Constitutional Conventions' (American Political Studies Association, 2013) <http://www.auspsa.org.au/sites/default/files/the_political_theory_of_constitutional_conventions_scott_brenton.pdf>, accessed 15 January 2018.

downgrade the role of conventions, either stating that 'they do not have any practical importance'[4] or doubting the utility of such a notion outside the bounds of British constitutional theory.[5] On the other hand, the United Kingdom can be viewed as the polar opposite of the Greek case. Since Dicey and Freeman, scholars have stressed the importance of conventions, as well as their distinctiveness from law and their contribution to the functioning of the constitution. Furthermore, the UK has influenced a great number of jurisdictions of the Commonwealth tradition, from Canada[6] to Australia and New Zealand, forming what can be called 'the Westminster paradigm', which includes countries sharing common political and constitutional features, like the parliamentary system of government or, in our case, constitutional conventions.

Nevertheless, conventions are not theorised in the UK as a British or even a Commonwealth peculiarity. Dicey, in his *Introduction* used the example of the United States to ground his argument for the existence of constitutional conventions under a written constitution on the same conditions as under an unwritten.[7] Munro went one step further arguing that 'it is at least arguable that conventions should play a larger role in countries with written constitutions',[8] yet it is exactly Dicey's example, the US, that will be the third jurisdiction examined here. Although constitutional conventions are neglected by the vast majority of US literature, there are a number of conventions which are of great

[4] Philippos Spyropoulos and Theodore Fortsakis, *Constitutional Law in Greece* (2nd edn, Kluwer 2013) (in Greek) 55

[5] Evangelos Venizelos, *Courses in Constitutional Law* (2nd edn, Ant N Sakkoulas 2008) (in Greek) 118.

[6] Andrew Heard, *Canadian Constitutional Conventions, The Marriage of Law and Politics* (2nd edn, OUP 2014).

[7] Dicey, *Introduction to the study of the law of the constitution* (8th edn, Macmillan, 1915) 29.

[8] Colin R Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR. 218, 219.

importance for the US constitutional structure. The number of Supreme Court justices, the way the Electoral College votes, and the exclusion of a third presidential term (before the twenty-second Amendment put this on legal footing) are three important examples of conventional rules of the US constitution.

The academic standpoint and constitutional reality will be the two pillars of my examination of conventions. Regarding the latter, I will use examples of conventions of the three jurisdictions examined in order to shed light on the way these rules are shaped by their implementation, through the stance of the relevant constitutional actors. Regarding the former, Chapter 1 will show that the perception of conventions is overly dependent on the views of academic scholars (or even their neglect) which form an 'academic tradition' in each jurisdiction.

This neglect of the role of conventions in jurisdictions where they play an important role for the stability of the constitutional edifice as well as the confusion caused by misconceptions and terminological discrepancies among jurisdictions bring out the importance of the twin questions asked and answered in this thesis: what is the nature and normativity of constitutional conventions? The two questions are so closely linked that we could speak of a single question, since the realisation of the distinguishing characteristics (*differentia*) of conventions paves the way for approaching the particular nature of their normativity.

In this thesis, conventions are brought out as constitutional rules of a political nature, which form a species of the *genus* of constitutional norms, along with rules like legal constitutional provisions (either included in a codified provision or in a statute) and constitutional customs; what differentiates conventions is their political nature and

normativity. The normativity of conventional rules has frequently been ignored, rejected or completely misinterpreted due to a fundamental mistake: starting from Dicey, scholars have approached the normativity in constitutional discourse as being identical to the normativity of law.

Yet, the constitution is not solely composed of legal rules or of legal normativity. The constitution is a *synthesis* of legal and political rules, with convention being the central case of the latter. Enforceability not in court but in the political *fora*, the distinguishing characteristic of conventions, is closely connected to the political character and delineates an area of autonomy for political actors within the constitutional structure. Constitutional conventions are resolved in political *fora*, such as the Parliament and the electorate. The normativity of conventions is shaped by these factors: conventions coordinate political actors within the constitutional context. Nevertheless, this coordination is not content-free; it points towards a certain direction, that of enhancing democratic accountability.

The search for the nature and normativity of conventions in this thesis renders it a useful exercise for constitutional design: constitutional designers can pick the optimal constitutional regulatory technique, taking into consideration the particular characteristics of each species of rules pertaining to their nature and normativity. Constitutional conventions are one of the possible choices and political character, flexibility, avoidance of the finality and definitiveness of law, non-enforceability in court, resolution of disputes in political *fora* and political sanctions, all add important advantages to the regulation of the relevant issue. This is why conventions have been deliberately chosen in many cases during the last years in order to settle newly risen constitutional issues.

Regarding the foundations of the research conducted in this thesis, it is important to note that the answer to the question about the normativity of constitutional conventions is neither simple nor examined in depth by modern constitutional and jurisprudential thought. The view that simply describes conventions as bridging the gap between constitutional text and political reality[9] lacks a normative underpinning. Though analytically important, this argument implies a merely auxiliary role for conventions. Moreover, academic literature on conventions suffers from a lack of systematic character. The majority of academic contributions on this issue tend either to focus on a specific convention or make some comments about conventional regulation in general, sometimes including normativity as topic but not treating it in any thorough or systematic way. Finally, the idiosyncratic character of conventions as a field of study in constitutional law that is neither law nor enforced by courts, means that the most important cases involving conventions in some way—like the Canadian *Patriation Reference*,[10] as well as the more recent and controversial *Miller/Cherry* case[11] -are useful for academic discussion but not in any way decisive on the issue of normativity.

Overall, the thesis answers a basic twofold question regarding the nature and normativity of constitutional conventions, which could be analysed into five interrelated sub-questions: (1) Are constitutional conventions normative? In other words, do they *regulate* or simply describe conduct of constitutional actors? (2) What is the nature of conventional rules and their position within the constitutional edifice? (3) Should

[9] Keith E Whittington, 'The status of unwritten constitutional conventions in the United States' [2013] U Ill L Rev 1847, 1853.
[10] *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1 880.
[11] *R. (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2019] 3 W.L.R. 589.

conventions be normative? Which is the reason and purpose of the normativity of conventional rules? And finally, (4) What are the future prospects of conventional regulation as a constitutional regulatory technique? The answer to each question fills a gap in academic writing, through addressing issues that are to a great extent under-theorised.

Chapter 1 is dedicated to the academic position on conventional rules in the three jurisdictions examined. Conventions are researched in the UK but unsystematically, neglected in the US, and almost rejected by academic theory in Greece. Nevertheless, conventions do exist in all three jurisdictions. Since major authors' points of view will provide the academic background for the following chapters of this thesis, the final section of this chapter, based on the preceding analysis of the shortcomings of the existing literature, aims at answering the question why it is important further to research into the nature and normativity of conventions.

Chapter 2 explores the question whether conventions are actually normative. The normativity of constitutional conventions should be viewed as an all-things-considered normativity, taking into consideration both objective and subjective elements, like the understanding of political actors that they are bound by a rule. Taking the above into consideration, I examine the ability of conventions to guide and not simply describe the conduct of political actors. The guidance of conventions has not only a limiting but also an enabling side. I present cases from the three jurisdictions showcasing political difficulties that follow breaching a rule, as well as cases which are frequently considered a failure of conventional regulation. It is proven that there are certain questions we should ask before speaking about an outright breach of a 'full-blooded' convention. The final part of the chapter discusses the particular characteristics of the normativity of conventional rules.

Chapter 3 aims at bringing out the *genus* and the defining characteristics of conventions. Conventions are juxtaposed to constitutional custom as well as to the other prominent species of the *genus* of constitutional norms. Based on that, the distinguishing characteristics of conventions will be presented: they are political rules and judicially non-enforceable, resolved in the political *fora*. In this last section, the impact of *Miller Nos 1 and 2* cases on the courts' perception of non-justiciability will be analysed.

Chapter 4 explores the position and role of conventions as political rules in the functioning of the constitutional system. Firstly, this chapter examines the association between conventions and the historical development of a constitution of a 'political' character in the UK. Then, it searches for the relationship between political constitutionalism as a model and constitutional conventions, taking into consideration the commonality of their purpose and method of regulating the constitution. Finally, the reasons for the neglect of conventions by the vast majority of political constitutional scholars are examined, focusing on the denial of the normative character of conventional rules. Thus, chapter 4 further explores the political character of constitutional conventions and their normativity, proving that it is not as an idiosyncratic element of this category of rules but part of a wider notion of the political in constitutional discourse, which plays a crucial rule in real-world constitutions comprising both legal and political elements.

Chapter 5 answers two interrelated, crucial questions: firstly, do we need constitutional conventions as norms within the constitutional edifice? Secondly, what are the reasons behind the normativity of conventional rules? The first question is answered through imagining the alternative scenario, that of a real-world situation with conventions lacking the element of normativity. It is shown that a constitutional structure without the

normativity of conventional rules would be far from ideal. The legalistic idea that every part of the constitution should be regulated by law is also refuted. Then the reason behind the normativity of conventions is analysed: constitutional coordination achieved through conventions points in a certain direction, that of democratic accountability, keeping the constitutional edifice in touch with the growth of constitutional values.

Chapter 6, the final chapter, examines the present and future of conventional regulation. The analysis starts by answering the question whether there are particular areas of the constitution that should be regulated by convention. Challenges with regard to conventions have arisen from constitutional reforms in the UK, the financial crisis of 2008, political tensions, coalition governments, and other matters. The Brexit challenge in the UK and the Trump administration in the US, as well as the use of conventional rules in order to deal with novel problems or circumstances, bring out the importance of conventions in the constitutional discourse of 21st century.

CHAPTER 1-THE ACADEMIC PERCEPTION OF CONVENTIONS-WHY TO RESEARCH THEIR NATURE AND NORMATIVITY?

The effort to provide an account of the nature and normativity of constitutional conventions needs to start by an examination of the relevant existing literature, since the character of conventions as largely unwritten rules followed by political actors makes academic writing particularly important for their perception. It could be said that conventions are a paradigmatic example of cases in which academic discussion takes part in shaping the character of its field of study. Since the initial conception of the notion of conventions by Freeman[1] and Dicey,[2] theory has influenced and been influenced by constitutional reality. In the UK, political actors and informed members of the electorate (which, as it will be shown, is the ultimate arbiter of the propriety of politicians in their constitutional conduct) have to a large extent based their view of conventional rules on their perception of writings by leading constitutional theorists on the relevant issues. Equally, the neglect or even rejection of the role and theory of conventional regulation by scholars in some jurisdictions has led the public and political actors to ignore or underestimate the binding character of conventions.

Therefore, as previously implied, the purpose of this chapter is to provide an account for the academic perception of constitutional conventions. This will be done in reference to three particular jurisdictions: UK, Greece and the US. The first three

[1] Edward A Freeman, *The growth of the English constitution from the earliest times* (3rd edn, Macmillan 1890) 122.
[2] Albert Venn Dicey*, Introduction to the study of the law of the constitution* (8th edn, Macmillan 1915) 411.

sections aim to critically present theoretical issues regarding conventions, as they have been approached by scholarship in the three jurisdictions examined. The final section of this chapter, based on the preceding analysis of the shortcomings of the existing literature, answers the question why it is important to further research into the nature and normativity of conventions.

1.1. United Kingdom: The prominence and lack of systematicity of its literature on conventions

An analysis of the literature regarding conventions should start with the United Kingdom, given the prominent character of its academic production and political practice on this particular topic. Of course, a fair presentation and analysis of the position of UK scholarship on the issue of conventions could take many hundreds of pages.

Nevertheless, the exceptional quantity of UK academic literature in comparison to other jurisdictions does not entail that the theory in the UK is completely in good shape. Although the United Kingdom is, for obvious reasons, the country where conventions are most thoroughly theorised, the analysis of conventions lacks a fully systematic account. There is no treatise dealing exhaustively or exclusively with conventions. Even Geoffrey Marshall's *Constitutional Conventions: The Rules and Forms of Political Accountability*,[3] which constitutes the only book in the UK aspiring to fully examine the issue, is based on a case by case analysis, speaking mainly about specific

[3] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984).

conventions and not adequately focusing on the theoretical questions.[4] The fragmentary character of British academic literature on conventions may reflect the perception of the UK constitution as a 'constitution of multiple sources'.[5] But despite being uncodified, the UK constitution is not unsystematic. The body of the constitution, despite having emerged from an evolutionary process and not from a constitutional moment, has an internal unifying logic. This observation goes also for conventions, which constitute a distinctive method of constitutional regulation, having specific theoretical underpinnings. Therefore, the analysis of the theoretical issues about conventions as a structured whole can help us understand better both specific conventions and the British constitution in general.

For the purposes of this thesis, it is necessary to try to systematise the broad and piecemeal British academic literature, touching the major issues related to giving an account of the normativity and nature of conventional regulation. Therefore, I will emphasise the position of British scholarship on issues that significantly influence the substance of conventions and shape their perception within the British constitutional edifice. The synthesis of academic positions in the various issues related to conventions will not be in the form of a 'patchwork' of unrelated views. It will connect the positions touched here and there by theory, finding their deeper interrelations in order to provide a fresh start for a critical account of British literature on conventions.

[4] Cf. Karl-Ulrich Meyn, *The constitutional conventional rules in the constitutional system of Great Britain [Die Verfassungskonventionalregeln im Verfassungssystem Grossbritanniens]* (Schwartz 1975) (in German).
[5] Keith Syrett, *The foundations of public law: principles and problems of power in the British constitution* (2nd edn, Palgrave Macmillan 2014) 9; Adam Tomkins, *Public Law* (OUP 2003) 9.

1.1.1. The UK constitutional background and the importance of Dicey's contribution

Having a long history of being a constitutional state, the United Kingdom forms one of the few countries known not to have a single constitutional document. This lack of a tradition of constitutional codification inevitably leads to the prominent role of non-written constitutional rules. At the same time, the absence of a breaking point since the 17th century—i.e. a constitutional moment marking the transition from a certain type of Crown rule towards a more representative way of government—led to the preservation of old and dated constitutional forms. This created a discrepancy between the legal, archaic constitution and the real, unwritten or conventional one, something that could not have escaped the attention of the major scholars of the time.[6] Beyond Bagehot's more general distinction between the 'dignified' and 'efficient' parts of the constitution,[7] an Oxford historian, Edward Freeman tried to approach the very same issue on the level of rules of political morality which constitute the 'conventional constitution'. Freeman's contribution could be described as one of the inaugural moments of the attack on constitutional legalism.

Between 1857 and 1873, Freeman examined at the single 'School of Law and Modern History' at Oxford,[8] something which must have led to the development of close relations between him and lawyers as well as some kind of confrontation between the dominant legal viewpoint and his own, historical, approach to the analysis of the constitution. Freeman's aim seems therefore not to analyze the particular character of non-legal constitutional rules but rather to argue for the supremacy of a historical over

[6] Hood Philips, 'Constitutional Conventions: Dicey's Predecessors' (1966) 29 Mod L Rev 137.
[7] Walter Bagehot, *The English Constitution* (2nd ed. OUP 1928) 44.
[8] Philips (n 6) 144.

a legal approach to constitutional reality and history; these two, it should be noted, remain closely connected in a constitutional environment characterised by continuity: the present constitutional landscape is in a sense shaped by history. Therefore, Freeman's purpose led him to bring out the importance of the conventional constitution as the constitution of historical development, restricting him simultaneously within the limits of his argument. To this extent, his contribution towards deciphering the existence of a constitutional landscape beyond legal norms is useful for the purpose of the present thesis.[9]

Thus, Dicey was neither the first to speak of the existence of what is now called constitutional conventions nor the first to draw a distinction between them and the legal constitutional rules. Nevertheless, his analysis formed the basis for all subsequent academic and political discussion. In reality, the importance of Dicey's work for the study of the nature and normativity of conventions has not only to do with the answers he gives—which have suffered a considerable amount of criticism—but even more with the questions he asks. These are the very same questions that constitutional theory tries to answer today, predominantly in the United Kingdom but also wherever the relevant topic is at the center of discussion. In Dicey's words, the basic questions are two:

> What is the nature of the conventions or understandings of the constitution? What is the force or (in the language of jurisprudence) the 'sanction' by which is enforced obedience to the conventions of the constitution?[10]

These are actually the fundamental questions regarding the substance of conventional rules and the reasons for their normativity. In the course of answering these questions, Dicey asks—and answers—further questions; his analysis of the substance of conventional rules makes him inevitably confront their relationship with legal rules as

[9] Freeman (n 1) 112.
[10] Dicey, (n 2) 414.

well as their purpose. A closer look at his *Introduction* could reveal a further and related question: whether constitutional conventions are rules peculiar to the United Kingdom constitution.[11]

Regarding the second fundamental question (reasons for the normativity of conventions), it should be observed that it presents the normativity of conventional rules as a matter of sanction, without actually focusing on the binding effect that conventional rules have.[12] He presupposes that the binding effect of conventional rules is solely a matter of sanction. It is not coincidental that Dicey has been criticised the most regarding the answer he gave to the question of sanctions for non-obedience.

This is in actuality an example of circular reasoning: by bypassing the question regarding the particular nature of the binding effect of conventions, he supposes that the reason behind their normativity is 'nothing else than the force of law'.[13] Therefore, in my view, the key to understanding why and how Dicey erred with this particular argument lies not in mentioning examples showing that a breach of convention does not inevitably lead to a breach of law—something which is a common place in theory —[14] but in focusing on his incomplete account of their normativity. In his view, the binding effect of conventions could be described as having 'nearly the force of law'.[15] In this way, the normativity of law is the point of reference and conventions are just compared to this concept, found to be 'nearly' equal in their ability to bind constitutional actors.

Therefore, the erroneous point in Dicey's analysis lies not in his theory of sanctions following the violation of a convention. This is just a symptom resulting from

[11] Ibid 29.
[12] Cf H L A Hart, *The Concept of Law* (3rd edn. OUP 2012) 56-57.
[13] Dicey (n 2) 441.
[14] Sir Ivor Jennings, *The law and the Constitution* (5th edn, University of London Press 1959) 129.
[15] Dicey (n 2) 437.

a mistake made at an earlier stage of his reasoning; namely, taking for granted that the normativity of constitutional conventions is of the same kind with that of law. This lack of focus on the normativity of conventional regulation as well as the reasons behind it had a negative impact on the analysis of their nature since these two issues are intertwined: normativity shapes the nature and vice versa.

1.1.2. Dicey, criticism to Dicey and the current position in scholarship

Setting aside the aforementioned fundamental criticism of Dicey, his contribution to the theory of conventions can hardly be overstated. Not only did he pose the basic questions which scholars still try to answer today (even if he omitted one further question, that on normativity) but he also answered the vast majority of them in ways that constitute the point of reference for modern constitutional theory. The way this happens is twofold: either through praise or through academic criticism by subsequent scholars. In this section, I try to critically present his answers in parallel with other constitutional scholars' views on the very same questions. Thus, Dicey's as well as his critics' answers to his particular questions regarding conventions will be viewed side by side in order to (re)construct the fragmented current position of UK literature on the issue of conventional regulation.

1.1.2.1. Starting from the second Diceyan fundamental question

In the previous section, I drew a distinction between (A) two, 'fundamental' Diceyan questions regarding the substance of conventional rules and the reasons for their normativity and (B) three further questions he confronts (relation to law, purpose, peculiarity) in the course of answering them. I will here follow the same basic

distinction, starting from different answers given to the second of them, that regarding the sanction for the enforcement of conventions, which met the greatest amount of criticism. Besides this criticism, scholars also moved one step forward, providing alternative accounts of this very sanction which explains conventions' enforcement.

Of those alternative accounts, it is worth bringing out the contribution of Joseph Jaconelli. This is because Jaconelli is one of the few theorists who focus their research on the way constitutional conventions manage to have a binding effect, thus showing an interest in the normativity of constitutional conventions. He thus avoids the mistake made by Dicey. His idea that constitutional conventions 'form only a sub-class of the *genus* of social rule'[16] puts the issue of conventional regulation on an interesting footing. Nevertheless, despite his positive move towards a theory of the normativity of conventions, his account of the sanctions by which conventions of the constitution are enforced is based on 'serial power-sharing between the various political groupings in society'.[17] Such a position suffers, as Jaconelli himself admits, by the inability to 'furnish an obligatory basis' for any type of conventional rule.[18]

The first difficulty arises with the so-called 'interinstitutional' conventions. Such conventions, like the royal assent to bills passed by Parliament, have to do with the relations between institutions and are not part of the basic scheme of political parties taking turns in power. Moreover, the idea of taking turns in power is very closely attached to the traditionally bi-partisan Westminster political system and needs substantial modification of a great scale in order to fit (if possible) the modern reality of coalition governments, especially between the two major political parties, as in the case of the German ' Große Koalition' or a more fragmented political system, like

[16] Joseph Jaconelli, 'The Nature of Constitutional Conventions' (1999) 19 Legal Studies 24, 30.
[17] Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149, 173.
[18] Ibid.

reality in continental Europe suggests. Both such developments have given rise to new emerging conventions[19] whose binding character cannot be explained by a simplifying utilitarian approach, based on political expediencies. Therefore, Dicey's second question about the sanction by which conventions of the constitution are enforced remains effectively unanswered, mainly due to the lack of interest in the particular features of conventions' normativity

1.1.2.2. Regarding the first fundamental question and the relationship between conventions and legal regulation

Regarding the first fundamental Diceyan question—'What is the nature of the conventions or understandings of the constitution'[20]—UK literature has been much more detailed. In the course of researching the nature of conventional regulation, Dicey had to answer a complementary question over the relationship between conventions and laws. It seems that the nature of law constitutes for legal theorists the point of reference; thus, their analyses of the nature of conventions is dependent on the way each of them views law as well as on the extent of difference or similarity he considers as existing between laws and conventions.

Dicey's response to his own question seems quite vague. In Chapter XIV of his *Introduction* entitled 'Nature of conventions of the constitution',[21] he provides a general presentation of conventional rules and their role within the UK constitution. At the same time, he mixes questions regarding the purpose, functionality and content of

[19] Greg Taylor, 'Convention by consensus: Constitutional conventions in Germany' (2014) International Journal Of Constitutional Law 12(2) 303.
[20] Dicey (n 2).
[21] Ibid 413.

conventional rules as 'mainly rules for governing exercise of prerogative'.[22] It is only in turning to the next chapter (XV), titled 'The Sanction by which the convention of the constitution are enforced'[23] that he gives the reader a more precise view regarding the nature of conventions in the form of their difference from law. According to Dicey, the basic differentiating factor between these two categories of the constitution is that conventions are not justiciable:

> Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the Courts[24]

To put it simply, in the classic Diceyan perception, conventions are rules which are not judicially enforceable, mainly regulating the discretionary authority of the executive.[25] In later editions of his book, Dicey goes one step further, arguing that conventions are not even recognised by courts.[26] The latter view, especially in light of recent major cases involving recognition of conventions cannot be anymore sustained;[27] it is clear that the courts can take into account a wide variety of things beyond legal rules when making their judgements.[28] Nonetheless, recognition and enforcement are two separate notions.[29] This was highlighted in the first *Miller* case,[30] which will be analysed in chapter 3.[31]

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[22] Ibid 419.
[23] Ibid 435.
[24] Ibid.
[25] Ibid 421.
[26] Dicey, *Introduction to the study of the law of the constitution* (10th edn, Macmillan 1959) 417.
[27] Among others, the most recent UK cases involving conventions are: *Evans v Attorney General* [2015] UKSC 21; [2015] 2 W.L.R. 813; *Evans v. Information Commissioner*, [2012] UKUT 313 [75] (AAC) (UK) ; *R. (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5.
[28] Colin R Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218, 233.
[29] Contra T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1994) 244.
[30] *Miller* (n 27) 146, Cf Farrah Ahmed and Richard Albert and Adam Perry, Judging Constitutional Conventions (September 26, 2017). Oxford Legal Studies Research Paper No. 59/2017. Available at SSRN: <https://ssrn.com/abstract=3043190> or <http://dx.doi.org/10.2139/ssrn.3043190> accessed 10 August 2020.
[31] Cf 3.3.2.

At this point, it is worth mentioning that the non-enforceability of conventions by courts is not the only factor proposed as defining the nature of conventions and differentiating them from laws. C Munro, in his writings, focuses on the lack of systematic character of conventions. In other words, individual conventions, unlike laws, stand alone and do not form, as laws do, a coherent set of primary and secondary rules; they are a 'discrete unconnected set'. All these analyses bring out differences between conventions and legal regulation; nevertheless, as it will be shown, what is actually important is the ability of a criterion to act as the defining characteristic of conventions in terms of their relation with the other members of the *genus* of constitutional rules.

Considering the nature of conventions and similar phenomena, it is worth keeping in mind that besides law, there is also constitutional *practice*. It is almost ignored by Dicey in his *Introduction* yet it is quite important for this analysis since it lies at the other end of the spectrum, lacking a normative element. Barber calls it 'pure custom' and does not consider it to belong to the category of a rule at all.[32] On the other hand, Wheare calls customs the conventions that gradually arise over a long period of time, unlike those that are established by agreement.[33] Therefore, *custom* is used to describe different things, accentuating confusion regarding unwritten constitutional rules.

Returning to the two criteria proposed for differentiating laws from conventions, it should be noted that perhaps the best criticism towards using them has been expressed relatively recently by Nick Barber. His basic hypothesis is the possibility of a 'double crystallisation'. On the one hand, conventions are perceived to

[32] Nick Barber, *The Constitutional State* (OUP 2010) 85.
[33] K C Wheare, *Modern Constitutions* (OUP 1951) 180.

differ from laws only on the degree of formalisation. Jennings, for example, stated that there is 'no distinction of substance' between laws and conventions, both resting essentially 'upon general acquiescence'.[34] According to Barber, conventions can 'crystallise' into law that is enforced by courts through being increasingly formalised. On the other hand, a practice can gain normative force and crystallise into a rule.[35] This is the second part of the 'double crystallisation' of constitutional rules.

This idea of crystallisation has led scholars to argue against the existence of a conceptual difference between conventions and laws. Barber for example considers it solely 'a matter of degree',[36] both being two forms of social rules. It is true, as the crystallisation thesis asserts, that constitutional conventions and legal regulation generally differ in terms of formalisation. But the fact that they can be placed on a spectrum of formalisation does not preclude the possibility of a 'distinction of substance or nature' between laws and conventions, and it does not demonstrate that there are examples of gradual transformation of conventions into laws (the lack of such examples will be shown in chapter four). The mere discovery of a similarity or a grey area does not lead the distinction to collapse. As Jaconelli has put it in a recent article:

> there is a clear divide between laws and constitutional conventions even if there exist certain points at which, and various ways in which, they overlap or one helps to shape the content of the other[37]

The lack of a single identifiable turning point between day and night does not mean that a distinction between them is false and depict no conceptual difference. There is a difference between legal regulation and conventions that is based on a clear

[34] Jennings, *The law and the Constitution* (n 14) 117.
[35] Barber, *The Constitutional State* (n 32) 85.
[36] Ibid 97.
[37] Cf. Joseph Jaconelli, 'The Proper Roles for Constitutional Conventions' (2015) 38 Dublin ULJ 363, 371.

conceptual distinction: conventions are not enforceable in court.[38] Moreover, in many cases, it would not be desirable for judges to turn them into laws.[39] In the words of the Upper Tribunal in *Evans v Information Commissioner*: 'What are constitutional conventions? The first thing to stress is that they are not law. They are not enforced by courts'.[40]

As I will argue later in this thesis, this is a matter of *forum*: courts are the appropriate *forum* for the resolution of issues arising from the interpretation and implementation of legal rules. On the other hand, conventions are political norms,[41] having as their point of reference political institutions, parliament and public opinion.[42] Courts are simply unsuited to answer these questions, and when they attempt to approach such issues, they do so indirectly, through the intervention of legal notions, like the doctrine of 'confidentiality' in *Attorney General v Jonathan Cape.*[43]

In conclusion, recent case law developments seem to vindicate the early Diceyan view that, unlike laws, conventions are by their nature judicially unenforceable. Nevertheless, this juxtaposition of conventions with law in UK literature may seem unfamiliar or even strange for a non-UK scholar. In constitutional environments characterised by the existence of a codified constitution, the latter is the obvious candidate for being compared to conventional regulation.[44] The UK literature though, with some exceptions, seems to provide little or no guidance for the relationship between conventions and the codified constitutional text. This may be because this

[38] Adrian Vermeule, 'Conventions in Court' (2015) 38 Dublin ULJ 283, 284.
[39] Contra M Elliott, 'Parliamentary Sovereignty and the New Constitutional Order' (2002) 22 Legal Studies 340, 375, Barber, *The Constitutional State* (n 32) 93.
[40] *Evans v. Information Commissioner* (n 27) [66].
[41] Vermeule, 'Conventions in Court' (n 38) 289.
[42] On this issue cf. Forsey's view in Eugene A Forsey, 'The courts and the conventions of the constitution' (1984) 33 University of New Brunswick L J 11, 13.
[43] *A-G v. Jonathan Cape* [1976] Q.B. 752.
[44] Cf. Richard Albert, 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin ULJ 387, 410.

literature is overly focused on the particularities of the UK constitutional edifice, characterised by the absence of such a single document.

This lack of interest among British scholars is mitigated by the fact that, contrary to the dominant trend of constitutional legalism in continental jurisdictions, the constitution is perceived in the UK as an entity comprised of non-legal sources as well. In this way, even continental constitutional lawyers, like Greek scholars, when writing about the difference between conventions and the constitution, speak about the distinction between conventions and the 'law of the Constitution', as Dicey described it. Therefore, in actuality, many of the conclusions of UK scholarship regarding the differences as well as the relationship between laws and conventions are applicable to the relation between conventions and codified constitutions; the latter contain many provisions which find their equivalent in the UK 'constitutional statutes'.[45] What remains to be examined, however, is the extent to which the possibly entrenched character of codified constitutional provisions affects the general picture, especially in regard to constitutions which are quite difficult to amend, as in the US or Greece. This will be explored in Chapter 3.

1.1.2.3. Regarding the peculiarity of UK conventions

The comparison between conventions and codified constitutions is connected to the discussion regarding the existence and importance of conventions in constitutional environments other than the UK's uncodified constitution. As it has already been noted, the UK is one of the few known paradigms of such an 'uncodified' constitution. Other

[45] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [2002] 3 WLR 247, Tarunabh Khaitan, 'Constitution" as a statutory term' [2013] 129 LQR 589, 592.

systems are based on a single constitutional document, which has contributed to academic discussion in such systems neglecting or even rejecting the existence, role and importance of conventions.

Dicey was the first to question whether conventions exist in constitutional systems other than the UK. Freeman had considered conventions to be a peculiarly UK phenomenon. As he observed, 'The code of our unwritten Constitution, has, like all other English things, grown up bit by bit'.[46]

Munro states that Dicey followed Freeman's view that conventions are 'peculiarly a feature of the English constitution'[47] in the first edition of Dicey's *Introduction.* However, in the first Lecture of that edition*,* Dicey argues that the difference between the law of the constitution and the conventions of the constitution is one 'which may exist in countries which have a written or a statutory constitution'.[48] He then provides a brief but illuminating account of US constitutional conventions. He is the first scholar to deal with the subject.

Nowadays, the existence of constitutional conventions in other jurisdictions seems obvious for UK scholars, even if this point has not been fully examined by them. Yet what role can conventions have within a system with a codified constitution? On this issue two main opinions have been expressed; the first is encapsulated in Jaconelli's statement that conventions 'exist in considerable abundance in those systems—the prime example is the United Kingdom—the affairs of which are ordered by an unwritten constitution'.[49] In other words, those few jurisdictions lacking a codified

[46] Freeman, *The growth of the English constitution from the earliest times* (n 1) 122.
[47] Munro, 'Laws and Conventions Distinguished' (n 28) 219.
[48] Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed. Macmillan 1885) 29.
[49] Jaconelli, 'Do Constitutional Conventions Bind?' (n 17) 149.

constitution rely more on conventional regulation.[50] On the other hand, Munro has expressed a rather more radical view: 'the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring'.[51]

In the UK, after the New Labour initiatives toward constitutional reform, there was a widespread discussion on the possibility of a future written constitution, which prominently included discussion of which existing constitutional conventions should be included. Bogdanor pointed out that 'it is clear that not all conventions would be likely to prove both suitable for enactment and also justiciable'.[52] This passage implies that if included in a written constitution, a convention would become justiciable and lose its conventional character. This has been the Greek experience, as this thesis will show. In the case of the current UK uncodified constitution, conventions have a role which is not peculiar to the UK but definitely more important than, for example, in Greece or Germany. Nevertheless, there is a common experience of having conventional regulation which is universal and applicable to a great variety of jurisdictions.

1.1.2.4.Regarding the purpose and reason for conventional regulation

In order to grasp the nature of conventional regulation, one must understand its purpose as well as the reasons for its existence. Dicey was the first to understand this, giving his view of the purpose of conventional regulation in the course of an account of the nature of conventions. His answer remains important. He argued that conventions 'in one way

[50] Cf John Gardner, 'Can There Be a Written Constitution?' in Leslie Green and Brian Leiter (eds) Oxford Studies in Philosophy of Law: Volume 1 (OUP 2011) 189.
[51] Munro, 'Laws and Conventions Distinguished' (n 28) 219.
[52] Vernon Bogdanor, *The new British constitution* (Hart 2009) 227.

or another, are intended to produce harmony between the legal and the political sovereign power'.[53] Their ultimate object, he claimed, is to assure that Parliament or the Cabinet appointed by it 'shall in the long run' give effect to the will of the nation, the latter being the political sovereign of the state.

The importance of Dicey's contribution lies in initiating an approach to conventions which emphasises their contribution to the democratic character of the constitution. A century later, Marshall expressed a similar point: 'Conventions have as their main general aim the effective working of the machinery of political accountability'.[54] This accountability is democratic accountability, with conventions forming the basic mechanism by which it is realised within the UK constitutional system.

Jennings is the first to shift the center of interest from the difference between laws and conventions towards their interplay within the constitutional edifice. He described conventions as 'the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep in touch with the growth of ideas'[55] in a section titled 'The purpose of the conventions'. In this way, conventions' relationship with law, their importance and purpose seem inextricably linked in Jennings' theory. The two approaches to conventions, originating from Dicey and Jennings, are perfectly reconcilable; conventions have indeed kept the legal constitution in touch with the growth of ideas, through harmonising it with the prevailing constitutional value of our time, namely the democratic principle.

[53] Dicey (n 2) 434.
[54] Marshall, *Constitutional Conventions* (n 3) 211.
[55] Jennings, *The law and the Constitution* (n 14) 81-82.

Jennings not only wrote on the purpose of conventional regulation but also provided us with the now classic tripartite test:

> 'first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by the rule; and thirdly, is there a reason for the rule?'[56]

Regarding the third part, objections have been expressed. Barber has said that 'some conventions may just be mistakes'.[57] The courts, however, both in the *Patriation Reference* and the *Evans* cases,[58] seem to follow Jennings' approach, viewing conventions as the 'critical morality' of the Constitution;[59] it seems that conventions do not arise without a particular reason behind them, a function which is associated with the workings and character of the constitution itself.

For Jennings the 'reason for the rule' is an essential element, since 'the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy'.[60] The issue of the reason for a *specific* convention is therefore linked but not identical to the discussion about the purpose of conventional regulation in general. This is parallel but not identical to Finnis's distinction between the framework principle behind the formation of customary rules for solving coordination problems in general and the practical judgement for the existence of a specific authoritative customary rule requiring certain action.[61] Here the issue of importance is again crucial. Not all conventions are of equal importance: some are at the center of the notion while some lie at the periphery. As Bogdanor and Vogenauer

[56] Ibid 136.
[57] Barber, *The Constitutional State* (n 32) 91.
[58] *Evans v Information Commissioner* (n 27) [106]; *Re Resolution to Amend the Constitution* [1981] 1 SCR [753], [888].
[59] Marshall, *Constitutional Conventions* (n 3). It is worth noting that I am not referring to courts as legally authoritative here.
[60] Jennings, *The Law and the Constitution* (n 14) 136.
[61] John Finnis, *Natural law and natural rights* (2nd edn, OUP 2011) 242-244.

have expressed it: 'Conventions, however may be of very different importance. Some may be quite fundamental'.[62] Some, it could be added, are not so fundamental. The closer the reason for a convention is to the general purpose of conventional regulation, the more important it is for the whole constitutional edifice; and vice versa. Therefore, the differing importance of conventions has an impact on the 'reason' and its relation with the purpose of conventional regulation in general. This idea can protect constitutional theory from the frequent criticism that conventions 'may just be pointless, or wrong'[63] if there is in reality a loose connection between reason and purpose.

1.1.3. A first conclusion regarding UK literature on conventions

In the previous section, I tried to construct a cohesive account out of a fragmented literature on conventional regulation. It seems that in the UK, a number of scholars dealt with the issue of conventions in distinct ways, each shedding light on a specific theoretical aspect of conventional regulation or on a particular conventional rule. Nevertheless, however fragmented UK literature may be, UK conventions have received an unparalleled level of attention by scholars for reasons relating to the country's constitutional edifice as well as history. My approach towards this vast and detailed material was based on the importance of Dicey's contribution. Even though Dicey was not the first to write on conventions, the theoretical questions that he was the first to ask are still at the center of the academic discussion.

[62] Vernor Bogdanor and Stefan Vogenauer, 'Enacting a British constitution: some problems' [2008] PL 38, 50.
[63] Barber, *The Constitutional State* (n 32) 84.

The above critical view towards various approaches in UK scholarship forms the basis for researching the nature and normativity of conventions, a quest which is not restricted within the bounds of the United Kingdom but is equally important, as the next sections will show, for countries whose scholarship has neglected or even rejected conventions as a constitutional regulatory technique.

1.2. The traditional neglect of constitutional conventions in US literature, with some interesting exceptions

1.2.1. The content of neglect

Conventions are ignored by the vast majority of scholars in the US and the topic is not addressed in US constitutional law textbooks. Indicative of this phenomenon is the fact that in Akhil Reed Amar's book *America's Unwritten Constitution,* the author makes no reference to constitutional conventions, in the sense the word has been used in UK constitutional writings.[64] Having the first codified constitutional text in the world history as well as a relatively powerful Supreme Court, the United States has experienced a long tradition of constitutional legalism, which cannot easily take into consideration mostly unwritten and political constitutional rules.

Nevertheless, conventions exist in the US constitutional system and they are neither few nor lacking importance. The Electoral College is maybe the most famous example in the UK literature; when British scholars look for examples from foreign jurisdictions, the conventional regulation of the Electoral College's voting is the most popular choice. But beyond the Electoral College, there are many more conventional

[64] Akhil Reed Amar, *America's Unwritten Constitution: the precedents and principles we live by* (Basic Books 2012).

rules: the number of justices of the Supreme Court,[65] the prohibition of a third presidential term before the twenty-second amendment, the conduct of military affairs,[66] to name just a few.

Some scholars recognise the existence of such practices, yet they fail to explain this gap between the text of the constitution and constitutional reality through the existence of a specific category of constitutional rules, like conventions.[67] This creates a paradox: although aware of the existence of such practices, some US scholars tend neither to group them under a single category of rules nor to realise their normative content. This tendency creates further complexities in understanding the nature of the US constitution in general, beyond the rather short and old constitutional text.

There are exceptions to the rule of neglect. But they are relatively recent, with only a couple of writers having written specifically on this particular topic before 2010—though few have mentioned conventions, usually tersely, in the course of their analyses of other subjects.

1.2.2. The origins of US scarce literature on conventions

The first scholar to characterise US unwritten political constitutional norms as conventions was not a US constitutional lawyer but Dicey himself. Dicey answered the question regarding the existence of conventional rules outside the UK constitutional system, using, even from the first edition of his *Introduction*, the examples of the (then)

[65] James G Wilson, 'American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior' [1992] Buffalo Law Review 645, 674.
[66] Vermeule, 'Conventions in Court' (n 38).
[67] Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' [2013] University of Illinois L Rev 101, 103.

conventional prohibition of a third presidential term and the US electoral system.[68] The latter example is also present in Jennings' writings.[69] Both Dicey and Jennings structured their references to US conventions as examples of the existence of conventional rules in jurisdictions other than the UK uncodified constitution, characterised by the dominance of a single constitutional document.

Shortly after Dicey, Lord Bryce, a British academic, included in his *American Commonwealth* a chapter on 'The Development of the Constitution by usage'[70]. He is the first to provide us with a catalogue of what he considers as US usages at the time as well as the first to argue about the role of conventions within a constitutional environment characterised by the existence of a codified constitution.[71] Thus, Bryce opened the discussion on the existence and role of conventions not only in the US but more generally in codified constitutional systems.

In 1925, an Englishman, Herbert W Horwill, wrote the first and to this day only book on US conventional rules, which remains rather unknown in British literature.[72] The difference between Horwill's account and those of Dicey, Bryce and Jennings lies not only in the systematic (yet in some cases untheoretical) way in which he approaches almost all US conventional rules at the time but also in the fact that he builds his account of conventions as an argument in favour of the close similarity between the functioning of the UK and US constitutional systems.[73]

Horwill's contribution is important in a variety of ways. First of all, this has to do with his influences; for example, very early in his book, Horwill refers to Judge

[68] Dicey (n 48) 29-30.
[69] Jennings, *The law and the Constitution* (n 14).
[70] James Bryce and Gary L McDowell, *American Commonwealth: Two Volumes* (Liberty Fund 1995) 348.
[71] Ibid 350.
[72] Herbert W Horwill, *The Usages of the American Constitution* (OUP 1925).
[73] Ibid 8-9.

Cooley's statement that the constitution is defined as 'a body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised'.[74] Moreover, his work posed an influence on the few contemporary US scholars who have written on conventional regulation; for example, Wilson,[75] Whittington[76] and Vermeule[77] refer to Horwill, in some cases recognising the innovative character of his work for researching US conventions. In this way, Horwill provides not only a UK view on the working of the US constitution, but functions as a predecessor to those US scholars who relatively recently have tried to go against the dominant neglect of conventions by US theory.

Both before and after Horwill and Bryce, there existed some references to an 'unwritten' US constitution, namely to constitutional practices which remained outside the codified US constitutional text[78]. A characteristic example is Tiedeman's book, *The Unwritten Constitution of the United States*.[79] Nevertheless, those scholars tend to write in a descriptive way about the existence of constitutional practices[80] that are not included in the codified US constitution. Moreover, even if they describe such practices and the way they deviate from the constitutional text,[81] their work lacks any characterisation of the relevant practices as conventional rules and does not have any normative content. In this way, some scholars recognise the existence of the relevant practices but fail to connect them to the wider literature on constitutional conventions.

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[74] Thomas McIntyre Cooley and Andrew C McLaughlin, *The general principles of constitutional law in the United States of America* (3rd edn Little, Brown and Company 1898) 22 ; Horwill (note 82) 4.
[75] Wilson (n 65) 657.
[76] Whittington, 'The status' (n 67) 109-110.
[77] Vermeule, 'Conventions in Court' (n 38).
[78] Amar, *America's Unwritten Constitution* (n 64).
[79] Christopher G Tiedeman, *The unwritten constitution of the United States: a philosophical inquiry into the fundamentals of American constitutional law* (G P Putnam's Sons, 1890).
[80] Ibid 46-53.
[81] Akhil Reed Amar, *America's constitution: a biography* (Random House 2005).

At this point we should address a major terminological issue: we cannot speak of literature on conventions when the relevant practices are just mentioned. Two further criteria must be met: firstly, there should be a recognition of the normative character of the relevant practices; in other words, there should be an understanding of the fact that a certain constitutional phenomenon does not amount to a mere habit of constitutional actors, but also has normative content, binding, limiting or enabling political actors. Secondly, there should be a characterisation of the relevant normative rule as a convention (though not necessarily by that term; Horwill's 'usage' has the same basic meaning as convention). This is not just a matter of words; it is epistemologically important, since it connects the relevant rule to the wider literature on conventional regulation and gives systematic coherence to the academic analysis. Both these criteria are met in Horwill's and Bryce's works, while US scholars' writings through the 1990s on the 'unwritten constitution' or even 'unwritten constitutional rules' have not satisfied them.[82]

1.2.3. US scarce literature on conventions and its theoretical stance

In this part, I will try to synthesise the theoretical positions towards conventions expressed by American literature meeting the two aforementioned criteria. It is in fact only a handful of articles that will be critically analyzed here, starting from J Wilson's contribution in the early 1990s. Moreover, this US academic production on conventions was initiated as fundamentally different from its contemporary UK writings, since it had to face different opponents: it started as an effort to include conventions in American constitutional discourse and shed light into already existing US non-

[82] Wilson (n 65).

justiciability doctrines, against the dominant tide of constitutional legalism. Therefore, it had to prove, against the general neglect, that conventions do exist in the US and academics should take them into account, when forming their account of the US constitutional edifice and its rules. In the course of time, we witness a shift of interest in US writings, expressed through the effort of writers to contribute to the international dialogue regarding the major questions surrounding the nature and normativity of constitutional conventions.

Wilson's article constitutes the first effort to approach conventional regulation in the United States. It is characterised by its utilitarian use of the language and doctrines of conventional regulation. Namely, Wilson seems on the one hand to prove the existence and importance of US conventions, while on the other hand his main purpose is to bring out the usefulness of conventions in shedding light on the judicial doctrine of non-justiciability.[83] The article starts by a criticism of the failure of the political question and standing doctrines 'to give the Supreme Court (and the rest of us) adequate guidance on how to resolve many constitutional disputes'.[84]

Wilson's argument is straightforward and, in any case, correct: there are a number of constitutional issues which are not appropriate for resolution by the Supreme Court's jurisdiction, since the latter in some categories of cases, 'cannot adequately protect parts of the constitution, even when unconstitutional behavior exists'.[85] The central element of conventions is their non-enforceability by courts. Thus, conventions enrich the current American doctrines on non-justiciability, introducing the concept of conventions as a category of non-justiciable constitutional rules. In this way, they not

[83] Wilson (n 65) 705.
[84] Ibid 645.
[85] Ibid 707.

only determine the nonjusticiable issues [86] with greater precision, but also strengthen 'the underlying notion of judicial restraint'[87] and provide the defendant with an alternative resolution of the issue, outside the courtroom, through conventional regulation.[88]

More recently, Keith Whittington seems to overcome Wilson's utilitarian 'non-justiciability' approach, providing an account of US constitutional conventions focused on their relationship with the codified constitutional text. The US example is illuminating: even when the constitutional edifice is dominated by the existence of a 'capital c' Constitution, there remain areas of the constitution which are and should be regulated by conventional rules. Those rules 'supplement' in Whittington's terms, the codified and authoritative constitutional text.

In Whittington's analysis, conventions are incorporated in his wider theory of 'constitutional construction'.[89] The latter term refers to the process by which:

> The indeterminate text is rendered determinate through the creative action of government officials and commentators, discretion is hemmed in by the generation of "authoritative norms of political behavior."[90]

Thus, conventions are in his view, 'one mode of construction'.[91] In this way, Whittington approaches the interplay between provisions of the codified constitution and conventional rules as a matter of construction of constitutional meaning, when any interpretative method of discovering meaning 'has run out'.[92] In other words,

[86] *Baker v Carr* 369 US 186 (1962).
[87] Wilson (n 65) 707.
[88] Ibid.
[89] Whittington, *Constitutional construction: divided powers and constitutional meaning* (Harvard University Press 1999) 1-17.
[90] Whittington, 'The status' (67) 108.
[91] Ibid.
[92] Ibid.

conventions, as a subcategory of construction follow interpretation as a 'last resort'[93] for approaching the meaning of the Constitution.

In any case, Whittington seems to open the discussion of the relationship between constitutional conventions and the codified constitution, an issue to which we will return later in this thesis. Moreover, at the level of answering the question regarding the bindingness of conventions, Whittington supports the idea that conventions play a coordination function;[94] this function results from their ability to 'structure expectations' among political actors, since they fix the rules of the political game, through 'mutual expectations of compliance'.[95]

So far, both Wilson and Whittington have provided constitutional literature with general presentations of US conventions, mainly proving the existence of conventions in their jurisdiction as well as briefly touching some elements of theory. US scholars have only recently published articles focusing on particular theoretical questions regarding conventions: Richard Albert's[96] 'How Unwritten Constitutional Norms Change Written Constitutions'[97] and Adrian Vermeule's 'Conventions in Court'.[98]

Albert's article focuses on a topic that was already more briefly approached by Whittington: the relationship between conventional rules and the provisions of a codified constitution, and how conventions lead to informal changes to the constitutional text. He distinguishes between two basic categories of change, which he names incorporation and repudiation. He then divides the two categories into two

[93] 'construction zone' Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' 110 Harv L Rev (1997) 1359, 1371.
[94] Whittington, 'The status' (n 67) 116.
[95] Ibid 117.
[96] Richard Albert is a Canada-born US scholar, frequently writing on Canada and the US.
[97] Richard Albert, 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin ULJ 3di87.
[98] Vermeule, 'Conventions in Court' (n 38) 284.

further subcategories. Incorporation refers to introducing something new in the constitutional text without altering it, and is divided into void-filling and refinement of the existing constitutional text. On the other hand, repudiation is a term encompassing what Albert calls 'void creation' through the disablement of a written constitutional provision as well as substitution of a written provision by a constitutional convention which contradicts it.[99]

By accepting the existence of 'repudiation by substitution', Albert seems to neglect the repercussions which would follow from directly violating a constitutional provision and replacing it with a (mostly) unwritten constitutional rule, having the exactly opposite content. Among others, this would put the whole concept of rule of law at risk, since the hierarchically superior rule of the constitutional edifice would be turned over by a rule emerging out of political practice, undermining predictability.[100] Remembering Jennings' tripartite test, no 'reason for the rule',[101] could be found to justify such a move. Neglecting this fact at the level of categorisation of informal changes leads Albert to make up a 'rule of law' dilemma later on, when he moves to normative considerations regarding conventions.[102]

Finally, Adrian Vermeule, suggests that US public law should adopt what he characterises as the 'modern Commonwealth view'[103] regarding the incorporation of conventions into court decisions, with the parallel claim that the US Supreme Court has 'implicitly moved' towards such a view in recent cases.[104] He upholds the view that judges recognise but do not enforce conventions and expresses his preference for such

[99] Albert (n 97) 391.
[100] Ibid 411.
[101] Jennings (n 14) 136.
[102] Albert (n 97) 404.
[103] Vermeule, 'Conventions in Court' (n 38) 284.
[104] Ibid 283, 293;.*Free Enterprise Fund v. Public Company Accounting Oversight Board* 561 U.S. 477 (2010)

an approach as 'the least of the evils', compared to the other possible solutions.[105] He thinks that it is unrealistic for courts to avoid recognising conventions (what he calls 'the classical view'), since they are frequently interconnected with law in the modern administrative state.[106] On the other hand, enforcing conventions (the 'incorporationist view') is objectionable on democratic grounds because of the lack of accountability and responsiveness in their generation.[107] He omits, however, any reference to the political character of conventions as a ground for not enforcing them in court.

The same conclusion as well as a suggestion to the US courts to adopt the 'Commonwealth approach' of recognising but not enforcing conventions is present in an earlier article of Vermeule.[108] In the course of arguing for the conventional foundation of the independence of administrative agencies,[109] Vermeule offers an account of the relationship of convention with law and politics and the reasons why they are followed by political actors. On the latter issue, he suggests a distinction between 'thin' and 'thick' obligations. The former are related to coordination norms and equilibria,[110] while the latter include 'internalized moral constraints'[111] as well as what he terms as 'the cognitive hegemony of conventions'; that is, it never occurs to political actors to breach them due to a strong degree of internalising the rule.[112]

It is true that coordination functions and political morality are connected to the normativity of conventions. Nevertheless, Vermeule does not look into the ways in which coordination and content-based considerations interplay within the normativity

[105] Ibid 300-301.
[106] Ibid 302.
[107] Cf 5.3.
[108] Adrian Vermeule, 'Conventions of Agency Independence' 113 (2013) Colum L Rev 1163.
[109] Ibid 1179
[110] Ibid 1186-1187.
[111] Ibid 1189.
[112] Ibid 1190.

of constitutional conventions, being restricted by the purpose of his article, namely the presentation of the conventions of agency independence.

1.2.4. Trump's presidency and the theory of conventions—a first conclusion regarding the approach of US scholarship

Donald Trump's presidency has given rise to an interest among some scholars in informal constitutional rules within the US constitutional edifice.[113] It is noticeable that the relevant constitutional literature takes for granted the fact that conventions are 'underappreciated' by US scholars,[114] while arguing for the violation or disregard of conventional rules by President Trump. The majority of scholars who take part in this debate had already written on issues relating to conventional rules in the US either during the years preceding Trump's election or immediately afterwards,[115] something which seems to have urged them to shift their interest towards the question whether conventions constitute an effective safeguard against deviations from democracy as well as the consequences for the violation of conventions. Since both these arguments pertain to the bindingness of conventional rules as well as to the future of conventional regulation as a constitutional regulatory technique, these contributions will be approached in detail in Chapters 2 and 6 respectively.

The handful of articles analyzed and criticised in the previous section as well as the current shift of interest towards conventions following Trump's election should not

[113] Cf Neil S Siegel, 'Political Norms, Constitutional Conventions and President Donald Trump' 93(1) (2018) Indiana Law Journal 177, Josh Chafetz and David E Pozen, 'How Constitutional Norms Break Down' 65 (2018) UCLA L Rev 1430; Mark Tushnet, 'The Pirate's Code: Constitutional Conventions in US Constitutional Law'45 (2018) Peperdine Law Review 481.
[114] Ibid Siegel 187.
[115] Curtis A Bradley & Siegel, 'Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers' 105 (2017) Geo L J 255, Pozen, 'Self-Help and the Separation of Powers' 124 (2014) Yale L J 2.

obscure the big picture of the academic stance in the US: conventions are neglected by the vast majority of US academics. It took more than half a century for the emergence of Horwill's successors and they are still few, counted on the fingers of one hand. Nevertheless, these scholars meet the two criteria we have set: they both characterise the relevant rules as conventions (or a synonym of it) and are fully aware of their normative character. It is also important to observe that during the years that have lapsed since the first contemporary article written on conventions, academic articles have moved from a mere presentation of the existence of conventions in the US accompanied by some theoretical considerations to an analysis of theoretical questions regarding conventions. Could this mean that we are experiencing a turn in US theory towards acknowledging the importance of conventions within the US constitutional edifice and analyzing their nature and normativity? I think it is quite early to say so. Neglect of conventions is still the dominant approach in the US. Nevertheless, the internationalisation of academic production, comparative constitutional studies, and recent political developments could play a role in the realisation of the importance of constitutional conventions within the US constitutional edifice in the future.

1.3. Greece: the (near) rejection of conventions as a constitutional regulatory technique

If 'neglect' is the appropriate word to describe the traditional stance of US academic literature, the respective word for Greece could be 'rejection'. The negative stance towards conventions in Greek theory is shaped by the specific characteristics of the country, namely its turbulent modern history, as well as by continental academic

tradition.[116] The current state of affairs regarding conventions could be summarised by the 'peculiarity' and the 'residual character' claims. In other words, conventions are considered peculiar to the UK constitution; if and to the extent they exist in Greece, they have a residual and unimportant character.[117] Thus, Greece represents an example of essentially rejecting conventions.

The analysis of conventions in Greek theory is always accompanied by a mention of the Westminster case. In all the relevant literature, there is no reference to conventions without pointing out that these norms are born in the UK constitutional order. Evangelos Venizelos, for example, in his *Courses in Constitutional Law*, notes that 'Constitutional conventions have developed historically mainly in Britain, on issues where, in some area of discretion prescribed to the Crown, a specific way of exercising this discretionary power was imposed'.[118] This tendency of scholars does not equate to acknowledging the UK case as paradigmatic, but rather to a perceived antithesis between the continental tradition followed in Greece and the 'UK constitutional peculiarity', norms of which are considered the conventions of the constitution.

[116] Constitutional conventions were translated in Greek as '*synthikes tou politeumatos' [συνθήκες του πολιτεύματος]*. The interesting fact about this naming is that the term "constitutional" is not translated using the standard modern Greek word for the Constitution 'Syntagma' [Σύνταγμα] but as 'politeuma' [Πολίτευμα], meaning polity in general. The rationale of such a choice lies on the one hand on a legalistic conception of the Constitution, which according to Greek theory refers just to the single constitutional text. On the other hand, this choice implies the connection of conventions as a theoretical construct to the polity in its broader sense. The terminological differences are therefore important and indicative of a completely different perception of the Constitution and its non-legal norms in the UK and Greece. In other words, at a terminological level Greek theory seems to connect conventions with polity in general but not specifically with the constitution, as this is conceived in legalistic terms (the supreme law of the state).

[117] Konstantinos Mavrias, *Constitutional Law [Συνταγματικό Δίκαιο]* (Ant N Sakkoulas 2008) (in Greek) 267.

[118] Evangelos Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn. Ant N Sakkoulas 2008) (in Greek) 118-119.

1.3.1. The initial position

It seems that nothing has changed in Greek theory during the last half century, due to the popular belief among scholars that these issues were settled definitively a long time ago. Nevertheless, this was not always the case. Greece is a country where the whole system of parliamentary government was introduced through a constitutional convention, the so-called 'declared confidence' convention, as early as 1875. The convention, a type of rule introduced as a constitutional transplant from the UK, provided that the King was committed to give the mandate to form a government to the leader of the majority in the Parliament as well as to maintain his government as long as it continued to have the confidence of the majority.[119]

The 1875 changes were soon reflected in Greek academic literature. Athanasios Rodiris, in 1876, was the first to point out, echoing Bagehot,[120] that the cabinet is in actuality 'a committee of the Parliament', since the decision of the King to appoint a government is determined by the majority in the Parliament.[121] Moreover, Anastasios Stoupis observed that 'in our country, as in England the parliamentary type of constitutional monarchy is dominant'.[122] N.N. Saripolos, the most important constitutional lawyer of his time, wrote in 1909 that the parliamentary system, introduced in Greece in 1875 was based on conventional norms (*Konventionalregeln*).[123] Such was the importance of the Westminster paradigm for Greek parliamentarianism that in 1959, Christos Sgouritsas, an actor in the 1965 crisis,

[119] John S Koliopoulos and Thanos M Veremis, *Modern Greece: A History Since 1821* (Wiley-Blackwell 2009) 45.
[120] Bagehot (n 7) 48.
[121] Athanasios Rodiris, *The Organization of the State according to the Constitution [Η κατά Σύνταγμα Οργάνωσις του Ελληνικού Κράτους]* (Mellon 1876) (in Greek) 176.
[122] Anastasios Stoupis, *System of Constitutional Law [Σύστημα συνταγματικού δικαίου]* (Paraskevas Leonis 1889) (in Greek) 31-32.
[123] Nikolaus N Saripolos, *Public Law of the Greek Kingdom [Das Staatsrecht des Königreichs Griechenland]* (Mohr 1909) (in German) 81-82.

included the 'English polity' in his 'indirect sources of constitutional law' pointing out, among others, that 'the institution of ministerial responsibility was transplanted from England to the European states'.[124] Therefore, the parliamentary system as well as its conventional character and UK origins were recognised by a large number of authorities of late 19th and 20th century.

1.3.2. Aristovoulos Manesis and the origins of the current position

Greece's scholarship is always quite susceptible to the country's turbulent constitutional and political history. This fact can explain the major turn in Greece's theorising of conventions towards near rejection, which has been witnessed since 1950s and became dominant after the fall of the military junta in 1974. Aristovoulos Manesis' book *The Guarantees for Respecting the Constitution* (1956) has been of paramount importance for the position of Greek theory and has greatly influenced all subsequent academic discourse. In a footnote regarding the practice of royal assent to bills passed by the Greek Parliament, he stated that in those cases where a state organ has discretionary power to 'choose one among two equally legal solutions, the continuous and constant preference of one of them cannot be considered to lead to the creation of a constitutional custom (sic) such that a future choice of the other legal solution would be unconstitutional'. Such a position entails *mutatis mutandis* that a refusal of the British Monarch to give her assent to a bill would also not be considered

[124] Christos Sgouritsas, *Constitutional law Vol. A [Συνταγματικόν Δίκαιον Τόμος Α]* (Zacharopoulos 1959) (in Greek) 85, 99.

unconstitutional by Manesis;[125] this is actually the example he used, briefly referring to his—mistaken—perception of the UK case.[126]

In these passages, we notice the central parameters of both the Greek conception of unwritten constitutional norms as well as the prevailing position regarding unconstitutionality. Manesis believed that 'constitutional custom' can only be supplementary; it does not repeal or amend written constitutional provisions.[127] According to his point of view, it is the rigid character of the Constitution rather than its written nature that renders the creation of 'constitutional customs' and repealing customs in particular problematic.[128]

What consolidated the dominance of Manesis' view was the turbulent Greek 20th century. The apogee of this constitutional turmoil was the constitutional crisis of 1965, which discredited conventions in the eyes of major political actors and academics. The 'ineffectiveness argument' has marked Greek scholarship,[129] and for 20th century scholars, it operated as a form of 'constitutional self-fulfilling prophecy'. By this I mean that both theorists and political actors, by considering conventions ineffective and unstable guarantees of the constitutional *status quo*, and thus downgrading their status, made it easy and common to breach to them, leading in turn to their replacement by written provisions. It is interesting at this point to juxtapose this argument with British theory, which through stressing the importance of constitutional conventions and their effectiveness in regulating political actors' conduct, has contributed to general institutional stability—which is accomplished (somewhat

[125] Aristovoulos Manesis, *The guarantees for respecting the Constitution [Αι εγγυήσεις τηρήσεως του Συντάγματος]* (To Nomikon 1956) (in Greek) 156 note 4.
[126] Ibid.
[127] Ibid 161.
[128] Ibid 156.
[129] Venizelos, *Courses in Constitutional Law* (n 118) 401.

paradoxically) through the flexibility of conventions.[130] Academic literature not only describes its field of study but has the ability, willingly or not, to shape it as well.[131]

Given this widespread theoretical approach, Greek literature on the issue of conventions is unsurprisingly scant. It amounts to standard short references in treatises on constitutional law and a few articles that could be described as being relevant to this issue. Of these articles, only one uses the term 'constitutional convention' in its title, published in 1987.[132] Thus, the unimportant role given to conventions by Greek theory is also reflected in the small number and brevity of the references to them; conventions in Greece are not only underestimated but also under-theorised.

1.3.3. Reasons for the insignificance of conventions—a critical evaluation

Venizelos, who served as the general rapporteur of the majority in the Constitutional Amendment of 2001, doubts the importance of conventions and their normative quality. This suspicion seems to be shared by the vast majority of contemporary Greek constitutional theorists. Venizelos doubts the utility of the concept of conventions in countries with a single, written constitutional document. He seems to restrict, to a great extent, the usefulness of conventions to 'the context of the peculiarity of British constitutional norms'.[133] According to his view, conventions have a residual and fragmentary character in Greece, regulating fields that lack any political importance. 'They are supplementary norms of conduct that refer to issues on which … the balance

[130] Dicey (n 2) 413, Jennings (n 14) 81, N W Barber, 'Laws and constitutional conventions' [2009] LQR 294.
[131] Barber, *The Constitutional State* (n 32) 82.
[132] Antonis Pantelis, 'A constitutional convention: the decision to grant pardon' [Μια συνθήκη του πολιτεύματος: η απόφαση απονομής χάριτος] [1987] ToSyntagma (in Greek) 23.
[133] Venizelos, *Studies on Constitutional Law 1980-1987 [Μελέτες Συνταγματικού Δικαίου 1980-1987]* (Paratiris 1987) (in Greek) 108.

of power is not affected, and the political legitimacy of organs is not at stake'.[134] I will argue, however, that both Greek constitutional history, especially in times of crisis, and the role of conventions in the current state of affairs, can prove quite the opposite.

The common ground in Greek scholarship is the insignificance of constitutional conventions in the Greek constitution. It is therefore interesting to briefly investigate the reasons given for such assumptions. Antonis Manitakis believes that the 'nonexistence' of conventions in Greek polity, with the sole exception of the parliamentary system of government in its initial phase, should be attributed to the frequent amendments of the Greek Constitution and its wordy character, which 'does not leave room for the development of constitutional conventions'.[135] Other scholars, like Mavrias and Tsatsos, focus on the importance of the written and rigid character of the Greek Constitution,[136] while Kontiades and Tassopoulos, in keeping with their broader notion of 'informal methods of constitutional change', emphasise the role of the turbulent Greek history and the subsequent reluctance to trust the political class.[137]

Pantelis' writings constitute the sole exception to the rule of underestimation and under-theorisation of conventions in Greece. Nevertheless, he believes that actions that breach a convention are not necessarily unconstitutional.[138] In other words, he shares a legalistic conception of unconstitutionality. Pantelis holds that conventions cover the Prime Minister's decision to dissolve Parliament, the regulation of the days that political parties' campaign rallies take place, and decisions to grant pardon. On this

[134] Venizelos, *Courses in Constitutional Law* (n 118) 118-119.
[135] Antonis Manitakis, *What is Constitution [Τι είναι Σύνταγμα]* (Savvalas 2007) (in Greek) 103.
[136] Dimitris Tsatsos, *Constitutional Law Vol A: Theoretical Foundation [Συνταγματικό Δίκαιο Τομος Α: Θεωρητικό Θεμέλιο]* (Ant.N.Sakkoulas 1994) (in Greek) 428
[137] Xenophon Kontiades and Ioannis Tasopoulos, 'Constitutional change in Greece' in Xenophon Kontiades (eds) *Engineering constitutional change: a comparative perspective on Europe, Canada, and the USA* (Routledge 2013) 157-158.
[138] Antonis Pantelis, *Constitutional law handbook [Εγχειρίδιο Συνταγματικού Δικαίου]* (2nd edn, A Livanis Publications 2007) (in Greek) 182.

last issue, Pantelis has written the sole article in Greek constitutional literature that recognises the existence and importance of a convention, in which he expresses the view that the decisive power for the grant of pardon has been conferred conventionally to the President of the Republic.[139] He comes to that conclusion, following Jennings' tripartite test, after examining the concept of the royal prerogative in the United Kingdom.[140]

With minor exceptions, all the above analyses seem first to downgrade the historical side of the question, namely the importance of the parliamentary system of government that was based for many decades on a constitutional convention. Second, these analyses overlook the fact that conventions are not restricted to the context of the UK constitution but embedded in the constitutional reality of countries of the continental tradition, even in those that have experienced an equally turbulent 20th century.[141] Thus, in their effort to argue for a 'UK peculiarity' of the significance of conventions, they create a 'Greek peculiarity' in terms of their insignificance. These arguments are based on a *petitio principii*, by which both the instability of conventions and their incompatibility with a codified or rigid constitution are taken for granted in order to establish a conclusion tautological to the premises: the ineffectiveness and insignificance of conventions in Greece or, in some cases, their residual and secondary character. The sporadic references to specific constitutional conventions seem to be just serving the scholarly need for examples rather than forming a basis for theorising the role of conventions in the Greek constitution.

[139] Pantelis, A constitutional convention' (n 132) 42.
[140] Ibid 30.
[141] On German constitutional conventions cf. Greg Taylor, 'Convention by consensus: Constitutional conventions in Germany' [2014] International Journal Of Constitutional Law 12(2) 303-329. On Italy cf. Lorenzo Cuocolo, 'Constitutional Conventions and the Economic Crisis: The Italian Paradigm' (2015) 38 Dublin ULJ 265, 268, pointing out that in Italy 'scholars have paid a surprising amount of attention to them'.

Nevertheless, as it will be shown, both Greek history as well as constitutional reality prove that conventions existed and still exist within the Greek constitutional edifice, despite the dominant trend in academic writing. They have developed within a constitutional edifice and academic background which either pre-empted or even rejected their existence and utility. This is why they are of particular importance for this thesis.

1.4. The need for further research on the nature and normativity of constitutional conventions: A Conclusion

The critical analysis of academic literature has brought out three different stances towards conventions in the three jurisdictions examined: prominence and lack of systematicity in the UK, traditional neglect in the US and near rejection in Greece. At the same time, this difference in the positions of scholarship showcases three important challenges for any effort to approach the nature and normativity of conventional regulation. First, it has to prove that conventions exist as a category of rules and that they are the best way to describe the relevant practices and their normative character, in order to face claims that the same phenomena can be adequately approached through other theoretical schemes. Second, a theorist should also aim to prove that there are areas of the constitution that can and should be effectively regulated by conventional rules, rather than legal norms or codified constitutional provisions, contrary to what Greek scholarship supports in its rejection of conventional regulation. And thirdly, a concise account of conventional regulation which proves and accepts their important role within the constitutional edifice should be systematic, instead of simply

cataloguing conventions or touching a single theoretical aspect, ignoring the interrelated character of all the major theoretical questions concerning conventions.

The search for the nature and normativity of conventions is of paramount importance for meeting the three challenges presented above. Conventions, as rules with a political character which have the power to limit or enable the actions of political actors, are a separate category of constitutional norms which cannot be replaced by other concepts within academic literature. Therefore, neglect of conventions or mere description of the relevant practices without realisation of their normative character may produce a distorted picture of the constitutional edifice. This is particularly important in times of crisis, when it is realised that 'Democracies work best—and survive longer—where constitutions are reinforced by unwritten democratic norms'.[142] Furthermore, the normative character of conventional rules can provide the basic argument for countering claims that the ineffectiveness of conventional rules for binding political actors leads to their underestimation by theory and practice which in turn grounds their avoidance as a constitutional regulatory technique, as Greek scholarship supports.

Although all the above should not be underestimated, the biggest of all challenges is theorising in a systematic way. Any concise account of conventional regulation has to answer the questions first posed by Dicey, alongside the question he omitted regarding the normativity of conventions. The relevant discourse is not in any case new, but the analysis of this chapter has shown that it is far from settled. In order to answer all the Diceyan questions systematically, it is important to place at the center of the analysis the two most fundamental questions, pertaining to the nature and normativity

[142] Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History reveals about our Future* (Viking 2018) 8.

of constitutional conventions. Only by providing a persuasive response to these basic questions can the prerequisite of systematicity be based on firm ground, rather than providing a case-by-case analysis or a fragmentary answer to theoretical questions. If a scholar slides over these two basic questions, considering conventions' nature and normativity as self-evident and/or more or less similar to that of law (as Dicey did, regarding normativity), he will be rather unprepared for giving an all-round account of a specific constitutional convention and its role within the constitutional edifice.

The differences in theoretical positions in Greece, US and the UK surveyed in this chapter involve the perception of conventions and their functioning in the three jurisdictions examined. Despite these apparent differences between the three countries' approaches towards conventions, there is some common ground in the relevant topics of discussion. Nevertheless, even though the questions are similar, the answers are different. These differences form what can be termed as an 'academic tradition' that imposes a strong influence on conventions themselves. Academic writing not only provides descriptive and normative accounts of the subject, but can form it as well, giving it its current shape. This critical account of the position of scholarship in the three jurisdictions will prove useful through the arguments examined and the shortcomings brought into light in approaching the basic theoretical questions regarding conventions in the following chapters, as well as bringing out the actual place of conventions within the constitutional edifice.

CHAPTER 2-ARE CONSTITUTIONAL CONVENTIONS NORMATIVE? THE ELEMENT OF GUIDING CONDUCT AND THE SANCTIONS FOR THEIR BREACH

In order effectively to regulate areas of the constitution, conventions should be normative. But this does not prove that they are actually normative. To prove this point, I should add content to the general term 'normative'. Furthermore, it is necessary to examine the extent to which conventions successfully guide rather than simply describe the constitutional conduct of political actors, using specific examples. Guiding conduct, however, does not necessarily translate into imposing duties, since there are not only limiting but also enabling conventions. This distinction is important for the examination of cases in the three jurisdictions which apparently seem to include the 'bending' of conventional rules. Finally, if conventions are meant to be normative, in the sense I describe, their violation should have negative consequences for those breaching them.

The first section of the chapter aims at defining the bounds of the term 'normative' in the context of conventions. The next sections counter claims that what we call conventions are simply a group of practices describing and not guiding the conduct of political actors. But guiding conduct does not suffice. This must be done effectively and, in order to prove this, I have to look into cases where political difficulties follow the breach of a conventional rule or deter political actors from such a breach. Moreover, I discuss cases which have been perceived as failures of conventions effectively to regulate the constitutional conduct of political actors. The

final part of the chapter discusses the particular characteristics of the normativity of conventional rules.

2.1. 'Normativity' in the context of conventions. In which sense are conventions normative?

It is important to delineate the meaning of 'normativity' in the context of conventional regulation. In the previous chapter, I tried to adopt the widest possible approach on normativity regarding the literature on conventions in the three jurisdictions concerned. At this point, it is important to bring out in which sense conventions can be normative and, more importantly, in which sense I will actually investigate whether they are normative.

There are a couple of ways in which conventions can be normative. First, this can be a matter of self-presentation. Conventions may present themselves as normative, i.e. as purporting to tell us what to do. Second, there is the way in which those to whom they are addressed view them. This approach focuses on conventions being treated by those subject to them *as if* they were normative and translates into a particular feature of conventions, namely, that they only exist if some people accept their normativity. Finally, there is a wider normative question: whether we *should* treat conventions as normative.

Regarding the first and second versions of the normativity of conventions, it is important to keep in mind some differences in the way law and conventional regulation arise and present themselves, taking into consideration the 'central cases' of both. First of all, law retains its ability to impose obligations regardless of the willingness of its

subjects,[1] a characteristic which is unique to it. Moreover, unlike law, conventions remain, in their classic form to a large extent unwritten, developing through precedents. Their existence is generally proven in retrospect, by looking back, first of all, to the objective element of the precedent(s) already followed. For example, searching for the last time a specific power was exercised is the way to trace the beginning of a limiting convention.[2] Of course, remembering Jennings' tripartite test, there should also exist a 'reason' for the rule as well as a certain stance of political actors.[3]

Indeed, Jennings' tripartite test is of paramount importance here: taking it into consideration, three points in time should be singled out in relation to the normativity of conventions. The first refers to the moment when the first precedent has been followed; the second (which may coincide with the first, in the case of a single precedent) is when adequate precedents have been followed; and the third is when all the different elements of the tripartite test, both subjective and objective are present. In the case of the first two time points, it is obvious that we are dealing with an emerging convention rather than a fully realised one. Thus, bringing conventions into life is not only a matter of the concurrence of the actions of those following the precedents. There is something more needed than what Jellinek characterised as the 'normative force of the factual'.[4] Conventions are products of the combinations of facts, often taking the form of 'behavioral regularities',[5] with reasons. They are not grounded solely on precedent, and it is reasonable to say that the latter does not suffice for their emergence or for defining their normativity.

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[1] Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) 36.
[2] A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2014) 21.
[3] Sir Ivor Jennings, *The law and the Constitution* (5th edn, University of London Press 1959) 136.
[4] Georg Jellinek, *Allgemeine Staatslehre [General Theory of the State]* (3d ed O Haering 1914) (in German) *338.*
[5] Adrian Vermeule, 'Conventions of Agency Independence' 113 (2013) Colum L Rev 1163, 1190.

Therefore, speaking of the 'normative self-presentation' of conventions as well as the way in which those to whom they are addressed view them, we should keep in mind that conventions, unlike law, are a composite constitutional phenomenon including not only precedents and rule-obeying but also the subjective view of those following the precedents as rules. The judgment on whether each combination of following a practice and considering it a rule suffices for the characterisation of the relevant constitutional phenomenon as a convention is something that takes place *ex post*, in retrospect.[6] This judgment shows that the normativity of conventions is not solely a matter of self-presentation of the rules, regardless of the way the addressees view them; it should not be approached as an approximation to the normativity of law. In the case of conventions, the existence of a binding rule and the fact that this rule is perceived by the relevant actors as a standard of behaviour[7] are two inextricably connected phenomena.

At this point, two conclusions can be drawn: first, a conventional rule can have no normative claim without taking into account the way this rule is viewed by the relevant actors; second, the view of those actors does not suffice for the characterisation of a convention as normative.[8] By being part of the test, the view of political actors cannot be its result as well; it is a factor towards proving the existence of normative rules and not the normative element of those rules *per se*.

Should we draw a distinction between the claims made by conventions as a category of rules as well as the way they are viewed in general by the relevant actors and the way in which we find the existence of a specific conventional rule according to

[6] Bradley, Ewing and Knight (n 2).
[7] John Bell, *French Constitutional Law* (OUP 1995) 57.
[8] *Re Resolution to Amend the Constitution* [1981] 1 SCR [753], [888]; *Evans v. Information Commissione*r [2012] UKUT 313 (AAC) [69]; *Evans v Attorney General* [2015] UKSC 21; [2015] 2 W.L.R. 813 [105].

Jennings' tripartite test? In my view, such a distinction would soon be proven futile: if every single rule which is characterised as convention is based on the existence of precedents that are considered as binding by actors which follow them, the attributes of the members of the group 'constitutional conventions' characterise *a minore ad maius* the whole category of norms defined as such. It would be a logical fallacy to think that the normativity of conventions as a category of rules can exist regardless of the way the normativity of every single rule is grounded. What happens in the smaller scale is also true for the larger one.

By showing the shortcomings of both a purely objective and a subjective account to the normativity of conventions, the above analysis leads to turning to all-things-considered accounts of the normativity of conventions; namely, to accounts that take into consideration both the relevant subjective and objective elements. The feeling of political actors that they are bound by the rule, in other words the treatment of conventions as normative, is inextricably linked to the existence of precedents. The latter is an objective factor that needs to be present along with the subjective understanding of political actors in order for a constitutional habit to have a normative element.

In this chapter I focus on whether conventions have the ability to regulate constitutional conduct in particular cases, providing standards of behaviour and whether this is done effectively. There is a second, related question regarding whether conventions should be normative. This will be addressed in Chapter 5.

2.2. Conventions as rules

The previous chapter has shown that a large part of UK literature has taken for granted the normativity of conventions and in many cases assimilated it with that of law. In other words, the normativity of conventions has not been questioned by the majority of UK scholars, who frequently approach them as 'quasi-legal' rules.[9] In the case of the US, the presentation of conventional rules as 'practices' by the majority of US scholars deprives them of their normative element. Similarly, in Greece, academics have questioned the ability of conventions to act as rules preventing unconstitutional behaviour.

As it has previously been stated, in order to show that conventions are normative, it is essential to prove that they are not simply a description of certain practices followed by political actors. Conventions do not amount to simply what is predicted that political actors will do in a given situation or to what is necessary or prudent for them to do for reasons of political expediency. The discourse on the description of constitutional phenomena, prediction of future action and necessity or convenience present similarities but they are in no case identical to that on the normative quality of rules.

2.2.1. The constitutional element of conventions

To begin with, it is crucial to bring out the 'constitutional' element of constitutional conventions. Political actors engage in activities prescribed constitutionally. Nevertheless, a legalistic perception of political life combined with an equally legalistic

[9] Albert Venn Dicey, *Introduction to the study of the law of the constitution* (8th edn, Macmillan 1915) 437.

perception of the constitution place more emphasis on the engagement of political rules with legal constitutional rules than what happens in reality. The actual role for constitutional conventions within a political system constitutes a challenge to the above scheme. Conventions are non-legal (political) rules that guide the conduct of certain actors when their behaviour is within the scope of constitutional regulation, that is, when they actually implement and/or take advantage of rules pertaining to the allocation and exercise of powers relating to the constitutional state[10] and its organs.[11]

A delineation of the term 'constitutional' in the case of constitutional conventions avoids searching for the normativity of practices and rules that may be related to the conduct of such actors but do not have a constitutional element. In reality, a great part of the political game is played in an area not prescribed by the constitution (either codified or conventional), with the latter only providing its outer limits. The rejection of the normativity of conventions is in many cases a result of expanding their scope and including among them political practices that simply describe other forms of conduct in the political game.[12]

The next question to be considered is whether conventions regulate the whole area of the constitution. It should be remembered that what is described as a small 'c' constitution basically provides for two things, according to the dominant view: the organisation of state organs (constitutional organs) and rights (constitutional rights). Moreover, the subjects of constitutional norms, which could be put as constitutional actors can vary from the electorate to political actors and the judiciary. Constitutional conventions do not potentially guide the conduct of all constitutional actors in the whole

[10] Nick Barber, *The Constitutional State* (OUP 2010) 75.
[11] Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149, 152.
[12] Evangelos Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn. Ant N Sakkoulas 2008) (in Greek) 119.

spectrum of constitutional regulation; their scope is rather more specific: they guide the conduct of political actors when dealing with issues relating to the organisation of the state and the relationship between its organs. This means that the normative power of conventional rules does not pertain to the area of constitutional rights or to that of non-political constitutional organs.

Does this mean that there are no unwritten constitutional rules regarding rights or e.g. the judiciary? Beyond doubt, there is no area of the constitution that is exhaustively regulated by written provisions. Nevertheless, not all unwritten constitutional rules are of the same quality. In the following chapter, constitutional conventions will be distinguished from constitutional customs. In the context of this thesis, custom is an unwritten norm of the legal constitution, characterised by the existence of '*opinio juris'*[13] among the relevant constitutional actors; in other words, by their conviction that they are following a legal rule.[14] Constitutional custom is, in actuality, unwritten constitutional law.[15] 'Conventions' pertaining to the judiciary can be included in the category of constitutional custom, rather than to that of conventional regulation, which is political in character. An exception could be made in regard to 'inter-institutional'[16] conventions regulating the relationship between, on the one hand, state organs, like Parliament and the executive, and supreme and constitutional courts on the other, with the latter acting as quasi-political bodies.[17]

[13] Philippos Spyropoulos and Theodore Fortsakis, *Constitutional law in Greece* (2nd edn, Kluwer 2013) 55.
[14] Andreas Dimitropoulos, *System of Constitutional Law [Σύστημα Συνταγματικού Δικαίου]* (2nd edn, Sakkoulas 2011) (in Greek) 284.
[15] Cf 3.2.2.
[16] Bart Driessen, 'Interinstitutional conventions and institutional balance' (2008) 33 European Law Review 550, 555.
[17] Cf Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Hart Publishing 2018) 158.

It would be quite paradoxical if conventional rules regulated the conduct of adjudicatory organs, when their distinguishing characteristic is that they are not justiciable. If I were to accept such a position, the first thing to name as a 'judicial convention' would be the rule that conventions are not justiciable, i.e. enforceable by court. But that would translate into a paradox when a court would be in the position to characterise a conventional regulation as non-justiciable:[18] it would actually enforce a presumed 'judicial' convention, that of non-justiciability.

Finally, the basic characteristics of conventions render them unsuitable for the constitutional protection of rights. The traits of being flexible and unwritten stand on the opposite of the need for a definitive protection by express constitutional provisions, as sought by the advocates of the rights discourse. The same goes for non-justiciability. It seems that constitutional entrenchment of specific rights is based on the dual basis of legal provision and judicial resolution of the relevant disputes in the judicial *fora*. Conventions belong to a different constitutional *rationale*, based on the virtue of keeping an area of the constitution immune from judicial intervention. If rights express a skepticism towards democracy, conventions defend the ability of politics to regulate its own affairs, without the need for external interventions by the judicial branch.

2.2.2. Constitutional conventions as practices gaining normative force/'Evolved' and 'declared' conventions

Given the above clarification, it is time to face claims challenging the role of conventions for the conduct of political actors. The first claim is that conventions

[18] *R. (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, 146.

amount to no more than a description of the conduct of political actors in a constitutional context, a habit of following patterns of behaviour when faced with certain circumstances. Conventions are thus presented as a phenomenon quite close to what has been described by many theorists as *constitutional practice.*

Constitutional practice, like conventions, forms part of the 'non-legal' constitutional structure. Nevertheless, unlike conventions,[19] constitutional practice is not a rule, but a mere habit.[20] However, it forms part of the wider notion of constitutional reality or *Verfassungswirklichkeit.*[21] The latter notion is used in Europe to describe the sum of both what is provided by constitutional rules and what actually happens within a given constitutional structure, but its usefulness transcends the borders of continental legal tradition.[22]

Since constitutional practice will be analysed in Chapter 3, suffice it to say that I could describe the descriptive elements of the constitutional structure as 'what happens'. On the other hand, the normative parts of the constitution could be briefly put as 'what should and should not happen' within the constitutional structure. 'What happens' interacts with what 'should happen' in various ways. Normative rules shape reality, through their existence and implementation by constitutional actors. The opposite can also happen, something which is demonstrated in the case of conventions. Conventions in many cases emerge from 'what happens' towards what 'should happen', through the development of a belief among political actors that they are bound by

[19] Joseph Jaconelli, 'The Nature of Constitutional Conventions' (1999) 19 Legal Studies 24, 30.
[20] Rodney Brazier, 'The non-legal constitution: thoughts on convention, practice and principle' (1992) 43 N Ir Legal Q 262, 270
[21] Cf Karl-Ulrich Meyn, *The constitutional conventional rules in the constitutional system of Great Britain [Die Verfassungskonventionalregeln im Verfassungssystem Grossbritanniens]* (Schwartz 1975) (in German).
[22] Cf 3.1.2.

precedents taking the form of a rule, to cite again Jennings' tripartite test.[23] In other words, facts of constitutional reality create conventions, in the form of certain practices gaining normative force.[24]

Does this happen with all conventions? Are they all a product of practice gaining normative force? First of all, there is always the possibility of a single precedent 'with a good reason'[25] gaining normative force and becoming a convention. In other words, practice in terms of conventions is not tautological to *longus usus*, 'long use', which is indispensable for the existence of custom; with conventions, the term 'practice' can be reduced to a single precedent, if it is accompanied by a strong reason for the existence of the convention. George Washington's notable decision not to stand for a third term despite his popularity is an example in this direction, when John Adams decided whether to run for a third term.

Furthermore, a basic distinction may be recalled here between conventions developing out of practice and those which are 'declared' by political actors.[26] In this particular case, conventional rules can be 'announced' by formal agreement, by a declaration of a political actor, who decides to undertake a self-limitation, or by a decision made by the Prime Minister and adopted by the Cabinet.[27] The existence of 'declared' conventions raises a question regarding the existence of a second route to normativity, parallel to that of normative evolution through practice.

A closer look at the bindingness of such 'declared' conventions proves that a differentiation between the normativity of evolved and declared conventions soon

[23] Jennings (n 3) 136.
[24] Brazier, 'The non-legal constitution' (n 20) 270-272; Vermeule (n 5).
[25] Ibid.
[26] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] 71 Mod L Rev 853, 856.
[27] S A de Smith and R Brazier, *Constitutional and Administrative Law* (Penguin Books, 6th ed, 1989) 43.

proves to be false. In actuality, what is produced by the declaration or agreement to follow a convention is not, strictly speaking, rule-creation but rather an anticipation for the creation of a convention, through precedents which will follow.[28] For example, when Lord Sewel, the then minister for Scotland announced that the UK Parliament will 'not normally' legislate on a matter within the devolved competence of the Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly, he did not mark the moment of birth of a convention. He rather announced, through his official governmental capacity, the creation of an anticipation among political actors that a convention will be born, on this particular issue, having the content described by his declaration.

The key to understanding the true nature of 'declared' conventions lies in the exact wording of Lord Sewel:

> we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.[29]

It becomes clear from the above passage that Lord Sewel spoke about the creation of an 'expectation' for the emergence of a new constitutional convention, not of the creation of a new convention at that particular moment.[30] The Sewel convention has risen as a normative rule out of subsequent practice, which was followed by UK governments of different political orientation. The rule has experienced a stable and

[28] McHarg (n 26) ''Reforming the United Kingdom Constitution' 858; D Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [20071 PL 258, 259.
[29]HL Deb 21 July 1998 Vol 592 c 791.
[30] This declaration was expressed more formally in the subsequent Memorandum of Understanding between the United Kingdom Government and the Scottish Parliament: *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (UK Government 2013) paras 14-15 and finally codified in Section 28(8) of Scotland Act 1998.

coherent implementation in the years that followed.[31] Thus, this expectation declared by Lord Sewel 'has been fulfilled', as the Supreme Court notes in *Miller (no 1)*.[32]

Does all this mean that there is no significant difference between the so-called 'declared' and the classic 'evolved' conventions? In terms of their normativity, the answer is affirmative. With both declared and evolved conventions, constitutional practice gains normative character at some point. Thus, in both cases, the normative character of the rule arises from the way political actors act.

A point of difference can be found in the deliberate creation of 'declared' conventional rules. This does not of course mean that evolved conventions are created by unconscious actions; it is rather the choice of conventions as the optimum constitutional regulatory technique that is deliberate particularly before the emergence of declared conventions. This difference can be realised through the following test: we tend to locate the emergence of an evolved convention in retrospect, looking back at the precedents. On the contrary, the emergence of declared conventions can be monitored prospectively, since political actors follow a certain practice knowing that their conduct will eventually lead to the development of a new conventional rule.

Is this particular difference between the two categories of conventions sufficiently important to lead to the conclusion that there is a significant discrepancy in the way their normativity develops over time? I think that the deliberate choice to form a convention is important in terms of proving the trustworthiness of conventions for regulating the constitutional edifice, but it does not change anything regarding the way they bind political actors. The goal is achieved through the normative development of practice; the fact that this practice has been announced or agreed at the outset does not

[31] Jane Munro, 'Thoughts on the 'Sewel Convention'' (2003) 23 SLT 194.
[32] *R. (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 [137].

change its nature. Practice remains equally important for the rule and declared conventions guide conduct in the same way as evolved ones do.

Finally, the prospective (and not retrospective) search for the emergence of the rule through practice is methodologically important for the academic observer but does not change the way practice gains normative character; it only affects the ability of scholars and political actors to foresee the crystallisation of the practice into a rule. After the emergence of a convention, the fact that we could have searched for precedents prospectively or retrospectively before this emergence had taken place does not have normative significance. At the end of the day, normativity is a trait of already existing conventions and only in nascent stages can it be traced in developing ones.

2.2.3. The addressees and content of conventions' guidance

At this point two further questions arise: to whom are conventions addressed and what is the content of their guidance? In other words, who are the addressees of the normative message of conventional regulation and what do conventions guide them to do?

2.2.3.1. The addressees

As has been shown in Section 2.2.1., conventions are not constitutional norms applicable to the whole area of the constitution. Their regulatory ambit is determined by their distinguishing characteristics[33] and functions:[34] they are meant to regulate the conduct of political organs, providing them with an area immune from judicial

[33] Cf 3.3.
[34] Driessen, 'Interinstitutional conventions and institutional balance' (n 26).

intervention and boosting their ability to regulate their own affairs. Therefore, the constitutional organs regulated by conventional regulation are *political* organs; they comprise one or many political actors.

The question naturally arises: how broad should our conception of a political organ be? This issue is particularly interesting regarding political parties. Their importance within the political sphere can hardly be doubted; they are important political organs. But can they also be regarded as political constitutional organs, so that the rules regulating the conduct of political actors when acting within them (e.g. the state by state nomination process in the US) or in their name to be considered as conventions? In order to respond to such a question, we should consider the nature of political parties. As groups created by the concurrent will of political actors, they are effectively collective political actors.[35]

Moreover, there are examples of recently established conventions guiding political parties, like the German unwritten rule that the President of the *Bundestag* 'must always be a member of and nominated by the party with the greatest number of seats'.[36] The same rule applied in Greece during the crisis period (2011-2019), when all governments formed were coalitions: the President of the Parliament was always an MP of the major coalition partner, who also had the relative majority of seats in the Parliament. In both cases, the rules pertaining to the selection of the President of Parliament are rules enabling the major political party to choose its nominee ensuring she will ultimately be elected to the post.

[35] Evangelos Venizelos, *The Open Party [Το ανοιχτό κόμμα]* (3rd edn Epikentro 2007) (in Greek) 20.
[36] Greg Taylor, 'Convention by consensus: Constitutional conventions in Germany' (2014) International Journal Of Constitutional Law 12(2) 303, 307.

The above conventions regulate the conduct of political parties in their relationship with another institution. They are 'inter-institutional' conventions:[37] they determine the person to be selected by the Parliament as its President by her affiliation with a specific political party and the latter's backing of her. But can we also speak of conventional rules that regulate the internal structure of political parties? In other words, are the rules that determine the way political parties take decisions, appoint leaders, and regulate their own affairs conventional in their nature? Returning to the example of the selection of the President of Parliament in Greece and Germany: if there existed a rule regulating the selection of the person to be the party's nominee for the Presidency of the Parliament, would this rule also be a constitutional convention?

To answer this question, it is worth taking into consideration what happens with collective political organs other than political parties: a good example is the Cabinet,[38] comprising the various ministers who take part in its works. The effective working of the government asks for the regulation of the way the Cabinet conducts its internal affairs, with the prime example being its proceedings. In the UK the majority of these rules, including unanimity and confidentiality,[39] constitute conventions that are now codified in the Cabinet Manual.[40] The conventional nature of those intra-institutional conventions has never been doubted.

Is there any reason to distinguish political parties from other collective political constitutional actors? The only plausible argument for such a distinction would be that, unlike other cases, political parties are not state organs in the strict sense of the term. Yet, the same goes for local government, which can and should be distinguished from

[37] In the context of the EU, Driessen, 'Interinstitutional conventions and institutional balance' (n 16) 555.
[38] Σύνταγμα της Ελλάδας, Constitution of Greece (2019), art 82(1).
[39] John P Mackintosh, *The British Cabinet* (3rd edn. Stevens and sons 1977) 17.
[40] Andrew Blick, 'The Cabinet Manual and the Codification of Conventions' (2014) 67 Parliam Aff 191.

the central machinery of the state, run by 'state government'.[41] An even more important example is the electorate.[42] It constitutes a constitutional organ through its participation and voting in a number of cases, among which national and local elections and referenda. Through these means, the electorate is the ultimate arbiter of the propriety of politicians in their constitutional conduct. Although it does not constitute a *stricto sensu* state organ, the electorate is a constitutional organ of outmost importance.

Modern democracies, unlike authoritarian regimes, are based on a delineation between the state and political parties. Nevertheless, this should not obscure the fact that political parties have an important role to play within the constitutional edifice, as channels between the other two main elements of the constitution: the state and the people.[43] In this sense, the constitution in modern representative democracies can be viewed as a triadic relationship between the state, the electorate and the mediating political parties.[44] Within this triadic scheme political parties act as a safeguard for democracy, since they promote the responsiveness of political actors to the electorate.[45]

The importance of political parties to the functioning of the constitution and democracy renders their internal rules constitutional in nature. Therefore, with the addition of political parties, the profile of the addressees of conventional regulation becomes richer. It includes not only individual political actors and state-associated constitutional institutions, but also collective political actors who do not belong to the state apparatus. This means not only entities like local government and the electorate

[41] Donald P Haider-Markel (ed), *The Oxford Handbook of State and Local Government* (OUP 2014)
[42] Dicey, *Introduction to the study of the law of the constitution* (n 9).
[43] Tarun Khaitan, 'Constitutionalising the Party' (draft paper).
[44] N W Barber, *The principles of constitutionalism* (OUP 2018) 6.
[45] Graham Gee and Gregoire C N Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 283, 285; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Dmocracy* (CUP 2007) 259.

but also political parties, whose external and internal affairs can be regulated by conventional rules.

At this point, a final question arises: can the electorate be also conceived as an addressee of conventional rules? As will be further analysed when I will examine the political difficulties that follow breaking conventions, the electorate is the ultimate arbiter of the conformity of the constitutional conduct of political actors with conventional rules. In this sense, conventional rules are addressed to the electorate, providing the rule and the context according to which it has to judge a specific action. This can either happen directly, through approval or disapproval of parties and persons in elections, or indirectly, with the mediation of the Parliament. Parliament judges the propriety of a specific act by a political actor, and it is evaluated in turn for its judgment by the electorate, at the time of general elections.[46]

2.2.3.2. The content of the guidance of conventions

Conventions are crucial in the direction of maintaining the ability of politics to regulate its affairs through its own means. This is why the two classical legal constitutional 'external' interventions to politics, the judiciary and rights, are kept outside their ambit. If the independence of the judiciary is provided for by legal constitutional means, the independence of politics from the judiciary is grounded on conventions. The idea that not all areas of the constitution are appropriate for legal regulation[47] and judicial resolution can be taken as a 'negative' ground for the justification of conventions; the autonomy of the political sphere within a democratic constitution is a 'positive'

[46] Cf Dicey (n 9) 434.
[47] Timothy Endicott, 'The impossibility of the Rule of Law' [1999] 19 OJLS 1, 12.

justification. These two ideas combined determine the areas regulated by conventions as those pertaining to the conduct and relations between constitutional actors which could be characterised as political.

The question regarding what constitutes 'political' in the constitutional sphere will be approached in detail in chapter 4. For the moment, it is important to stress that conventions are not just the guardians of the outer limits of a constitutional area which is regulated by political and not legal means. Of course, they act as 'borders' of non-justiciability; this is their external function. But they also have an internal function, which in actuality provides the rules by which the constitutional game is played within a political field.[48] The omission of this internal function by traditional theory was not coincidental; it rather depicted a perception of politics as an area whose internal affairs are left constitutionally unregulated.

A common criticism of the advocates of conventional regulation is that, by rendering the matters they regulate non-justiciable, they create an environment where constitutional wrongdoing is left without an effective constitutional remedy.[49] This can of course be attributed to the legalistic view that the only effective limitation to constitutional actors is judicial censure. This perception led Dicey, among others, to look for a legal 'sanction' by which obedience to the conventions of the constitution'[50] is enforced, and scholars like Allan or Elliot to argue that conventions can actually become enforceable in court.[51]

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[48] Dimitris Tsatsos, *Constitutional Law Vol. A: Theoretical Foundation [Συνταγματικό Δίκαιο Τόμος Α: Θεωρητικό Θεμέλιο]* (4th ed. Ant N Sakkoulas Publications 1994) (in Greek) 116-117.

[49] Cf Jaconelli, 'Do Constitutional Conventions Bind? (n 11) 152 'Generally, to pose the question ''Do constitutional conventions
bind?'' might appear to invite an immediate answer in the negative'.

[50] Dicey (n 9) 414.

[51] M Elliott, ''Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention' (2002) 22 Legal Studies 340, 362; T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993) 244.

The bottom-line of this perception is that politics, unless it is limited by judicially enforceable law, will not be not be regulated by rules at all but determined only by relationships of power. Nevertheless, the 'internal' function of conventional regulation as well as their 'positive' justification point towards another direction. There are rules by which the political game is played—constitutional rules regulating the conduct of political actors when they act within the constitutional sphere. Conventions do not simply provide for the outer limits of politics or the areas which are not appropriate for judicial resolution; they also guide conduct through political constitutional means.

At this point, it should be remembered that the traditional conception of the normativity of conventions has viewed them as an alternative to law or the codified constitution in limiting the conduct of constitutional actors. However, the true picture is different: the role of conventions is much more important than being a regulatory alternative to law; the rationale for their existence is wider than providing for a non-justiciable alternative to enacting a statute.

The content of guidance that conventions provide to political actors is also different than its traditional perception: conventions do not simply limit the conduct of political actors within the bounds of a non-justiciable, political constitutional territory. In other words, they are not only a shield against constitutional wrongdoing of political organs; they can equally be viewed as a sword, since they provide for an area of autonomy for the political sphere. This perception of conventions as a political sword translates not only into non-legal limitations but also into providing political actors with the means to fulfill their constitutional role. In other words: enabling them to conduct political affairs and govern the state.

The idea of entitlement-conferring rules is not unknown to theory. Before Marshall drew the distinction between duty-imposing and power-conferring conventions, Hart, in his classic *Concept of Law* wrote on the existence of power-conferring norms which are not coercive in nature but rather create a capacity for those to whom they are addressed.[52] Hart's point refers to norms in general and more particularly to laws that, unlike limiting ones, are not enforced by coercion. The powers they accord are voluntary and can be exercised or not by the addresses. Examples include the powers to marry or sign a contract or enact legislation.[53]

Marshall translated Hart's concept into the context of conventions, although he does not refer *expressis verbis* to Hart in his analysis. Compared to laws, which regulate an important part of social life,[54] conventions are rules regulating the constitutional conduct of the political game. In this much more specific context, Marshall makes some brief remarks. They mainly relate to presenting cases of 'entitlement-conferring' conventions, as opposed to 'duty-imposing' ones, without further theoretical analysis.[55]

In any case, the acknowledgement of the existence of two kinds of power-conferring rule—legal and conventional—within the constitutional edifice, leads to a richer conception of the constitution as a composite phenomenon. It includes both the traditional limiting, negative constitutionalism but also a more modern, positive constitutionalism which aims at enabling the machinery of government to fulfill its role and attain the objective of the state.[56] These are issues which will be analysed in more detail in Chapter 4.[57] What is important to note though, is that it is a mistake to stick to

[52] H L A Hart, *The Concept of Law* (3rd edn, OUP 2012) 29.
[53] Leslie Green, 'Introduction' in Hart (Ibid) xxxi.
[54] Ibid xxv.
[55] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1987) 7-10.
[56] Barber, *The principles* (n 44) 6.
[57] Cf 4.2.

the limiting side of regulation when theorising the normativity of conventions, ignoring the equally important enabling side.

In many cases conventions that enable some political organs create obligations for others. In other words, there are conventions that are simultaneously power-conferring and duty-imposing. This issue can be examined in the case of collective responsibility conventions that enable the Prime Minister as well as the Cabinet collectively to exercise their powers, while creating obligations for ministers from which they cannot 'release themselves at will'.[58] A relative concern is presented and rejected by Hart regarding power-conferring rules; are they at the end of the day just 'recipes for creating duties'?[59] In other words, are power-conferring rules incomplete fragments of laws merely specifying the conditions leading the relative organ to apply sanctions?[60]

Such an approach treats power-conferring conventions as merely directing constitutional power of political organs towards limiting others and providing for political remedies when they act outside their designated limits. This approach is one-sided in terms of the ways in which conventions fulfill their constitutional regulatory role and entails a very thin conception of constitutionalism;[61] it results from the traditional conception of constitutionalism as a limitation to power. If we were to accept such a view, the normative element of the rule would be complete only if associated with a sanction. This resembles Dicey's mistaken presentation of the normativity of conventions as a matter of law-driven sanction, according to his perception of law.[62]

[58] Marshall (n 55) 60.
[59] Hart (n 52) 33.
[60] Ibid 35, 36.
[61] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Libery Fund 2007) 2.
[62] Cf 1.1.1.

In reality, some conventions function as power-conferring for some political organs while at the same time have a limiting function for others, e.g. the Prime Minister and ministers respectively in the case of cabinet collective responsibility. In order to categorise such conventions that have both limiting and enabling elements it is crucial to look at the reason behind the specific rule[63] and its primary function within the constitutional edifice. If it primarily amounts to limiting the conduct of a political actor, then we are dealing with a negative convention; conversely, if the main reason is linked to enabling a political actor and the limits posed on another are just side-effects of this rationale, then the convention should be characterised as positive.

Finally, a closer look should be given to the content of guidance provided by conventions creating new constitutional organs. This is not a phenomenon unknown to constitutional reality. Two examples suffice to showcase the importance of this group of conventions: the Council of Political Leaders in Greece,[64] which is summoned in cases of national emergency in order to ensure national unity, is created and regulated by convention. The same goes for the office of the Prime Minister in the UK, which has been historically created through the development of conventional rules, remaining for centuries almost unknown to statute.[65] How should we categorise such conventions? In my view, these conventional rules amount to a subcategory of enabling conventions. They not only confer powers but also, before that, create a whole new institution, to whom these powers are accorded. In a sense, they showcase the regulatory ambit of power-conferring conventions as expressions of positive constitutionalism: they can go so far in conferring power to certain political actors that whole new constitutional

[63] Jennings (n 3) 136.
[64] George S. Katrougalos 'The constitutionality of the 'council of political leaders' [Η συνταγματικότητα της «σύσκεψης των πολιτικών αρχηγών»] in *Festschrift for Aristovoulos Manesis: Studies in Constitutional Law and Jurisprudence Vol II [Χαρμόσυνο Αριστόβουλου Μάνεση: μελέτες συνταγματικού δικαίου και φιλοσοφίας του δικαίου Τόμος ΙΙ]* (Ant N Sakkoulas 1999) (in Greek) 222.
[65] Bradley, Ewing and Knight (n 2)19.

organs are created, having sometimes exceptional importance for the working of the constitution.

2.3. Consequences of breaching conventions

2.3.1. Consequences: Political, not legal difficulties

The aforementioned analysis should guide us through deciphering the consequences of breaching conventional rules. First of all, the fact that conventions do not merely describe but guide constitutional action entails that violating them should translate into negative consequences for those breaching them. This is *a conditio sine qua non* of their capacity to regulate constitutional issues.

But where should we search for such consequences? It would be a mistake to think that breaches of conventions never have an effect in the legal world. For example, if an adequate number of presidential electors decided to defy voters' wishes and vote for another presidential candidate in the Electoral College,[66] the breach of the relevant convention would mean that another person would be chosen as President of the United States. Moreover, if the Monarch decided not to give her Royal Assent to a bill[67] or the President of the Greek Republic exercised her legal power to send back a bill,[68] there would be no valid Act of Parliament. In all these cases, the consequences just mentioned belong to the legal sphere.

[66] James G Wilson, "American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior' [1992] Buffalo Law Review 645, 651.
[67] Bradley, Ewing and Knight (n 2) 19.
[68] Geogre Gerapetritis, *The Constitution and the Parliament [Σύνταγμα και Βουλή]* (Nomiki Vivliothiki 2012) (in Greek) 125.

Nevertheless, the normatively significant consequences of breaching conventional rules do not lie in the legal arena. If conventions are safeguarding an area of constitutional regulation immune from judicial intervention, it would be paradoxical if their breach had primarily legal consequences. Breaching the aforementioned conventions would have major constitutional consequences not because of their impact in the legal sphere; in these cases there are changes in the legal constitutional context, but the developments are much more important from a political than from a legal point of view.

Therefore, the area where the 'difficulties' that follow for breaching a conventional rule are to be found is the political sphere. For example, the choice of another person to the position of the President of the US if this person accepted the post, could even result in a revolution, whereas refusing assent to a bill could cause a serious challenge to the Monarchy. This is attributed to the fact that breaching a convention does not necessarily entail any violation of the legal elements of the constitution but has various negative effects on the political constitutional edifice. In other words, when searching for the consequences of the breach of conventional rules, we should search for the 'political difficulties' that follow if conventions are not obeyed.[69] Of course, the idea of political difficulties can imply what can be described as 'political self-interest',[70] but it is not necessarily restricted to that. Political actors can also have considerations other than strictly utilitarian: these can be related to the overall stability of the constitutional edifice and the reason behind the rule. In Chapter 1 I have shown that a purely utilitarian approach, based on political expediency, like the one suggested by Jaconelli based on 'serial power-sharing',[71] fails to give the full account of the

[69] Jennings (n 3).
[70] Colin R Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218, 221.
[71] Jaconelli, 'Do Constitutional Conventions Bind? (n 11) 173.

consequences of various categories of conventional rules, like inter-institutional conventions or some conventions related to the unelected Head of State. In these cases, the element of parties coming in turn to government is absent, leading into collapse the whole argument of obeying conventions solely out of political expediency.[72]

Searching for the political difficulties which follow from breaching conventional rules should be done, first of all, in reference to the *forum* where such difficulties arise: there are two major political *fora* in a modern constitution: Parliament and the electorate. The former constitutes, especially in parliamentary systems, like Greece and the UK, the main organ of ministerial accountability.[73] Thus, ministerial accountability is not just a convention *per se* but a convention which can be used for monitoring and punishing the breach of other conventions: a breach of convention by a minister or the Prime Minister makes him accountable, first of all, to the Parliament and can lead to his resignation or censure.

The way modern Parliaments are structured, with stable parliamentary majorities of the governing parties or coalitions, may protect a member of the executive who has breached a convention from Parliament's scrutiny but will ultimately bring the breach of convention to the final arbiter of the propriety of politicians in their constitutional conduct, namely the electorate, in the next general election. There, a breach of convention will be taken into consideration as a reason for voting for or against a candidate or a political party, through the retrospective character of voting;[74] in other words, through the assessment of the conduct of political actors in the years preceding casting the vote. It thus seems that the normativity of conventions and the

[72] Cf 1.1.2.1.
[73] *Cabinet Manual* para7(1) 'Civil servants are accountable to ministers, who in turn are accountable to Parliament''
[74] Bernard Manin, *The Principles of Representative Government* (CUP 1997) 179.

principles of representative democracy are intertwined, an issue to which I return in chapter 5.[75] Yet, the degree on which the electorate's vote depends on the constitutional conduct of a political actor on the issue of conventions of course depends on a variety of factors. These range from the importance of the violation and the role of the particular convention in the constitutional edifice to its nature and rigidity, as well as the centrality of the issue in the political debate.

2.3.2. Exceptions to a conventional rule: the prohibition of third presidential term and FDR's reelections

Every factor of the aforementioned deserves a certain degree of attention. First of all, 'violation' can have various degrees of importance: it can be a matter of interpretation of the conventional rule as it has been shaped by practice and applied in exceptional circumstances; or it can be an outright and overt violation of the rule. A good example on this distinction is the conventional prohibition of a third presidential term before the 22nd Amendment[76] and President Franklin Delano Roosevelt's decision to run for a third term in 1940, and then a fourth in 1944. Continuity in the executive was perceived as important in times of crisis and this could lead to a change in the convention, given that the US in 1940 would be and by 1944 was already engaged in the largest war in world history.[77] In such cases, it is difficult to argue for the existence of a *stricto sensu* 'breach' of the conventional rule. Providing for an exception to the rule in times of crisis was really a matter of interpretation which was contested and approved by the

[75] Cf 5.3.
[76] Herbert W Horwill, *The Usages of the American Constitution* (OUP 1925) 88.
[77] Akhil Reed Amar, *America's Unwritten Constitution: the precedents and principles we live by* (Basic Books 2012) 435.

electorate in two consecutive elections. Ambiguities were resolved in favour of Roosevelt's stance through his reelections.

Although sometimes presented as a violation of convention, Roosevelt's campaigns for third and fourth terms amount to a lower level of interfering with the content of conventional rules, resulting in the clarification of the convention, with the addition of an important exception. The fact that the presidential terms convention was in need of some clarification was obvious even before WWII. For both Theodore Roosevelt and Grover Cleveland, it was unclear whether the conventional rule should be interpreted in the direction of excepting from the prohibition presidents who served one full and one partial term or two non-consecutive terms.[78]

In my view, the 22nd Amendment, which was initiated two years after Franklin Roosevelt's death and ratified in 1951, was not just a response of the political system to the ambiguities created by the eagerness of the electorate in 1940 and 1944 to accept changes and interpretations to the conventional rule.[79] In the eyes of the political actors, namely the Congress, the President should be much more limited than provided for by the convention as it stood at that time. In other words, I believe this was not just a matter of preference of the rigidness of the codified constitution over the flexibility of convention, as it is presented, but also an effort to change the rule through legal means, erasing the questionable exception, which had been created by the electorate's approval.

[78] Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' [2013] University of Illinois L Rev 101, 122-123; Horwill, *The Usages of the American Constitution* (n 76) 93-96.
[79] Amar (n 77).

2.3.3. Breach of full-blooded conventions and the seriousness of its repercussions: the case of 1965 Greece

So far, we have viewed a case where there was a change in the rule that does not amount to a *stricto sensu* breach and the change was accepted by the ultimate arbiter, namely the electorate. This case also proves that not all conventions are the same, in terms of the rigidity of their normative content. There are conventional rules whose slightest change could create public outrage and extreme political difficulties, while there are others that are open to change and re-interpretation.[80] The latter are those where observing the reason for the rule can be approached through various ways and interpretations, including exceptions which, although qualifying the rule, leave the reason for its existence unharmed. The prohibition of the third presidential term, belonged to this category, since the establishment of convention by Washington[81] made any attempt by his successors to run for a third term seem a constitutional hubris; this underlying reasoning though could remain intact while allowing an exception for running for a third term when there is an emergency and/or war. On the other hand, conventions of the first, rigid category, like those on which the democratic elements of the constitution are grounded, could be described as 'full-blooded' conventions, being closer to the purpose of conventional regulation[82] and having a much more rigid way in which they serve their reason for existence.

The appointment of the Prime Minister and his Cabinet by the Head of State in parliamentary democracies is an example of a breach of a conventional rule which cannot be tolerated by the electorate and inevitably leads to a serious constitutional

[80] Mackintosh, *The British Cabinet* (n 39) 20-21; Andrew D Heard, 'Recognizing the Variety Among Constitutional Conventions' 22 (1) Canadian Journal of Political Science (1989) 63, 65.
[81] Whittington (n 78) 121.
[82] Cf 5.2.2.

turmoil. The vast majority of such rules in countries following the Westminster model are conventional, without a formal arrangement of who has the right of government formation.[83] It is accepted that the Head of State always follows such a convention, since any attempt of breach could cause a severe constitutional and political turmoil.

This was—at least theoretically—the case in Greece before the seven-year military dictatorship, since the country followed the Westminster paradigm[84]. From a constitutional point of view, the events of 1965 had to do with conventions related to responsible government. During the first stage of the crisis, King Constantine violated the convention according to which ministers are appointed on the advice of the Prime Minister, refusing to allow Prime Minister George Papandreou to appoint himself to the post of the Minister for Defence, thus implying that Armed Forces were under the King's supervision.[85] Following the resignation of the government and an unprecedented escalation of political tension from all political parties, the third government formation attempt was finally successful, securing a majority and remaining in power for a little more than a year.[86]

The crisis of 1965 was in actuality a crash among two conceptions of the constitution, having to do with the role reserved for conventions within the constitutional edifice. On the one hand, the monarchical position claimed that the constitution included only the constitutional text of 1952, while conventions lacked any normativity; they interpreted the constitution in a rather legalistic way,[87] speaking of

[83] Scott Brenton, 'Minority and multi-party government' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions In Westminster Systems* (CUP 2015) 128.
[84] Nikos K Alivizatos, *The Constitution and its enemies in Modern Greek history 1800-2010 [To Σύνταγμα και οι εχθροί του στη νεοελληνική ιστορία 1800-2010]* (Polis 2011) (in Greek) 42.
[85] Nikos K Alivizatos, *The political institutions in crisis (1922-1974): Aspects of the Greek experience* [*Οι πολιτικοί θεσμοί σε κρίση 1922-1974: Όψεις της ελληνικής εμπειρίας*] (Themelio 1986) (in Greek) 268.
[86] Ibid 244.
[87] Christos Sgouritsas, *Constitutional Law Vol A [Συνταγματικόν Δίκαιον Τόμος Α]* (Sakkoulas 1965) (in Greek) 389 n 1.

'purely political' and not constitutional obligations of the Head of State.[88] On the other hand, those who considered constitutional conventions and principles an integral part of the constitution, requiring compliance with the spirit of the constitutional text and not just its letter, found the King's actions unconstitutional.

This difference of views regarding the sources and spirit of the constitution was also apparent in the debates among the major political actors of the time. In the Parliament, for example, a spokesman of National Radical Union (ERE) went so far as to argue that art. 31 of the Constitution, providing that 'The King appoints and dismisses his Ministers', gave the Crown a substantive and not only formal power.[89] Against this view, the parliamentary spokesperson for the left, Elias Iliou, pointed out that 'the polity consists of the written constitutional rules and the "conventions of the constitution"'.[90]

What were the consequences of breaching the conventional rule and considering it as void of normativity? General elections were called for May 1967, and the anti-royalist sentiment that was created in the electorate after the King's unconstitutional conduct was the decisive factor for predicting a defeat for the royalist right. Since censure was not inflicted by the Parliament, which finally gave its confidence to the last royalist government in December 1965, the electorate, as the ultimate arbiter, was about to decide on the breach of conventional rules that took place by the King. Polls predicted a victory of the anti-royalist Center Union with more than a 50% share of the

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[88] George O Anastasiadis, *The appointment and dismissal of governments in Greece: From the 'principle of declared confidence' to the 1975 Constitution [Ο διορισμός και η παύση των κυβερνήσεων στην Ελλάδα: από την «αρχή της δεδηλωμένης» στο Σύνταγμα του 1975]* (University Studio Press 1981) (in Greek) 139.

[89] *Formal Minutes of the Parliament Proceedings 8th Period Special Session [Επίσημα Πρακτικά των Συνεδριάσεων της Βουλής Περίοδος Η' Σύνοδος Έκτακτος]* (National Printing Office 1965) (in Greek) 83.

[90] Elias Iliou, *The political crisis: From the triumph of Democracy to the July coup [Η κρίση εξουσίας: Από τον θρίαμβο της Δημοκρατίας στο Ιουλιανό πραξικόπημα]* (Themelio 1966) (in Greek) 182.

votes. Elections were not finally held due to the unexpected coup d'état of April 1967. Nevertheless, the return to democracy in 1974 was accompanied by a referendum which, by a way of censure for a series of unconstitutional actions, led to the abolition of Monarchy.

The above example underlines the potentially massive significance of breaching a full-blooded convention. Such examples explain why thoughts of political self-interest may be combined with considerations other than the strictly utilitarian, which concern the stability of the whole constitutional edifice, thus leading political actors to self-limitation and to abiding by a conventional rule. Remaining in office is often not only connected with short-term political interest but also with political actors' ability to guarantee the stability of the constitutional and political system.

2.3.4. Political difficulties as a deterrent from breach of conventions

In Greece, the King's unconstitutional conduct was not stopped by the other *forum* for the resolution of political conventional disputes, namely the Parliament, which finally approved his conduct by giving a vote of confidence to his third government formation attempt. Nevertheless, this is not always the case, even in presidential (as opposed to parliamentary) democracies. Parliament can act both as a safeguard for abiding by conventional rules and a censure mechanism for their breach. In this way, it can augment the fear of political difficulties for political actors and deter them from finally breaching a conventional rule.

Franklin Roosevelt's attempt to pack the Supreme Court is an illustrative example. The US Constitution does not specify the number of Supreme Court justices,

leaving the matter to the Congress.[91] By the 1920s, however, it was already an established convention that the number of Supreme Court justices should be nine, consisting of the Chief Justice and eight Associate Judges.[92] The convention aims at safeguarding the independence and impartiality of the Supreme Court from political interventions which could increase the number of justices in order to attain a favourable majority in the Court. President Roosevelt attempted to pack the Court by the Judicial Procedures Reform Bill of 1937, which would appoint one new justice for every justice over 70 in the Court (up to a maximum of six additional justices). He proposed this with the goal of having the Court uphold his New Deal legislation, which had been opposed by Court during the *Lochner* era. The proposal was a legal move but would violate a long-standing convention; this led to public protest reflected in the Congress.[93]

The Senate vote against the Bill, thus acting as the guardian against unconstitutional behaviour and stopping the powerful President from breaching a long-standing convention.[94] Although the 'switch in time' of Supreme Court's position in favour of New Deal legislation in the spring of 1937 made the opposition to President's plan easier,[95] it is beyond doubt that the Senate's stance in July 1937 against court-packing was actually an exercise in preventing the breach of a conventional rule. Congress was guarding an already existing convention—not creating a new one[96] since the number of Supreme Court justices was considered an unwritten rule of the constitution long before 1937. Yet, it is not an unusual phenomenon for a convention

[91] Horwill, *The Usages of the American Constitution* (n 76) 186-187.
[92] Ibid 187, 189; Widrow Wilson, *An old master and other political essays* (Charles Scribner's Sons 1893) 151.
[93] *TIME* (New York City, 15 February 1937).
[94] Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History reveals about our Future* (Viking 2018) 133.
[95] Ibid.
[96] Wilson, 'American Constitutional Conventions' (n 66) 665: 'The American Congress may have created a similar convention when it refused President Roosevelt's request to pack the Supreme Court in 1937.'

to be discovered by academics exactly when it is in risk, since this is the time when it is brought to the center of political discussion. We should keep in mind that some constitutional rules in times of political normalcy lie in the periphery, since political actors are not enticed toward the unconstitutional behavior they concern. However, such rules, rise in prominence in times of political and/or economic crisis, when political actors tend to test the limits of their authority.

At the end of the day, the fact that no president since FDR tried to pack the Supreme Court is a proof of this unsuccessful attempt of deviating from convention acting as a deterrent for future political actors willing to bypass the rule. If Roosevelt at the peak of his power in 1937 was unable pack the court and met the hostility of the Congress, the political difficulties which would follow for any President willing to do the same in the future would likely be formidable, in the *fora* of Congress and the electorate (from which Roosevelt was relatively immune due to his recent reelection 1936) so as to prevent him from breaching the conventional rule.

It is not coincidental that the recent proposal by some Democratic presidential candidates to add justices to the Supreme Court,[97] has been criticized even by judges nominated by Democrats, like Ruth Bader Ginsburg.[98] A similar example of political difficulties acting as a deterrent for the breach of US conventions is the vote of electors in the electoral college. Some academics have argued that such a severe constitutional crisis in such a scenario that the President who is elected based on the vote of faithless

[97] Olivia B Waxman, 'Some Democrats Want to Make the Supreme Court Bigger. Here's the History of Court Packing' <https://time.com/5702280/court-packing-history/> (*TIME*, 17 October 2019)> accessed 1 January 2020.

[98] Nina Totenberg, 'Justice Ginsburg: 'I Am Very Much Alive'' (*NPR,* 24 July 2019) < <https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive?t=1577898666309> accessed 1 January 2020.

electors may not even accept the position. [99] This will be further analysed in Chapter 6.[100]

Of course, similar examples can be found both in Greece and the UK, the homeland of conventional regulation. In Greece, the powers of the Head of State were viewed with suspicion, after the events of 1965 and the return to democracy in 1974. Between the voting of the new republican Constitution in 1975 and its amendment in 1986[101], the President of the Republic had been accorded the so-called 'super-competences'[102] which left open the possibility of a confrontation between the Head of State and the government. These were mainly powers of the Head of State to prorogue Parliament under certain conditions and remove the government as well as to call a referendum.[103]

During the relevant period and until the elimination of such powers in the 1986 Amendment, the President had never exercised them. Even though this would have been legal, the emergence of a constitutional convention limited him. This convention has never been breached due to the role of the turbulent constitutional past as a deterrent predicting severe political difficulties in such an event. Although there was a long period of 'cohabitation' with the Head of State and the Prime Minister coming from different political parties (1980-1985), the President of the Republic was prudent not to exercise his legal powers, being deterred by the repercussions of past Head of State's

[99] James Albert Woodburn, *The American Republic and its Government* (2nd ed New York 1916) 216-217, Whittington (n 78) 111.
[100] Cf 6.5.
[101] Aristovoulos Manesis, 'The legal and political importance of the constitutional amendment of 1986: A general critical evaluation' [Η νομικοπολιτική σημασία της αναθεώρησης του 1986: Μια γενική κριτική αποτίμηση] (1987) 13-14 Dikaio kai Politiki (in Greek) 5, 27.
[102] *The Economist* (London, 24-30 0ctober 1981) 43.
[103] Antonis Pantelis, 'Three presidential competences: the appointment of Prime Minister, the removal of government and the declaration of a state of siege' [Τρεις προεδρικές αρμοδιότητες: ο διορισμός του πρωθυπουργού, η παύση της κυβερνήσεως και η κήρυξη καταστάσεως πολιορκίας] [1981] ToSyntagma (in Greek) 242.

interventions against the elected government. The convention in combination with the need to avoid political turmoil had limited President's powers to such an extent that when the Constitution was amended in 1986 and these legal powers were erased from the text, a prominent constitutional lawyer pointed out that the President was deprived 'of something he did not have'.[104]

Finally, in many cases the fear of political difficulties and turmoil is so dominant that makes the breach of a conventional rule unthinkable. This happens especially in cases of confrontation between the Head of State and the parliamentary majority. There is clearly a strong reason for such a practice. A bill passed by Parliament has the authority of being approved by the representative assembly of the nation and therefore the politically unaccountable Head of State is not entitled from a political constitutional point of view to stop it from becoming a valid law.

Such a strong reason associated with democratic governance can hardly leave room for derogations or justifications for breaching or bending the rule. In any case, severe political difficulties are without doubt easily predictable. Moreover, since they are related to the Head of State, they can easily lead to generalized political and institutional instability. This is why the rule that the Crown does not refuse Royal Assent to a bill passed by Parliament has not been breached in the UK and can be also traced with small variations in jurisdictions following the Westminster parliamentarian system of government, like Greece.

In Greece, since 1975, a convention has emerged that the President of the Republic never exercises his power to send back a bill. This convention was actually the successor of the pre-existing limiting convention which provided that the President

[104] Antonis Pantelis, *Constitutional Law handbook [Εγχειρίδιο Συνταγματικού Δικαίου]* (2nd edn Livanis Publications 2007) (in Greek) 305.

could not refuse to ratify a bill passed by Parliament. As George Gerapetritis has observed, it is not coincidental that the power of the President to send back a bill has not been exercised, even in cases of violation of procedural provisions of the Constitution.[105]

The rigidness of the rule as well as the reason behind it is something followed by all Presidents of the Greek Republic, who have never exercised this power,[106] even if there were voices that asked them to do so, especially during the crisis years. Therefore, the Presidents themselves, like the British Monarchs, felt bound by the rule, refraining from interfering with the directly elected and representative Parliament and its legislative work.

In all these cases, the danger for constitutional stability, the functioning of the Parliament as a *forum* of censure and the electorate as the ultimate arbiter of the constitutional propriety of political actors act as serious deterrents for breaches of the relevant conventional rules. The only arguable exception would be when following the convention could endanger the constitution itself; in other words, when the existence of the conventional rule would undermine its functioning as a protection against constitutional turmoil. This could happen for example in the UK when the bill about to receive royal assent, if enacted, would undermine the basic pillars of democracy and the constitution. It is a matter of the reason for the rule: in these cases, the reason for the existence of the relevant convention is undermined by the result of abiding by it. Thus, the Head of State should act as 'the ultimate guardian of democracy'.[107]

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[105] Gerapetritis (n 68) 125.
[106] Pantelis 'The send-back of the bills' [Η αναπομπή νομοσχεδίων] (*Kathimerini,* 30 April 2008) <http://www.kathimerini.gr/709020/opinion/epikairothta/arxeio-monimes-sthles/h-anapomph-nomosxediwn> accessed 15 May 2019 (in Greek).
[107] Brazier, 'The non-legal constitution' (n 20) 269.

2.3.5. Perceived failures of conventional regulation

At this point a question naturally arises: are there examples where, either due to the severity of the consequences for the whole constitutional edifice or the ease with which one could breach a conventional rule without consequences, we can speak of a 'failure' of conventional regulation? In other words, are there examples of failure of constitutional conventions to act as a rule armed with normativity and effectively regulate areas of the constitutional structure?

I should start by an important remark: the mostly unwritten nature of the vast majority of conventional rules makes it easier for someone to argue that they have been violated. In other words, by not being authoritatively written down in a text, conventions can be easily misinterpreted in regard to their content or construed as more limited or stricter they actually are, in order to argue that there has been a breach of rule. Moreover, since the addressees of the normativity of conventions are political actors and in times of crisis the constitutional discourse frequently rises in prominence, a political argument can be easily turned into a constitutional one by alleging a violation of a conventional rule.

It is also possible to witness another, similar phenomenon: to argue that conventional rules have no normative content at all in order to justify the unconstitutional conduct of a political actor. This was the case in the first phase of the constitutional turmoil surrounding the unconstitutional conduct of the Greek Monarch in 1965; On the one hand, the monarchical position claimed that the constitution included only the constitutional text of 1952; they interpreted it in a rather legalistic way, speaking about 'political' and not constitutional obligations of the Head of State.

On the other hand, those who considered constitutional conventions and principles an integral part of the constitution, being in accordance with the 'spirit' of the constitutional text, found the King's actions unconstitutional.[108]

The monarchical view built on the dominant among Greek theory legalism in order to justify King's unconstitutional behavior. Thus, the Greek case is an illustrative example where the perceived failure of conventional regulation to limit the Head of State was actually the result of a certain approach to constitutional rules by academics and politicians of the royalist side. It was not the weakness of the normativity of conventions but rather legalism which was used as a vehicle for justifying the King's breach of conventional rules that lead to the violation of the convention.

Regarding 'failures' of conventions to regulate effectively an area of the constitution, it is worth noting two cases where there is support for a view that endorses 'bending' or even breaching of conventional rules. The first one results from a common misconception of the variations in the normativity of different categories of conventional rules; power-conferring conventions are frequently viewed as producing the same kind of obligations with limiting ones. This misreading of the content of enabling rules leads to the conclusion that there exists a breach of convention every time a political actor chooses not to exercise a power conferred to her by an enabling conventional rule. Thus, these cases are perceived as failures of conventions to effectively limit political actors, when actually their content has exactly the opposite function.

[108] George O Anastasiadis, *The appointment and dismissal of governments in Greece: From the 'principle of declared confidence' to the 1975 Constitution [Ο διορισμός και η παύση των κυβερνήσεων στην Ελλάδα: από την «αρχή της δεδηλωμένης» στο Σύνταγμα του 1975*] (University Studio Press 1981) (in Greek) 139.

Conventions enabling the Prime Minister are both the most prominent category of power-conferring conventions and those attracting the most attention. Collective responsibility and confidentiality can be characterized as power-conferring conventions; they give to the Head of the Cabinet, namely the Prime Minister, a power that enables him as well as the Cabinet collectively to fulfil their constitutional role.[109] Consequently, the Prime Minister, for the needs of his policy can abandon the rule in relation to a specific subject. This was the case, for example, with Harold Wilson and the EEC Referendum in 1975 when an 'agreement to disagree' was reached.[110] Moreover, one important effect of the Conservative-Liberal Democrat coalition formed in 2010 was the agreement that 'the principle of collective responsibility, save where it is explicitly set aside, continues to apply to all Government Ministers'.[111] In other words, the possibility of setting aside the collective responsibility convention was acknowledged, realised and democratised during the five years of the coalition.

Thus, much of the confusion about a purported 'bending' of conventional rules in cases of non-invoking a power-conferring convention is caused by the lack of closer analysis of the nature of their normativity. Not following such a convention does not amount to a breach but to a decision not to use a right or power. But what about the aforementioned cases where a convention is enabling in character but creates limitations for other political actors? For example, if a minister decides to break the rule of unanimity and disagree with a decision of the Cabinet and he neither resigns nor is forced by the Prime Minister to do so. Is this a breach of a conventional rule? In my view this is not the case; the rule would be breached if the Prime Minister wanted her to resign but did not have the power to force her; yet the power over the Cabinet is tied

[109] Marshall (n 55) 7.
[110] Eric Barendt, *An introduction to constitutional law* (OUP 1998) 42.
[111] *Coalition Agreement for Stability and Reform* (Cabinet Office 2010) 2(1).

to the constitutional position of the Prime Minister, so not removing the Minister is an example of a retrospective validation by the Prime Minister of the minsters' derogation from the unanimity convention.

A relatively recent example of a perceived breach of conventional rule, comes from the US. Neil Siegel in 'Political Norms, Constitutional Conventions, and President Donald Trump'[112] argues that conventions 'are derived, at least in part, from the historical practices of governmental institutions'[113] as well as on their ability 'to help the US government function at least tolerably well by keeping partisanship within reasonable bounds',[114] Nevertheless, although he presents Trump's 'disregarding' of constitutional conventions and political norms, he fails to prove that President Trump has actually violated an established constitutional convention of the US polity.

Josh Chafetz and David Posen distinguish between[115] destruction and decomposition of a norm, and argue that it is preferable for a norm to be destroyed than merely eroded since this will cause public ire and create political difficulties for the rule-breaker, leading him to offer justifications to political opponents. Decomposition, however, can slip under the radar. Though the article is not restricted to conventions and addresses unwritten rules in general, it mentions conventions as a major category of unwritten rules and gives examples. They contend that President Trump has often violated unwritten rules, though hardly any of these involve conventions.[116] Insofar as the argument does apply to conventions, it fails to observe that one of their main advantages as a constitutional regulatory technique is flexibility. Therefore, in some

[112] Neil S Siegel, 'Political Norms, Constitutional Conventions and President Donald Trump' 93(1) (2018) Indiana Law Journal 177.
[113] Ibid 181.
[114] Ibid 187.
[115] Josh Chafetz and David E. Pozen, 'How Constitutional Norms Break Down' 65 (2018) UCLA L Rev 1430.
[116] Ibid 1450.

cases of conventions, arguing for a preference of destruction over decomposition translates into arguing for the preferability of breaking the norm rather than taking advantage of one of its most important characteristics: their ability to change, without being broken. The argument assumes that conventions have the rigid, all-or-nothing character that Dworkin ascribed to legal rules.[117]

The above analysis shows that many instances that are presented as breaches of conventional rules, leading to doubt among scholars over the overall ability of conventions to regulate the constitution effectively, are based on misconceptions regarding the true nature[118] of the normativity of conventional rules. These misconceptions can either be the product of a lack of theorisation of specific conventional rules or categories of conventions, as in the case of power-conferring conventions or of auto-suggestive claims about the lack of conventions' regulatory force, as in 1965 Greece.

2.4. Conclusion: the particular characteristics of the normativity of conventions

The normativity of constitutional conventions has its own characteristics and should not be approached as an approximation to that of law. It should be viewed as an all-

[117] Gavin Phillipson 'Historic' Commons' Syria vote: the constitutional significance. Part II – the way forward' (UK Const L Blog, 29th November 2013) <https://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 12 August 2019.

[118] Cf Pozen, 'Self-Help and the Separation of Powers' 124 (2014) Yale L J 2. In this article, Pozen refers to conventions as 'quasi-legal norms' 27.

things-considered normativity, taking into consideration both objective and subjective elements, like the understanding of political actors that they are bound by a rule.

This last element of effective constitutional regulation is important, since conventions do not simply describe but guide the conduct of political actors when acting within the scope of constitutional regulation—that is, the rules pertaining to the allocation and exercise of powers relating to the constitutional state and its organs. These rules arise out of constitutional practice that gains normative force, even when this is announced prospectively and deliberatively by the 'declaration' of a convention and when practice gains normative force after only a single precedent.

Constitutional actors to whom constitutional conventions are addressed can either be single or collective and are not restricted to *stricto sensu* state organs. Politics is not an area whose internal affairs are left constitutionally totally unregulated; conventions are rules pertaining to the conduct and relations between constitutional actors which could be characterized as political, either limiting or enabling their actions.

Breaching conventions entails political difficulties. Having this consequence is a *sine qua no*n of the effective regulation of constitutional issues by conventions and simultaneously acts as a deterrent for their violation. Censure for breach takes place in the political *fora*, either the Parliament or the electorate. Nevertheless, not all conventions are the same, in terms of the rigidity of the relevant rule. There are certain questions we should ask before speaking about an outright breach of a 'full-blooded' convention.

It can be concluded that these questions pertain first to the nature of the conventional rule at hand, whether it is duty-imposing or power-conferring, the reason for the rule and its importance for the democratic functioning of the constitution. We

should further ask how broad the rule is and whether it can be equally served through another interpretation or whether the creation of an exception/change leaves the reason unharmed. Finally, if all the previous questions are answered and we find that there is a breach or a claimed exception to the rule that goes beyond its reason, we should ask whether there is a constitutional justification such that the conduct of political actors should cause a change to or abrogation of the rule.

Thus, we should avoid claiming a breach of a conventional rule without taking into consideration all the above parameters. At the end of the day, changing a rule is not a phenomenon unknown to constitutional regulation. A codified constitutional provision or a constitutional statute can be amended or repealed. This can also happen with conventional rules: outside some core settlements which constitute the basic foundation of the constitutional edifice, this is possible without resorting to unconstitutional conduct. The realisation of the analogy brings out the importance of the relationship between the normativity of conventions and that of other constitutional norms. It is to this relationship between conventions and other forms of regulating the constitutional area, such as constitutional law and custom, that I now turn.

CHAPTER 3 - *GENUS* AND *DIFFERENTIA* OF CONSTITUTIONAL CONVENTIONS

The normativity of conventions and its particular characteristics were brought out in the previous chapter. Nevertheless, someone could argue that although conventions are normative, they do not constitute a separate category of rules. They could either form a subset of unwritten constitutional law, an alternative to what has been described in continental tradition as 'constitutional custom',[1] or they could even be normative in the way social rules are, lacking a distinct constitutional element. In such cases, the normativity of conventions would either be purely 'borrowed' from the sphere of social custom, or it would be 'law-like'[2] and not a separate constitutional phenomenon.

The present chapter aims at bringing out the defining characteristics of conventions which render them a special category of norms as well as the *genus* of norms to which they form part. In the first section of the chapter, it will be argued that conventions belong to the *genus* of constitutional norms or constitutional regulatory techniques, a category which also includes the law of the constitution,[3] and share with the other members of this group some common characteristics. In the following section, conventions will be compared to the other prominent members of this group, namely provisions of constitutional statutes and codified constitutions as well as constitutional custom. Based on that, the distinguishing characteristics of conventions will be presented in section 3: they are political rules and judicially non-enforceable. In this

[1] Giorgos Katrougalos, 'The constitutional custom' [Το συνταγματικό έθιμο] [1991] ToSyntagma (in Greek) 253, 278.
[2] Cf 'nearly the force of law' Albert Venn Dicey, *Introduction to the study of the law of the constitution* (8th edn, Macmillan 1915) 437.
[3] Tarunabh Khaitan, 'Constitution as a statutory term' (2013) 129 LQR 589, 590.

last section, the impact of *Miller No 1* and the *Cherry/Miller* case on the courts' perception of non-justiciability will be thoroughly analysed.

The idea and methodology followed in this chapter is Aristotelian in its origin: every species belongs to a *genus* and has its *differentia*. The *genus* or kind is distinguished along with its species from other things in general and the *differentia* differentiate it from other species within the *genus*;[4] this was Aristotle's idea, brought out in his *Topics.*[5] This distinction between *genus* and *subgenera* plays an additional major role: it acts as a delineation of the substance of the notion of conventions and defines the rules which possess the particular elements of their normativity.

3.1. The *genus* of constitutional conventions

3.1.1. The *genus* of constitutional conventions: constitutional norms/constitutional regulatory techniques

The importance of the 'constitutional' element of constitutional conventions has already been stressed in this thesis.[6] It must be remembered that conventions do not regulate the whole area of the constitution; they rather guide the conduct of political actors. Nevertheless, not all forms of conduct of political actors are constitutional; there exist areas of the political game that remain constitutionally unregulated. The constitution does not address only political issues, nor does it cover the whole area of politics. Thus, it could be said that there exist points of intersection between the

[4] Edgar Herbert Granger, 'Aristotle on Genus and Differentia' 22 (1984) Journal of the History of Philosophy 1, 3.
[5] Cf Aristotle, *Categories* and *Topics* in *Organon*, 'Aristotle's Categories*, The Stanford Encyclopedia of Philosophy* (2013) <https://plato.stanford.edu/entries/aristotle-categories/> accessed 4 February 2020.
[6] Cf 2.2.1.

constitution and politics[7] (e.g., the political constitution) but in no way are these terms tautological. Of course, conventions are not the only rules regulating the constitutional area. The constitution also includes legal rules incorporated in a codified constitutional text, in a constitutional statute, or even in an unwritten form.

At this point, it is worth mentioning that constitutionalism as a concept associated with constitutional regulation was initially a much more specific idea than having a wide variety of norms regulating the constitutional sphere: it had rather been conceptualised as a method for imposing legal limits on the actions of state organs.[8] In other words, the term meant limiting power and avoiding tyranny exercised through law. Nevertheless, this could be viewed as the historical perception of the term, associated with the move towards codified constitutional texts,[9] starting from the US and France and spreading in a large number of countries, including Greece in the 19th century[10] and eastern Europe in late 20th century.[11] Nowadays, constitutionalism is a term encompassing much wider aspects, both limiting and enabling, political and legal, as will be argued in the next chapter. It is therefore important to distinguish between the 'historical' legal and limiting constitutionalism and the modern one. The former is a political and ideological current having particular content and claims at a certain point in history, while the latter approaches the constitutional phenomenon in a much more nuanced way.

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[7] David Feldman, 'Beginning at the Beginning: The Relationships between Politics and Law' in Feldman (ed) *Law in Politics, Politics in Law* (Hart 2015) 3.

[8] N W Barber, *The principles of constitutionalism* (OUP 2018) 1; G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853, 855

[9] J Waldron, 'Constitutionalism: A Skeptical View' (*NYU School of Law, Public Law Research Paper No. 10-87*, 11 December 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771> accessed 5 February 2020.

[10] Nikos K Alivizatos, *The Constitution and its enemies in Modern Greek history 1800-2010 [To Σύνταγμα και οι εχθροί του στη νεοελληνική ιστορία 1800-2010]* (Polis 2011) (in Greek) 33.

[11] David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 Global Constitutionalism 229 <https://www.law.utoronto.ca/utfl_file/count/documents/Dyzenhaus/Dyzenhaus-Constitutionalism%20in%20an%20old%20key.pdf> accessed 6 February 2020.

Constitutionalism as a historical term can be associated with constitutional legalism: 'historical' constitutionalism is one of the theoretical foundations of the idea that the constitution is based on legal rules,[12] and, in the vast majority of states, codified in a single constitutional text. Nevertheless, as it is obvious from countries like the UK, constitutional designers have a much wider variety of constitutional regulatory techniques at their disposal. Such an idea entails accepting that the answer to the question 'what is a constitution composed of' is more than a single word. Of this multiplicity of answers, every single one, whether it entails legal or political norms, is important in structuring the constitutional edifice.

In the same way, in Greece, as in the whole continental tradition,[13] academics write about the 'sources of the constitution' as the normative building blocks of the constitutional edifice.[14] The term denotes the 'authoritative standards by reference to which constitutional norms are identified'[15] and the relevant textbooks and treatises refer, along with the codified constitutional text, to other forms of constitutional norms, lying outside codified constitutional provisions. In Greece, the relevant analysis traditionally includes a doubt over the existence and/or importance of rules other than the codified provisions.[16] The analysis is nonetheless useful, since it presents at least theoretically a taxonomy of forms of constitutional norms. The idea that every constitution is to some degree, regardless of the presence of a codified constitutional

[12] Nick Barber, *The Constitutional State* (OUP 2010) 75; Jeremy Waldron, 'Are constitutional norms legal norms?' 75 (3) (2006) Fordham Law Review 1697, 1710; Thomas C Grey, 'Do We Have an Unwritten Constitution?' 27 (1975). Stanford Law Review 703.
[13] John Bell, *French Constitutional Law* (OUP 1995) 57.
[14] Eg Antonis Pantelis, *Constitutional law handbook [Εγχειρίδιο Συνταγματικού Δικαίου]* (2nd edn, A Livanis Publications 2007) (in Greek) 180.
[15] Bell (n 13).
[16] Cf 1.3.

text, a 'constitution of multiple sources'[17] is also present in the US. Despite the general lack of interest in conventional regulation, some US scholars refer to the 'unwritten' US constitution,[18] namely to that part of the constitution that remains outside the codified US constitutional text. Although this also includes practices,[19] some of these non-written elements constitute US constitutional norms.

Therefore, the *genus* to which conventional rules belong can be put as 'constitutional norms' or 'constitutional regulatory techniques'. This *genus* describes the various rules which, through their normativity, act as ways to organise the constitutional sphere and regulate the conduct of constitutional actors; in other words, they are the building blocks of the normative constitutional edifice. There are two main elements that define the *genus* and differentiate its members: the constitutional and the normative. The former is a matter of the content of the rules, while the latter is a trait they possess and makes them serve their purpose, which is the guidance of actors through establishing standards of conduct within the constitutional sphere. Constitutional regulatory techniques can either be deliberately created or emerge through practice; conventions are a good example of a category combining rules created through both ways, as has been shown in the previous chapter.[20] In cases of gradual development, they emerge from a constitutional phenomenon which, though not part of the *genus* of constitutional regulatory techniques, does not lack importance: constitutional practice.

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[17] Regarding the UK constitution: Keith Syrett, *The foundations of public law: principles and problems of power in the British constitution* (2nd edn, Palgrave Macmillan 2014) 9; Adam Tomkins, *Public Law* (OUP 2003) 9.

[18] Eg Akhil Reed Amar, *America's Unwritten Constitution: the precedents and principles we live by* (Basic Books 2012); Waldron (n 12) 1712;

[19] Christopher G Tiedeman, *The unwritten constitution of the United States: a philosophical inquiry into the fundamentals of American constitutional law* (G P Putnam's Sons, 1890).

[20] Cf 2.2.; Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] 71 Mod L Rev 853, 856.

3.1.2. Constitutional practice: an entity lying outside the *genus*

Constitutional practice is the fundamental category of constitutional incidents lying outside the *genus* of constitutional norms. This is why it is quite important to our categorisation, since it sheds light on things differentiating members of this *genus* from things standing outside of it. Constitutional practice is a phenomenon of the constitutional sphere and, in this way, shares a feature with constitutional norms. Constitutional practice describes the ways political actors act in various circumstances, when certain conditions are met. It is mostly known to continental literature;[21] in the UK, it seems that constitutional theory tends to mix both normative and non-normative phenomena under the term 'practice'.

The convention-practice distinction is fundamental to the realisation of the importance of the rule-quality of conventions. Yet, by arguing for a difference between the two notions, I go against a certain tide in UK literature which in many cases uses the two terms interchangeably. The source of this mixture of convention and practice in the UK can be traced back to Dicey. A short passage from the Introduction is illustrative:

> 'the other element, here called the "conventions of the constitution," consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the constitution, are not in strictness laws at all'[22]

In this short passage Dicey uses the terms 'conventions' and 'practices' as tautological and juxtaposes them to law. This has been the dominant view ever since in the United

[21] Evangelos Venizelos, 'Constitutional practice: an autonomous notion' [Συνταγματική Πρακτική: μια αυτοτελής έννοια] in *Studies in Constitutional Law 1980-1987* (Paratiris 1987) (in Greek) 97 et seq.
[22] Dicey, *Introduction to the study of the law of the constitution* (n 2) 24.

Kingdom.[23] My intention here is to prove exactly the opposite: that conventions are as far from practice as they are from law. In actuality, they share with law membership of the common *genus* of constitutional regulatory techniques, something which is not the case with constitutional practice.

First of all, there is a logical fallacy in stating that conventions are the same as constitutional practice: this is a matter of a wrong perception of the transformation of a practice into a convention: this move from a non-normative phenomenon towards a normative constitutional rule has wrongly been doubted, leading to descriptive accounts of conventions.[24] On this issue, it is worth first keeping in mind that not all practices lead to the emergence of conventions. When there is *longus usus*, the long use of a certain practice gaining normative force through the development of *opinio juris,* the rule developed is not a convention but a custom, an issue which will be analysed in the following sections.[25] Moreover, it should be noted that practices are not imperfect conventions or customs waiting to gain normative character; they exist autonomously within the constitutional edifice. It is not the purpose of every practice to be transformed into a constitutional convention or custom; moreover, some practices would be useless or mistaken if converted into conventions or customs, due to their content.

Let me give an example: the briefing of the President of the Republic by the Speaker of the Parliament regarding the elections' results in the case of Greece is a conduct made out of political comity and deprived of any normative element. What is the point of turning this formal information given by the Speaker of the Parliament into

[23] Barber, *The Constitutional State* (n 12) 85; Rodney Brazier, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NILQ 262, 270; Barber, *The principles of constitutionalism* (n 8); G Marshall and G Moodie, Some Problems of the Constitution (5th edn, London: Hutchinson, 1971) 26.
[24] Cf 2.2.2.
[25] Cf 3.2.2.

a rule,[26] regardless of whether it would be legal or political, formal or informal? A great number of practices are and should remain without normative underpinnings, since there is no need for them to be considered a rule-like standard of behaviour or for their breach to have negative consequences.

Constitutional practice has thus rightly been described as 'an autonomous entity of the constitutional edifice',[27] It is distinguishable from constitutional custom and conventions and lies outside the *genus* of constitutional norms. It emerges through the repetition of a certain pattern of behaviour when the circumstances are the same. In other words, constitutional practice simply reflects the way political actors behave, without entailing negative consequences and criticism for breaking the relevant pattern of behaviour. Remembering Bagehot's well-known quote,[28] unlike conventions which definitely belong to the efficient parts of the constitution, constitutional practice is associated with more ritualistic elements. Regarding the UK constitutional edifice, the setting and props during the Queen's Speech at the opening of Parliament is such an example of constitutional practice, reflecting the long repetition of a certain ritual among political actors, which lacks normative quality. Unlike conventions, constitutional practice is not armed with the constitutional gravity so as to belong to those parts of the constitution 'by which it works and rules'.[29]

An important distinction should be made here: the approach to constitutional practice differs depending on whether we have to do with a constitutional structure based on a codified constitutional text or with an uncodified constitution, as happens in

[26] Evangelos Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn. Ant N Sakkoulas 2008) (in Greek) 119, who supports that this constitutes a constitutional convention, since he doubts the normative character of conventional rules, Cf 1.3.
[27] Venizelos, 'Constitutional practice' (n 21).
[28] Walter Bagehot, *The English Constitution* (2nd ed. OUP 1928) 44.
[29] Dicey, *Introduction to the study of the law of the constitution* (n 2) 424.

the UK. In the former case, constitutional practice is also considered as a consistent way of implementing the constitutional text or its gaps with 'repetition, coherence and long duration',[30] as it has been rightly observed. In other words, it presents some form of attachment to constitutional provisions, to the way the written part of the constitution is viewed and approached by constitutional actors. On the other hand, in an uncodified constitutional environment, practice differs since it is produced to a greater degree *de novo*, based on the long-standing conduct of political actors.

Joseph Jaconelli,[31] Rodney Brazier and Nick Barber are among those who refer to the existence of such practices within the British constitutional edifice. Barber refers to them as 'customs', something which could open a broad terminological discussion, since the term may coincide to what is characterised by continental constitutional theory as a 'constitutional custom'—a different concept that involves a form of legal normativity.[32] Since the word 'custom' is most frequently used, especially in continental literature, to describe an unwritten normative rule, the word 'practice' is used here, which better outlines the descriptive character of the relevant entity.

Nevertheless, Barber rightly distinguishes between 'pure customs'/practices and practices 'which have ossified into rules.'[33] In other words, he emphasises the fact that not all practices can or should be turned into constitutional rules, something which is contested by Brazier. The latter discusses the possibility of the opposite phenomenon: a convention being turned into practice.[34] In this sense, a breach of a conventional rule may lead to the loss of its normative force, rendering what was formerly normative into

[30] Ibid 103.
[31] Joseph Jaconelli, 'The Nature of Constitutional Conventions' (1999) 19 Legal Studies 24, 31.
[32] Katrougalos, 'Constitutional Custom' (n 1).
[33] Barber, *The Constitutional State* (n 12) 85.
[34] Rodney Brazier, 'The non-legal constitution: thoughts on convention, practice and principle' (1992) 43 N Ir Legal Q 262, 272.

something descriptive. Thus, a new possibility opens for the result of a breach of conventional rule: it can either be amended or annulled or downgraded into a simple constitutional practice.

A final question arises regarding constitutional practice: is it part of the constitution? It has already been shown that practice is not part of the *genus* of constitutional norms or constitutional regulatory techniques. Barber moves one step forward, stating that 'pure customs' are not part of the constitution, since 'They may influence conduct, but they do not guide it'.[35] Nevertheless, such a negative answer connotes that the constitution is only a matter of normative rules; that it is only a field of regulation, not description. In my view, except for the constitution in the normative sense, namely the sum of norms which are constitutional in their content regulating the institutions and protecting citizens' rights, there is also the constitution in the descriptive sense. The latter includes, in addition to norms, practices, habits and other phenomena lacking normative content but being important in terms of depicting a certain *ethos* among constitutional actors.

Constitution in the normative sense is composed of what I have termed here 'constitutional regulatory techniques' or 'constitutional norms', excluding constitutional practice; constitution in the descriptive sense corresponds to what is known in Germany as 'Verfassungswirklichkeit', as I have argued in Chapter 2.[36] To argue that the constitution embraces only constitutional norms is to identify completely the norm with the field which it regulates. In a similar way, to categorise practices along with social customs and exclude them from the ambit of the constitution means

[35] Barber, *The Constitutional State* (n 12) 85.
[36] Cf 2.2.2.

assimilating them with social practices (e.g., the etiquette of formal dress), which, at the end of the day, have a rather different content.[37]

3.1.3. Social rules and the importance of the content of constitutional norms

The discussion of the importance of the content of rules and practices is important for the purpose of understanding the relationship between constitutional conventions and social conventions. In fact, a question naturally arises: why do social conventions not belong within the *genus* of constitutional conventional rules? Before arguing against such a prospect, it is important to note that this has been supported by important scholars, among whom Joseph Jaconelli, who has written that:

> The idea of a social rule, it is submitted, captures the essence of a constitutional convention. Of course, not all social rules qualify as constitutional conventions. Not even all such rules which appertain to government do so. Constitutional conventions form only a sub-class of the genus of social rule.[38]

First of all, it should be admitted that, in one sense, constitutional conventions are a form of social rules.[39] At the same time, the study of social conventions and their normativity is also useful in the course of understanding the normativity of conventions of the constitution. For example, the idea of a 'diachronic' account of the development of a social convention,[40] which traces the origins of the behavior, may also provide us with an explanation of the way certain conventions have influenced the constitutional

[37] Andrei Marmor, 'On Convention' (1996) 107 Synthese 349, 366.
[38] Jaconelli, 'The Nature of Constitutional Conventions' (n 31) 30.
[39] Ibid, Barber, *The Constitutional State* (n 12).
[40] Ismael Al-Amoudi and John Latsis, 'The arbitrariness and normativity of constitutional conventions' [2014] 65 The British Journal of Sociology 358, 367.

area in a certain direction through following their historic development. Moreover, some of the considerations about the relationship between normativity and the reason for the existence of the rule apply both to constitutional and social conventions.[41]

Yet, it is not only conventions that belong to the category of social norms; the latter also includes the other members of the *genus* of constitutional regulatory techniques, like constitutional statutes and constitutional custom, or even the codified constitution.[42] Thus, the *genus* of constitutional regulatory techniques itself belongs to the wider category of social rules. The latter include both formal and informal, legal and non-legal,[43] written and unwritten rules, as long as they regulate interaction within the social sphere and provide standards of behaviour in various circumstances of social life. Since humans have been characterised by Aristotle as social beings, it is arguable that all matters regarding human interaction—and certainly rules pertaining to the constitution of polities—constitute social rules.

Nevertheless, two arguments should be raised here, the one connected to the other. The first has to do with the nature of the relationship between the species and the *genus.* Each species belongs to a certain *genus*, which in its turn may belong to a wider *genus* and further on. In other words, constitutional norms are a species within the wider *genus* of social norms. However, what differentiates constitutional norms from the other members of the group of social rules (in other words the *differentia*) is the area that these rules regulate, namely the constitution. Thus, the constitutional content of these norms singles them out from other members of the *genus* of social rules.

[41] George Letsas, 'The DNA of conventions' [2014] 33 Law and Philosophy 535.
[42] Barber, *The Constitutional State* (n 12) 97.
[43] Jon Elster, 'Political norms' 63 (2014) The Jerusalem Philosophical Quarterly 47.

The constitutional content of the relevant rules also paves the way for my second argument. This has to do with the purpose of the whole project of categorisation: by realising that constitutional conventions form a species of a wider *genus* of constitutional norms or constitutional regulatory techniques, they are brought out as an option for regulating the constitutional sphere. This is particularly important for those cases where conventions are deliberately chosen as the appropriate regulatory technique available. In particular, constitutional conventions are in such cases regarded as preferable to their competitors, namely the other members of the same *genus* of constitutional norms, since they are all norms regulating the same field.

In order to understand why conventions are and should be preferable in specific circumstances to their competitors, especially legal regulation,[44] it is important to search for their *differentia*, namely, the defining characteristics which single them out from other species of the same *genus*. The ways in which conventions differ from other members of the same *genus* are closely connected to the reasons for choosing them as the suitable regulatory measure. Thus, assigning norms to the correct *genus* and singling out the *differentia* of conventions is of special importance to this thesis.

3.2. Species of the *genus* of constitutional regulatory techniques

3.2.1. The idiosyncratic relationship of law with the *genus* of constitutional norms

3.2.1.1. Constitutional statutes

[44] House of Lords Constitution Committee*, Constitutional arrangements for the use of armed force* HL 46 (House of Lords 2013-2014), para 61.

Regarding the different species of the *genus* of constitutional norms, it is important to bring out the fact that one of the most famous among them—namely, law—has an idiosyncratic relationship with its *genus*. Law is not always a constitutional regulatory technique. In fact, in the vast majority of instances, law regulates matters other than constitutional affairs. 'Law' in the constitutional context of the UK in the majority of cases translates into what has been termed as 'constitutional statutes'.[45] Again, this is first of all a matter of the content of the relevant statute and the area it regulates, having repercussions for the nature and functioning of the rule. In the *Thoburn* case, constitutional statutes were defined by Lord Justice Laws as follows:

> In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights.[46]

In LJ Laws' view, constitutional statutes cannot be implicitly repealed.[47] It should be noted that LJ Law's definition is focused too much on citizens' rights, overlooking other important elements of the constitution.[48] Beyond rights-related statutes, constitutional law also relates to 'the organisation of, and the allocation of power to, the institutions of government'[49] and more widely of political power. In a country lacking a codified constitutional text, like the UK, this body of 'law of the constitution'

[45] Farrah Ahmed and Adam Perry, 'The quasi-entrenchment of constitutional statutes' 73 (3) (2014) Cambridge Law Journal 514, 515.
[46] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) 62; cf *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413 [30], *(HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 (*HS2*).
[47] Cf *H* [2012] UKSC 24, [2013] 1 AC 413 [30]-[32].
[48] Farrah Ahmed and Adam Perry 'Constitutional Statutes' (2017) 37 OJLS 461, 466, D Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343, 350.
[49] Mark Elliott and Robert Thomas, *Public Law* (2nd edn OUP 2014) 41.

comprises mostly constitutional statutes[50], such as the Fixed-Term Parliaments Act or the Scotland Act 1998 to name just a couple.

Statutes pertaining to rights and those regulating the organisation of constitutional organs both belong to the *genus* of constitutional regulatory techniques. Only the latter category, however, is truly an alternative to conventions. As argued in Chapter 2,[51] conventions do not provide for the rights of the citizens and are not amenable for this purpose. This stems from their defining characteristics and relates to their advantages and disadvantages as a regulatory technique.

Thus, the constitutional designer, when choosing the normative scheme for dealing with a certain constitutional issue (we have many such cases in the 21st century as analysed in Chapter 6), should consider conventions alongside a specific category of constitutional statutes: those regulating the organisation of political constitutional power. On the other hand, if one compares conventions and constitutional statutes as possible constitutional regulatory techniques on constitutional rights issues, the particular characteristics of statutes would always render them preferable to conventions. Rights are so closely connected to the notions of clarity and enforceability in court that they seem unsuitable for conventional regulation.

3.2.1.2.Constitutional statutes in the UK, constitutional provisions in continental constitutional law and the US

Constitutional statutes bring with them a notion of exceptional importance of their content. Therefore, in the majority of cases, when comparing constitutional conventions

[50] As well as some constitutional secondary legislation Cf Tomkins (n 17).
[51] Cf 2.2.1.

with law, we are not actually comparing them with an ordinary legal provision but with either a particular category of constitutional statutes or with codified provisions of a constitution.

The traditional British constitution lacked any idea of different levels of importance of legal provisions; not only was there no codified constitutional text but all laws were perceived as equal.[52] This central idea emerged from the principle of parliamentary sovereignty, which, according to the classic Diceyan view, is the cornerstone of the UK constitution.[53] Changes that took place in the second half of the 20th century, especially the UK taking part in the process of European integration through the EU,[54] devolution, and the application of ECHR rights, brought about a more nuanced picture of the UK constitutional edifice.

The idea that there are different levels of statute, with one being at the legal level and others at a constitutional level, was not brought out as novelty in *Thoburn* and the decisions that followed it. What was novel was their recognition by common law, not their existence.[55] This is why LJ Laws includes among constitutional statutes not only laws enacted relatively recently but also parts of the UK constitutional tradition going back to 'the Magna Carta, the Bill of Rights 1689, the Act of Union, [and] the Reform Acts which distributed and enlarged the franchise'.[56]

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[52] Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' [2014] European Constitutional Law Review 379, 381.
[53] Dicey, *Introduction to the study of the law of the constitution* (n 2) 37.
[54] Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144, 149.
[55] *Thoburn* (n 43) 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental: see for example such cases as *Simms* [2000] 2 AC 115 *per* Lord Hoffmann at 131*, Pierson v Secretary of State* [1998] AC 539, *Leech* [1994] QB 198, *Derbyshire County Council v Times Newspapers Ltd.* [1993] AC 534, and *Witham* [1998] QB 575.'
[56] Ibid.

There is a presumption of greater importance and deliberation given to constitutional statutes in Parliament, reflected in the impossibility of implied repeal of constitutional statutes. Therefore, it is more accurate to state that when comparing convention with 'law' we actually compare it with norms of the legal constitution, mainly expressed as provisions of a codified constitution or a constitutional statute. These legal provisions safeguard the stability of the constitution and constitutional identity, but lead to inflexibility. This inflexibility highlights the importance of the flexibility of constitutional conventions as an alternative.

The above should not preclude the possibility of a constitutional designer enacting an ordinary statute in countries having a codified constitution, like the Judiciary Acts of 1789 and 1925 in the US and the so-called 'implementing statutes'[57] in Greece.[58] This can happen, for example, due to the existence of exceptional circumstances which demand immediate action and cannot be approached through a long-lasting or politically unattainable constitutional amendment. Yet, the constitutional importance of the relevant provision will eventually lead to its introduction into the body of the codified constitution if the circumstances change.

3.2.2. Constitutional custom as unwritten constitutional law

Constitutional custom remains enigmatic for scholars of unwritten constitutional rules. Is there a separate species of constitutional norms called constitutional custom, and, if

[57] In Greek constitutional practice, 'implementing statutes' are specified what is p
[58] Tomkins (n 17); Cf E Posner and A Vermeule, 'Legislative Entrenchment: A Reappraisal' (2002) 111 Yale Law Journal 1665; in Greece a statute implementing a constitutional provision is not considered hierarchically superior and can be repealed or amended by another statute including a new relevant provision Cf Konstantinos Mavrias, Constitutional Law [Συνταγματικό Δίκαιο] (Ant N Sakkoulas 2008) (in Greek) 262.

so, how does it relate to the other members of the *genus*, namely constitutional legal provisions and constitutional conventions?

Before analysing constitutional custom, it is worth repeating what has already been stated in this thesis[59]: by the word 'custom', scholars from different jurisdictions mean different things. For example, I have already referred to Barber's 'pure custom' as a form of practice,[60] whereas Wheare calls customs the conventions that gradually arise over a long period of time.[61] In a similar way, in the US, academics and political actors use the term 'custom' to describe all unwritten constitutional rules.[62] Nevertheless, I use 'constitutional custom' here as technical term denoting a separate form of unwritten constitutional norms in continental constitutional tradition.

Despite the scarce literature on constitutional custom, there are some common *topoi* in the Greek continental academic tradition that can form an 'orthodox view'. The basic idea is that constitutional custom constitutes an implementation of the general concept of custom in the field of the constitution. Thus, for the existence of a constitutional custom, three elements should be present: *longus usus*, *opinio juris*[63] and constitutional content.

The Latin term *longus usus* is translated as 'long use' and refers to a constant practice followed for a long period of time. In other words, this is a matter of long deliberate practice of the relevant constitutional actors, which amounts to a series of precedents. Therefore, the first element present in constitutional custom refers to an

[59] Cf 1.1.2.2.
[60] Cf 3.1.2.
[61] K C Wheare, *Modern Constitutions* (OUP 1951) 180.
[62] Eg Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' [2013] University of Illinois L Rev 101, 115; Amar, *America's constitution: a biography* (Random House 2005) 434
[63] Aristovoulos Manesis, *The guarantees for respecting the Constitution [Αι εγγυήσεις τηρήσεως του Συντάγματος]* (To Nomikon 1956) (in Greek) 150.

observable and tangible constitutional phenomenon, that of long and uniform practice.[64] On the other hand, *opinio juris* is a subjective criterion, referring to the conscience of constitutional actors when following the precedents. According to this criterion, in order for a constitutional custom to exist, the relevant actors should feel that they are bound by a legal rule; they should be following the custom as if it were a legal constitutional norm.[65] And constitutional custom must be 'constitutional' in the sense that it regulates an issue of constitutional law, and the relevant actors following the precedents and having *opinio juris* should be constitutional actors.[66]

Let me take as an example the Greek rule that local government authorities are elected through direct elections: first of all, this is an unwritten rule, not included in the relevant constitutional provision (art 102 of the Greek constitution). There is a long use of the rule, since local elections have been held through direct election in Greece since 19th century. All political actors, namely the government, local authorities and the electorate, recognise the relevant constitutional rule as a legal rule. Therefore, direct election in local elections is a rare case of a constitutional custom, an unwritten constitutional legal rule, which can be enforced by courts.

The conditions for the existence of a constitutional custom as well as the analysis of its function within the constitutional edifice pose questions which in many cases are similar to those posed regarding constitutional conventions; at the end of the day, they are both (mostly) unwritten constitutional rules, belonging to the *genus* of constitutional norms. Thus, it is not surprising that the relationship between continental constitutional custom and convention has been a matter of discussion among scholars.

[64] Venizelos, 'Constitutional practice' (n 21) 115.
[65] Andreas Dimitropoulos, *System of Constitutional Law [Σύστημα Συνταγματικού Δικαίου]* (2nd edn, Sakkoulas 2011) (in Greek) 284.
[66] Manesis, *The guarantees for respecting the Constitution* (n 63) 150-151.

On this issue, the orthodox Greek view holds that constitutional conventions are an immature form of constitutional custom. They can develop into constitutional customs if they gain full-blooded normativity.[67] It could be said in general that continental theory analyses the rules that are considered conventional in the UK under the rubric of constitutional custom. In Greece, these sometimes include the UK conventions themselves.[68]

The Greek position is flawed for three reasons. First, the relevant academic discussion is purely theoretical, since the dominant view considers both constitutional conventions and customs 'of no practical importance'[69] in the Greek constitutional edifice. It is therefore quite easy to express a theoretical view since this is not considered to have repercussions for the implementation of important constitutional norms. The second flaw has to do with the legalistic perception that the only form of normativity in the constitutional sphere is the bindingness of law; it is easier to accept the normative quality of law-like unwritten rules, like constitutional customs, than the non-legal normativity of constitutional conventions.

The third flaw of the Greek account of constitutional customs relates to the second one: the legalistic perception of normativity makes scholars blur cases of conventions and customs. It is indicative that, in the only article written on the issue of constitutional custom in Greece, the UK constitution is characterised as 'grounded completely on custom',[70] while another author considers the introduction of

[67] Katrougalos, 'Constitutional Custom' (n 1) 264.
[68] Lina Papadopoulou, *Constitutional Law: Universtiy Lectures [Συνταγματικό Δίκαιο: Πανεπιστημιακές Παραδόσεις]* (SEAB 2015).
[69] Philippos Spyropoulos and Theodore Fortsakis, *Constitutional law in Greece* (2nd edn, Kluwer 2013) 55.
[70] Katrougalos, 'Constitutional Custom' (n 1) 260; Alexandros Svolos, *Constitutional Law Volume A [Συνταγματικό Δίκαιο Τόμος Α]* (Athens 1934) (in Greek) 166, where Svolos also seems to state that the only form of unconstitutionality is 'legal unconstitutionality'. Custom' in Greece constitutes in the majority of cases a legalistic categorization of norms that are actually observed by political actors, accompanied by the belief that all constitutional obligations are legal obligations

parliamentarianism in Greece as a constitutional convention and not as a custom due to its (perceived) frequent violations.[71]

Greek theory's approach would consider all well-functioning conventional rules as constitutional customs. Such a stance opens the discussion regarding whether constitutional conventions and customs are truly two separate categories of rules or whether they are different ways to call the same thing: constitutional customs in Greece and elsewhere in the continental tradition, and constitutional conventions in the UK and countries following its paradigm.

To answer such a question, we should turn back to the conditions for the existence of a constitutional custom, comparing them to what we already know about conventions. The criteria for the existence of constitutional customs and Jennings' tripartite test for conventions[72] differ in various ways: first of all, in the case of conventions there is no need for '*longus usus*' of precedents; even a single precedent can ground a convention if there is a good reason for the rule.[73] This last point, the reason for the rule, is not existent in the test for constitutional customs.

The most fundamental of all differences is connected with the existence of *opinio juris* in the case of constitutional custom. To constitutional actors and academics, the idea of following a legal rule makes redundant the existence of a reason for the rule and entails the inclusion of constitutional custom in the legal constitutional sphere. Actors do not only feel bound to follow the rule as with conventions; they also rightly regard the custom to be a legal rule. This paves the way for deciphering the true nature of constitutional custom: it is a form of unwritten constitutional law. It acts as an

[71] Pantelis. *Constitutional law handbook* (n 14) 214.
[72] Sir Ivor Jennings, *The law and the Constitution* (5th edn, University of London Press 1959) 136.
[73] Ibid.

unwritten legal provision which could have been included in a constitutional statute or a codified constitution. But since it is unwritten and customary, it is considered by the dominant tide in theory to be neither entrenched nor hierarchically superior.[74]

The 'legal' character of constitutional custom paves the way for the discussion on its justiciability. The basic problem regarding this issue is the scarcity of examples of constitutional customs in real world constitutions. This creates a great amount of ambiguity, as in many jurisdictions there is no relevant case law on point. Therefore, the relevant discussion should be based on the qualities of constitutional customs: since they are legal rules in their nature and perception by constitutional actors and scholars, there is always the possibility of being enforced by court.[75] Italy provides an example of judicially enforcing a constitutional custom. The Italian Constitutional Court has in one case resolved an issue regarding a conflict among state powers by considering a specific power exercised by the Court of Accounts as a 'constitutional custom'.[76] The same can be said of Norway, where what is described as 'customary constitutional law' is enforceable.[77] In the latter case, a special 15-member court of five Supreme Court Justices and 10 MPs can find politicians responsible for violating unwritten 'customary constitutional law', distinguishable from political conventions. A characteristic example of such Norwegian constitutional customs is the obligation of government to give parliament all the information needed for enacting laws.[78]

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[74] Manesis, *The guarantees for respecting the Constitution* (n 63) 168.
[75]Pantelis, *Constitutional law handbook* (n 14) 184.
[76] Lorenzo Cuocolo, 'Constitutional Conventions and the Economic Crisis: The Italian Paradigm' (2015) 38 Dublin ULJ 265, 268 Cf G U Rescigno, 'Ripensando le convenzioni constituzionalli' [Rethinking constitutional conventions] (1997) 4 Politica del Diritto (in Italian) 499, 514; Panagiotis Doudonis, 'The normativity of constitutional practice and the Italian political and constitutional crisis' [Η κανονιστικότητα της συνταγματικής πρακτικής και η ιταλική πολιτική και συνταγματική κρίση] (2018) Efimerida Dioikitikou Dikaiou.
[77] Jon Elster, 'Political norms' 63 (2014) The Jerusalem Philosophical Quarterly 47,
[78] Ibid.

Moreover, it is notable that there is an interesting example of constitutional custom in Greek constitutional history: judicial review in Greece was based on a constitutional custom until it was included in the codified constitution in 1927:[79] no provision of the codified constitution dictated the review of the constitutionality of legislation. The relevant precedents had led to the creation of an unwritten legal constitutional rule, implemented by the courts. The first precedent can be traced back to a 1897 decision of the Supreme Civil and Criminal Court in Greece[80] and was followed by the Council of State in its very first decision.[81] It should finally be noted that Denmark, Norway and Iceland are three jurisdictions where the dominant view in theory considers judicial review 'as mandated by constitutional custom'.[82] Courts act in these cases as constitutional organs, which means that the long use of a certain practice along with the belief among the judiciary that they are following a legal rule, has led to the creation of a constitutional custom.

One question remains: given that constitutional customs are justiciable, why are there so few instances of enforcing a constitutional custom? Why, in other words, are customs scarce in real world constitutions? In my view, this has to do with their particular characteristics which make them in many cases unsuitable for regulating the constitution. Constitutional customs are unwritten rules of a legal nature; this creates first of all a contradiction which has an impact on their potential use as a constitutional regulatory technique. As unwritten rules, at least theoretically, constitutional customs could have been armed with flexibility, a useful trait for many cases of constitutional design. Yet, this flexibility is mitigated, if not annulled, by the fact that customs operate

[79] Art 5, interpretative clause.
[80] Greek Supreme Civil and Criminal Court [ΑΠ] 23/1987 Cf *Marbury v Madison*, 5 U.S. 137 (1803).
[81] Greek Council of State [ΣτΕ] 1/1929 Mavrias, *Constitutional Law* (n 71) 314.
[82] Ragnhildur Helgadóttir, 'Nonproblematic judicial review: A case study' 9 (2011) ICON 532, 542.

like legal rules which can be enforced by court. The possibility of the courtroom being the *forum* for the definitive resolution of any issue, and the finality of adjudication and resolution of the matter[83] arising from a constitutional custom in the judicial *fora*, act as a deterrent to any effort to accord more flexibility to the relevant constitutional area through its regulation by such unwritten constitutional rules.

Moreover, this combination of being unwritten but having legal nature creates issues of constitutional legitimacy. Constitutional custom is created by the practice of constitutional actors who follow precedents; at the same time, the ultimate arbiter for its implementation and interpretation is the judiciary, since custom belongs to the legal constitutional sphere. This entails that customs cannot be justified in the manner of conventional rules, which are decided in democratic political *fora*, like the Parliament and the electorate.[84] The above argument could be put as the 'democratic' argument against constitutional custom:[85] custom is not transparent and 'democratic' in its production or in its implementation.[86]

The fact that constitutional custom is created by a close number of officials and can be judged only in courts gives rise to arguments restricting its use and ability to interfere with codified constitutional provisions. Given the above, constitutional custom poses a serious challenge to the principle of people's sovereignty, which is dominant in continental jurisdictions. This has an impact on its function: continental scholars consider custom only supplementary of the written provisions, unable to change the way powers are allocated among constitutional organs. Since the codified constitution gains authority from being voted on by the representative assembly, it has

[83] Timothy A O Endicott, 'The impossibility of the Rule of Law' [1999] 19 OJLS 1, 9.
[84] Cf 5.3.
[85] Cf Barry Hough, 'Conventions and Democracy' (2000) 29 Anglo-Am L Rev 368.
[86] Manesis, *The guarantees for respecting the Constitution* (n 63) 146 et seq.

strong connections with people's sovereignty and cannot be challenged by customary, unwritten rules. Both constitutional provisions and constitutional custom are legal rules, yet the former trump the latter, which can only supplement what is already provided by the codified constitutional text. In other words, codified continental constitutions are entrenched from change not only by ordinary statutes but also by constitutional customs.[87] Given their mode of creation, Greek academics support the view that there is no room in continental constitutional traditions for constitutional customs that amend or repeal a codified constitutional provision.[88]

To sum up, constitutional custom belongs to the wider concept of the legal constitution, being a form of unwritten constitutional law. Its characteristics render its use quite scarce in real world constitutions. However, constitutional custom is still a recognisable and distinct species of the *genus* of constitutional regulatory techniques. It is different from conventional rules in many ways, the most important being that constitutional custom is justiciable. It is to this issue of non-justiciability as the distinguishing characteristic of conventional rules that I now turn.

3.3. The *differentia* of conventions: political *fora* and non-enforceability in court

3.3.1. The distinguishing characteristic of conventional regulation is political, not judicial enforcement of conventional rules

[87] Ibid 162; Cf Richard Albert, 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin ULJ 387.
[88] Aristovoulos Manesis, *The guarantees for respecting the Constitution Constitution* (n 63)156.

So far, I have presented the *genus* to which constitutional conventions belong: constitutional regulatory techniques or constitutional norms. I have also presented the particular characteristics of the other important members of this *genus*, namely constitutional statutes, codified constitutional provisions and constitutional customs. Since they are all legal in their nature, they are justiciable: the appropriate *forum* for the resolution of legal constitutional questions is the courtroom. It is this particular feature that is different in the case of conventions.

According to Aristotle, in order to be singled out from the other member of its *genus*, a species should have its distinguishing characteristic, its *differentia*.[89] The latter acts as the part of the species which cannot be defined by its *genus*. In the case of constitutional conventions, there is clearly an orthodox view about this distinguishing characteristic. It has evolved from the Diceyan analysis on the difference between conventions and 'law'. This traditional view about the difference of conventions from laws has been met with fierce criticism and alternative criteria have been suggested, as noted previously in Chapter 1.[90]

The first step towards approaching the whole issue is answering the question whether the criterion used by Dicey for distinguishing between conventions and 'laws', namely enforceability in court, can be also used as the *differentia* of conventions. Let's briefly recall Dicey's initial use of the criterion of enforceability. When discussing the sanction by which the conventions of the constitution are enforced, Dicey starts by defining their nature negatively:

> Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the Courts.[91]

[89] Aristotle (n 5).
[90] Cf 1.1.2.2.
[91] Dicey, *Introduction to the study of the law of the constitution* (n 2) 435.

In my view, this classic statement can serve as the guideline for bringing out non-enforceability in court as characteristic of conventions, connected to their special nature and status within the constitutional edifice. What Dicey wants to underline here is not only that conventions differ from 'laws' on this particular issue; his intention is, in my view, more general.

The importance of the statement that constitutional understandings are 'not laws' is not restricted to the comparison between conventions and statutes. As has already been shown, convention is not frequently compared to ordinary law; in the majority of cases, the comparison is made between a convention and a written provision, either included in a codified constitution or in a UK-style constitutional statute. In other words, enforceability in court is truly the point of difference between law and conventions, yet its use is much wider than a strict reading of Dicey.

In my view, Dicey brings out the fact that conventional regulation is not part of the legal constitution. Constitutional legalism gives us a partial, distorted view of the constitutional edifice: the constitution is not only composed of legal rules but also of political ones. The quintessential characteristic of a non-legal constitutional category of rules, like conventions, is that the appropriate *forum* for the resolution of issues arising from their implementation is not the courtroom.

Of course, an orthodox, restricted approach can easily be contested: there are cases of non-justiciable laws or even non-justiciable constitutional provisions. An example mentioned by Barber and found in almost all jurisdictions, including the UK, the US and Greece, are the rules regulating the working of representative assemblies.[92]

[92] Barber, *The Constitutional State* (n 12) 95; Contra Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218, 255.

Does the fact that they are not justiciable render them conventional rules? It is thus important to make clear that enforceability in the political *fora* (through mechanisms of political judgment and censure that have been described in Chapter 2 regarding the consequences for not following a conventional rule) is related to conventions as a category of rules, as a species of constitutional regulatory techniques. It thus refers to what Aristotle termed as the central case of the relevant category. Borderline cases can of course exist.[93] The issue though is what happens at the core of each notion: the central case of conventional regulation is a non-justiciable political constitutional rule, usually—but not always—unwritten, which is characterised by flexibility.

At this point a question arises: how does the *differentia* of conventions, namely political and not legal enforcement, relate to other characteristics of conventional regulation, like flexibility? Is there any cause-and-effect relationship? It is true that conventions have been characterised as a flexible form of regulating the constitutional area,[94] unlike rigid constitutional provisions. This flexibility gives them the opportunity to adapt relatively quickly if circumstances change[95] and thus endure more exogenous shocks than rigid constitutional provisions which may have to be amended or even repealed if the constitutional reality changes. This flexibility has been associated with the traditionally unwritten character of conventions. In other words, there is a scheme stating that an unwritten rule is by definition a flexible rule.

Of course, no one can deny that there is an association between being unwritten and flexibility, but this is by no means an absolute one. There are other parameters that should also be taken into account. Comparisons with the case of constitutional customs

[93] Joseph Jaconelli, 'The Proper Roles for Constitutional Conventions' (2015) 38 Dublin ULJ 363, 371.
[94] Ministry of Justice, *The Governance of Britain: War powers and treaties: Limiting executive powers* (Cm 7239, 2007), para 7.
[95] Robert Hazell, 'United Kingdom' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015) 178.

easily contest such an absolute association. As I have shown in the previous section, constitutional customs have been unpopular as a method of regulating the constitution, since their flexibility potential is mitigated—if not annulled—by the fact that they are justiciable.

What truly distinguishes between these two species of the *genus* of constitutional regulatory techniques—constitutional customs and conventions—is legal quality and enforceability in court. Judicial decisions are armed with claims to authority. When it comes to the legal constitution, courts, especially Supreme Courts, regard themselves as the single authoritative[96] source of constitutional decision-making. Since their review of the relevant provisions is designed to claim to settle the issue without leaving any place for maneuver, this is a system based on values that promote certainty and rigidity, standing on the opposite side of the benefits of flexibility.

On the other hand, the breach of conventions is associated with mechanisms of political difficulties which follow. These difficulties do not result from the adjudication of a court but from political *fora*, like the Parliament and the electorate, as has been shown in Chapter 2.[97] These political *fora* are receptive to the changes of circumstances and can adapt to shifts in the mentality of constitutional actors, which include the people themselves. Therefore, the political character of the monitoring and sanction mechanism in the case of conventions safeguards their immunity from the authoritative character of legal and, thus, judicial intervention, ensuring their flexibility. No one can deny that flexibility is a trait of constitutional conventions; yet, it derives from their

[96] Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 HLR 1359; Cf M Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press 1999) 27-28.
[97] Cf 3.2.

political, non-judicially enforceable character, which is the characteristic distinguishing conventional rules from the other members of the *genus* of constitutional regulatory techniques.

It is important to mention that conventions, even if losing their unwritten character, retain their defining characteristic. This becomes quite obvious from the results of the codification procedure. The wide-scale codification of conventional rules during the last many years in the UK[98] has not rendered the relevant rules judicially enforceable. I will thoroughly analyse this phenomenon in the last chapter of this thesis; at the moment, it is important to bring out that being unwritten does not constitute a defining feature of conventional rules; writing down the relevant rules does not render them legal and thus justiciable.[99] A characteristic example is the Sewel convention. It belongs to those conventions that have been codified not in an executive guidance code but in a statute. [100] By being a 'declared' convention, its content was already expressed by Lord Sewel's words[101] and put more formally in the subsequent Memorandum of Understanding between the United Kingdom Government and the Scottish Parliament.[102] It was finally included in 2016 in section 28 of the Scotland Act (Acts of the Scottish Parliament), retaining the same content. An identical provision has also been included in clause 2 of the Wales Act 2017.[103]

[98] Codification is used here within the context of the UK codification procedure and thus in a different sense from its use above of codified constitutional provisions.
[99] R Brazier and St J Robilliard, 'Constitutional Conventions: The Canadian Supreme Court's Views Reviewed' Public Law 28 (1982) 28, 33.
[100] Hazell, United Kingdom' (n 96) 179.
[101] HL Debates, vol no 592, part no 191, col 791 (21 July 1998).
[102] *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (UK Government 2013).
[103] 'In section 107 of the Government of Wales Act 2006 (Acts of the National Assembly for Wales), after subsection (5) insert—"(6)But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly".'

In the first *Miller* case, the question whether there was a legal requirement for consent of the devolved assemblies for legislation on UK's withdrawal from the EU was put before the UK Supreme Court.[104] In the next section, I will examine the implications of this decision for upholding the non-enforceability of conventions in court. It is important for the needs of the present analysis that the Sewel convention was approached as a non-enforceable political rule by the court, although included in statutory provisions. This was expressly stated in the following passage:

> 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.[105]

Therefore, the court in *Miller (no 1)* recognised in the clearest way that conventional rules, which are codified into codes or even statutes, are generally not turned into judicially enforceable law. In other words, they do not lose their political character by being turned into a written form, even when placed in a statue; they remain conventions since they still are not enforceable in court.

The above analysis has shown that there is a negative and a positive way to view the *differentia* of conventional regulation. According to the negative approach, conventions differ from other rules since they are non-enforceable in court; in other words, they are distinguishable because they do not have a trait that the central cases of

[104] Aileen McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' in Elliott, Jack Williams and Alison L Young (eds), *The UK constitution after Miller: Brexit and beyond* (Hart 2018) 157.

[105] *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, 148.

other rules have, namely enforceability in court. According to the positive approach, conventions are political rules since they are appropriate for resolution in the political *fora*, like the electorate and the Parliament. In actuality, these are two ways of describing the very same thing: conventions are non-enforceable in court, since they are political rules, resolved in political *fora*. This is what differentiates them from other species of the *genus* of constitutional regulatory techniques.

3.3.2. The judicial perception of the *differentia* of conventional rules; the two *Miller* cases

In order to have a better grasp of the *differentia* of conventional regulation, it is important to have a look at what the courts have stated on this particular issue. What political actors and the majority of academics believe does not suffice; when it comes to enforcing conventional rules, the active cooperation of courts through their self-limitation is also needed. Although there is no explicitly related case law on conventions in the US[106] and Greece, it is important to remember that, in the former, the relevant academic discussion was initiated as a way to enrich the already existing US non-justiciability doctrines, against the dominant tide of constitutional legalism.[107] On the other hand, in the UK there is a small but effective number of cases which deal with the issue. The majority of these cases have been widely known and analysed by UK theory. They uphold the dominant view that conventions can be recognised but not enforced by court.

[106] Adrian Vermeule, 'Conventions in Court' (2015) 38 Dublin ULJ 283, 285.
[107] James G Wilson, 'American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior' [1992] Buffalo Law Review 645.

On the other hand, the whole discussion regarding the possibility of non-recognition of conventions was influenced by Dicey's authority,[108] fueled by references to later editions of his *Introduction.*[109] In reality, courts cannot avoid recognising the existence of conventions: Marshall's lengthy examination of the reasons and cases where the court recognises conventions is right[110] but not exhaustive, since it does not take into account the judicial reality as it has been later briefly and accurately put by Barber:

> Courts can recognize anything they wish to recognize. Judges frequently make reference to dictionaries, encyclopaedias, and a host of other things. It would be surprising if they never recognized constitutional conventions[111]

At the same time, the wide variety of things that courts recognise in their judgments compared to the much more restricted category of things (actual legal rules) they enforce explains why there is truly a difference between recognition and enforcement and this difference is an important one.[112]

The UK judiciary has followed this basic distinction, recognising but not enforcing conventions in the cases where a conventional rule was connected to deciding a legal question.[113] The same distinction was followed in the famous Canadian *Patriation Reference*.[114] By refraining from enforcing constitutional conventions, UK courts have first of all shown a clear understanding of the difference in the nature of

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[108] Arthur Berriedale Keith, *The Governments of the British Empire* (Macmillan and Co 1935) 6.
[109] Dicey, *Introduction to the study of the law of the constitution* (10th edn, Macmillan 1959) 417.
[110] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) 12.
[111] Barber, *The Constitutional State* (n 12) 90.
[112] Allan has exactly the opposite view on this issue: T R S Allan, *Law, Liberty and Justice* (Clarendon Press 1993), 244.
[113] *Cf Attorney-General v Jonathan Cape* [1975] QB 75 *Evans v Attorney General* [2015] UKSC 21; [2015] 2 W.L.R. 813; *Evans v Information Commissioner*, [2012] UKUT 313, par 66 (AAC) (UK)
[114] *Re Amendment of the Constitution of Canada* (Nos 1, 2 and 3) (1982) 1 SCR 753, [775].

constitutional rules which renders them inappropriate for legal resolution. At the same time, they have created a harmonious relationship between the dominant view in theory and case law regarding the relationship between conventions and courts.

The stance of the UK judiciary has thus been steady since *Madzimbamuto v Lardner Burke*. In this case, in the context of deciding on the unilateral declaration of independence of Rhodesia, the Privy Council stated that '[T]heir Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.'[115] Although this may seem as a rejection not only of the enforcement but also of recognition of conventions by court,[116] in actuality in Madzimbamuto v Lardner Burke:

> the learned judges refer to the statement of the United Kingdom Government in 1961, already quoted, setting out the convention that the Parliament of the United Kingdom does not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. That was a very important convention but it had no legal effect in limiting the legal power of Parliament. [117]

Thus, the Privy Council discussed and recognised the existence of a convention, also stating that 'it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention.'[118] What the stance of the Privy Council in *Madzimbamuto* actually implies is that conventions do not have a legal effect on the laws of the constitution and thus cannot bring about such changes in the legal powers of constitutional organs so as to become enforceable in adjudicatory bodies like courts. Let's think again about the aforementioned statement: 'Their

[115] *Madzimbamuto v Lardner Burke* [1969] 1 A.C. 645 [723].
[116] Marshall, *Constitutional Conventions* (n 110) 16.
[117] *Madzimbamuto* (n 115) [722-723].
[118] Ibid [723].

lordships … are not concerned with these matters' not in general but 'when declaring the law'.[119]

Non-enforceability of conventions in court has thus been supported not only by the academic orthodoxy but also by case law. As Munro has put it regarding non-enforceability, 'there are no instances which controvert that proposition'.[120] In the words of the Upper Tribunal in *Evans v Information Commissioner*: 'What are constitutional conventions? The first thing to stress is that they are not law. They are not enforced by courts'.[121] Scholars who have supported the enforcement of conventions in court have to this day not given an example of a court decision that has *expressis verbis* enforced a conventional rule.[122] Their arguments are either based on their academic position that conventions should or may in the future be enforced by courts,[123] or on a blurring of recognition and enforcement[124] or rather on their interpretation of the court's decision. Nevertheless, there was never a case expressly and directly[125] confirming their arguments about the enforcement of conventional rules. Courts, through the wording and content of their judgments, always uphold the traditional view of non-enforceability.

In my view, the question that has arisen during the last years does not concern the traditional view of non-enforceability of conventions *per se*. It is rather a wider question of whether the doctrine of non-enforceability, along with other elements of the

[119] Ibid.
[120] Colin Munro, *Studies in Constitutional Law* (2nd edn, OUP 2005) 68.
[121] *Evans v Information Commissioner* (n 113) [66], Cf 1.1.2.2.
[122] Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (2nd edn, OUP 2014) 27, J R Mallory, *The Structure of Canadian Government* (2nd edn Gage 1984) 442.
[123] Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order' (2002) 22 Legal Studies 340, 356.
[124] Allan (n 112).
[125] Barber, *The Constitutional State* (n 12) 90.

UK constitutional edifice,[126] can survive times of political tension involving the courts. The Brexit saga has indeed involved the courts, including the Supreme Court in the two *Miller* decisions.[127] This issue of conventions and their normativity during periods of political turbulence, like the Brexit period in the UK, will be approached in the last Chapter of this thesis.[128] Here, I will try to approach the repercussions of these developments on the more specific issue of the non-enforceability of conventions in court.

As previously noted, the *Miller (no 1)* case included a discussion of the Sewel convention. The Supreme Court drew a clear dividing line between recognising the Sewel convention and enforcing it. Although it acknowledged the fact that conventions can be taken into account by Courts in the course of 'deciding a legal question', it stated that:

> Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case - Attorney General v Jonathan Cape Ltd), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world[129]

This passage is of exceptional importance, since it provides an answer to a particular line of argument in UK theory supporting the possibility or desirability of the enforcement of conventions.[130] The Court not only expressed the view that conventions

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[126] Panagiotis Doudonis, 'Brexit, the Miller case and the UK constitutional identity' [To Brexit, η απόφαση Miller και η αγγλική συνταγματική ιδιαιτερότητα] (2017) 6/2016 Efimerida Dioikitikou Dikaiou (in Greek).
[127] Nick Barber, 'Constitutional hardball and justified development of the law' (Policy Exchange, 29 September 2019) http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/> accessed 30 September 2019.
[128] Cf 6.5.
[129] *Miller* (n 105) 146.
[130] Cf Ahmed, Farrah and Albert, Richard and Perry, Adam, Judging Constitutional Conventions (September 26, 2017). Oxford Legal Studies Research Paper No. 59/2017. Available at SSRN: <https://ssrn.com/abstract=3043190> or <http://dx.doi.org/10.2139/ssrn.3043190> .

cannot be enforced by the courts; it also held that conventions should not be judicially enforceable. This conclusion stems from the arguments employed: 'Judges therefore are neither the parents nor the guardians of political conventions', which is quite clear in the message it conveys; it is not the proper role for the judiciary to enforce political rules,[131] like the Sewel convention. Moreover, the Court states that 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'.[132] In other words, the UK judiciary, through its highest organ, the Supreme Court, clearly delineated between enforcement and recognition, showing respect to the existence of a convention but simultaneously limiting itself to serving its constitutional purpose, which lies in protecting the rule of law and not in implementing conventions or in sanctioning their breaches. It seems that the traditional view in UK theory regarding the nature and distinguishing characteristic of conventions has won in *Miller (no 1)*.

Nevertheless, the second *Miller* decision, namely *Miller/Cherry*, brought a degree of confusion.[133] In this case, the Supreme Court based its decision that Prime Minister's prorogation of the Parliament was null, void and of no legal effect on parliamentary sovereignty and parliamentary accountability.[134] Of particular importance for this thesis is the use of the conventionally grounded parliamentary accountability as a criterion for deciding on the exercise of the power to prorogue. The

[131] Anthony Gordon, 'Sovereignty, Consent and Constitutions: The Northern Ireland References' in Elliott, Williams and Young, *The UK constitution after Miller* (n 116) 193; McHarg, 'Constitutional Change and Territorial Consent (n 104) 173: 'Once again, the Supreme Court seems to have deliberately adopted a narrow view of its legitimate constitutional role, constructed around a sharp distinction between legal and political issues'.
[132] *Miller* (n 105) 151.
[133] *R. (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2019] 3 W.L.R. 589.
[134] P Craig, "The Supreme Court, Prorogation and Constitutional Principle" [2020] PL 248, 252.

decision has been criticised by some scholars,[135] among others for unconstitutionally enforcing conventions and thus transforming them into rules of law.[136]

This criticism is plausible, but a clarification must be made: the court in *Miller/ Cherry* has not gone so far as explicitly enforcing the bunch of conventional rules of which parliamentary accountability is composed.[137] It did not do so overtly, but covertly through the deployment of the notion of constitutional principle.[138] Parliamentary accountability is thus judicially transformed from a conventional rule into a constitutional principle and thus rendered justiciable. In this way, the appearance of the non-enforceability of conventions in court remains intact, while its spirit is undermined.

At this point a question naturally arises: can a conventional rule, although non-justiciable, constitute the basis of a justiciable constitutional principle? In order to answer such a question, it is important briefly to investigate the idea of constitutional principles. It is beyond my intention to cast doubt on the existence of constitutional principles; in my view, the most crucial parameter lies not in the existence of constitutional principles *per se* but rather in whether they constitute a separate form of

[135] Even in Greece, Cf Charalampos M Tsiliotis, 'The prorogation in Westminster as a field of tension between constitutional law and politics: Thoughts after the UK Supreme Court decision on 24.9.2019 (Cherry/Miller)' [Η αναστολή λειτουργίας του Westminster στο πεδίο έντασης μεταξύ Συνταγματικού Δικαίου και Πολιτικής. Σκέψεις με αφορμή την από 24.9.2019 απόφαση του Ανωτάτου Δικαστηρίου του Ηνωμένου Βασιλείου] (2020) 5/2019 Efimerida Dioikitikou Dikaiou (in Greek) 631-648.
[136] John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (*Policy Exchange*, 28 September 2019) 12, <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/> accessed 28 February 2020.
[137] Diana Woodhouse, *Ministers and parliament: Accountability in theory and practice* (Clarendon Press 1994) 27; Marshall, *Constitutional Conventions* (n 122) 210 'rules and forms of political accountability'.
[138] Martin Loughlin, "A Note on Craig on Miller; Cherry" [2020] PL 278, 280; Cf Mark Elliott, 'The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?' (*Public Law for Everyone*, 24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 15 March 2020.

constitutional norms; in other words, a species of the *genus* of constitutional regulatory techniques.

Constitutional principles do indeed exist, being in many cases of exceptional constitutional importance by expressing fundamental values of the constitutional edifice. This happens in Germany, for example, where the principle of human dignity is the basis of the whole constitutional structure. Yet, however important they are, constitutional principles do not constitute a separate category of constitutional norms. As Barber rightly argues, they are rather narrowly drafted rules.[139] In actuality, not only is there no sharp boundary between rules and principles as Hart[140] and Barber have argued,[141] answering to Dworkin's argument,[142] but also constitutional principles constitute the basis of one or a combination of constitutional rules.[143] These rules can either be written (like provisions of constitutional statutes or Constitutions and codified conventions) or unwritten (like many conventions and constitutional customs)[144] but, in any case, they must belong to at least one category of the known constitutional norms. However general constitutional principles are, there can be no constitutional principle without at least one corresponding constitutional norm which, at the end of the day, can be either of a political or a legal character.

For example, the above German principle of human dignity is provided for in Art 1 of the Basic Law of the Federal Republic of Germany. It is thus grounded on a constitutional provision, rendering it a legal constitutional norm. On the other hand, the existing UK principle of parliamentary accountability is the base of a group of

[139] Barber, *The Constitutional State* (n 12) 87.
[140] Their difference being a matter of degree H L A Hart, *The Concept of Law* (3rd edn, Clarendon Press, 2012) 262.
[141] Barber, *The Constitutional State* (n 12) 86-87.
[142] Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 38-39.
[143] Cf Barber, *The Principles of Constitutionalism* (OUP 2018) 17.
[144] Heard, *Canadian Constitutional Conventions* (n 122) 19.

accountability constitutional conventions;[145] it is thus expressed through political constitutional norms. Therefore, the nature of the norm based on the constitutional principle is decisive for its treatment by the courts. In this case, since the parliamentary accountability principle is expressed through a conventional norm, this renders the corresponding norm non-enforceable in court, according to the case law encapsulated in the Canadian *Patriation Reference*.[146]

In reality, in *Miller/Cherry*, the Supreme Court attempted a covert enforcement of a conventional rule through the vehicle of constitutional principles in order to resolve a political tension.[147] Since the deviation from the non-enforceability rule was not done expressly and the decision was met with criticism along these lines by a considerable number of scholars,[148] I do not believe *Miller/Cherry* will in the long term change the dominant judicial stance towards the non-enforceability of conventional rules. Nevertheless, although the court has not gone so far as enforcing a convention *expressis verbis*, it seemed to reserve for itself the role of policing the whole constitutional edifice,[149] without respect for the political-legal distinction. In the words of the Supreme Court 'the courts have the responsibility of upholding the values and principles of our constitution and making them effective.'[150]

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[145] Woodhouse, *Ministers and parliament* (n 137).
[146] *Re Amendment of the Constitution of Canada* (n 114).
[147] Stephen Tierney, 'Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision' (*Policy Exchange*, 30 September 2019) < https://policyexchange.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-miller-cherry-decision/> accessed 4 March 2020.
[148] Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (n 148).
[149] Paul Yowell, 'Miller (No 2) and political questions' (*Policy Exchange*, 30 September 2019) <http://judicialpowerproject.org.uk/paul-yowell-miller-no-2-and-political-questions/> accessed 5 March 2020.
[150] *Miller/Cherry* (n 133) [39;] Mike Gordon, 'The Prorogation Case and the Political Constitution' (UK Const L Blog, 30 September 2019) < https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/> accessed 5 March 2020.

The stance of the Supreme Court in *Miller/Cherry* seems to legalise the whole constitutional edifice. This is done not only through the use of constitutional principles but also through the legalisation of all of them. Not all constitutional principles are legal constitutional principles. Especially the principle in question, parliamentary accountability, through the corresponding constitutional norms, namely accountability conventions, remains highly political within the UK constitutional edifice. Its legalisation is another step away from constitutional orthodoxy. Furthermore, it sets a poor precedent as a way of tackling constitutional issues in times of political turmoil.[151] This blur between the legal and political sides of the constitution sheds light on the importance of bringing out the role of conventions within the wider constitutional edifice and especially their importance for the legal-political constitutional divide.

Conclusion

The present chapter analysed the *genus* to which constitutional conventions belong and their *differentia* from the other species of this *genus*. The first section presented this *genus*, namely constitutional norms or constitutional regulatory techniques. Constitutional norms regulate the constitutional edifice through their normative content. They are more specific than social norms since they regulate a particular area of social life, the constitution. Constitutional practice, although being an entity of the constitution, is not armed with normativity and thus remains outside this *genus*.

Not all categories of law are species of the *genus* of constitutional norms. Law should first of all have a constitutional content, like provisions of constitutional statutes

[151] Paul Yowell, 'Is Miller (No 2) the UK's Bush v Gore?' (UK Const L Blog, 7 October 2019) <https://ukconstitutionallaw.org/2019/10/07/paul-yowell-is-miller-no-2-the-uks-bush-v-gore/> accessed 10 March 2020.

and codified constitutions. Unwritten constitutional law refers to constitutional customs, an entity mostly known to continental European tradition, but with little practical use due to its justiciable and thus inflexible character. All these species of the *genus* of constitutional norms can be compared to conventions. Constitutional designers may take into account the characteristics of the specific area of the constitution they want to regulate, along with the advantages and disadvantages of each constitutional regulatory technique.

Finally, the traditional theory is correct in a sense: non-justiciability in court is very important for conventions. Non-justiciability allows for the recognition but not enforcement of conventions in court. Non-justiciability is not just an element of the comparison of conventions with law but rather something larger: it constitutes the *differentia* of constitutional conventions, the characteristic which distinguishes them from other members of the *genus* of constitutional norms. It is the other side of their political character, connected to their flexibility. The latter should be viewed as a trait of conventions attributable not to their supposedly unwritten character but rather to the lack of the finality and rigidity associated with the judicial resolution of legal constitutional issues.

UK case law has shown an impressive degree of agreement with theory over the non-enforceability of conventions in court. Important cases like *Madzimbamuto*[152] and *Evans*[153] have stressed the lack of judicial enforcement of conventional rules. During the period following the 'Leave' vote in the Brexit referendum, the two Miller decisions were also related to conventional rules. *Miller (no 1)*[154] followed the constitutional

[152] *Madzimbamuto* (n 115).
[153] *Evans v Information Commissioner* (n 113) [66]; Cf the *Canadian Patriation Reference Re Amendment of the Constitution of Canada* (n 114)
[154] *Miller* (n 117).

orthodoxy of non-enforceability, while in *Miller/Cherry*[155] the Supreme Court turned conventions of parliamentary accountability into constitutional principles, in its effort implicitly to enforce them. This was not done expressly but covertly. This blurring of the line between political and legal constitutional rules brings out the importance of the role of conventions within the constitutional edifice and more specifically within the legal-political divide. It is to these issues that I turn in the following Chapter.

[155] *Miller/ Cherry* (n 133).

CHAPTER 4-CONVENTIONS AS POLITICAL CONSTITUTIONAL RULES: HISTORY, POLITICAL CONSTITUTIONALISM AND THE NORMATIVITY OF CONSTITUTIONAL CONVENTIONS

Building my account of the nature and normativity of constitutional conventions, I now focus my attention on their position within a constitutional system; in other words, the questions regarding the role they have played in the wider constitutional context and whether they can be seen as an indispensable component of what has been called by British scholars "the political constitution".[1]

The aim of this chapter is three-fold: first, it examines the historical relation between conventions and the 'political' character of the British constitution. Second, it gives an account of the relationship between political constitutionalism as a model and constitutional conventions based on the commonality of their purpose and method of regulating the constitution. Conventions are the central case of political constitutional regulation. This type of regulation is found not only to the UK but also in a wide variety of jurisdictions, in varying degrees. Legal and political elements coexist in real-world constitutions through a *synthesis* of legal and political constitutional norms. Finally, the chapter examines the reasons for the neglect of conventions by most political constitutional literature, focusing on their normative character as well as the role of conventions within the contemporary constitutional systems. Overall, it argues for the political character of constitutional conventions and their normativity not as an

[1] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1.

idiosyncratic element or a matter of function but as part of a wider, revisited notion of politics.

4.1. The historical relation between the British 'political' constitution and constitutional conventions

As shown in chapter one, the UK is the homeland of conventional regulation. An effort to search for constitutional transplants into the UK constitution, especially on the issue of constitutional conventions, would soon prove futile. The UK has in many cases served as the paradigm for other jurisdictions. 'Westminster systems' have adopted many British conventions relating to the institution of Parliament and responsible government.[2] But this phenomenon is not confined within the bounds of the Commonwealth; it applies also to some countries in the continental tradition, with the introduction of the parliamentary system of government in 19th century Greece forming a significant example.[3]

At the same time, the British constitution has been characterised by specific constitutional scholars as a 'political constitution'.[4] Having a political constitution means that in the UK the mechanism of political control and accountability traditionally constitutes the basic remedy against abuses of power.[5] The centrality of the notion of accountability brings to mind Marshall's definition of constitutional conventions as the

[2] Brian Galligan and Scott Brenton, 'Constitutional conventions' in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions In Westminster Systems* (CUP 2015) 8.
[3] Nikolaus N Saripolos, *Public Law of the Greek Kingdom [Das Staatsrecht des Königreichs Griechenland]* (Mohr 1909) (in German) 81-82.
[4] TRS Allan, *The sovereignty of law: freedom, constitution, and common law* (OUP 2013) 50.
[5] Griffith, 'The Political Constitution' (n 1) 16.

'rules and forms of political accountability'.[6] Therefore, the common British origin of constitutional conventions and the political constitution seems not coincidental, since *prima facie* both are inextricably connected to the holding of political actors into account by political means. Before further elaborating on this idea, it is worth exploring the genetic, historical connections between the two notions through a brief analysis of the long tale of the presence and role of constitutional conventions in the UK constitution.

Since conventions are not transplanted from a foreign jurisdiction, the first step is naturally to examine the time of emergence of conventions as a category of norms of the British constitutional order. This, however, is difficult to answer. It brings to mind an extract by Sophocles where Antigone states that the unwritten laws of the gods 'live not only now and yesterday but always, and no one knows when they emerged'.[7] Nevertheless, conventions are neither God-originated nor laws, leading to a tendency in early academic literature to describe them as a product of the early modern period. This is suggested by both Freeman and Dicey in the first edition of his *Introduction*,[8] with the former arguing that their 'beginning may be placed in the reign of William the Third'.[9]

Nevertheless, despite the importance of their contribution to the study of conventions, Freeman and Dicey seem to overlook the fact that conventions existed at least two centuries earlier, as the work of Sir William Holdsworth[10] and the presentation of Dicey's predecessors by Hood Philips indicate.[11] Conventions of the sixteenth and

[6] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1987) 210.
[7] Sophokleous, *Antigone* (Lipsiae: Sumptibus et typis B.G. Teubneri 1870) (in ancient Greek) 456-457.
[8] Colin R. Munro, 'Laws and Conventions Distinguished (1975) 91 LQR 218, 219
[9] Freeman Edward A, *The growth of the English constitution from the earliest times* (3rd edn, Macmillan 1890) 122.
[10] Sir William Holdsworth, *A History of English Law vol VI* (2nd edn, Methuen & Co 1937) 4.
[11] Hood Philips, 'Constitutional Conventions: Dicey's Predecessors' (1966) 29 Mod L Rev. 137.

seventeenth century served a different purpose within the constitutional edifice; the former focused on the political predominance of the monarch,[12] the latter on the system of checks and balances between the divided powers of government.[13]

At this point a question naturally arises: if conventions are not a construct of the last 200 years, what constitutes the distinctiveness of the UK conventions that developed in the 19th century? What has led them to successfully form a 'Westminster paradigm' for other countries as well as to retain their dominant position in UK's constitution for already more than two centuries? The key word is 'continuity'. Conventions have been tested during the turbulent 19th and 20th centuries and have been proven to contribute decisively to the most distinguishing characteristic of the United Kingdom, its institutional as well as constitutional continuity.

Vernon Bogdanor has pointed out that in the long history of the British constitution 'there has never appeared to be a genuine 'constitutional moment' …There has been no formal breach in the historical continuity of England since 1689'.[14] Even if this can be traced back to the fact that England 'never began', as Bogdanor argues,[15] the development of constitutional conventions contributed significantly to a smooth transition from a primarily monarchical to a democratic constitution[16] without an aberration from 'normal politics'[17] during the last three centuries. In other words, the distinctiveness and paradigmatic character of British 19th century conventions originate from their effectiveness in limiting the discretionary powers of the Crown[18]

[12] Holdsworth, *A History of English Law* (n 10) 5.
[13]Sir William Holdsworth, 'The Conventions of the Eighteenth. Century Constitution' (1932) 17 Iowa L Rev 161, 177.
[14] Vernon Bogdanor, *The New British Constitution* (Hart 2009) 11.
[15] Ibid.
[16] Barry Hough, 'Conventions and democracy' (2000) 29 Anglo-Am L Rev 368, 376.
[17] Bruce Ackerman, 'Storrs Lectures: Discovering the Constitution' (1984) 93 Yale Law Journal 1013, 1022.
[18] Albert Venn Dicey, *Introduction to the study of the law of the constitution* (8th edn, Macmillan 1915) 422.

and according political supremacy to the electorate without endangering the continuity of the UK constitution. In this way, as Walter Bagehot first pointed out, in 19th century UK the 'dignified' parts of the constitution (including the role of the monarch) differed from the 'efficient' parts, 'those by which it works and rules';[19] the latter were defined by constitutional conventions.[20]

The democratisation of the constitution was achieved mainly through three interrelated types of conventions. The first type gradually limited the powers of the monarch. The second type provided for the exercise of the executive power 'by the Sovereign's Government, which has a democratic mandate to govern', as the Cabinet Manual puts it nowadays.[21] The third type relates to the Parliament and provides for the accountability of the government to the Parliament as well as for the supremacy of the elected House of Commons over the formerly aristocratic House of Lords. This does not mean that all conventions contributed to the transition towards a democratic constitution or are currently related to democracy. Many Commonwealth conventions form an illustrative example of conventional norms having a different aim.[22] Nevertheless, this should not obscure the fact that conventional regulation provided the institutional mechanism for the democratic transition through the aforementioned three categories of norms that lie at the heart of the notion.

The evolutionary character of conventions is in accordance with the predominant continuity of the UK constitution. An effort to search for clearly defined turning points in the history of British conventions would have by definition a

[19] Ibid 424
[20] Brian Galligan 'Executive Conventions' in Galligan and Brenton (eds), *Constitutional Conventions In Westminster Systems* (CUP 2015) 53.
[21] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011) Introduction para 1.
[22] Marshall (n 6) 22

retrospective and in most cases negative character, searching for the last time a specific power was exercised to trace the beginning of a limiting convention.[23] For example, the point of reference for the emergence of the conventions regulating the grant of royal assent is 1708, when Queen Anne was the last monarch to refuse assent to a Bill. Conventions that are formed by agreement of the political actors constitute the exception that proves the above rule.[24] The Salisbury convention, ensuring the supremacy of the elected House of Commons in manifesto Bills, belongs to this category; its origin is an agreement between the Leader of the House of Lords and the Leader of the Opposition in that House in 1945.[25]

Constitutional conventions, as the Canadian Constitutional Court has pointed out in the *Patriation Reference* (echoing Jennings)[26] aim 'to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period'.[27] In this way they guarantee the continuity as well as the dynamic character of the constitution. A historical account of constitutional conventions should examine the direction in which they shaped the character of the British constitution. As already shown, constitutional conventions provided the basic mechanism for avoiding the divisive character of legal constitutional regulation in the process towards the establishment of a democratic constitution.[28] It is submitted that the effect of the predominance of conventions during the last three centuries is a system that is chiefly a political constitution. In this way, as Freeman

[23] A Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2014) 21.
[24] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] 71 Mod L Rev 853, 856.
[25] Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2011) 193.
[26] Sir Ivor Jennings, *The law and the constitution* (5th edn, University of London Press 1959) 83.
[27] *Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 1 SCR 753, 880.
[28] Hough (n 16).

pointed out, in the United Kingdom the notion of unconstitutionality in most cases does not coincide with the notion of illegality.[29]

The political character of conventions lies at the heart of their nature. The operation of the normative quality of politics is based on the value of accountability. According to Geoffrey Marshall, conventions have 'as their general aim the effective working of the machinery of political accountability'.[30] Therefore, the constitutional value of democratic accountability defines the purpose of conventions and grounds their normativity.[31] In this way, conventions have paved the way to democracy.

Tomkins has argued that the institutional mechanism of political accountability 'remains absolutely central to British constitutional practice, as it has been for centuries'.[32] His account traces the origins of accountability back to 17th century.[33] Nevertheless, the modern sense of accountability, namely democratic accountability, has been shaped in the UK through conventional regulation during the evolutionary transitions of 19th century. Conventions of the 17th century served a substantially different but accountability-related purpose, ensuring the existence of a system of checks and balances between the divided powers of government.[34] Democratic accountability in 19th century was achieved through a combination of transformations, the majority of which were in one way or another related to conventions. The introduction of the convention that the government should have the support of the majority in the Parliament led to the emergence of a strong two-party system. The development of the convention of responsible government during 18th century formed

[29] Freeman (n 9) 114.
[30] Marshall, (n 6).
[31] P A Morton, 'Conventions of the British Constitution' [1991-1992] 15 Holdsworth L Rev 114, 118.
[32] Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 65.
[33] Ibid 87-108.
[34] Holdsworth, *A History of English Law* (n 10).

the basis for the rivalry of Liberals and Tories[35] in the next century, providing the 'rituals of the confrontation of government and Opposition'.[36]

Moreover, the wide-scale reform of the electoral system that took place in three stages (1832,[37] 1867,[38] 1883-1885)[39] accorded to the House of Commons the democratic credentials needed for an enhanced constitutional role. Thus, the democratic political constitutionalism of the UK was based on, though not exclusively composed of, unwritten conventions and principles. Even in those cases that do not seem directly connected to a political change, conventions provided the stable constitutional environment needed for the political and constitutional change to take place without the turmoil that has been evidenced in continental Europe, including the example of Greece.

Therefore, if the smooth transition from a primarily monarchical to a democratic constitution[40] without a constitutional moment is the historical reason behind the prominence of British constitutional conventions since 19th century, the establishment of a primarily political constitution, based on the value of democratic accountability of the constitutional players, forms the main result of this prominence. The fact that the relationship between conventions and political constitutionalism in the UK is, with few exceptions, under-researched, should not obscure their close association with each other, which was catalytic both for the role of conventions and for the character and growth of the UK constitutional system. By acknowledging and making a place for the role of conventions, the UK has not experienced the strong wave of constitutional

[35] Sir William Holdsworth, *A History of English Law vol XIV* (2nd edn, Methuen & Co 1937) 3.
[36] HJ Hanham, *The nineteenth century constitution 1815-1914: Documents and Commentar*y (CUP 1969) 110
[37] Representation of the People Act 1832 cf. M Ostrogorski, *Democracy and the Organization of Political Parties* (Macmillan and Co 1902) Vol. I, 140.
[38] Representation of the People Act 1867
[39] Representation of the People Act 1884.
[40] Hough (n 16).

legalism of continental European jurisdictions in both academic and political discourse. This proved catalytic for the continued importance of conventional regulation for constitutional theory as well as practice.

4.2. The political constitution and constitutional conventions: the commonality of purpose and method of regulation

The previous section offered an historical argument for the connection between the political constitution and constitutional conventions. But the fact that the primarily political character of the constitution is a result of the centrality of conventions in the process of a smooth transition towards a democratic constitution does not suffice; this is because it could easily restrict the connection between the two notions in the sphere of historical coincidence. Someone could argue that things could have happened differently and produced the same result (a primarily political constitution); or even that this connection can be witnessed only within the bounds of 'British constitutional peculiarity'.

Therefore, it is of paramount importance to bring out the commonality of purpose characterising the political constitution as a model and constitutional conventions as a type of constitutional norm. Scholars following Griffith have made an effort to reinterpret the basic parameters of the political constitution, founding what can be characterised as 'political constitutionalism'.[41] Their account differs substantially from that of Griffith in being heavily based on abstraction. Griffith was oriented towards pragmatism, avoiding grand theoretical categorisations. The two basic lines of argument of political constitutionalism, supported by Richard Bellamy and Adam

[41] Aileen Kavanagh, 'British Constitutionalism Beyond Polarities' (draft paper) 10-11.

Tomkins respectively, focus on the two different ways in which constitutionalism in general can be viewed, as well as the two basic functions a Parliament can play in modern democracies. On the one hand, Bellamy views the legislative function of Parliament as the key element of democracy and emphasises the value of the democratic process ('the democratic process is the constitution').[42] On the other hand, Adam Tomkins, as already noted, focuses on the mechanism of political accountability in order to ground his account of political constitutionalism. At the heart of the British constitution, according to Tomkins:

> lies a simple — and beautiful — rule. It is a rule that has formed the foundation of the constitution since the seventeenth century. It is that the government of the day may continue in office for only as long as it continues to enjoy the majority support of the House of Commons.[43]

Regarding Bellamy's 'positive' political constitutionalism theory, focusing on enabling the democratic elements of the constitution in fulfilling their role,[44] its target is overly influenced by Griffith's negative stance in two key issues, judicial review and the existence of legal constitutional rules governing the political procedure. In this way, to the extent that Bellamy speaks of the 'tyranny of the minority'[45] when referring to judicial review, he offers a model of the political constitution that suffers from the disadvantages of an ideological approach. Moreover, he fails to give an account of the building blocks of the democratic process, thus trying to be normative without referring to specific categories of norms, other than using terms as abstract as the republican

[42] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Dmocracy* (CUP 2007) 5, cf Graham Gee and Gregoire C N Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 283.
[43] Tomkins, *Our Republican Constitution* (n 32) 1.
[44] N W Barber, *The principles of constitutionalism* (OUP 2018) 6.
[45] Bellamy (n 42) 26.

'non-domination' or 'political equality'[46] without further analyzing the political constitutional rules on which they are realised within a constitutional edifice.

The aforementioned constitutional norms of the political process are, as Tomkins rightly observes, the rules that constitute the mechanism of political accountability. The most important of these constitutional mechanics are conventions, but they are not mentioned by Tomkins in his political constitutional works. It is by the twin conventions of collective and individual responsibility that Tomkin's accountability ideals are realised within the British constitution. Therefore, the purposes of political constitutionalism and conventions intersect at what can be termed 'democratic accountability'. Nevertheless, political constitutionalism and conventions are not identical, since the former constitutes the ideal, the model that is suggested to be followed while the latter offer the norms, the building blocks by which the ideal will be attained.

A closer look at the convention of collective responsibility reveals that it is comprised, as Marshall has pointed out, of three key components: the confidence rule, unanimity and confidentiality.[47] Collective responsibility is the other face of the collective functioning of the Cabinet. The reason behind the conventions of collective responsibility, unanimity and confidentiality of the cabinet can be expressed through Bagehot's statement that the Cabinet 'is a combining committee—a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state'.[48] For collective responsibility to operate effectively, there needs to be unanimity as well as confidentiality. Confidentiality provides the Cabinet with the veil needed in order for every major decision to be presented as unanimous and the Cabinet as united

[46] Ibid 145.
[47] Marshall (n 6) 55.
[48] Walter Bagehot, *The English Constitution* (Batoche Books 2000) 50.

before the Parliament.[49] The latter is, according to the confidence rule, the ultimate arbitrator of the Government remaining in power. Although not obvious in single-party governments with large parliamentary majorities, the confidence rule is always available as a censure against the incumbent government.

Confidentiality, the confidence rule and collective responsibility of the Cabinet are not the only conventions creating limitations for ministers. To be more precise, while the two aforementioned conventions create obligations for the ministers towards the Cabinet, there are also obligations of them towards the quintessential organ of parliamentary democracy, namely the Parliament. These obligations can be summarised as the individual accountability convention, which is not a single convention but a term used to describe a category or group of conventions.[50]

In the first chapter, I referred to the purpose of conventional regulation as the harmonisation of the legal constitution with the fundamental constitutional principle of democratic accountability,[51] a concept which will be revisited in Chapter 5.[52] The ministerial accountability conventions play an important role in this direction. The Cabinet Manual provides that 'Civil servants are accountable to ministers, who in turn are accountable to Parliament';[53] the Ministerial code also provides that 'Ministers must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code and the requirements of the Constitutional Reform and Governance Act 2010.'[54] By these simple rules, important conventions regarding ministerial accountability are codified. Nevertheless, the

[49] John P Mackintosh, *The British Cabinet* (3rd edn. Stevens and sons 1977) 17.
[50] Diana Woodhouse, *Ministers and parliament: Accountability in theory and practice* (Clarendon Press 1994) 27.
[51] Marshall (n 6) 211.
[52] Cf 5.2.2.
[53] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011) para7(1).
[54] *Ministerial Code* para 5(1).

implementation of these general principles in practice is not as simple as it seems. Ministers cannot nowadays exert control over all civil servants of their department, something that can lead to their being sacrificed as 'scapegoats' in cases of great political pressure.[55] It is therefore important, if we want to take a principled approach to the convention of ministerial accountability, to accept responsibility towards Parliament and especially its harshest penalty, ministerial resignation, only in cases where there is adequate cause for such measures to be taken against ministers. The crucial criterion seems to be the ability of the ministers to exercise control over their departments and the particular activities in question.[56]

Nevertheless, regardless of the way in which they are implemented, the twin conventions of collective and individual responsibility of the government, along with elections themselves, constitute within the British constitutional system the fundamental expressions of the 'removable' character of politicians, which grounds the basic argument in favour of a constitution with a 'political' character. In Griffith's words:

> I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. It is an obvious corollary of this that the responsibility and accountability of our rulers should be real and not fictitious[57]

Therefore, the realisation of this responsibility and accountability process is to a large extent a matter of conventions. In other words, if accountability lies at the heart of political constitutionalism, the means to achieve it is constitutional conventions. This happens regardless of the fact that in the UK a large amount of such conventions are nowadays included in the Ministerial Code and the Cabinet Manual. As will be shown

[55] Richard Scott, 'Ministerial accountability' [1996] PL 410, 414.
[56] Woodhouse (n 50) 27.
[57] Griffith, 'The Political Constitution' (n 1) 16.

later,[58] this codification has not led to the loss of the conventional character of the rules. Thus, conventions retain their distinguishing characteristics.

The distinguishing characteristic of conventions, lack of enforceability in courts, links them with political constitutionalism through Griffith's negative stance towards judicial constraints upon politicians.[59] He states:

> For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons[60]

Griffith seems overall sceptical about the idea of legal accountability of politicians. His position can be explained partly due to his overall rejection of the existence of constitutional rights and partly due to his appraisal of British constitutional arrangements of the time. The political constitution according to Griffith is the British constitution, with its lack of a single rigid constitutional document.

Nevertheless, although this extensive skepticism about judicial constraints cannot be sustained, the claim of political constitutionalism for some form of non-justiciable limitation of politicians is realised through constitutional conventions. It is by conventional means that politicians are held accountable and abide by political rules, without the fear of legal censure by a court of justice. Thus, politics remains an area of autonomy within the constitutional system, an area immune from judicial intervention and amenable only to political self-regulation. This is a matter of choice of *forum* for the resolution of issues arising out of the implementation of constitutional rules: for legal constitutionalists the appropriate *forum* is the courtroom, while for the proponents

[58] Cf 6.2.
[59] Graham Gee, 'The political constitutionalism of JAG Griffith' (2012) 28 Legal Studies 20, 35.
[60] Griffith, 'The Political Constitution' (n 1) 16.

of the political constitution the political *fora*,[61] like the Parliament and the electorate in general, are the most suitable to resolve such issues.

The same conclusion regarding the relationship between the political constitution and conventions on the issue of non-enforceability in court can be reached through a closer look at the views of some legal constitutionalists. These rivals of the political constitution have associated it with conventions[62] but have moved in the opposite direction regarding the characteristics of the latter. Trevor Allan, a prominent legal constitutionalist, regards conventions as something they are not, depriving them of their distinguishing characteristic, non-enforceability in court, in order to fit his perception of the constitution. Since he considers the courtroom as the ultimate arbiter of constitutional issues, he views conventions as potentially justiciable. In his words, the distinction between recognising and enforcing conventions in court 'overlooks the moral and political responsibility inherent in the practical activity of adjudication.'[63] Thus, it is implied, some areas regulated by conventions are too important to be decided in the political and not in the judicial *fora*.

Negating the distinguishing characteristic of a rule translates into negating its very essence. As it has been shown in the previous chapter, the distinguishing characteristic or *differentia* is what distinguishes a species from the other members of its *genus*. Since it has been proven that in the case of conventions non-enforceability in court constitutes their *differentia,* arguing that conventions should be enforced in court translates into supporting their elimination as a separate category of norms. Allan blurs

[61] Mark Tushnet, 'The Pirate's Code: Constitutional Conventions in US Constitutional Law'45 (2018) Peperdine Law Review 481, 493.
[62] Allan, *The sovereignty of law* (n 4) 57.
[63] TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1994) 244; Cf Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: legislative freedom, political reality and convention' (2002) 22 Legal Studies 340, 375.

the distinction between judicial recognition and enforcement, arguing that recognising conventional rules actually implies approving them in order to conclude that the 'last refuge of orthodox theory—plainly dissolves'.[64] But think of a court approving all things that it recognises, even factual evidence; that would be paradoxical.

Moreover, the aforementioned idea that important issues are to be regulated by legal rules and adjudicated by judges can also be witnessed by having a look at the legalism of the Greek academic tradition. The often-quoted phrase that conventions are 'of no practical importance'[65] under the current Greek constitution has not only descriptive but also normative meaning: important issues should not to be regulated by convention.[66] A constitution is considered in good shape when its key elements are included in legal constitutional provisions. The room left for conventional regulation under such a conception of constitutional design is minimal. Thus, regardless of whether we have to do with legal constitutionalists in the UK or legalists of the continental tradition, conventions have in the best case a secondary role to play in the constitutional edifice: important issues must be regulated by 'law' and resolved by judges in the courtroom.

Returning to political constitutionalism, I have already analyzed in Chapter 2[67] conventions imposing limitations upon political actors, making them accountable to others. These are the limiting or 'duty-imposing conventions',[68] as Marshall who first

[64] Ibid.
[65] Philippos Spyropoulos and Theodore Fortsakis, *Constitutional law in Greece* (2nd edn, Kluwer 2013) 55; Antonis Pantelis, *Constitutional Law handbook [Εγχειριδιο Συνταγματικού Δικαίου]* (2nd edn, Livanis 2007) (in Greek) 214.
[66] Cf regarding the Italian constitution Lorenzo Cuocolo, 'Constitutional Conventions and the Economic Crisis: The Italian Paradigm' (2015) 38 Dublin ULJ 265, 270: 'The latter (customs) are generally considered the most important, since they are true sources of law'.
[67] Cf 2.2.3.2.
[68] Marshall (n 6) 8.

introduced this category called them. There is also a second category composed of conventions *enabling* political actors to exercise their constitutional duties and powers.

Power-conferring conventions may at first seem at odds with the centrality of accountability within a political constitution. Nevertheless, negative, limiting constitutionalism is far from the central case of a political constitution. If the legal constitution has been historically associated with limiting political actors, but also has a positive, enabling side, aiming at the efficient government of the state and not just the protection from tyranny, this happens *a fortiori* with the political constitution.[69] The claim of the latter for an area of autonomy for politics is not satisfied only with the primacy of political controls over the legal ones. Equally important is making 'removable' and 'accountable' politicians able to efficiently work 'the machines of government'.[70] The first step towards attaining such a goal is to empower political actors through rules of a political character. Enabling or 'entitlement-conferring conventions',[71] as Marshall called them, belong to this category of rules. As already noted, they do not have to do with obligations, but with empowering political actors towards fulfilling their constitutional role. Not following such a convention does not amount to a breach but to a decision not to invoke a right or power. We could therefore also label this category 'positive conventions', in contrast with limiting, 'negative' conventions.

Important examples of enabling convention implementing the purpose of the UK political constitution are those regulating the position of the Prime Minister. Indicative of their importance is that in the UK the entire office of the Prime Minister

[69] Kavanagh (n 41) 12-13.
[70] Jennings (n 26) 102.
[71] Marshall (n 6) 8.

has been created by convention, with very few powers vested in him by statute.[72] His power, historically associated with the rise of the Cabinet and the shift of power from the monarch to the Parliament, has been achieved mainly through the development of constitutional conventions. The relationship between these three phenomena is showcased by the UK convention that the Prime Minister should be a member of the House of Commons.[73]

The aforementioned case shows the way in which enabling conventions have contributed to paving the way to democracy, through their interaction with limiting ones. While enabling conventions, like those instituting the office of the Prime Minister or giving him control over his Cabinet, as in the case of collective responsibility and confidentiality, have empowered him, a limiting convention has developed over time, making him a Member of the House of Commons and therefore guaranteeing his accountability to it as well as his election in Parliament from popular vote. In other words, negative and positive constitutionalism complement each other within the bounds of the political constitution in the direction of enhancing efficiency and accountability: removable political actors are both able to fulfil their constitutional role and accountable for the way in which they actually fulfil it.

To sum up, so far I have shown that the political constitution and UK conventions are not only connected through their historical relations, but also through their purpose: they both seek to attain political accountability in well-functioning democratic institutions. The method they use is also similar: they guarantee an area of autonomy for the political elements of the constitution, a *Shutzbereich* in which political actors can act without fear of intervention from the judiciary. This commonality of

[72] Bradley, Ewing and Knight (n 23) 19.
[73] Rodney Brazier, *Constitutional practice* (Clarendon Press 1988).

purpose and method has led us to the idea that if the political constitution is a model of thinking about the British constitution, conventions, as normative rules, are the ways in which this model is implemented within the British constitutional system. Conventions are means by which political constitutionalism pervades the British constitution. As 'law', in the form of legal constitutional provisions either included in codified constitution or constitutional statutes,[74] is the paradigmatic example of a normative rule for the legal constitution, conventions are paradigmatic for the political constitution. Thus, the academic debate over the relation between legal regulation and convention is at the end of the day also a debate over the methods of legal and political constitutionalism, as well as over the *forum* for the resolution of questions which arise out of the implementation of constitutional rules, something that adds a new, deeper dimension to the constitutional theory of both law and conventions.

4.3. Are political constitutional rules a 'British peculiarity'? The case of Greece

Before further elaborating on the relation between conventions, the political and the legal constitution in what is called by Gee and Webber a 'real world constitution',[75] it is worth researching the question whether political constitutional rules are purely a British phenomenon.

In 1978, in the Seventh Chorley Lecture, J.A.G. Griffith presented his 'Political constitution' as a notion describing the UK constitution. According to him, the

[74] Cf 3.2.1.
[75] Gee and Webber (n 42) 291-292.

unwritten, or more precisely, uncodified character of the UK constitution, left more areas open for discussion and debate, something connected with the deliberative character of Griffith's political constitution.[76] Every effort to codify the UK constitutional edifice in a single constitutional text seemed in the eyes of Griffith an attempt to radically de-politicise the constitution by turning it into a legal one. Thus, the political constitution remained to a large extent the British constitution, since the fundamental presumptions of such a constitution, according to Griffith (distrust towards constitutional rights and judiciary, unrestrained ability of the political element to resolve conflict) were incompatible with a rigid, codified constitutional text.

The 'Britishness' of the political constitution according to Griffith, resembles another 'peculiarity', supported a century before, regarding constitutional conventions. As already noted, Freeman claimed that conventions constitute a peculiarity of the British Constitution. Nevertheless, Dicey, from the very first edition of his Introduction used the example of the United States to ground his argument for the existence of constitutional conventions under a written constitution on the same conditions as under an unwritten.[77] Munro went one step further arguing that 'it is at least arguable that conventions should play a larger role in countries with written constitutions'.[78]

Whether or not this last suggestion depicts reality, it seems that here there is a common scheme that can applied not only to conventions but also to the larger issue of political constitutionalism: the British origin of a notion is commonly associated with a perceived British peculiarity. The constitutional reality though, is different. Both notions examined in this chapter do not constitute a phenomenon restricted within the

[76] Griffith (n 1) 20.
[77] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed. Macmillan 1885) 29.
[78] Colin R Munro, Laws and Conventions Distinguished' (1975) 91 LQR 218, 219.

bounds of the British constitutional edifice. On the contrary, British conventions have played a paradigmatic role for foreign jurisdictions, including the case of Greece.

The history of Greek conventions is useful for recognising the importance of the normativity of conventional regulation in a legal constitutional environment, which is dominated by a rigid and 'lengthy' constitution and an academic literature with a completely negative stance towards the existence of unwritten, political constitutional rules.

Greece forms an example of a continental jurisdiction whose written constitution is a product of historical distrust towards conventional regulation. This has been attributed to the turbulent 20th century and especially the 1965 crisis.[79] The result was a lengthy constitution, leaving prima facie little or even no space for conventional regulation. Nevertheless, constitutional history and reality prove quite the opposite. Conventions were introduced in Greece from as early as 1875. Despite the fact that Prime Minister Charilaos Trikoupis is widely known and appreciated in Greece for introducing parliamentarianism, little is known of the method by which this was achieved as well as the paradigm which he followed in this direction. This took place through the introduction of the 'principle of declared confidence' as a constitutional convention. Moreover, both parliamentary government and constitutional convention, as the mechanism used to achieve the parliamentary transformation of the constitution, were inspired by the British constitutional tradition. In this way, Trikoupis 'transplanted' not only the British parliamentary model in Greece[80] but also constitutional conventions, as a discrete category of constitutional norms.

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[79] Evangelos V Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn, Ant N Sakkoulas Publications 2008) (in Greek) 401.

[80] Nikos K Alivizatos, *Pragmatists, demagogues and dreamers: Politicians, intellectuals and the challenge of power [Πραγματιστές, δημαγωγοί και ονειροπόλοι: Πολιτικοί, διανοούμενοι και η πρόκληση της εξουσίας]* (Polis 2015) (in Greek) 41.

Moreover, despite the length of the 1975 Greek Constitution, the Greek constitutional system does not lack constitutional conventions. There exist conventions both limiting and enabling the political actors, with the limitation of the President of the Republic's powers to 'send back' a bill and the council of political leaders forming characteristic examples. The latter is an institution wholly regulated by convention.[81] The first precedent dates back to the meeting of the leaders on the issue of the Former Yugoslav Republic of Macedonia in 1992,[82] followed by that on the Anan plan for Cyprus in 2004 and the meetings of the crisis period. Thus, the convention of the Council, being supported by a series of precedents since 1992, aims at the harmonisation of the opposing political views on issues of national importance. In this way, it purports to form through the meeting of the leaders a national strategy that transcends the boundaries of party politics.

Therefore, this enabling convention guarantees efficient government and national unity, in a way that remains purely political, avoiding the legalisation of the issue through judicial intervention and giving an area of autonomy for the Head of State and Prime Minister in the management of issues critical for the nation's future. It thus resolves the problem according to the model of political constitutionalism: the 'removable' character of the Prime Minister, the 'accountability' created by the publication of the proceedings of the Council, and the avoidance of judicial intervention, all are key elements of the contemporary conception of political constitutionalism.

[81] George S. Katrougalos 'The constitutionality of the council of political leaders' [Η συνταγματικότητα της «σύσκεψης των πολιτικών αρχηγών»] in *Festschrift for Aristovoulos Manesis: Studies in Constitutional Law and Jurisprudence Vol II* [*Χαρμόσυνο Αριστόβουλου Μάνεση : μελέτες συνταγματικού δικαίου και φιλοσοφίας του δικαίου Τόμος ΙΙ]* (Ant N Sakkoulas 1999) (in Greek) 222.
[82] G Anastasiadis 'Constitutional Chronicle' [Συνταγματικό Χρονικό] [1992] ToSyn (in Greek) 303.

The example of Greece brings to the fore the question: how can conventions exist in a 'legal' constitutional environment? Greece has a legal constitutional system. It is based on a model of a single constitutional text, as in the majority of jurisdictions throughout the world. Moreover, the mentality of Greek constitutional lawyers and the judiciary is oriented towards the 'legal' character of the constitution, disregarding its non-legal elements, such as constitutional practice or conventions. The constitution is approached as solely the 'supreme law of the state' a fundamental legal document, higher than statute in the hierarchy of legal norms, leaving apparently no space for political constitutional norms.[83]

Therefore, since we have already shown that conventions constitute a key element of political constitutionalism, the existence of such political rules within a primarily legal constitutional edifice, as for example in Greece, entails that 'real world constitutions'[84] are not purely legal or political. This does not mean that the dichotomy between legal and political elements of the constitution is a false one.[85] Nevertheless, the way in which this coexistence of political and legal elements within a single constitutional edifice is perceived forms an issue open to debate. It is to these very issues that I now turn.

4.4. Constitutional conventions and the relationship between the legal and the political constitution

A closer look at constitutional systems can reveal that they are composed of both legal and political rules, the most important of the latter being constitutional conventions. All

[83] Antonis Manitakis, *What is Constitution [Τι είναι Σύνταγμα]* (Savvalas 2007) (in Greek) 103.
[84] Gee and Webber (n 42) 291-292.
[85] Bellamy (n 42) 5.

constitutional systems include political norms to some extent.[86] The realisation of the plurality of sources of the constitution[87] and the abandonment of its legalistic Kelsenian perception have led to heated debate over the relation between its two major poles, the legal and the political.

Griffith, by introducing the notion of the 'political constitution', was also the first to examine the relationship between the legal and political elements of the constitution. Their difference is, according to him, not one of substance but rather of presentation: the fairness of the political element of the constitution lies in the fact that it is presented as such, while 'law is politics carried on by other means'.[88] Griffith's approach is untenable. Denying the autonomous existence of law within the constitution depicts his fundamental suspicion[89] towards legal constitutional arrangements as well as his trust in the political management of conflict:

> Laws are merely statements of a power relationship and nothing more. A law remains a political act about which it is indeed possible to hold opinions. But it can be called good only in the limited sense that a number of people hold that opinion of it.[90]

This seems to be a strong criticism of public law, aiming at being provocative and though-provoking. Moreover, such an approach denies the possibility of a viable relation between the two major poles of the constitution; according to his perception, the political element will always bring into the fore the political character of the resolution of conflict, while the legal will always try to hide it. Finally, under such a perspective, recent developments in the British constitution, like the Human Rights Act,

[86] Nick Barber, *The Constitutional State* (OUP 2010) 88.
[87] Ibid 78.
[88] JAG Griffith, 'The common law and the political constitution' (2001) 117 LQR 42, 59.
[89] Kavanagh (n 41) 4.
[90] Griffith, 'The Political Constitution' (n 1).

devolution and EU law must be seen as a major 'legal turn' for the British constitution, and the political constitution theory would have lost its allure.

Contemporary political constitutionalism scholars have not moved far away from Griffith's distrust towards legal regulation, presenting it as a battle between legal constitutionalism and political constitutionalism. According to Tomkins:

> For sure, we can show that legal constitutionalism is unwise. We can show that it is undemocratic, that it is ineffective, and that it is politically undesirable. But we can also take the argument to a new level. We can also show that it is unconstitutional.[91]

Although Tomkins seems later to have revised his initial position,[92] Bellamy, when arguing for the 'constitutionality of democracy', actually attacks the legal constitution and its two major elements: rights and judicial review. At the end of the day, this is a debate about holding politicians into account: legal constitutionalists support accountability in the courtroom while political constitutionalists prefer political means.

The widespread distrust of political constitutionalists towards legal regulation explains why, in their view, the twin purposes of accountability and democracy are not served by the enactment of statutes. Political constitutionalists' attack against legal constitutionalism aims both at the form and substance of rules. In a sense, in their view these two are inextricably linked: not only are political controls to executive action preferred to legal which are policed by the judiciary but also political controls should be put through political rules, since constitutional statutes and laws in general are simply hiding the political character of the relevant rules. Legal rules, even if non-

[91] Tomkins, *Our Republican Constitution* (n 32) 40.
[92] Adam Tomkins, The Role of the Courts in the Political Constitution (2010) 60 U Toronto LJ 1.

justiciable, like those pertaining to the Parliament,[93] are not trusted by the central idea of political constitutionalism, since they still are 'politics carried on by other means'.[94]

Nevertheless, this picture of a battle of two conflicting models seeking dominance over a single constitutional system is illusory. At the same time, the reality of coexistence of political and legal mechanisms of accountability within a single constitution as well as the recent developments in the British constitution, have led some scholars to move decisively towards an approach that regards the legal and political elements as non-conflicting but cooperating. Constitutional law is thus not 'another site of politics'[95]. It has an autonomous existence and the two models are not antithetical but either 'complementary'[96] or 'partners'[97] within real world constitutions.

Even if significant arguments have been deployed, both opinions seem in a sense to fail to give an accurate account of constitutional reality. First of all, the relation between the political and the legal elements of the constitution is not always a close collaboration. This can be clearly seen if we compare the central case of political constitutional regulation, namely conventions, with the legal constitution. The discussion here is not about the substantial differences of the legal constitution and conventions that make their distinction possible (analysed in the previous chapters of this thesis) but rather of the problems arising sometimes by the areas they regulate as well as the way in which they regulate them.

It is observed that in some cases the legal constitution and conventions regulate the very same area of the constitution in a different direction, limiting or enabling

[93] Barber, *The Constitutional State* (n 86) 95.
[94] Griffith, 'The common law and the political constitution' (n 88).
[95] T Poole 'Tilting at windmills? Truth and illusion in The political constitution' (2007) 70 MLR 250, 253.
[96] Robert Brett Taylor 'Foundational and regulatory conventions: exploring the constitutional significance of Britain's dependency upon conventions' [2015] PL 614.
[97] Tom R Hickman, 'In Defence of the Legal Constitution' (2005) 55 UTLJ 981, 1016.

political actors in ways which are sometimes incompatible. This incompatibility is witnessed in a number of cases of 'strong', 'full-blooded' conventional rules, which guide the actions of political actors in a strict way, leaving them no space to act based on the discretion accorded to them by the legal constitution. The royal assent to a bill passed by Parliament in the United Kingdom is an illustrative example. As Brazier has put it:

> The Sovereign's legal power to refuse that assent undoubtedly remains, but convention requires that she must give royal assent to a Bill passed by Parliament, even if she personally disapproves of its contents.[98]

As a result, royal assent has not been refused to a bill passed by both houses of Parliament since the reign of Queen Anne in 1708.[99] Therefore, in this case the Prerogative, which is part of the legal constitution, gives the Queen a power whose exercise is constrained by a convention. But the truth remains: if the Queen personally disagrees with the content of the bill, what the legal constitution, in the form of the Prerogative, permits her to do is exactly the opposite of what the political constitution, in the form of convention, requires, i.e. to give her assent for the bill to become an Act of Parliament.

The situation is far more strained when we turn to jurisdictions with a codified constitutional text. Revisiting the case of Greece, it is worth remembering that one of the most severe constitutional crises of the 20th century was actually caused by a disparity between a convention and the legal constitution, in the form of a written constitutional provision. Art. 31 of the Constitution provided that 'The King appoints and dismisses his Ministers'. Nevertheless, a convention had developed, according to which ministers are appointed on the advice of the Prime Minister. The legalistic

[98] Rodney Brazier, 'The non-legal constitution: thoughts on convention, practice and principle' (1992) 43 N Ir Legal Q 262, 269.
[99] Bradley, Ewing and Knight (n 23) 19.

reading of the constitution, disregarding the existence of such a convention led the King in the first stage of the crisis to refuse to allow Prime Minister George Papandreou to occupy the post of the Minister for Defence, as discussed in Chapter 2.[100]

In this last case, the tension between the constitutional limitations and powers accorded to a political actor by the legal and political constitution led to major turmoil followed by a 7-year military dictatorship. This is not to say that the relation between the two dominant elements of the constitution is combative but rather to showcase the extent to which the political and legal norms regulating the same subject matter can diverge in some cases, and the gravity of the problems that can be caused by a model that disregards one of those elements.

Discrepancies between the substance of norms regulating the same constitutional issue are not the only areas of tension between legal and political constitutionalism. It has been observed that the two models differ 'in the claims about the nature, content and workings of the constitution'.[101] Such a statement contains some elements of exaggeration, so it would be better to insist on our presentation of the difference between legal and political regulation as one of *forum*. The *forum* for the resolution of constitutional questions arising out of a legal constitutional provision is the court, while political *fora* like the electorate or the Parliament are the appropriate for political constitutional regulation. For example, the conclusion that a certain conduct constitutes a convention, automatically categorises it as a political constitutional rule and excludes it from judicial enforcement. This is more evident in cases of codified constitutions, where borderline cases exist between constitutional

[100] Nikos Alivizatos, *The political institutions in crisis (1922-1974): Aspects of the Greek experience [Οι πολιτικοί θεσμοί σε κρίση (1922-1974): Όψεις της ελληνικής εμπειρίας]* (Themelio 1986) (in Greek) 268.
[101] Gee and Webber (n 42) 296-297.

interpretation and conventional practice. Interpretation is a matter for the courts, while conventions belong to the sphere of autonomy reserved for political actors.

The difference in the claims made by the two models does not result in all-encompassing political or legal real constitutions. In other words, the two models are not in a state of conflict because neither of them aspires to dominate over the constitutional body, eliminating the influence of the other. We know of no real-world constitution which is exclusively legal or political. Thus, the two models and the norms implementing them coexist within a single constitutional system. Therefore, their relationship, which is definitely not one of collaboration for the reasons presented above, is also not one of confrontation.

To be more precise, I should revisit the notion of the *genus* of constitutional norms or constitutional regulatory techniques analysed in Chapter 3. The analysis of the *genus* and *differentia* of conventional rules and the presentation of their legal counterparts serves as an exercise in theoretical constitutional design. In actuality, legal and political models correspond to two different approaches to constitutional design depending on the choice of the relevant constitutional norms. By choosing to regulate a particular area of the constitutional edifice through conventions, constitutional designers opt for a political constitutional rule. On the other hand, when opting for a legal constitutional provision, either included in a codified constitution or a constitutional statute, they chose legal regulation, having in mind the particular character of the nature and normativity of the relevant rules.

Therefore, what is presented as a model through political and legal constitutionalism is a theorisation of the choice made by constitutional designers. This choice is made on a case-by-case basis, based on the particular characteristics of the constitutional area to be regulated and its compatibility with the characteristics of the

constitutional norm to be chosen. Sometimes, as in the case of royal assent and US electors, conventional regulation regulates an area already regulated by law, with the former pointing to a different direction than the latter. The opposite can also happen as in the case of the 1975 Greek Constitution: an area already regulated by convention can be reregulated by the codified constitution.[102]

Given such overlaps between political and legal rules and the fact that some areas are more apt for legal regulation while others for political through conventional rules, as will be shown in the last chapter, the real-world constitutions are a composite phenomenon, a *synthesis* of legal and political elements.[103] The constitutional reality reconciles and combines the two different claims, albeit in a different way in each constitutional system, finding *synthesis* at different points, varying according to the historical developments as well as the 'constitutional culture' in each different state. This is why we can speak of constitutions which are 'primarily political' or 'primarily legal',[104] based on the point in which the equilibrium is found. Thus, the nature of the British constitution as 'primarily political' does not preclude the developments of the last 20 years, like the Human Rights Act, which augmented the role of the judiciary and rights. At the same time, the Greek constitution's primarily legal character can perfectly be reconciled with the existence of constitutional conventions within the constitution throughout its modern history. *Synthesis* cannot be composed of just one of the different elements; it should be the result of their mixture.

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[102] Cf 5.1.2.

[103] Jakob L Fink (ed), *The development of dialectic from Plato to Aristotle* (CUP 2012) 2; G W F Hegel, 'Hegel's logic : being part one of the Encyclopaedia of the philosophical sciences (1830) / translated by William Wallace; with foreword by J N Findlay' in Hegel, Findlay, Wallace, TM Knox, Henry Stewart Macran, A V Miller, *G.W.F. Hegel: The Oxford University Press Translations* (InteLex Corporation 2000) 117 <http://pm.nlx.com/xtf/view?docId=hegel/hegel.06.xml;chunk.id=div.hegel.ency1.8;toc.depth=1;toc.id=div.hegel.ency1.8;brand=default> accessed 25 October 2017.; V J McGill and W T Parry, 'The Unity of Opposites: A Dialectical Principle' (1948) 12 Science & Society 418.

[104] Kavanagh (n 41) 11.

Constitutional law is not a substitute for politics. They both retain their autonomy, understood as two differing normative ideals, with distinct mechanisms towards the same goal, the constitutional state. In this perspective, constitutional conventions and legal regulation, as constitutional norms, namely as mechanisms for the attainment of constitutional goals, both have a legitimate claim for regulating the constitution.[105] Choosing the former or the latter can thus be viewed as a choice of model and method within a composite relationship: legal provisions are the central case of the model of legal constitutional regulation, whereas convention is the central case of the political. Their differences are justified by the differing nature of the two models to which they belong, while their similarities are an aspect of the *synthesis* of the two models achieved within each real-world constitutional structure.

The concepts of a *synthesis* of legal and political constitutional norms is not just useful for explaining the role of conventions within the wider constitutional context. It also illuminates the theoretical approach of conventions. Brian Galligan and Scott Brenton have suggested that constitutional conventions should be addressed from a political science and not a jurisprudential perspective. According to them:

> What is a convention (how it exists, in what form and specific applications); what gives a convention legitimacy (creation with agreement and binding in practice); and how conventions remain stable yet adaptable (changes, breaches and effects) are all political questions requiring answers derived from political practice and political theory.[106]

Their basic argument is that the perspective of constitutional lawyers on conventions tends to legalism, defining conventions as 'non-law' and impliedly considering them inferior to it. It is worth remembering that Dicey was not only the first to analyze

[105] Cf W T Stace, *The Philosophy of Hegel: A systematic exposition* (McMillan and Co 1924) 106.
[106] Brian Galligan and Scott Brenton, 'The Political Theory of Constitutional Conventions' (American Political Studies Association, 2013) <http://www.auspsa.org.au/sites/default/files/the_political_theory_of_constitutional_conventions_scott_brenton.pdf> accessed 10 August 2020

systematically conventions but also to express his discomfort with their being part of the field of study of constitutional law.[107]

There is traditionally a strong tendency in scholarship to make such categorisations that are characterised by clearly defined boundaries between the various fields of study. Such an approach to disciplinary boundaries, which denies the possibility of intersections between the fields of study, ignores the complexity of reality. In the case of conventions, the view of the constitutional as a *synthesis* provides the reasons for including them within the field of study of constitutional lawyers as well; conventions are political in character but so is also one of the two basic components of the constitution. Allocating the study of conventions solely to political theorists would disregard two basic elements: first, their being part of the political constitution and second, the *synthesis* of political and legal elements within the constitutional edifice. Thus, a negation of the appropriateness of constitutional and jurisprudential literature in the case of conventions can only be supported by a legalistic perception of the constitution, which disregards the normativity of non-legal constitutional rules and political constitutionalism in general.

4.5. Political constitutional literature and conventions: A paradox

I have argued that conventions are not only historically but also conceptually related to the political constitution. Moreover, conventions have been shown to be the central case of its political constitutional element. It is surprising, then, that the main proponents of political constitutionalism have not examined the centrality of the contribution of conventions to the political constitution. Conventions are largely neglected by the

[107] Dicey, *Introduction* (n 77) 23.

literature of political constitutionalism. For example, there is no express acknowledgment of the importance of conventional regulation in Adam Tomkins' *Our Republican Constitution*,[108] in spite of his analysis of the notion of accountability,[109] nor any reference to constitutional conventions in Richard Bellamy's *Political Constitutionalism*.[110] The only examples of academic writing bringing out the connection between conventions and political constitutionalism are Robert Brett Taylor's 'Foundational and regulatory conventions' and Aileen McHarg's 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law'.[111] The author of the former points out that 'in making the case for the survival of Britain's primarily political constitution, one crucial area of the constitution has been overlooked by commentators: constitutional conventions'.[112]

The explanation of this discrepancy between constitutional reality and scholarship lies in Griffith's descriptive conception of the political constitution, which although extensively criticised,[113] influenced many subsequent scholars. His descriptivism, is most obvious[114] in his famous aphorism 'Everything that happens is constitutional. And if nothing happened that would be constitutional also'.[115] This has led Griffith to reject the theoretical construction and normativity of conventions. Griffith's position on conventions can be clearly seen in his Comment in *Pubic Law*. There, he presents conventions as composed of 'little riddles' and comes to the conclusion: 'so let us delete those pages in constitutional textbooks headed

[108] Tomkins, *Our Republican Constitution* (n 32) 1 and 48 where he describes many conventions as 'alarmingly unclear'.
[109] Ibid 64-65.
[110] Bellamy (n 42) 78.
[111] McHarg (n 24).
[112] Taylor (n 96).
[113] Tomkins, *Our Republican Constitution* (n 32) 37.
[114] Gee and Webber (n 42) 280.
[115] Griffith, 'The Political Constitution' (n 1) 19.

Conventions, with their unreal distinctions and their word puzzles'.[116] In other words, Griffith's descriptive account could not leave space for the existence of normative rules of the political constitution.

Yet, in his work on Parliament[117] and local government,[118] we can clearly observe the existence of a great number of practices that could be described as conventional. For example, writing on the 'Personal responsibility and accountability' of ministers towards Parliament, Griffith analyses the political reality regarding holding ministers to account and their being blameworthy in the case of blunders.[119] He fully accepts the fact that certain practices are followed by constitutional actors in the execution of their duties. What is absent from his work, is the recognition of the normative character of such constitutional practices.[120]

Thus, the theory of conventions seems to be rejected by Griffith not due to a doubt regarding whether such practices truly exist within the bounds of the British constitution. It is rather a matter of the way he viewed theorising about the constitution that prevented him from following the classic Diceyan categorisations. Dicey's three pillars of the constitution—parliamentary sovereignty, the rule of law and constitutional conventions—are rejected as almost metaphysical, a pure theoretical construct that cannot be helpful in an analysis of constitutional reality, of what actually 'happens'. In Griffith's sociological, positivist view, the British constitution is not a constitution in the normative sense.[121] Due to this conviction, Griffith views conventions as simply

[116] Comment (1963) PL 401.
[117] JAG Griffith and Michael Ryle, *Parliament: functions, practice and procedures* (2nd ed. Sweet & Maxwell 2003).
[118] JAG Griffith, *Local authorities and central control* (Chichester: Rose for Local Government Review 1974).
[119] Griffith and Ryle (n 117) 45.
[120] Nevertheless, in one of his last articles entitled 'The common law and the political constitution' he makes twice reference to 'conventions' Griffith, The common law and the political constitution' (n 88) 43, 49.
[121] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 3.

practices followed by constitutional actors. This explains why, although referring to conventions, he does not name them as such or place conventional practice into a discrete, single category. Thus, his Comment in *Public Law* is a provocative statement focusing on the 'unreal distinctions' and 'world puzzles' created by the theory of conventions. Conventions, are for Griffith not a discrete category of constitutional norms; what is called a convention by British constitutional theory is in his eyes merely a widely observed practice among constitutional actors, lacking normative content.

This position led to a strong tendency of political constitutionalism to underestimate the contribution of conventions. This tendency survived the normative turn in political constitutional thought: although the descriptive origins of political constitutionalism were abandoned, a repercussion of them, namely the neglect of normative political constitutional rules, continued to play an important role for the position of scholars. This phenomenon is quite paradoxical, given the extent to which the modern tide of normative constitutionalism differs from its pragmatist origins in Griffith, which left no space for theoretical categorisations. Nevertheless, moving away from a descriptive model that rejected conventions as an ideological construct, did not result in a turn towards an express appreciation of the role of conventional regulation within the political constitution.

If the basic reason behind the neglect of conventions by political constitutionalists is the descriptiveness of Griffith's perception of the constitution, there is one more element that determined the stance of normative political constitutional theory towards them: modern political constitutional scholarship overlooks the executive. It is overly focused on the role of day-to-day political life,[122] the workings

[122] Gee and Webber (n 42) 283.

of Parliament and the democratic process,[123] and omits to give an account of the executive branch of government and its importance for the normative constitutional structure. The political constitutional scholarship has focused mainly on the role of the Parliament.[124] By neglecting the workings of the executive, these scholars actually neglect the area of the constitution where the majority of conventions reside.

Returning to Griffith, it is worth briefly investigating the reason behind the association of the political element with descriptiveness in his work. This is not something superficial or accidental, but belongs to a general perception of the political as having the sole purpose of resolving conflict in society. According to Griffith:

> For the best we can do is to enlarge the areas for argument and discussion, to liberate the processes of government, to do nothing to restrict them, to seek to deal with the conflicts which govern our society as they arise. Marx defined life as the actions of men in pursuit of their ends. I am afraid we shall have to accept that.[125]

Here Griffith encapsulates all his fundamental arguments for his preference of politics over law. Politics is a mechanism for dealing with a society dominated by conflict through dialogue. His reference to Marx is also not coincidental; according to Marx and Engel's *Communist Manifesto* 'The history of all hitherto existing society is the history of class struggles.'[126] Griffith, following the radical socialist tradition of the London School of Economics[127] was influenced by this concept, although he perceives it in more general terms as conflict within the society and not restricted to classes. Politics is thus described as a mechanism for managing conflict, a means of non-violent resolution of struggle. This position is not far from the nominalism of scholars like Carl

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[123] Bellamy (n 42) 5.
[124] Gee and Webber (n 42) 284.
[125] Griffith (n 1).
[126] Karl Marx and Friedrich Engels, *Communist Manifesto* (Pluto Press 2008) 33.
[127] Martin Loughlin, 'John Griffith obituary' (*The Guardian*, 25 May 2010) <https://www.theguardian.com/education/2010/may/25/john-griffith-obituary> accessed 7 September 2017.

Schmitt who argued for an equally descriptive, yet much more combative approach, according to which politics is based on the distinction 'between friend and enemy'.[128]

Nevertheless, politics has also a much older, normative origin which can explain the normativity of political rules, such as conventions. This can be traced back to the thought of Aristotle, who viewed politics as a system of morality for organised societies, similar to ethics for the person. According to him, the respective normative system that determines the practice of the city-state is called politics.[129] Ethics and politics are connected: the former has to do with the actions of human beings in their capacity as individuals, while the latter has to do with their actions in communities. Related to his perception of politics is the fact that Aristotle, unlike Plato, introduces a normative, qualitative criterion, the promotion of the common interest (*koinon sympheron*), for distinguishing correct from deviant constitutions.[130] This criterion is connected to the well-being of the citizens[131] as the purpose of political community and politics as a means to organise it towards the attainment of this purpose.[132]

Under such a perspective, politics is not simply a descriptive science, and since it has a pervading *telos* in Aristotle's political work—'the well-being of the citizens'[133]—can include within its bounds normative rules, like conventions. It is only by referring to this ultimate purpose of the political that politics can have a legitimate claim for primacy within constitutional discourse;[134] Griffiths supports this primacy but

[128] Karl Schmidt, *The Concept of the Political. Expanded Edition (1932)* (University of Chicago Press, 2007)
[129] Cf. Dimitris Tsatsos, *Constitutional Law Vol. A: Theoretical Foundation [Συνταγματικό Δίκαιο Τομος Α: Θεωρητικό Θεμέλιο]* (4th ed. Ant N Sakkoulas Publications 1994) (in Greek) 116-117.
[130] W D Ross, *Aristotle* (6th edn, Routledge 1995) 158.
[131] Barber, *The principles of constitutionalism* (n 44) 5.
[132] Ibid 152. Ross, as many other sholars, uses the term 'good life', instead of 'well-being' used here.
[133] Fred Miller, 'Aristotle's Political Theory', *The Stanford Encyclopedia of Philosophy* (Summer 2017 edn) <https://plato.stanford.edu/archives/sum2017/entries/aristotle-politics/> accessed 7 April 2020.
[134] Gee (n 59) 34.

only provides a negative justification for it. Finally, this primacy is mitigated within a constitutional edifice by law's equally legitimate claims to regulate.

Viewing the notion of political constitutionalism in Aristotelean terms has the potential of connecting this concept with its ancient origins. Moreover, it could constitute a fresh start for finding the underlying reason behind the values of democratic accountability and autonomy of the politics within the constitution.[135] Conflicts exist in society, but politics is destined for more than simply resolving them. In this way, the political constitution can be viewed as a normative structure serving the ultimate purpose of politics through its rules, with the most prominent being constitutional conventions. Therefore, the normativity of conventions is not an idiosyncratic element but rather part of a wider notion of the normativity of rules that are political in character and as such have the value of serving the well-being of the citizens within the constitutional state.[136]

Finally, it is worth revisiting the famous aphorism that epitomises Griffith's descriptivism: 'Everything that happens is constitutional. And if nothing happened that would be constitutional also'.[137] Gee is right to comment that even if everything that happens is constitutional, this does not mean that anything can indeed happen.[138] Gee, though, does not make the necessary step forward; in other words, he omits to give an account of the norms providing what can happen or not within the bounds of the constitution. The regulation of this, as far as the political constitution is concerned, is a matter of conventions. Recalling the fundamental distinction already made in this

[135] Panagiotis Doudonis, 'The heritage and outlook of political constitutionalism, 40 years after J A G Griffith's Chorley Lecture' [Η κληρονομιά και οι προοπτικές του πολιτικού συνταγματισμού, 40 χρόνια μετά τη Chorley Lecture του J.A.G. Griffith] (2019) Efimerida Dioikitikou Dikaiou 393 (in Greek).
[136] Barber, *The Constitutional State* (n 86) 12.
[137] Griffith (n 1) 19.
[138] Gee (n. 59) 42.

chapter between enabling and limiting conventions, it could be said that positive, power-conferring conventions, regulate what could happen. On the contrary, negative, duty-imposing conventions provide for what should not happen; in other words, what political actors should not do. Thus, conventions are the regulatory method for adding the necessary normative element in Griffith's descriptive account.

Conclusion

The purpose of this chapter was to present conventions as political constitutional rules within the wider constitutional structure. I aimed to bring out the fact that conventions are not just unwritten norms that as a matter of historical development are not subject to juridical enforcement. They have strong historical bonds to the British idea of the political constitution, but their connection to it is not restricted to a particular history or to the United Kingdom's uncodified constitution. They present a strong commonality of purpose and method with the political constitution, which helps to establish them as the central case of political constitutional norms. The latter constitute one of the two major elements of the constitution, achieving a *synthesis* with the other pole, namely the legal constitution. The paradox of neglect of the role of conventions by prominent scholars of the political constitution can be traced to Griffith's descriptivism. However, a normative turn following the Aristotelean notion of politics could mark the beginning of appreciating the role of conventions within the political constitution.

CHAPTER 5 - SHOULD CONVENTIONS BE NORMATIVE? THE REASONS FOR THE NORMATIVITY OF CONSTITUTIONAL CONVENTIONS

In this thesis, I have already discussed the nature of conventional regulation and its normativity, as well as its history and position within the constitutional edifice. At this point a question arises: why do we need this kind of norm? Constitutional conventions are political, non-justiciable rules, addressed to political actors and regulating the constitutional sphere. Is there truly a need for such kind of norms in a constitutional edifice? This will be the question approached in the first section of this chapter.

In the second section I will address the specific reasons for the normativity of constitutional conventions. Of particular importance will be their coordination function, which is known to theory from customary authority. This is not simply decision-making taking into account game theoretical returns and pay-offs but coordination towards a certain purpose: enhancing democratic accountability. Finally, objections expressed on grounds of democracy to the normativity of conventions will be examined and refuted.

5.1. Do we need political constitutional rules like conventions armed with normativity?

5.1.1. Imagining a constitution with non-normative conventions

I find it useful to start my analysis from imagining the scenario of a real-world situation with conventions that lack the element of normativity. What would be the impact of

having no normative conventional rules? The answer to this question translates into a constitution comprised of legal rules and non-normative constitutional practices. By searching for the repercussions of having practices but not conventions, I am envisioning the arguments of many academics who doubt the normative quality of conventional regulation and prefer not to consider conventions as rules. This can happen either for normative or descriptive reasons. Regarding the former, conventions have been considered by, for example, Greek scholars as an inadequate constitutional safeguard, something which led them to the conclusion that viewing them as rules is dangerous and should be avoided.[1] On the other hand, conventional rules can be considered as practices simply due to ignorance of their rule-quality and of the relevant category of norms, as happens quite frequently in US theory and practice.[2]

In any case, imagining a constitution with non-normative conventions equals imagining a constitution comprised only of various legal rules and constitutional practices. Moreover, the absence of the normativity of conventions means the absence of the subjective and/or objective elements of which they are comprised[3] as well as the elimination of their monitoring and censure mechanisms. Thus, a constitution without normative conventions translates into a constitution where conventional rules do not present themselves as normative and political actors do not regard them as such.[4] Of course these two elements speak to each other. But of particular importance for my analysis is the perception of political actors that they follow a conventional rule; a rule which they are obliged to follow. I believe that this feeling of obligation is not without a normative explanation. Political actors feel obliged to follow a conventional rule

[1] Cf 1.3.4.
[2] Cf *Chiafalo et al v Washington* 591 U.S. 2.
[3] Sir Ivor Jennings, *The law and the Constitution* (5th ed. University of London Press 1959) 136.
[4] Ibid.

because of their position and role in the constitutional edifice. From this position arise as rules the relative standards of behavior.[5] Person x considers himself bound by the rule not due to her personal identity but due to her role in the working of the constitutional system.

For example, the US electors who vote in the Electoral College for the candidate who secured the previous popular vote do not feel this obligation as private persons but as political actors having the relevant position within the constitutional edifice.[6] This is why calls for electors to 'defect' and vote for another candidate are rarely successful:[7] such arguments are addressed to the morality of the persons and not to the morality of the role of a state delegate in the Electoral College. Constitutional conventions are rules of political morality; in other words, they are rules of the morality of those holding the relevant constitutional positions. This happens not only with limiting but with enabling conventions as well. Collective responsibility and confidentiality conventions enable not the particular person but her constitutional role as Prime Minister. Thus, these rules exist in order for the constitutional role of the Prime Minister to be fulfilled.[8]

Therefore, the normativity of a conventional rule is in close relationship with the *ethos* of the role a person has undertaken within the constitutional edifice. If conventional rules were considered simple habits, this would have serious repercussions for the perception and the existence of this very role. For example, I may

[5] John Bell, *French Constitutional Law* (OUP 1995) 57.
[6] James G Wilson, "American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior" [1992] Buffalo Law Review 645, 651.
[7] Olivia B Waxman, 'Some Democrats Want to Make the Supreme Court Bigger. Here's the History of Court Packing' (*TIME*, 17 October 2019) <https://time.com/5702280/court-packing-history/> accessed 1 January 2020.
[8] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) 7.

have the habit of reading poetry every Saturday morning; this does not render me a literary critic. On the other hand, the empowerment of the Prime Minister in monitoring the conventions of collective responsibility[9] and confidentiality is partly based on his position and partly constitutes the position itself. The example of the Prime Minister in the UK is again illuminating: the entire office is created by convention through according him conventional powers. If these powers were mere habits and not norms, what constitutes the office of Prime Minister would be just a description of a constitutional ritual, deprived of the accordance of constitutional power which has rendered the Prime Minister what it is: the dominant figure within the UK constitutional edifice, 'one of the strongest elective officers in the world'.[10]

In general, the nexus of limits imposed and powers accorded by constitutional norms to political actors constitute their position as constitutional organs and guide their role. Offices or organs are creations of duty-imposing and power-conferring rules. This is why organs having exactly the same name, like 'President' in the US presidential system and the Greek parliamentary system,[11] are in actuality completely different. In the US case the powers accorded to the Head of State are of a significantly wider extent than in Greece: although nominally the two positions are the same, they are rendered completely different through the allocation of constitutional power.

Moreover, it should be recalled that separation of powers is a technique whose aims include not only prevention of tyranny but also enabling efficient government.[12] This dialogue between powers and limits is based on both political and legal rules.

[9] Cf Eric Barendt, *An introduction to constitutional law* (OUP 1998) 42.
[10] Byrum Carter, *The Office of Prime Minister* (Faber and Faber 1956) 13.
[11] Philippos Spyropoulos, *The President of the Republic as 'regulator of the polity' [Ο Πρόεδρος της Δημοκρατίας ως «ρυθμιστής του πολιτεύματος»]* (Ant N Sakkoulas 1990) (in Greek).
[12] Nick Barber, *The Principles of Constitutionalism* (OUP: 2018) chapter 3; James Madison, 'No 47: The particular structure of the new government and the distribution of power among its different parts' in Madison, A Hamilton, and J Jay, *The Federalist Papers* (Dover Publications 2014) 235.

Depriving a category of rules of its normativity would pose a severe danger for the existence of constitutional organs as well as for the whole constitutional edifice as a system of allocation of powers. Think for example of the United Kingdom Parliament legislating regarding devolved matters without the consent of the Scottish Parliament[13] or ministers deciding that they are not to be held accountable by the Parliament.[14] Such a conduct would put the constitution in systemic danger. As will be shown later in this chapter, conventions ensure the democratic coexistence of political actors within the constitutional edifice.[15] It is beyond doubt that depriving the constitution of a category of rules and/or replacing them with a descriptive constitutional phenomenon, like practices, would impair the balance of powers between constitutional organs. This would act like removing a pillar in a building:[16] it may collapse.

This association between norms, offices and the whole constitutional system is also central to framing the direction a certain constitutional edifice takes. Constitutionalism is about limiting or enabling power and this cannot be done in a way that bypasses rule-creation and enforcement. Especially regarding the UK, it has been highlighted in the previous chapter that the transition from a primarily monarchical to a democratic constitution was achieved through constitutional conventions.[17] In other words, the normativity of conventions, their bindingness as standards of behaviour, is of paramount importance for the identity of a constitutional edifice, especially since

[13] HL Deb 21 July 1998 Vol 592 c 791.
[14] Diana Woodhouse, *Ministers and parliament: Accountability in theory and practice* (Clarendon Press 1994) 27; Venizelos, *Parliamentary government and its function according to the Constitution of 1975/1986 [Το κοινοβουλευτικό πολίτευμα και η λειτουργία του κατά το Σύνταγμα του 1975/86]* (Thessaloniki 1987) (in Greek).
[15] Jon Elster, 'Political norms' 63 (2014) The Jerusalem Philosophical Quarterly 47, 54.
[16] Mark Tushnet, 'The Pirate's Code: Constitutional Conventions in US Constitutional Law'45 (2018) Peperdine Law Review 481, 502.
[17] Barry Hough, 'Conventions and democracy' (2000) 29 Anglo-Am L Rev 368, 376.

conventions have a certain orientation that serves as their general purpose: that of enhancing democratic accountability.[18]

Moreover, constitutional actors who do not feel bound by a rule and act at will may suddenly cease to follow the practice. This happens specially if they find it hard to follow it, which is exactly the time when practice is the most useful. This also creates serious coexistence issues regarding the aforementioned allocation of constitutional powers. The separation of powers is a coordination between actors fulfilling their constitutional role and either not interfering with the powers allocated to other organs or intersecting with them where such interaction is needed.[19] Allocation of powers also means coordination and correlation of powers. This would be hampered if political powers and duties were not a matter of conventional rules but of practices and habits or of an unregulated political reality.

The absence of negative consequences, namely of 'political difficulties'[20] which follow breaching the rules, is another problematic situation. Imagining a constitutional edifice with non-normative conventions translates into imagining a constitutional edifice where violating or deviating from them has no negative consequences for political actors. Political difficulties act not only as a censure mechanism but also as a deterrent. As shown in Chapter 2,[21] sometimes the repercussions for breach are so serious that no political actor would even think of deviating from the rule. This mechanism cannot work in case the relevant conventions lacked normativity. Let's think especially of duty-imposing conventions: it is not possible to censure deviation from a habitual, non-obligatory conduct or from a non-existent rule. If no censure

[18] Regarding the central role of accountability for the UK constitutional edifice cf Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 65.
[19] Nick Barber, 'Self-Defence for Institutions' (2013) 72 CLJ 558, 561.
[20] Jennings (n 3) 134.
[21] Cf 2.3.2.

mechanisms exist, this means that an effective deterrent against breaking or pushing to the limit the relevant pattern of behavior becomes obsolete.[22]

Based on the above, I conclude that a constitution where conventions describe but do not guide conduct is a constitution where the substantial part of the inner workings of politics are left completely unregulated. It is based on a legalistic constitutional theory which considers politics an area of conflict without rules. But such a concept of unregulated politics cannot survive within a contemporary polity. A political arena without any standards of behavior can neither protect against tyranny nor ensure the effective working of the machinery of government; this is a deeply problematic situation, far from any ideal.

5.1.2. Alternative scenario: Legal provisions replacing the normativity of conventions?

An alternative scenario could be a constitutional edifice where politics, instead of being left totally unregulated, is regulated only by legal rules. In a sense, the first scenario analysed above, that of non-normative conventions, also amounts to a constitution which includes only rules of a legal nature within its bounds, since conventions in this case are not considered rules at all. In this second scenario, however, conventional rules are replaced by legal rules, which are extended to regulate everything. Such a scenario is not unrealistic: it is what constitutional legalism has advocated for. The first section of the following chapter will be dedicated to answering the question whether there are particular areas of the constitution that should be regulated by convention. I consider

[22]Antonis M Pantelis 'The send-back of the bills' [Η αναπομπή νομοσχεδίων] (Kathimerini, 30 April 2008); George Gerapetritis, *The Constitution and the Parliament [Σύνταγμα και Βουλή]* (Nomiki Vivliothiki 2012) (in Greek) 125.

this as the positive way of putting the same issue: why conventions are best-suited to regulate a given matter. But before that, there is an equally important issue framed in the negative: why law is not best-suited to regulate everything within the constitutional edifice, and especially why it cannot totally replace the normativity of conventions. Of course, the positive and negative questions speak to each other. Here I will analyse the non-suitability of law—the negative side—though keeping an eye on the positive as well.

In the words of Timothy Endicott, 'a community is legally in good shape if the law regulates what, from the legal point of view, it ought to'.[23] 'Law must be capable of guiding the behavior of its subjects'[24] but it must equally give way to other, non-legal rules or even in some cases to no regulation at all, when legal guidance is not needed. As shown in the previous section, in the case of areas regulated by convention, it is not an option to leave the relevant area completely unregulated, and thus without normative rules guiding conduct. Political actors need coordination and standards of behavior to achieve their common purpose and fulfill their constitutional role. On the other hand, legal regulation instead of conventional seems technically feasible, but it is not suitable and desirable in many cases, due to the nature of the relevant area. Politics should generally be regulated by norms; but these should not be legal norms.

Let me use Endicott's claim in the context of constitutions: in an ideal constitutional system, law regulates what it ought to regulate; this definitely does not equate into everything. As stated in the previous chapter,[25] the constitution is comprised of a *synthesis* two elements, a political and a legal. To these two elements correspond

[23] Timothy Endicott, 'The impossibility of the Rule of Law' [1999] 19 OJLS 1, 12.
[24] Joseph Raz, *The authority of law: Essays on law and morality* (Clarendon Press 1979) 214.
[25] Cf 3.4.

two different methods of regulation, political and legal constitutional norms.[26] Political norms are generally better suited to regulate the inner interactions of politics, securing an area of autonomy from judicial adjudication. Dworkin has gone too far by differentiating between courts as the *forum* of principle and the legislature as the *forum* of policy.[27] It is, however, true that the legislature, the electorate and the courts are all constitutional *fora,* but with different natures. The former two are political *fora* while the latter is legal.

A constitution exclusively comprised of legal rules translates into a constitution where the courts are potentially the ultimate arbiter of the whole constitutional edifice. The nature of politics, one of the two elements of the constitutional edifice, does not render it apt for legal regulation and judicial adjudication. Politics needs flexibility, a wide margin of appreciation for making complex political, moral and empirical judgements, and room for maneuver in order to tackle novel circumstances.[28] Regulating the interactions between political actors exclusively through legal rules translates into enforcement of the vast majority of these rules by organs, namely the courts, which are not equipped with the suitable persons or with the adequate method for resolving such problems. Starting from the latter, their decisions are characterised by finality,[29] resulting in relatively rigid rules, especially in continental civil law systems. Rigidity stands opposite to flexibility, which is needed in political interaction. Regarding the traits of the persons courts are comprised of, judges are appointed based on their legal expertise and impartiality and not on their ability to engage into the

[26] Robert Brett Taylor 'Foundational and regulatory conventions: exploring the constitutional significance of Britain's dependency upon conventions' [2015] PL 614.
[27] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 90; Paul Yowell, *Constitutional rights and constitutional design: moral and empirical reasoning in judicial review* (Hart Publishing 2018); Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 American Journal of Jurisprudence 93.
[28] Paul Yowell, *Constitutional rights and constitutional design* Chapter 5.
[29] Endicott (n 23) 9.

complex and polycentric political considerations involved in the application of political standards.

Connecting the legal character of the rules with their justiciability is based on the central case of law which translates into law enforced in courtroom. Of course, there are non-justiciable forms of law.[30] But these lie at the periphery and not at the center of the legal constitution. Moreover, turning conventional rules into legal provisions was in many cases not aimed at turning them into justiciable rules but rather a simple way of definitely resolving any ambiguities regarding the content of the rule through writing it down, given that the codification procedure in the UK is a relevantly recent development.[31]

Legalism regards legal regulation as the only acceptable form of normative constitutional rules. Replacing the normativity of convention with that of law can thus be simply the expression of distrust towards conventional regulation. This was the case with the Greek Constitution, many provisions of which result from the turbulent decade that preceded. As the general rapporteur of the 1986 constitutional amendment has put it: 'Behind many of the provisions of the Constitution of 1975, we find incidents and experiences from the turbulent period that started in July 1965 and ended in July 1975'[32]. Among them, art 37 epitomises the constitutional experience of the crisis of

[30] Barber, *The Principles of Constitutionalism* (n 12) 95.
[31] Andrew Blick, 'The Cabinet Manual and the Codification of Conventions' (2014) 67 Parliam Aff 191; Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011); Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] 71 Mod L Rev 853.
[32] *Minutes of the Parliament Proceedings 1985 [Πρακτικά των Συνεδριάσεων της Βουλής 1985]* (in Greek) 135.

1965[33] by turning into legal rules the conventions relating to the 'declared' confidence of Parliament to the government[34] as well as the appointment of Prime Minister.

A close look at the proceedings of the two constitutional subcommittees as well as the plenary session of the 1975 Parliament shows that MPs referred quite frequently to Greece's turbulent past in order to argue about the content of the new constitution provisions. Among these references, the constitutional crisis of 1965 and the military junta of 1967-74 are prevalent. It is estimated that ten MPs mentioned the events of 1965 and nine MPs referred to the 7-year military junta in the proceedings.[35] The rapporteur of the relevant articles of the Constitution, Konstantinos Paparrigopoulos, after mentioning the principle of declared confidence 'that was in force for a century as a constitutional convention', noted, regarding the provisions of the new Constitution, that 'all these limitations were not existent during the Kingdom. If they existed, the crisis of 1965, and many others that preceded it, would have been avoided'.[36] These passages, coming from a conservative politician, shed light on two facts regarding the constitutional amendment: first, that the principle of declared confidence was widely regarded as a cornerstone of the constitution;[37] second that the constitutional crises of the previous decade had discredited in the eyes of the politicians the normativity of all non-written and non-legal limitations of Head of State's powers, including

[33] Cf 2.3.3.; Nikos Alivizatos, *The political institutions in crisis (1922-1974): Aspects of the Greek experience [Οι πολιτικοί θεσμοί σε κρίση (1922-1974): Όψεις της ελληνικής εμπειρίας]* (Themelio 1986) (in Greek) 268.
[34] Andreas Dimitropoulos, *The principle of declared confidence [Η αρχή της δεδηλωμένης]* (2nd edn. Sakkoulas 2013) (in Greek) 134.
[35] George O Anastasiadis, 'History and historicity of the constitutional provision of articles 37, 38 and 41' [Ιστορία και ιστορικότητα της συνταγματικής ρύθμισης στα άρθρα 37, 38 και 41] (1987) Dikaio kai Politiki in Greek) 189, 192.
[36] *Minutes of the Proceedings of the Subcommittees of the 1975 Constitution Parliamentary Committee [Πρακτικά των Συνεδριάσεων των Υποεπιτροπών της επί του Συντάγματος 1975 Κοινοβουλευτικής Επιτροπής]* (4 2 1975) (in Greek) 148.
[37] George O Anastasiadis, *The appointment and dismissal of governments in Greece: From the 'principle of declared confidence' to the 1975 Constitution [Ο διορισμός και η παύση των κυβερνήσεων στην Ελλάδα: από την «αρχή της δεδηλωμένης» στο Σύνταγμα του 1975]* (University Studio Press 1981) (in Greek) 139.

constitutional conventions. One of the most basic aims of the constitutional committee was therefore to turn conventional limitations into written constitutional provisions, since trust was placed only in the normativity of the latter, even for issues which could be characterised as purely political.

Moreover, fearing the possibility of a future 'governmental crisis', the Constitution was amended in 1986 in the direction of a further formalisation of conventions and limitation of the Head of State's powers, especially those relating to the dissolution of Parliament and the appointment of the government. As far as the latter issue is concerned, the 'principle of declared confidence' was exhaustively regulated by art. 37 so that the regulatory competences of the President 'are not only drastically limited, but almost inexistent'.[38] As a result, at present, and after two more amendments, the Greek Constitution can be characterised as 'wordy'. It is indicative that the provisions regulating the appointment of the Prime Minister and the government in their current form comprise 353 words, almost twenty times more than comparable provisions in the Italian Constitution.[39]

Replacing the political normativity of conventions with the legal normativity of a codified constitutional provisions, as in the case of Greek art 37 Par 2 of the

[38] Aristovoulos Manesis, 'The legal and political importance of the constitutional amendment of 1986: A general critical evaluation' [Η νομικοπολιτική σημασία της αναθεώρησης του 1986: Μια γενική κριτική αποτίμηση] (1987) 13-14 Dikaio kai Politiki (in Greek) 5, 27; Pantelis, *The constitutional settlement of 1986 [Οι συνταγματικές ρυθμίσεις του 1986]* ('Nea Synora' Livanis 1994) (in Greek) 231.

[39] George Gerapetritis and Filippos Spyropoulos, 'Only an MP can be given a mandate to form government, according to the Constitution' [Μόνο βουλευτής μπορεί να λάβει εντολή σχηματισμού κυβέρνησης κατά το Σύνταγμα] (*Kathimerini*, 31 10 2015) <http://www.kathimerini.gr/836974/opinion/epikairothta/politikh/mono-voyleyths-mporei-na-lavei-entolh-sxhmatismoy-kyvernhshs-kata-to-syntagma>, accessed 25 January 2020 (in Greek); On the Italian conventions regulating the appointment of the Prime Minister cf. Lorenzo Cuocolo, 'Constitutional Conventions and the Economic Crisis: The Italian Paradigm' (2015) 38 Dublin ULJ 265, 270; Panagiotis Doudonis, 'Constitutional Conventions and the Italian President' (*UK Con Law Blog*, 30 May 2018) <https://ukconstitutionallaw.org/2018/05/30/panagiotis-doudonis-constitutional-conventions-and-the-italian-president/> accessed 25 January 2020.

Constitution[40] runs the risk of creating new problems. Turning a convention into a written constitutional provision ossifies the choices of the constitutional legislator through the definitiveness of written form. These definite choices may simply not be correct or may need amendment in order to cope with changes over time, yet in the majority of codified constitutions this is a lengthy and time-consuming procedure. Moreover, written form and strict wording puts limits to the interpretative ambit of academics and political actors. It makes it more difficult to cope with unexpected and novel situations, simultaneously running the risk of overregulation.

The Greek provision of art. 37 is an illustrative example of all the above: in case no party secures an absolute majority of seats in Parliament in the elections, there is an overly restrictive time limit of only three days for each of the three major parliamentary group leaders to secure an overall majority in the Parliament through collaboration with other parliamentary groups. Thus, the overregulation of the appointment of Prime Minister through turning a conventional rule into a codified provision has resulted in high-pressure time limits that constrain the ability to form a government through wider consensus, which is exactly what regulation was intended to enable.[41]

Moreover, the relevant constitutional provision does not completely safeguard the limitation of the President of the Republic's power though legal and thus judicial means since this provision is enforceable in court, yet not in an effective way. It can only be enforced through the liability of the President for 'intentional violation of the

[40] Aristovoulos Manesis and George Papadimitriou, *The Constitution of 1975 [Το Σύνταγμα του 1975]* (Ant N Sakkoulas 1983) (in Greek) 46.
[41] For a defence of the relevant constitutional provision Cf Xenophon Kontiades, *Our irrational constitution: why the political institutions have failed [Το Ανορθολογικό μας Σύνταγμα. Γιατί απέτυχαν οι πολιτικοί θεσμοί]* (Papazisis 2015) (in Greek) 166.

Constitution', provided by art. 49 Par.1 of the Constitution.[42] Yet convicting the Head of State for intentionally violating the Constitution would create even greater constitutional turmoil than that avoided by exhaustively including the rules regarding the appointment of the Prime Minister in the codified constitutional text.

The example of the Greek constitution shows that turning a conventional rule into a legal provision because of doubts about the normativity of the former creates a series of problems regarding the content, limits and interpretation of the relevant provision. Many of these problems can be solved only by a parliamentary supermajority through the time-consuming procedure of constitutional amendment. Exhaustive legal regulation is not the appropriate solution in the majority of cases, due to a difference in nature: the constitutional regulatory method used will be of a legal nature, while the regulated area belongs to the political sphere. Law could be a plausible solution for delineating the outer limits of politics but in the majority of cases it is not ideal for regulating its inner operation.

It is beyond doubt that legal rules cannot replace the whole *corpus* of conventional rules without a serious destabilisation of the constitutional edifice and creation of new problems over the definite and justiciable character of the legal settlement. Legalists doubt the normativity of constitutional conventions, but they have not been able to raise objections other than the ambiguity stemming from the unwritten character[43] of conventions. There is, however, another option for dealing with the ambiguity of conventions: formalising them through codification. Through this method, the content of conventions is no longer ambiguous, while the political character of their

[42] Art 49; Stylianos-Ioannis Koutnatzis, 'Special liability of the President of the Republic' in Filippos Spyropoulos, Kontiades, Charalampos Anthopoulos and Geapetritis (eds) *Interpretation of the Constitution* (Sakkoulas Publications 2017) (in Greek) 960.
[43] P A Morton, 'Conventions of the British Constitution' (1991-1992) 15 Holdsworth L. Rev 114, 162.

normativity is retained and their enforcement is not taking place in the courtroom. The UK has paved the way in this formalisation direction. This is an issue to which I will turn in the final chapter of this thesis.

5.2. The normativity of conventions: coordination for a reason, towards a common purpose

So far it has been shown that a constitutional structure without the political normativity of conventional rules would be far from ideal. This is true for both alternative scenarios. A constitution with non-normative conventions and a constitution where the normativity of conventions is totally replaced by that of law suffer important disadvantages with regard to constitutional design. Moreover, the examination of the scenario of non-normative conventions has brought out the two important functions of conventions, which at the same time constitute the reason for the existence and prominence of their normativity: coordination and enhancement of democratic accountability.

The question that naturally arises is whether coordination can be legitimately combined with democratic accountability, thus yielding a content-based argument for the normativity of conventions. Moreover, if this combination is legitimate, a further question should be asked: what is the interplay between the two elements of coordination and democratic accountability.

5.2.1. Constitutional coordination and conventional rules

Coordination theories are commonly known in the area of legal regulation and are not unknown to conventional regulation. An important number of legal scholars have attempted to approach the normativity of law through its coordination function.[44] Although these theories involve variations, the central idea is that law provides a solution to coordination problems.[45] The fact that conventions also have a coordination function is not a matter of law-like normativity, but rather a result of the fact that they both regulate the social community.[46]

There are be two ways in which the role of coordination in the normativity of conventional rules can be perceived: a thin view and a thick one.[47] The thin perception of coordination is associated with the prevention of chaos that may result from leaving the relevant area totally unregulated. This relates to the discussion in the first section of this chapter regarding the lack of normative conventions. In this thin perception of coordination, any kind of rule having any content or character is suitable; the goal is simply to avoid chaos as a consequence of lack of regulation.

At this point a remark should be made: regardless of how thin this concept of coordination may be, as far as the regulation of the inner workings of politics is concerned, it constitutes an important step in our understanding of the constitution. This happens because politics is still considered by an important number of people as an area of unregulated action, governed by the pursuit of short-term gains by the relevant actors.

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[44] Among others John Finnis, *Natural law and natural rights* (2nd edn, OUP 2011); Joseph Raz, *Practical Reason and Norms* (OUP 1999) 64; Gerald J Postema, 'Coordination and Convention at the Foundations of Law' 11 (1) (1982) Journal of Legal Studies 165; Chaim Gans, 'The Normativity of Law and Its Coordinative Function' 16 (1981) Isr L Rev 333.
[45] John Finnis, 'Law as Coordination' in *Philosophy of Law* (OUP 2011) 66.
[46] David K Lewis, *Convention: A Philosophical Study* (Blackwell 2002) 36 et seq.
[47] Cf Adrian Vermeule, Conventions of Agency Independence, 113 (2013) Colum L Rev 1163, 1189.

It is only by the realisation of the need to regulate the constitutional political game[48] that coordination considerations come into play.

Nevertheless, the importance of coordination for regulating the political constitutional area shows at the same time the limits of a pure coordination approach.[49] Pure coordination corresponds to the game theoretical view of the term. Coordination has been used as a technical term in game theory, meaning that the coordinated actors have to choose among choices which differ only regarding the returns/pay-offs for making them. This is a trait of pure coordination games that can be applied to *homo economicus* but has restricted applicability in the social sphere. This fact has also become obvious regarding legal regulation through the analysis of, among others, John Finnis. He delineates between the game theoretical coordination and coordination in the legal context, and stresses that that unlike game theoretical models, law does not have well-defined pay-offs (the nature of the pay-off could be contingent on other factors).[50]

Considering that the drawbacks of game theoretical approach[51] are associated with its inability to be applied in real life social situations, this applies *a fortiori* to constitutional coordination. An approach to the constitution based solely on pay-offs and individualistic returns could not only lead the whole edifice to collapse due to its high interdependence but could even justify tyrannical and incompetent rule by a powerful political actor. Thinking about constitutions we should remember that Aristotle's basic categorisation between correct and deviant constitutions is not based on how many people government consists of but on whether they aim at the

[48] Cf Dimitris Tsatsos, *Constitutional Law Vol. A: Theoretical Foundation [Συνταγματικό Δίκαιο Τομος Α: Θεωρητικό Θεμέλιο]* (4th ed. Ant N Sakkoulas Publications 1994) (in Greek) 116-117.
[49] Edna Ullman-Margalit, *The emergence of norms* (2nd edn OUP 2015) 82, Gans (n 45) 336.
[50] Finnis, 'Law as Coordination' (n 45) 68.
[51] Tushnet (n 16) 500.

advancement of all or solely at the advancement of those who govern.[52] The reason for this is that rulers' individualistic pay-off considerations constitute a constitutional pathology which renders the relevant polity deviant, entailing despotic rule.[53]

The importance of the character of pay-offs in Aristotle's political theory brings out why individualistic returns as that envisaged by game theory preclude, first, a pure coordination, game theoretical approach to constitutional conventions involving only personal return considerations. They also preclude any idea of equivalence between individualistic and altruistic considerations as incentives for the actions of political actors within the constitution. Of course, this does not mean that any idea of self-interest is completely excluded from our analysis; this would be unrealistic, especially at the stage of sanctions where self-interest has an important,[54] yet not exclusive role to play.[55]

The above analysis rather aims at showing that there are normative considerations which preclude a game theoretical approach to constitutional coordination, which are much wider than the realisation of the limits of such a model to serve a real-world social situation. A pure game theoretical coordination fails to deliver a theory of legitimate constitutional authority (*legitimum imperium*)[56] other than that of the thin notion of preventing chaos through coordination. It is not indifferent for

[52] Aristotle, *Politika* 1279a17–21 ὅταν μὲν ὁ εἷς ἢ οἱ ὀλίγοι ἢ οἱ πολλοὶ πρὸς τὸ κοινὸν συμφέρον ἄρχωσι, ταύτας μὲν ὀρθὰς ἀναγκαῖον εἶναι τὰς πολιτείας, τὰς δὲ πρὸς τὸ ἴδιον ἢ τοῦ ἑνὸς ἢ τῶν ὀλίγων ἢ τοῦ πλήθους παρεκβάσεις. ἢ γὰρ οὐ πολίτας φατέον εἶναι τοὺς <μὴ> μετέχοντας, ἢ δεῖ κοινωνεῖν τοῦ συμφέροντος. (when one or few or many govern to the common advancement, these are correct polities without doubt, whereas those which aim at the advancement of those who govern, one, few or many are deviant. Because those not being involved in the common target cannot be called citizens or in order to be called so should take part in the common advancement).
[53] Fred Miller, 'Aristotle's Political Theory', *The Stanford Encyclopedia of Philosophy* (Summer 2017 edn) <https://plato.stanford.edu/archives/sum2017/entries/aristotle-politics/> accessed 7 April 2020.
[54] 'political self-interest' Colin R Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218, 221; Cf Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149, 173.
[55] Cf 2.3.1.
[56] Pavlos Eleftheriadis, *The Deliberative Constitution* (2020, forthcoming).

constitutional actors whether they coordinate on one standard or a different one;[57] constitutional coordination through conventional rules cannot be value and content free.

The realisation of the inadequacies of a pure coordination approach shows that the element of constitutional coordination within the normativity of conventions does not correspond to coordination out of self-interest, since the choices are not only unequal in terms of pay-offs and returns, but also in terms of political virtues. Coordination first of all corresponds to the much thicker notion of constitutional coexistence.[58] By agreeing on a common standard of behaviour, actors continue playing the constitutional game through respecting the need for the continuous existence of all of them as constitutional actors. Such a stance leads to the longevity and efficient functioning of democracies[59] This is not an empirical fact, but the realisation of the virtue of constitutional coexistence by political rivals through constitutional coordination. I will return to this idea later in this chapter, discussing the relationship between conventions and democracy.

5.2.2. Coordination towards a purpose

The element of coexistence is an indicator of the fact that constitutional coordination is not a *value per se*, regardless of its content. The nature of the constitution as a *synthesis* of legal and political factors[60] renders any endorsement of coordination without a consideration of the content of coordinating rules not only mistaken but dangerous for a democratic polity. Let me return to the Aristotelean notion of the correct and deviant

[57] Vermeule, 'Conventions of Agency Independence' (n 47) 1186-1187.
[58] Elster (n15) 54.
[59] Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History reveals about our Future* (Viking 2018) 8.
[60] Jeremy Waldron, 'Are Constitutional Norms Legal Norms?' 75 (2006) Fordham L Rev 1697.

constitutions: since all of them are working constitutions, it goes without saying that they are comprised of effective rules of constitutional coordination. Nevertheless, the content of the relevant rules will render the relevant constitutional settlements pathological if the content aims at the advancement of those who govern and not at the well-being of all citizens.

Coordination should not be not come at any cost. If coordination is not subjected to evaluation of aims, even the most appalling regimes could be considered effective forms of coordinating the constitutional area. Think of totalitarian contemporary states like North Korea. The prevention of disorderly conduct might be achieved, but the content of the rules is far from acceptable. What follows from this discussion is that the content of the rule which achieves coordination within the constitutional edifice should go in a certain direction and serve a certain purpose that must be taken into consideration by normative constitutional theory.

John Finnis, in *Natural Law and Natural Rights*, discusses the formation of 'conventions or customary rules' in international law; there, he makes a fundamental distinction between the framework principle behind the formation of customary rules in general and the existence of a specific authoritative customary rule requiring certain action.[61] The former is based on coordination considerations and the latter on practical judgement. In his words:

> For, given this fact, recognition of the authoritativeness of particular customs affords all states an opportunity of furthering the common good of the international community by solving interaction and coordination problems otherwise insoluble. And this opportunity is the root of all legal authority, whether it be the authority of rulers or (as here) of rules.[62]

[61] Finnis, *Natural law and natural rights* (n 44) 242-244.
[62] Ibid 244.

Some observations should be made here. First of all, the areas regulated by international custom and constitutional conventions are different: the international community is comprised of states but it is not a constitutional state in itself. Moreover, international law may have been characterised as 'law which is not law',[63] but it still lies within the legal sphere, whereas the constitution is a *synthesis* of legal and political rules. Dicey was the first to speak of the analogies which can be drawn between international custom and constitutional conventions when discussing the latter, stating that his 'friend the Chichele Professor of International Law' being accustomed to 'those rules of public ethics which are miscalled international law, will find himself at home in expounding political ethics which, on the hypothesis under consideration are miscalled constitutional law'.[64] I will briefly focus here on these important common elements between the normativity of international custom and constitutional conventions in Finnis's analysis, omitting what is different among the two categories of rules.

The first thing to mention regarding Finnis's approach is that it is based on the existence of two layers: the framework principle provides coordination as the justificatory reason for the existence of customs while the second one refers to the existence of the authority of a specific customary rule. As discussed in Chapter 1, this is also my view regarding constitutional conventions: in addition to specific constitutional conventions, there exists a framework within which all conventional rules act. I am, however, sceptical about transplanting Finnis's theorising of his framework principle in purely coordination terms into the bounds of constitutional conventions. As I have shown in this section, coordination cannot be a *value per se*

[63] Albert Venn Dicey*, Introduction to the study of the law of the constitution* (8th edn, Macmillan 1915) 22.
[64] Ibid.

within the constitutional edifice. Believing that 'it is desirable that in this domain there be some determinate, common, and stable pattern of conduct and corresponding authoritative rule'[65] does not suffice for grounding the framework principle of conventions.

In my view, there is a certain direction towards which coordination achieved through conventions should show; there must be a certain value which conventional regulation as a whole serves. The advancement of the common good is not achieved simply by coordinating but by coordinating in a certain constitutional direction. In Chapter 1[66] I referred to Jennings' definition of the purpose of conventional regulation as 'the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep in touch with the growth of ideas'.[67] I have also shown how it relates to the reason for the existence of a particular convention, as included in his famous tripartite test, since 'the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy'.[68]

The connection between the reason for the existence of a specific convention and the general purpose of conventional regulation is thus a relationship between a framework purpose and its incarnations within a specific rule, which are actually implementations of this wider purpose. Any other idea of the framework principle having a value-free aim and value considerations appearing at the same time at the level of specific rules does present an inexplicable differentiation between the purpose of the category of rules and the reason for the existence of a specific rule.

[65] Finnis, *Natural law and natural rights* (n 44) 242.
[66] Cf 1.1.2.4.
[67] Jennings (n 3) 81-82.
[68] Ibid 136.

At the same time, this relationship between purpose and reason explains the difference in the importance of specific conventional rules. In actuality, the importance of a convention is based on how close the reason for its existence is to the general purpose of conventional regulation. Conventions are normative since their coordination is directed towards certain constitutional values, that of democratic accountability, which are fundamental for a contemporary constitutional state.[69] Let us take as examples three conventional rules widely considered to be very important in the three jurisdictions examined in this thesis: the collective responsibility of the Cabinet in the UK,[70] the principle of declared confidence as an expression of parliamentarism in 19th century Greece,[71] and the vote of state delegates in the electoral college in the United States.[72] What connects the three conventions and leads to their rise in prominence is their centrality for serving the purpose of democratic accountability. Through tying the government to Parliament's democratic scrutiny and control in the case of UK and Greece, and through ensuring that the choice of electors reflects the choice of voters of their state in the case of the US, these conventions are crucial for the constitution because of how they advance the general purpose of conventional regulation.

Therefore, conventions as a category, including certain political constitutional rules, coordinate towards a purpose that keeps the whole edifice in touch with the growth of constitutional values. In contemporary constitutional states, this prevailing value is democratic accountability, and conventional coordination aims at promoting it

[69] Vernor Bogdanor and Stefan Vogenauer, 'Enacting a British constitution: some problems' [2008] PL 38, 50.
[70] Walter Bagehot, *The English Constitution* (Batoche Books 2000) 50.
[71] Nikos Alivizatos, *Pragmatists, demagogues and dreamers: Politicians, intellectuals and the challenge of power [Πραγματιστές, δημαγωγοί και ονειροπόλοι: Πολιτικοί, διανοούμενοι και η πρόκληση της εξουσίας]* (Polis 2015) (in Greek) 41.
[72] James G Wilson, "American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior" [1992] Buffalo Law Review 645, 651.

through its 'rules and forms'.[73] The same conclusion can also be reached through a historical argument.[74] As shown in the previous chapter, conventions varied in their purposes through the ages in the UK.[75] When the prevailing political and constitutional values differed, so did the purpose of constitutional conventions. UK conventions of the 16th century aimed at rendering the monarch politically predominant,[76] while those of the 17th century aimed at a system of checks and balances between the divided powers of government.[77] These purposes of conventional coordination reflected in the best possible way the direction and values of the constitution of their time, its prevailing political philosophy. The democratic turn of the UK's 19th century constitution led to the shift of the direction of conventional coordination towards democratic accountability.[78] As we have seen,[79] this happened smoothly through the 'coexistence element' enshrined in conventional coordination.

The historical argument proves that conventions can serve a variety of constitutional purposes, ranging from monarchical to democratic rule, yet there is no historical period when the normativity of conventions remained value-free. The standards set by conventional rules and the reasons for their existence reflected to a great extent the framework direction of conventional regulation. This is why sanctions for breach of constitutional conventions are applied not simply for non-coordinating but for disregarding the reason for the existence of the conventional rule, which

[73] Marshall (n 8).
[74] Cf for social conventions 'the diachronic emergence of conventional behaviour: the sequence of events that led to the establishment of a convention' in 'Ismael Al-Amoudi and John Latsis, 'The arbitrariness and normativity of constitutional conventions' [2014] 65 The British Journal of Sociology 358
[75] Cf 4.1.
[76] Sir William Holdsworth, *A History of English Law vol VI* (2nd edn, Methuen & Co 1937) 5.
[77] Holdsworth, 'The Conventions of the Eighteenth. Century Constitution' (1932) 17 Iowa L Rev 161, 177.
[78] H J Hanham, *The nineteenth century constitution 1815-1914: Documents and Commentary* (CUP 1969) 110
[79] Cf 4.1.; Vernon Bogdanor, *The New British Constitution* (Hart 2009) 11.

encapsulated the wider purpose of conventional regulation as crucial for a certain polity. At the same time, political actors refrain from violating conventions, not only for individualistic fear of political censure but also due to their appreciation of the role of the rules for political coexistence, stability of the constitutional system[80] and respect for their purpose.

Thus, the idea of coordination towards the purpose of democratic accountability lies behind the normativity of conventions. This is a richer account of the way conventions provide standards of behaviour for political actors, overcoming the shortcomings of a pure game theoretical approach and connecting the purpose of the framework rule with the reasons for the existence of each specific convention. At the same time, this account provides an explanation for censuring the breach of a conventional rule and goes beyond political difficulties considerations in political actors' refraining from a breach. Conventions are truly 'the flesh which clothes the dry bones of the law',[81] since they achieve coordination and direct the constitutional edifice.

5.3. The normativity of conventions and democracy

Given that the purpose of the normativity of constitutional conventions is defined as democratic accountability, it is worth examining one interesting objection that has been expressed against conventional regulation. This objection considers conventions as undemocratic elements of the constitutional edifice. It is based on various arguments, ranging from the method of producing conventions to their influence on the political

[80] 'Discarding the rules endangers the game itself' Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' [2013] University of Illinois L Rev 101, 116.
[81] Jennings (n 3) 81-82.

and constitutional game and to arguments based on history. There is a paradox here: rules which aim at promoting democracy are accused of being undemocratic.

There is a certain tide of thought which is skeptical against conventions on democratic grounds. Barry Hough has summarised these arguments in the UK.[82] The first group of democratic objections comes from the way conventions come into existence: they do not arise from a transparent and inclusive procedure but are rather the product of political actors' practice, declaration or agreement. The rule production procedure is considered undemocratic due to the lack of transparency of the content[83] and the reasons behind the existence of the rules.

A second argument contends that conventions have historically played a dubious role in relation to the democratic development of the constitution. In particular, the vagueness of some of them leaves the executive with a great room for maneuver. This train of thought can be traced back to Harold Laski's criticism of the Crown's acts as taking place within the 'delicate realm of half-defined conventions in which the precedents themselves are so dubious and so contradictory as to place even the specialist in a position where judgment is difficult'.[84] The Labour party of the 1930s went so far as to believe that constitutional conventions could serve as a trick for depriving them of power in case of an electoral victory.[85] The interpretation of conventions by the political elite was particularly considered as a potential danger.[86]

A third train of arguments, very close to the first one, underlines the lack of democratic participation in their creation, also emphasising the elite character of those

[82] Hough (n 17) 368.
[83] Ibid 391.
[84] Harold J Laski, *The Crisis and the Constitution: 1931 and After* (Hogarth Press 1932) 9; Morton J Horwitz,' Why is Anglo-American Jurisprudence Unhistorical?' (1997) OJLS 551, 578.
[85] Ibid Horwitz 579, Laski, *Democracy in Crisis* (University of North Carolina Press, 1933) 89.
[86] Ibid Horwitz.

who consider the relevant conduct as obligatory.[87] This view is highly skeptical not only of the political actors feeling bound by the rule but also of those authorities who bring out and analyse academically the relevant conventions. At the roots of the argument lies the fact that conventions are not perceived to include the people in their creation and development. In a slightly different way, in Greece constitutional conventions as well as constitutional customs have been criticised as having a problematic relationship with the principle of popular sovereignty. More specifically, unwritten constitutional norms are compared unfavourably to the codified constitutional text, which is considered as expressing the constituent power and thus the sovereignty of the people.[88]

Adrian Vermeule has expressed similar considerations in speaking of the 'democratic deficit' of conventions[89] in regard not only their creation but also their amendment. In his words:

> The decentralization of constitutional norm-generation is what makes conventions democratically suspect. There is no well-defined office, official or institution who chooses among possible constitutional conventions and promulgates them. Suppose there is a convention that is obsolete, oppressive or unjust. There is no public body, no office, no well-defined institutional point of access, to which one might go in order to ask for a change in the convention.[90]

Finally, in continental jurisdictions there is always a doubt regarding the effectiveness of conventions in protecting against unconstitutional behaviour. In Greece, in particular, turbulent constitutional history has on the one hand led scholars

[87] Hough (n 17) 374.
[88] Tsatsos (n 48) 420, 428; Aristovoulos Manesis, *Constitutional Law, University Lectures Vol A [Συνταγματικόν Δίκαιον: Πανεπιστημιακαί παραδόσεις, τ Α΄]* (Sakkoulas 1967) (in Greek) 297.

[89] Adrian Vermeule, 'Conventions in Court' (2015) 38 Dublin ULJ 283, 304.
[90] Ibid.

to reject the ability of conventions to act as an effective constitutional safeguard[91] and on the other hand led politicians to turn many conventions into codified constitutional provisions, in both the Constitution of 1975[92] and its amendment in 1986.[93]

Starting my response from the last argument, such claims of ineffectiveness actually work in a self-fulfilling way, as shown in Chapter 1. In Greece, by perceiving conventions as an ineffective safeguard of the constitution, academic theory opened the way for the easy violation of conventions by political actors and finally to their replacement by codified constitutional provisions.[94]

Moving on to the 'historical argument' that has been deployed for grounding the 'dubious' relationship of conventions with democracy, it is clear that it is based on the perception and anxieties of a certain group of academics over a specific historical period, applying it without further justification to the whole historical process as well as to the contemporary constitution. In actuality, all these considerations stem from Labour party fears in the 1930s that they would be deprived of power despite winning elections; it was more or less a product of their negative reaction to the formation of a national government under Prime Minister Ramsay McDonald.[95] But why should the intricacies and fears associated with a very specific historical moment be taken to taint the whole history and role of conventional regulation?

Such a conclusion would be mistaken, particularly given the historical role played by conventions in the democratisation of the constitution not only in the UK but also in Greece. The big picture is that the historical relationship between conventions

[91] Evangelos Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn. Ant N Sakkoulas 2008) (in Greek) 401.
[92] Anastasiadis 'History and historicity of the constitutional provision of articles 37, 38 and 41' (n 35).
[93] Manesis, 'The legal and political importance' (n 37).
[94] Cf 1.3.2.
[95] Horwitz (n 84) 578.

and democracy is close and continuous. The analysis of Chapter 4 has shown the association between the democratic turn of the UK and Greek constitutions and the development of conventional rules which facilitated democratic accountability of the executive to Parliament and the electorate.[96] Bringing out the particularities of turbulent times as the general rule does not do justice to the role conventions have historically played.

The same goes for the present role of conventional regulation for the functioning of democracy. Arguments focusing on the way conventions are produced, which emphasise either the lack of transparency in the creation of the rule or the lack of popular participation, seem to suffer from one-sidedness. Both these considerations consider conventional regulation as elitist. Yet, first of all, they over-emphasise the mode of production of the rules, impliedly comparing conventions to law and simultaneously ignoring other elements like the mechanisms for sanctioning violations of the rule.

Emphasis on production is a clear influence from the virtues associated with the rule of law. The latter is considered an ideal, which at least in its traditional formal conception, is primarily concerned with 'the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.)' and 'the clarity of the ensuing norm';[97] in other words it addresses issues relating to the subjects and forms of the law-making process. The use of these arguments in the context of conventions does not take into consideration that what is called 'common law' presents

[96] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011) Introduction para 1; Alivizatos, *Pragmatists, demagogues and dreamers* (n 71).
[97] P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467.

some characteristics similar to conventions in its production;[98] moreover, in the case of common law the creation of rules mainly takes place not by political, but by judicial organs.

Speaking of the judiciary, the issue of sanction mechanisms comes into play. It seems that that all the above arguments underplay this particular aspect and its influence on the democratic character of the constitution. Courts, which are of paramount character in finding and sanctioning violations of legal rules, have no role to play in the case of non-justiciable conventions.[99] Courts are specially designated organs, mostly comprised of an elite of legal expert officials, who not only apply but also interpret the law, especially when issues of vagueness arise. On the other hand, violations of conventional rules are found and sanctions are imposed in the political *fora*[100] of the Parliament through its scrutiny and the electorate through elections. These two *fora* simultaneously constitute fundamental democratic constitutional organs in a modern constitutional state.[101]

Why is the role of Parliament and the electorate in the democratic character of conventions underplayed by their critics? As noted above, this has first to do with under-estimating the element of sanction and over-emphasising the method of producing rules, through an analogy with law. But there are more reasons: Parliament is viewed myopically as the legislature or law-maker, forgetting about its important accountability and scrutiny functions, closely connected with the existence and enforcement of conventional rules. Moreover, this train of thought is based on a poor perception of representative democracy and parliamentarianism, viewing

[98] Vermeule 'Conventions in Court' (n 89) 305-306.
[99] Elster (n 15) 51.
[100] Tushnet (n 16) 493.
[101] Antonis Pantelis, *Constitutional Law handbook [Εγχειρίδιο Συνταγματικού Δικαίου]* (3rd edn, Livanis 2016) (in Greek) 320-355.

representatives and the accountable executive as a non-accessible elite indifferent to the popular opinion, and not as actors elected on their merits through a democratic procedure, involving the equality of vote.[102]

In actuality, the workings of representative democracy simultaneously form the foundation for the imposition of sanctions, through the retrospective character of vote. In the words of Bernard Manin:

> Voters thus influence public decisions through the retrospective judgement that representatives anticipate voters will make. … In other words, in a representative system, if citizens wish to influence the course of public decisions, they *should* vote on the basis of retrospective considerations.[103]

This is exactly where democracy and sanctioning mechanisms for breach of conventions rules meet. Moreover, the secret character of the ballot ensures the effectiveness of sanctioning without fear of negative repercussions.[104] The verdict of the voters is thus given under guarantees of anonymity, ensuring its effective and fair character.

Regarding the vagueness of conventional rules, it is important to note that the political *fora* of the electorate and the Parliament not only sanction violations of conventions but also clarify their meaning, accepting one possible interpretation over the other. There is thus a mechanism for overcoming vagueness and filling gaps in the rules when that is needed, operating through the verdict of the *political fora*. A relevant example is Theodore's Roosevelt's attempt to run for a third presidential term. The convention provided that no one can serve more than two terms in the post of the President of the US, yet it was not clear whether this applied to (i) those whose first

[102] B Manin, *The Principles of Representative Government* (CUP, 1997) 149.
[103] Ibid 179.
[104] Elster (n 15) 57.

term was not the result of an election but who were promoted to Presidency from Vice Presidency after the incumbent President's death or (ii) did not intend to run for a third consecutive time, both being the case with Roosevelt. The electorate through the recently introduced secret ballot[105] ruled in favour of the stricter interpretation of the rule, leading to the defeat of Roosevelt by Woodrow Wilson.[106]

Therefore, it is at least paradoxical to speak of an undemocratic character of conventions. The sanctioning mechanism of conventions is the democratic procedure itself: the retrospective character of elections and parliamentary scrutiny are quintessential for both democratic accountability and the normativity of conventional rules, while conventions also promote the coexistence of political actors within democratic constitutional state. Democratic procedures are important for conventions not by coincidence but precisely because the normativity of conventions aims at democratic accountability. Arguments doubting the democratic character of conventional rules are not only ahistorical but start from a legalistic perception of normativity of conventions, stressing the traits that law must have. Yet, as it has been shown in this thesis, conventions emerge as standards of behaviour and are interpreted and applied—and their violations are sanctioned—through special, political normative means.

Conclusion

Thinking of a constitution without the normativity of conventions translates into conceiving a constitutional edifice where conventional rules are either replaced by

[105] Ibid.
[106] Herbert W Horwill, *The Usages of the American Constitution* (OUP 1925) 93-96.

constitutional practices or by law, or the relevant fields are left unregulated. All these scenarios present dystopian characteristics, since constitutional conventions ensure the appropriate regulation of the inner workings of politics and define their addressees, the political constitutional organs, through empowering and limiting them within the constitutional edifice. The latter would face serious instability if the allocation of powers changed through conventions ceased to exist.

Equally problematic is the alternative scenario of the normativity of conventions being replaced by that of law. It is a scenario envisaged by constitutional legalists who consider law as the only acceptable form of regulating the constitutional edifice. Nevertheless, the rigidity of law as well as justiciability and finality of the decisions of courts associated with the central case of legal rules stand opposite to the flexibility of conventions. Replacing the normativity of convention with that of law could be simply the expression of distrust towards conventional regulation, but it may also create further problems since the solution chosen and ossified in a rigid constitutional provision may not be the optimal one; such a provision is hard to amend and may prove unable to deal with novel circumstances. On the other hand, the only plausible argument of legalists against conventional rules, which criticises the ambiguities of their content, can be countered through conventional codification and other means.

The second section of the chapter addressed the relationship between coordination and democratic accountability within the normativity of conventions. Coordination within the bounds of the constitution should not be conceived in its pure, game theoretical form. Pure coordination not only fails to adequately fit real-life situations but, within the constitutional context, could justify tyrannical rule by a powerful political actor, by involving only considerations of personal pay-offs. Thus,

coordination of constitutional actors through conventional rules cannot be value and content-free.

Constitutional coordination through conventions first of all ensures democratic coexistence among political actors. But it also points toward a certain direction, that of democratic accountability, keeping the constitutional edifice in touch with the growth of constitutional values. This general purpose is present at the framework level of conventions as a category of rules but also specified through the reason for the existence of each convention. The varying importance of specific conventional rules can be explained by how close their reason is to the framework purpose of democratic accountability. Thus, political actors refrain from violating conventions, not only for individualistic fear of political censure but also due to their appreciation of the role of the rules for political coexistence, stability of the constitutional system and respect for their purpose.

Surprisingly, the normativity of conventions has been criticised as undemocratic with arguments based either on the way conventions come into existence or on their historical role. However, these historical arguments over-emphasise the particularities of very specific periods of time, ignoring the historic role conventions have played in the democratisation of the constitution in both the UK and Greece. On the other hand, focusing the arguments on how a rule is produced is influenced by considerations regarding the normativity of law. These ignore the democratic character of sanctioning mechanisms in the case of conventions as well as the role of electorate and Parliament for clarifying the content of the rules and deterring political actors from deviating from them. The workings of representative democracy form the foundation for the imposition of sanctions for breach of conventions, through the retrospective character of vote. It is

of paramount importance for conventions as standards of behaviour that the sanctioning mechanism for deviations from them is the democratic procedure itself.

CHAPTER 6—THE PRESENT AND FUTURE OF CONVENTIONAL REGULATION

This chapter aims to deal with the present and future of conventional regulation. The relevant considerations start from the question whether there are particular areas of the constitution that should be regulated by conventions. The following sections examine the extent to which conventions successfully deal with the challenges posed by new eras of great constitutional importance in the three jurisdictions, the UK, the US, and Greece. Section 6.2. deals with the effect that the changes to the British constitutional edifice have had on conventional regulation, while Section 6.3. examines the impact of crisis and coalitions on conventions. In section 6.4. the UK House of Common's approval of the deployment of armed forces overseas is used as a case study for the emergence of conventions for the purpose of enhancing the democratic accountability of the executive. Finally, section 6.5. examines the way political tension has interplayed with conventional regulation in the cases of the recent Trump presidency and Brexit debates.

Overall, this last chapter aims at arguing for the continued importance of constitutional conventions in a constitutional and political environment of great change as well as their ability to provide the framework for addressing new constitutional challenges emerging in the 21st century.

6.1. Should particular areas of the constitution be regulated by convention?

In Chapter 4, I presented the constitution as a *synthesis* of legal and political elements, both of which interact within the constitutional edifice. The central case of legal constitutional regulation is what is called by theory 'law', with its political constitutional counterpart being constitutional conventions. There is no possibility of absolute dominance of the one or the other element, with both elements being present in each constitutional edifice. This makes us realise that some areas of each constitution are regulated by conventional political rules. But does this also mean that some areas should be regulated by convention?

First of all, I must make clear the meaning of 'should'. This is clearly not something compulsory for a constitutional designer. The constituent power cannot be forced to regulate the constitutional area in a certain way, choosing one specific constitutional norm over the other. The meaning of 'should' here is that specific areas of the constitutional structure would be better and more effectively regulated by conventions.

The first thing that comes in mind when assessing the suitability of conventional regulation is the character of the area to be regulated and more particularly its position in the legal-political axis: politics is suited for regulation by political means, like conventions. Complete non-regulation of political life could lead to chaos, while legal regulation is an option with significant disadvantages, which have been analysed in the previous chapter.[1] What is now needed is a positive foundation of the suitability of conventional rules to regulate political areas of the constitution. This can be traced back to the particular traits

[1] Cf 5.1.2.

of conventional regulation, balancing them against their disadvantages and keeping always an eye on the other constitutional regulatory techniques. It should be remembered that in the majority of cases conventions are one among many options which include the other members of the same *genus* of constitutional norms, most importantly codified constitutional provisions, constitutional statutes and constitutional custom. The discussion of *genus* and *differentia* of constitutional conventions in Chapter 3 is particularly important in this direction.

Which traits of conventions are useful for constitutional design? Political character, flexibility, avoidance of the finality and definitiveness of law, non-enforceability in court, resolution of disputes in the political *fora*, and political sanctions all add important advantages to the regulation of the relevant issues. For any or a combination of these particular reasons, conventions can be deliberately chosen by constitutional designers or evolve through the conduct of political actors.

First of all, flexibility is one of the most useful advantages of conventional regulation, if seen within the wider constitutional context. Many constitutional structures are built around the ideas of rigidity and entrenchment. Amendment procedures may ensure that the constitution can change in order to meet new societal needs, yet they are in the majority of cases slower than ordinary legal change, sometimes demanding a supermajority vote.[2] Thus, dealing with a novel situation may demand giving some area of discretion, and some room for maneuver for political actors, which cannot be provided for by rigid

[2] R Dixon and A Stone, ,'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in D Dyzenhaus and M Thorburn (eds*), Philosophical Foundations of Constitutional Law* (OUP 2016) 95.

and codified constitutional provisions or constitutional statutes. Taking a decision on a political issue with wide public support may end up prohibited as illegal conduct, if regulated by strict legal means. If regulated by convention, however, the very same decision will be judged as shedding new light on the flexible meaning of the rule, if accepted by the Parliament and by the electorate in the following general elections. Thus, flexibility gives conventions the opportunity to adjust, still serving the same reason but accustomed to the new societal, constitutional and state needs.

Of course, this cannot take place beyond the bounds set expressly by the entrenched codified constitution, if such a text exists. Let me give an example: in Greece art. 50 of the Constitution sets a limit: 'The President of the Republic shall have no competences other than those explicitly conferred on him by the Constitution and the concurrent laws'[3] Therefore, Greek positive conventions enable the President in fulfilling his role but do not create new competences for him. They are 'power-conferring'[4] but not 'competence-creating' conventions. The end of democratic accountability cannot be served by any means: in cases where constituent power has been expressed through a codified constitutional text, conventions of course exist but they serve the purpose of political coexistence by first respecting the preconditions of their constitutional coexistence with the codified text.

Therefore, conventions can be used for adding flexibility to the constitutional edifice or tackling a new political issue. This is especially, but not exclusively, useful in

[3] Σύνταγμα της Ελλάδας (2019), Constitution of Greece (2019).
[4] Geoffrey Marshall, Constitutional Conventions, The Rules and Forms of Political Accountability (Clarendon 1984) 8.

rigid constitutional environments, respecting what is prohibited by the codified constitutional text. The alternative scenario,[5] that of replacing a written provision with a conventional rule of exactly the opposite content cannot be accepted not only out of respect for constituent power[6] and the entrenchment procedure, but also out of concerns for the predictability of regulation.[7] Predictability as well as clarity of the content of the norm[8] are closely bound to the rule of law: overthrow of a codified provision by a convention would eventually lead to an unneeded direct confrontation between the rule of law and political conventions. The harm done to the stability of the constitution would undermine any gains from the flexibility of conventional regulation, so it could be said that no reason could justify such a rule.[9]

Flexibility is, however, not the exclusive reason for regulating a particular constitutional area through convention. There are also considerations pertaining to the way constitutional change is achieved. Changing the regulatory framework through convention is not so radical a move as a constitutional amendment; it can ensure the smooth incorporation of the new elements into the constitutional edifice. On this point historical evidence is important: the transition towards a primarily democratic constitution in the UK, without divisive constitutional moments[10] is indicative of the role conventions play for

[5] Contra Richard Albert, 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin ULJ 387, 391.
[6] Dimitris Tsatsos, *Constitutional Law Vol A: Theoretical Foundation [Συνταγματικό Δίκαιο Τομος Α: Θεωρητικό Θεμέλιο]* (Ant N Sakkoulas 1994) (in Greek) 420, 428; Aristovoulos Manesis, *Constitutional Law, University Lectures Vol A [Συνταγματικόν Δίκαιον: Πανεπιστημιακαί παραδόσεις, τ Α΄]* (Sakkoulas 1967) (in Greek) 297.
[7] Cf 1.2.3.
[8] Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) Public Law 467.
[9] Cf Sir Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 136.
[10] Vernon Bogdanor, *The New British Constitution* (Hart 2009) 11; Ackerman Bruce, 'Storrs Lectures: Discovering the Constitution' (1984) 93 Yale Law Journal 1013, 1022.

achieving smooth transformations of the constitutional edifice. The legal elements of the constitution remain intact, while conventions have the ability to tackle sensitive issues through the machinery of political consensus. This was the case with both the Sewel convention in the UK and the Greek and UK emerging conventions of coalition governments, which will be examined below. Constitutional change is not restricted to legal change. The latter rather indicates an increased level of constitutional anxiety among designers, through its tendency to ossify the relevant settlement into difficult-to-change or even unamendable provisions. On the other hand, conventions show faith in the ability of the political system to achieve self-regulation through consensus and mechanisms of political censure.

These elements of sanctioning and censure are of particular importance for the choice of conventions as the optimal constitutional regulatory technique. The courtroom is in many cases neither the most appropriate *forum* for deciding violations of the constitution nor the most effective one. Political actors are frequently much more afraid of political censure than, for example, having their legislation found unconstitutional in the courtroom. Judges may strike down a statute or impose a legal penalty on a politician but they cannot and should engage in direct political condemnation. This is done in the political *fora*. In many cases, constitutional techniques are chosen with reference to the deterring character of the censure mechanism; if the fear of being defeated in Parliament or the electorate is a more effective deterrent of violations than a judicial decision, conventions should be preferred to legal regulation. For example, public outrage[11] has proven a much more

[11] James G Wilson, "American Constitutional Conventions: The Judicially Unenforceable Rules that Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior' [1992] Buffalo Law Review 645, 651.

efficient deterring mechanism in preventing US electors from defection than if their conduct is found illegal by a court.[12]

Moreover, there are areas of the constitution that need a degree of immunity from judicial control. Politics cannot work effectively under the complete and final control of a group of experts who do not have the democratic credentials and expertise to be the final arbiters of political issues. Under any conceptualisation of judicial review, whether in the Kelsenian or the US sense, judicial decisions include a certain degree of intervention into the political agenda: but judicial intervention cannot and should not cover the whole area of politics. The relationship between political constitutional organs in many cases needs to be regulated by political means, excluding court intervention.

This becomes clear where for various reasons such issues end up regulated by law, especially by codified constitutional provisions, and the courts are not eager to adjudicate on such issues. What is accomplished by judicial self-restraint in terms of legal regulation is a matter of constitutional design or self-regulation in the case of constitutional conventions, which express the will of the political world to avoid judicial intervention and resolve the relevant issues in the political *fora*. In other words, regulating a certain area through conventions is a matter of choosing the appropriate constitutional *forum.* If Parliament and electorate are better suited than courts to interpret the convention, find a violation and censure those who deviated from the rule, then conventions are the optimal constitutional norms to regulate the relevant area.

[12] Cf 6.5.

Finally, there is a certain tendency to consider conventions as an inappropriate method for constitutional regulation due to some perceived ambiguities of their content. This view, particularly popular in continental jurisdictions, associates conventions with some premature form of constitutional law, which has emerged before the rise of modern constitutionalism[13] as a method of regulating power through written and codified rules.[14] Yet, this is far from reality, since flexibility is in actuality a notion that characterises not only the content but also the form of conventions. As far as I know, the codification procedure examined below renders conventions the only constitutional norm that can be either written or unwritten, having exactly the same characteristics in both forms. This creates further opportunities for conventional regulation, since it retains its advantages, avoiding though any ambiguities regarding the content of the rules.

The preceding analysis has shown that my conclusions on the nature and normativity of conventional rules can form the basic tool for considering conventions as the optimal norm for regulating certain areas of the constitution. Flexibility, non-justiciability, and political character provide the basic arguments for choosing conventional regulation, while codification has proven an important move for countering the view that ambiguity regarding the content of the rule constitutes a serious disadvantage of conventions. The fact that conventions coordinate political actors towards democratic accountability is always present when choosing them over other constitutional norms. Therefore, in actuality, searching for the nature and normativity of conventions is an exercise in theoretical constitutional design.

[13] N W Barber, *The principles of constitutionalism* (OUP 2018) 4.
[14] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (rev edn, Libery Fund 2007) 2.

In the following sections, I will present cases from the three jurisdictions examined which prove the continuous importance of conventional regulation as well as their ability to meet new developments, tackle constitutional problems that have arisen recently, and adjust to the changing demands of times. Thus, it will be proven that conventions effectively deal with current challenges and are deliberately chosen for regulating new fields of the constitutional area. Based on specific examples, they will be brought out as not only normative but also up-to-date and effective contemporary constitutional rules.

6.2. The changes to the British constitutional edifice during the last 20 years and conventions

During the last 20 years, the British constitution has experienced a period of great change.[15] The leitmotif for many of these reforms is a preference for official documents over rules that remain unwritten. The paramount example of this tendency is the Cabinet Manual, which aimed to include a great number of conventions relating to government in a single text.[16] Nevertheless, a question naturally arises about whether the conventions included in manuals[17] and codes during the last decades retain their conventional character, after being codified.

The substance of our answer depends on the way we perceive conventions and their difference from legal regulation. In the eyes of those arguing that conventions differ from

[15] Ministry of Justice, *The Governance of Britain* (Cm 7170 2007) 10.
[16] Andrew Blick, 'The Cabinet Manual and the Codification of Conventions' (2014) 67 Parliam Aff 191.
[17] Peter H Russell, 'Codifying conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015) 233.

legal regulation only on their degree of formalisation,[18] the codification and systematisation of conventional rules is a major step towards their losing their conventional character and being turned into laws. According to Barber, conventions can gain law-like qualities, and conventional rules included in, for example, the Ministerial Code have 'slipped, over time, from a collection of conventions into a set of laws.'[19]

Nevertheless, the criterion of formalisation, used by Barber in the case of the Ministerial Code, although widespread, is not self-evident. If this criterion changes, then the codification process may not modify the conventional character of the rules. Consequently, we could argue based on the very same facts for exactly the opposite conclusion: since conventions do not differ from other members of the *genus* of constitutional norms only in their degree of formalisation, the conventions thus systematised and codified do not lose their conventional character.

This is the case with my argument in this thesis that the paramount criterion for distinguishing conventions from other constitutional norms is the issue of judicial enforcement: conventions 'are not law. They are not enforced by courts'.[20] In order to bring out its importance, it is worth revisiting the comparison between the UK paradigm and the Greek case, and specifically the association of the 1986 Amendment with contemporary codification efforts in the UK. In the two cases examined, the situation is rather different regarding justiciability and consequently the retention of conventional character of the rules, after their being turned into a written form. In the UK, the codification effort has two

[18] Nick Barber, *The Constitutional State* (Oxford University Press 2010) 97.
[19] Ibid 101.
[20] *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [66].

major parameters; first, the most notable example, the Cabinet Manual, was designed so as neither to modify existing conventions nor to change their conventional status.[21] Second, the codified conventions remain not 'legally enforceable';[22] some conventions were codified in statute but this was the exception and not the rule.[23] Thus, conventions retain their distinguishing characteristics, according to the distinction already made.

This becomes obvious through juxtaposition with the Greek constitution which, by turning limiting conventions into written constitutional provisions, has not only modified them but also rendered them in a sense justiciable. Such an effect has been achieved rather indirectly, through the liability of the President for 'intentional violation of the Constitution', provided by art. 49 Par.1 of the constitutional text.[24] This liability has to do with actions conducted by the President during the discharge of his duties;[25] among them, for example, the appointment of the Prime Minister and the dissolution of Parliament. In other words, to the extent they are provided and limited by written provisions, especially after the 1986 Amendment, these powers are subject to judicial proceedings before the special Court of art. 86 of the Constitution that judges whether in this case 'an intentional violation of the Constitution' by the President has taken place.[26] Therefore, since the President can be accused of violating the limitations provided by written constitutional provisions, these very provisions become—at least theoretically—justiciable,[27] and

[21] Robert Hazell, 'The United Kingdom' in Galligan and Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015) 182-183.
[22] Ibid 186.
[23] Ibid 179.
[24] Σύνταγμα της Ελλάδας (2019), Constitution of Greece (2019 Art 49.
[25] Statute 265/1976 Art 2(3), Antonis Pantelis, *Constitutional law handbook [Εγχειρίδιο Συνταγματικού Δικαίου]* (2nd edn, A Livanis Publications 2007) (in Greek) 356.
[26] Evangelos Venizelos, *Courses in Constitutional Law [Μαθήματα Συνταγματικού Δικαίου]* (2nd edn, Ant N Sakkoulas 2008) (in Greek) 587.
[27] Cf 5.1.2.

conventions codified in the Greek constitutional text lose their 'conventional character', unlike their British counterparts.

Nevertheless, the relation between the constitutional reform programme in the UK and conventions does not only have a 'neutral' effect, meaning that the codification effort has not undermined the existence and importance of constitutional conventions, but also a positive side. Alongside many significant reforms, new conventions have emerged, showcasing the importance of the flexibility provided by conventional regulation in cases of increased formalisation as well as production of constitutional rules.

I will mention two examples. The first has already been mentioned in this thesis[28] and is related to the devolution of powers and more specifically to the Scotland Act 1998. The so called 'Sewel convention'[29] originated from Lord Sewel's announcement during the passage of the Act. The constitutional reality in the 22 years that have passed since then, proved, contrary to reservations by some theorists,[30] that conventions formed along with law a coherent constitutional edifice on which the devolution of powers could be based. The stability of the convention was tried and tested when a new SNP executive took office in Scotland; but this did not preclude the normativity of the convention, despite the existence of a Conservative government in Whitehall.[31] The recent incorporation of the convention into the Scotland Act, retaining at the same time the wording 'will not normally

[28] Cf 2.2.2., 3.3.1.
[29] Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' [2008] 71 Mod L Rev 853; Cf 2.2.2.
[30] Jane Munro, 'Thoughts on the 'Sewel Convention'' (2003) 23 SLT 194.
[31] Ibid 194.

legislate',[32] is strongly connected to the result of the Scottish Independence Referendum of 2014 and should be interpreted within this specific context.[33]

Regardless of the political incentives behind incorporating the Sewel convention into a statute, it is important that the Supreme Court in *Miller (No 1)* acknowledged that the relevant rule remains conventional and thus non-enforceable in court.[34] In addition to what has been already analysed in Chapter 3,[35] it is important to note that *Miller* is also of paramount importance for clarifying that written conventions retain their distinguishing characteristics not only when this codification is done through manuals and codes but in some cases even when they are included in a statute. Depending on the nature of the relevant provision and the intention of the legislature as indicated, *inter alia,* by the wording used, writing down conventions in legal texts may simply serve to recognise their existence and clarify their meaning and not amount to turning them into judicially enforceable law.[36]

Furthermore, the codification process itself has contributed to the emergence of new conventions. A classic example is civil service support during negotiations for the formation of government, provided by the Cabinet Manual.[37] It has been viewed by theorists as a deviation from the general principle that codifications are limited to

[32] Scotland Act 1998 28(8); Scotland Act 2016.
[33] Joseph Jaconelli, 'The Proper Roles for Constitutional Conventions' (2015) 38 Dublin ULJ 363, 379.
[34] *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, 136 et seq.
[35] Cf 3.3.1.
[36] Ibid 148 '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'.
[37] Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Cabinet Office 2011), paras 2(14)-2(15).

describing already existent conventions,[38] but it is in fact an example of a 'declared convention'.[39] The initial announcement of the possibility of civil service support by Gordon Brown[40] was subsequently followed to some degree[41] by constitutional practice during the Conservative-Liberal Democrat negotiations in 2010 and finally provided to its full extent in the Manual. In other words, the provision of the Cabinet Manual was a declaration by the executive of the emergence of a convention enabling the civil service to fulfil an enhanced constitutional role when elections result in a hung Parliament.[42] This declaration, being in accord with an already emerging constitutional practice, gives rise to a new, full-blooded convention. This case proves that conventional regulation does not lose its flexibility through codification, but it rather moves towards an open dialogue with constitutional practice.

In sum, conventions have not been undermined by the great tide of constitutional reforms taking place in the United Kingdom during the last 20 years. Not only have they retained their conventional character after codification, unlike what happened following the constitutional amendments in Greece, but in many cases new conventions emerged after a major reform. These new conventions accompany the legal edifice and form along with it a reliable constitutional structure indispensable for the functioning of the polity. It could be said that during the last twenty years, conventions have changed, but they have not lost their importance for the UK constitution.

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[38] Blick (n 16) 200.
[39] McHarg (n 29) 856.
[40] 'Civil servants to help in deadlock' (*The Independent*, 31 March 2010).
[41] Blick (n 16) 200.
[42] House of Lords Select Committee on the Constitution, *Constitutional Implications of Coalition Government*, HL 130 (House of Lords 2013-2014), para 32.

6.3. Economic crisis, coalitions and (emerging) conventions

The economic crisis that erupted in late 2000s inevitably had consequences on the constitutional field. Crisis, as the Greek origin of the word showcases (*κρίσις*), is always a situation where the building blocks of the whole institutional structure are challenged. Therefore, crisis has questioned the durability and normativity of conventions, yet in a covert way, due to their unwritten and flexible character. Nevertheless, conventions have managed to dynamically overcome this situation, in some cases showing the way for addressing heatedly debated issues, such as formation of coalition governments.[43]

One of the crisis' major consequences was the temporary end of single party rule in both Greece (2011-2019) and the UK (2010-2015).[44] Greece, along with the United Kingdom constitute two of the few examples of European countries that have been governed almost without exceptions by single party majorities.[45] The crisis, however, was an important factor leading to the diminution of traditional parties' vote shares and the formation of coalitions, based on a common programme for dealing with the new economic challenges.[46] This was the case with the Conservative-Liberal Democrat Coalition Agreement which started by declaring[47] that 'The parties agree that deficit reduction and

[43] On the Italian experience cf. Cuocolo's rather critical view, Lorenzo Cuocolo, 'Constitutional Conventions and the Economic Crisis: The Italian Paradigm' (2015) 38 Dublin ULJ 265, 277.
[44] Themistocles Papatheodorou, 'The coalition government within the frame of Greek democracy' [Η κυβέρνηση συνεργασίας στο πλαίσιο της ελληνικής δημοκρατίας] (2011) ToSyntagma (in Greek) 865.
[45] David Butler, *Governing Without a Majority: Dilemmas for Hung Parliaments in Britain* (Collins 1983) 56.
[46] Andrew Geddes and Jonathan Tonge, 'Introduction: Single Party Government in a Fragmented System' (2015) 68(1) Parliam Aff 1.
[47] Vernon Bogdanor, *The Coalition and the Constitution* (Hart 2011) 45.

continuing to ensure economic recovery is the most urgent issue facing Britain'.[48] The same emphasis on economy and an even more dramatic emphasis on the crisis' challenge can be seen in the Greek coalition governments' agreements.[49] As the first of them laconically puts it in 2012, the aim of the government is 'to deal with the crisis'.[50]

In this way, Coalition Agreements and Programmes for Government formed an important parameter of the coalition governments in the two jurisdictions examined. Even when the new governing coalition of SYRIZA and Independent Greeks did not produce such a text, coalition partners felt the need to point out that 'the coalition agreement is included in the programmatic statements during the confidence vote in Parliament'.[51] Therefore, all coalition governments in Greece have felt obliged to publish one or a series of coalition agreements either written in a separate document or incorporated in another wider statement. There is clearly a reason for that rule, closely connected to overcoming a transparency and legitimacy gap often associated with coalition governments. The production of such documents therefore amounts to an emerging limiting convention, aiming at making coalition partners inform the citizens and political actors regarding the basic agreed policies on a wide range of fields and the priorities of the new government.[52] It may not be clothed yet with the normativity needed to talk about a full-blooded

[48] 'Full Text: Conservative-Lib Dem deal' (*BBC*, 12 May 2010) <http://news.bbc.co.uk/1/hi/8677933.stm>, accessed 15 July 2020

[49] General Secretariat of Information and Communication and General Secretariat of Media, *The programmatic framework of the coalition government* (2013) 1.

[50] General Secretariat of Information and General Secretariat of Communication, *Points of Programmatic Convergence of the Three Political Leaders taking part in Government* (Directorate of Information 2012) 1.

[51] 'Kammenos: coalition agreement is the programmatic statements during the confidence vote in Parliament' [Καμμένος: «Η προγραμματική συμφωνία με τον ΣΥΡΙΖΑ θα είναι οι προγραμματικές δηλώσεις της κυβέρνησης»] (*Ta Nea*, 27 January 2015) <http://www.tanea.gr/news/politics/article/5203064/kammenos-h-programmatikh-symfwnia-me-ton-syriza-tha-einai-oi-programmatikes-dhlwseis-ths-kybernhshs/>, accessed 16 July 2020 (in Greek).

[52] Bogdanor (n 47).

convention, but this is highly likely to happen in the future, if coalition governments come back, reinforcing the existent precedents and making apparent the political difficulties from not following such a norm.

Nevertheless, the fact that the coalition agreement is filling an accountability gap does not equate it with the political gravity of a party manifesto. Moreover, in many cases it contradicts it. The consequences of this contradiction differ between Greece, where only a small, politically biased segment of academic theory seemed to react negatively on this issue,[53] and the UK. This happened because the political gravity of the UK party manifestos is translated into constitutional gravity through, *inter alia*, the Salisbury convention, which focuses on the content of the government's election manifesto in order to bind the House of Lords not to defeat on a second reading any bill that was contained in it.

The constitutional reforms of the last 20 years and especially the House of Lords Act 1999 seem to put into doubt the reason behind such a rule, as the Lords were turned from a hereditary to a primarily appointed House, decisively boosting their legitimacy. The 2010-15 Conservative-Liberal Democrat coalition had acted upon the other side of the equation: some of its programme did not have the legitimacy of being approved by the people in the last general election.[54] Such considerations overlook the fact that, as already mentioned in this thesis, constitutionalism does not only have to do with limitation, but also with facilitating government in fulfilling its role.[55] In other words, the Salisbury convention is not just limiting the House of Lords but enabling the (coalition or single

[53] For an excellent account of these scholars' views cf. George Karavokyris, *The Constitution and the Crisis: From the law of emergency to the necessity of law [Το Σύνταγμα και η Κρίση: από το δίκαιο της ανάγκης στην αναγκαιότητα του δικαίου]* (Kritiki 2014) (in Greek) 136.
[54] Bogdanor (n 47) 46.
[55] Nick Barber, 'Constitutionalism: Negative and Positive' (2015) 38 Dublin ULJ 249.

party) government to implement its policy as well. This translates into the need for re-examination of the convention in the direction of emphasising not a party manifesto but the government's programme, as expressed in our case in coalition agreements. Such an approach is in accordance with a richer account of representation,[56] giving the representative greater freedom of action and ability to react to circumstances that are changing rapidly, especially in times of economic or political crisis, associated with a hung parliament.

Furthermore, the existence of a common coalition agreement and programme had put onto the table two major issues: on the one hand, the coordination of the government's actions in the direction of the implementation of its programme and on the other the so-called 'agreement to differ'. On the former issue, the first step is an arrangement of the appointments to ministerial posts as well as the allocation of functions, a power which in the UK under a single-party majority rule conventionally belongs to the Prime Minister; this convention is actually codified in the Cabinet Manual[57] and the Ministerial Code.[58] Nevertheless, the allocation of posts and functions in a coalition, more or less proportionate to the power of the two parliamentary parties,[59] becomes a matter of agreement between their leaders.[60] At the same time, the minor coalition partner's ministers are nominated by the Deputy Prime Minister.[61] In Greece, a similar practice had emerged during coalition rule (2011-2019), with the minor party's leader being actually in charge of advising the

[56] Bernard Manin, *The principles of representative government* (CUP 1997) 165.
[57] *Cabinet Manual* (n 37), para 3.3.
[58] Cabinet Office, *Ministerial Code* (Cabinet Office 2015), para 4(1).
[59] Richard Rawlings, 'A coalition government in Westminster' in Jeffrey Yowell, Dawn Oliver and Colm O'Cinneide (eds) *The Changing Constitution* (8th edn, OUP 2015) 197.
[60] *Coalition Agreement for Stability and Reform* (2010), para 1.
[61] Rawlings (n 59) 198.

persons to hold ministerial posts from his party.[62] These agreements were complemented by an effort to coordinate governmental policies and actions at the coalition level, through formal or informal committees, like the 'Coalition Committee' in the UK or the provision for 'a constant and institutionally organised intergovernmental coordination'[63] at the 2013 Coalition Agreement in Greece. All these arrangements mean that the authority of the Prime Minister, the *par excellence* conventional post of the British constitution[64] and the dominant figure of the Greek polity, was to a great extent curtailed, subject to either the agreement or even the advice of the coalition partner.

The aforementioned arrangements changed to a significant extent the content of the collective responsibility conventions in the UK, simultaneously forming practices that could gain with time normativity and possibly conventional status, if a new coalition emerges in the future. This prospect may seem currently unlikely but should not ruled out, given the rapid pace of political changes in modern democracies. Yet, it is 'agreement to differ' that has been viewed as the major constitutional issue regarding the relationship between coalitions and collective responsibility. Suspension of collective responsibility is, however, neither something novel nor related exclusively to coalition governments. It is rather an aspect of the enabling character of the relevant conventions.[65] Since this kind of convention aims at facilitating the political actors to fulfil their constitutional role, as shown in the previous chapter, the Cabinet decision to suspend the convention does not amount to its violation, but, on the contrary, to another way of implementing the reason

[62] In Greece, the minor coalition partner's leader is not always appointed Deputy Prime Minister.
[63] General Secretariat of Information and Communication and General Secretariat of Media (n 30), para 42.
[64] AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2014) 19.
[65] Marshall (n 4) 8.

behind it.[66] This is exactly why the Cabinet Manual provides that 'All government ministers are bound by the collective decisions of Cabinet, save where it is explicitly set aside'.[67]

Moreover, it is indicative that during the last 50 years in the UK, the collective responsibility convention has been suspended three times, all of which are connected to European affairs: in 1975 over the referendum on continued EEC membership, in 1977 over direct election to the European Parliament, and finally in 2016 over the Brexit referendum. Therefore, the coalition's 'agreement to differ' was something new only to the extent that setting aside the convention where needed became a matter of an *a priori*, written agreement[68] between the partners and was not based on the sole discretion of the Prime Minister. Thus, James Callaghan's quote that 'collective responsibility applies, except in cases I announce that it does not'[69] is not true in the case of a coalition agreement. This is not something that threatens collective responsibility conventions; it is on the contrary a major step towards the modernisation of these conventions based on an open, transparent agreement and not on 'the unfettered discretion of an official'.[70] The same goes *mutatis mutandis* in Greece for differentiations among coalition partners, one of which referred to an important vote on building a mosque in Athens,[71] with the only difference

[66] Ibid.
[67] *Cabinet Manual* (n 37), para 4.2.
[68] *Coalition Agreement for Stability and Reform* (n 60) para 2.1.
[69] Joseph Jaconelli, 'Continuity and change in constitutional conventions' in Mads Qvortrup and Vernon Bogdanor, *The British constitution: continuity and change: a festschrift for Vernon Bogdanor* (Hart 2015) 137.
[70] Ibid.
[71] 'Independent Greeks do not vote the provision for a mosque in Votanikos' [Οι Ανεξάρτητοι Έλληνες δεν ψηφίζουν τη διάταξη για τζαμί στο Βοτανικό] (*Proto Thema*, 3 August 2016) <http://www.protothema.gr/politics/article/600259/horis-tous-anexartitous-ellines-tha-htistei-to-tzami-sto-votaniko>, accessed 20 July 2020 (in Greek).

being that collective responsibility is not there a convention but is based on a written constitutional provision.[72]

Finally, returning to the crisis saga, it is worth remembering two cases where conventions have been proven of paramount importance for preventing political turmoil in the Greek case. The first case concerns the Council of political leaders, which was characterised as a convention helping to enable the President of the Republic to maintain and reinforce national unity. It goes without saying that this particular convention is extremely important in times of crisis and deep political division; some of these Councils have led to the production of written agreements of the political leaders during critical circumstances, like the agreement on the refugee issue in April 2016[73] or the 4-point agreement after the Greek referendum and before the final stage of negotiations in July 2015, when the provision that the no vote 'does not constitute a mandate for rupture'[74] saved an almost lost game for Greece. Such agreements, although thin regarding their content, constitute written statements of a minimum of political unity in moments where this unity is in no way self-evident.

On the other hand, the convention limiting the President's power to 'send back' a bill is equally important in times of crisis. When the anti-austerity rhetoric was at its peak, the President was called by the opposition to exercise this power, through a view of the

[72] Art. 85.
[73] 'Common Announcement after the Council of political leaders' [Κοινή ανακοίνωση μετά το Συμβούλιο Πολιτικών Αρχηγών] (*Ta Nea*, 4 March 2016) <http://www.tanea.gr/news/politics/article/5340173/synedriazei-to-symboylio-politikwn-arxhgwn-gia-thn-prosfygikh-krish>, accessed 3 August 2016 (in Greek).
[74] Chasapopoulos Nikos, 'Council of political leaders: The announcement-agreement of 4 points will be submitted by the Greek part in the summit' [Συμβούλιο πολιτικών αρχηγών: Η ανακοίνωση – Συμφωνία 4 σημείων θα κατατεθούν από την ελληνική πλευρά στη Σύνοδο Κορυφής] (*To Vima*, 6 July 2015) <http://www.tovima.gr/politics/article/?aid=719870>, accessed 3 August 2020 (in Greek).

constitution that overlooked the existence of a limiting convention on this issue. In some cases, scholars went so far as to suggest that by not exercising his power to send back a memorandum bill[75] 'the President violated the constitution and is liable for that, as provided by Art. 49 Par.1 of the Constitution'.[76] These analyses and accusations are not only based on the political ambitions of authors, but also make use of the dominant legalism in Greek theory, focusing exclusively on written constitutional provisions. For the sake of institutional stability, the then President withstood such pressures. He has thus continued a series of precedents dating back to 1864.

It has become obvious so far that during changing circumstances, conventions retain their importance for maintaining political continuity and in many cases provide the way to avoid constitutional deadlocks and achieve a minimum of national unity. At the same time, the UK Coalition Agreement's claim that there is 'no constitutional difference between a Coalition Government and a single party Government',[77] did not depict reality, at least as far as conventions are concerned.[78] Nevertheless, coalition governments both in the UK and Greece have not been proven threatening for conventional regulation in general.[79] On the contrary, the coalitions' working practices as well as agreements have enriched conventions in both jurisdictions examined.

[75] Statute 4093/2012.
[76] George Katrougkalos, 'The liability of the President of the Republic for the memorandum's para-Constitution' [Η ευθύνη του Προέδρου της Δημοκρατίας έναντι του μνημονιακού "παρασυντάγματος"] (2013) 57 DtA (in Greek) 109,114.
[77] *Coalition Agreement for Stability and Reform* (n 41) Introduction.
[78] Bogdanor (n 47) 48.
[79] On Fixed Term Parliaments Act that replaced the conventions relating to the dissolution of Parliament and, to some extent, the confidence vote cf. Andrew Blick, 'Constitutional Implications of the Fixed-Term Parliaments Act 2011' Parliam Aff (2016) 69 19, 25.

6.4. The decision to go to war and conventions in the 21st century

The need for the House of Commons to approve deployment of armed forces overseas has been characterised as a 'doubtful convention',[80] and questions have been raised regarding its normativity. In this section, I argue that this forms the paradigmatic case of emergence of a new convention in the 21st century, and further suggests that in some areas of the constitution, conventional regulation is preferable to legal. In other words, it answers questions of both how and why a convention emerges.

To start with, it is worth mentioning that all the precedents relating to this practice have taken place in the 21st century. Therefore, this convention does not date back to 20th century or earlier, like the majority of conventional rules.[81] Moreover, since it is based on debates and voting in Parliament as well as on government's response to them, it is much easier to single out the precedents. The first was the Blair government's decision to submit the decision to invade Iraq in 2003 to vote by Parliament. This was followed by a vote on the Libya bombing in 2011 as well as two votes on Syria in 2013 and 2015. These precedents are an excellent opportunity to examine the 'how' question regarding the emergence of a contemporary convention. Since this particular convention is a limiting, negative one, the 'stress test' would inevitably include a case where governmental action is prevented due to respecting the emerging norm.

[80] Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP 2011) 192.
[81] Gavin Phillipson, 'Historic' Commons' Syria vote: the constitutional significance (Part I)' (*UKConstL Blog*, 19 September 2013) <https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>, accessed 10 August 2020.

On this point, the most decisive moment was the disapproval by the House of Commons in 2013 of a proposed attack on Syria.[82] The government's response clearly indicated that it considered itself bound by the decision: it refrained from the proposed action. Thus, the negative vote resulted in a complete shift of governmental policy. It seems that a new, full-blooded convention has emerged limiting the action of the UK government. This is the turning point in the life of a convention aiming to ensure democratic accountability[83] for the exercise of an ancient power,[84] the war prerogative.[85] In doing so, the convention also contributes to promoting compliance with UN decisions , a factor that proved important during the recent inquiry over the Iraq war.[86]

The older convention that had transferred the real power of decision on war from the Crown to the Cabinet had proved questionable with regard to its legitimacy and democratic credentials. One of the most important decisions for a state was in the hands of a small group of officials, unchecked by parliament. This legitimacy gap was filled on the 29th of August 2013. Not only did the government give Parliament the opportunity to express its view, but it also felt bound to abide by Parliament's decision. The fear of political censure by public opinion—the political difficulties[87] that would be caused if the government decided not to follow the rule—led to an announcement that it 'got the message'.[88] Thus, the fact that in 2013 the government decided to rule out a British attack after its parliamentary defeat is indicative of the normative significance that this convention

[82] Hazell (n 21) 177.
[83] House of Lords Select Committee on the Constitution, *Waging war: Parliament's role and responsibility* HL 236 I (House of Lords 2005-2006), para 36.
[84] Phillipson (n 81).
[85] Bradley, Ewing and Knight (n 47) 256.
[86] *The Report of the Iraq Inquiry: Executive Summary* HC 264 (July 2016), para 25, 214.
[87] Jennings (n 9) 134.
[88] Phillipson (n 81).

has gained in the short period since the emergence of the first relevant precedent in 2003; it is a powerful demonstration of the continued normativity of conventions in the 21st century.

Nevertheless, if the reason behind the rule is legitimacy and accountability regarding a decision to go to war, which are important both for the functioning of the British democracy as well as for the 'morale of service personnel',[89] this does not entail that a convention is the only regulatory technique available. Nonetheless, there are reasons to think that it is the best suited regulatory technique available. In particular, constitutional convention is in this field preferable to its basic competitor, legal regulation.[90] First of all, in this case conventions provide the flexibility needed for the deployment of armed forces.[91] The rigidity of law is not only unnecessary but also potentially harmful when it comes to a number of aspects of national security, where there is both a margin of appreciation for the government regarding deployment of forces as well as grey areas between diplomatic and military action in an evolving international environment.[92] The maintenance of this flexibility to the maximum degree has also been decisive against the formalisation of this convention in a Parliament Resolution.[93] The House of Lords Constitution Committee has stated that the 'risks and difficulties associated with

[89] House of Lords Constitution Committee, *Constitutional arrangements for the use of armed force* HL 46 (House of Lords 2013-2014), para 40.
[90] Ibid para 61.
[91] Ministry of Justice, *The Governance of Britain: War powers and treaties: Limiting executive powers* (Cm 7239, 2007), para 6, 7.
[92] Ibid para 44.
[93] Gavin Phillipson 'Historic' Commons' Syria vote: the constitutional significance. Part II – the way forward' (*UKConstL Blog*, 29th November 2013) <https://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/>, accessed 12 August 2020.

formalisation outweigh any benefits which it might bring'.[94] Thus, the more flexibility is needed, the more political actors seem to trust conventional regulation in its traditional unwritten from, refusing the prospect of a formalisation process. Conventions in the 21st century are not rules 'of an illiterate society or of an oral tradition';[95] rather, some conventions should be formalised and some should not, depending on the degree of flexibility needed.

Moreover, the key element in choosing conventional regulation over statute is what actually differentiates it from legal regulation, namely justiciability. Turning a convention into law always entails the risk of rendering it subject to judicial review.[96] At the end of the day, this is an issue of the appropriate *forum*; by being regulated by convention, the use of armed forces abroad is subject to Parliament's[97] democratic scrutiny, debate and vote;[98] If turned into law, there would be a danger of courts intervening in deployment decisions. Therefore, since Parliament and the public opinion are the appropriate *fora* for holding government into account, and since the aim of regulating the deployment power is the democratisation of an exercise of the prerogative, a constitutional convention is preferable.

This issue, which relates to the 'political question' doctrine by which the US courts have limited themselves when faced with similar questions, regarding them as 'unsuitable for judicial resolution, and constitutionally relegated to the political branches',[99] suggests the relative advantages as well as the basic characteristics of conventional regulation.

[94] House of Lords Constitution Committee (n.89), para 61.
[95] PA Morton, 'Conventions of the British Constitution' (1991-1992) 15 Holdsworth L. Rev 114, 162.
[96] House of Lords Select Committee on the Constitution (n 83), para 82.
[97] Ministry of Justice (n 91).
[98] House of Lords Constitution Committee (n 83), para 54.
[99] David Jenkins, 'Constitutional reform goes to war: some lessons from the United States' [2007] PL 258, 266.

Moreover, the UK and US positions regarding decisions to go to war present some similarities. Despite formal legal requirements in the US, in both countries there is a significant degree of interaction between the branches of government.

The US constitution provides that the President is the 'Commander-in-Chief'[100] of the armed forces but that Congress has the power to decide whether to authorise a declaration of war. The experience over the years suggests that these two constitutional provisions speak to each other. Congress has not officially declared war since World War II (although it issued an authorisation for the 'use of force' for the second Gulf war). But since US armed forces have nonetheless engaged in numerous wars since 1945 under the direction of the US President, it would seem that a power-conferring convention has emerged, enabling the President to deploy military forces in certain circumstances. Such a convention would seem to be necessary at least in cases of emergency or immediate threat to the US and the life of its citizens. It has been argued that on other occasions the President should not act without approval by Congress.[101] There is ongoing tension between the branches of government, which could be seen when the US was having a debate over whether to attack Syria in 2013 similar to that of the UK. Although Congress enacted the War Powers Act in 1973 to limit the power of the President to initiate wars,[102] various Presidents have contended that parts of the Act are unconstitutional. The current settlement—which remains the subject of tension, debate, and ambiguity—could be described as a continuing negotiation over a constitutional convention.

[100] Akhil Reed Amar, *America's constitution: a biography* (Random House 2005) 188.
[101] Wilson (n 11) 688.
[102] War Powers Resolution/ War Powers Act of 1973 (50 U.S.C. 1541–1548).

Thus, it is clear, that both the UK and US conventions regulate the decision to go to war as an inter-branch relationship, though in a different way: the US convention enables the executive, namely the President, while the UK conventional rule limits it, by calling for parliamentary approval. This reflects different regulatory priorities: in the UK the aim is the democratisation of the power of the Crown to decide going to war. On the other hand, in the US the capital-C Constitution has accorded the Congress the power to declare war, which is mitigated and accustomed to the contemporary needs and challenges for a superpower by the power-conferring convention. The latter empowers the President who, in comparison to the founding era, has been equipped with more democratic credentials. The presidential office has been transformed from one elected by an unbound Electoral College (in accord with original constitutional design) into one whose authority derives from the votes of the people in their respective states.[103] In any case, both in the UK and the US, the need for autonomy of the political branches from the intervention of the judiciary on war powers is clear; this is why both areas are conventionally regulated, remaining unenforceable by court.

Therefore, during the last decades in the UK, by being flexible and not enforced by courts, and through boosting political accountability mechanisms, conventions have been proven more suitable for democratising one of the most sensitive prerogative powers. The emergence of this convention in the 21st century was neither accidental nor obligatory. It

[103] Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' [2013] University of Illinois L Rev 101, 111; James Albert Woodburn, The American Republic and its Government (2d ed. New York 1916) 216-217

was the result of an informed and detailed discussion among political actors,[104] a case that can be considered paradigmatic not only for the UK but a wide variety of jurisdictions.

6.5. Conventions and recent political tensions: Brexit, Trump presidency and conventional regulation

Two recent political developments, namely the Brexit procedure in the UK and the election of President Donald Trump in the US have had a considerable influence on the perception of the role of constitutional conventions and their normativity in the two jurisdictions. In both cases, questions arose regarding the importance of conventional rules in times of political tension. The answers given by scholars in both countries are of particular importance for the future of conventional regulation. In the UK, contrary to what has been recently decided by the Supreme Court, many academics supported the continuous importance of the distinguishing characteristics of conventions. In the US, a certain tide of authors bringing out the importance of conventions for democratic coexistence has recently emerged.

In Chapter 3, I have presented the relevant discussion following the *Miller/Cherry* decision.[105] For the purpose of the present analysis, it is important to note that the Supreme

[104] On the question whether conventions can be deliberately created Jaconelli is of different opinion, cf. Jaconelli, 'The nature of constitutional convention' (1999) 19 Leg Studs 24, 39-40. Jaconelli though refers to this particular convention recently in Jaconelli, 'The Proper Roles for Constitutional Conventions' (2015) 38 Dublin ULJ 363, 380-381.

[105] Cf 3.3.2.; *R. (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2019] 3 W.L.R. 589.

Court on the one hand and a number of academics on the other have expressed different views regarding, *inter alia*, the convention of parliamentary accountability. Although it had shown respect towards the non-enforceability of the Sewel convention in *Miller (no 1)*,[106] the Supreme Court has made a move towards the covert enforcement of conventional rules through the vehicle of constitutional principles in *Miller/Cherry*.[107]

Miller/Cherry conveys a problematic message regarding the legal-political divide and the role of conventions in times of political tension.[108] The court impliedly considered the convention of political accountability as inadequately protected in the political *fora* and turned it into a legal rule through the theoretical construct of (legal) constitutional principles.[109] Therefore, an important question arises for conventions: is political turmoil a necessary and sufficient condition for legalising the relevant constitutional issue, turning conventional rules into legal principles, through the intervention of the judiciary? *Miller/Cherry* is in this respect unprecedented for the UK constitutional edifice. It should be remembered that the Supreme Court in *Miller/Cherry* ruled on the prorogation of Parliament, an issue which had not only caused a significant amount of controversy but

[106] *Miller (no 1)* (n 34).
[107] Paul Yowell, 'Miller (No 2) and political questions' (*Policy Exchange*, 30 September 2019) <http://judicialpowerproject.org.uk/paul-yowell-miller-no-2-and-political-questions/> accessed 5 March 2020; Martin Loughlin, "A Note on Craig on Miller; Cherry" [2020] P.L. 278, 280; Contra Mark Elliott, 'The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?' (*Public Law for Everyone*, 24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 30 March 2020.
[108] Stephen Tierney, 'Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision' (*Policy Exchange*, 30 September 2019) <https://policyexchange.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-miller-cherry-decision/> accessed 4 March 2020.
[109] John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (*Policy Exchange*, 28 September 2019) 5, <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/> accessed 28 February 2020; Contra P. Craig, "The Supreme Court, Prorogation and Constitutional Principle" [2020] PL 248, 259.

was also an episode of the Brexit saga.[110] The fact that the Supreme Court used the conventionally grounded parliamentary accountability as a criterion for deciding on the exercise of the power to prorogue shows that the judiciary covertly enforced a convention, as the solution to the political and constitutional deadlock.

Are all political tensions destined to be resolved in the judicial *fora*? In other words, are conventions part of an 'everyday constitution', which is replaced by a strictly legal 'rainy-day constitution' policed in its whole extent by the judiciary? The *Miller/Cherry* decision was met with mixed responses, including some that were highly critical.[111] The influence of the decision on future adjudication is open to debate.[112] Above all, the attempt to legalise a controversial issue is in conflict with the UK political constitutional tradition[113] and closer to the continental European legalism. It is important, however, to mention that the court itself, taking into consideration the implications of the general application of its ruling, characterised the decision as a 'one off'.[114]

In my view, covertly turning a convention into a justiciable rule amounts to unconstitutional conduct; unconstitutionality is not only the result of the violation of the

[110] Nick Barber, 'Constitutional hardball and justified development of the law' (Policy Exchange, 29 September 2019) <http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/> accessed 30 September 2019.
[111] Among other Finnis (n 109); Yowell (n 107); Tierney (n 108). In Greece Charalampos M Tsiliotis, 'The prorogation in Westminster as a field of tension between constitutional law and politics: Thoughts after the UK Supreme Court decision on 24.9.2019 (Cherry; Miller)' (2020) 5/2019 Efimerida Dioikitikou Dikaiou 631-648.
[112] Nick Barber, 'Constitutional hardball and justified development of the law' (*Policy Exchange*, 29 September 2019) <http://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/> accessed 30 September 2019.
[113] Cf Panagiotis Doudonis, 'Brexit, the Miller case and the UK constitutional identity' 6/2016 (2017) Efimerida Dioikitikou Dikaiou; Mike Gordon, 'The Prorogation Case and the Political Constitution' (UK Const L Blog, 30 September 2019) <https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/> accessed 5 March 2020.
[114] *Miller/Cherry* (n 105) 1.

content of a conventional rule but also of its form and distinguishing characteristics. Since the *differentia* of conventions, namely non-enforceability in court, constitutes a boundary in the legal-political constitutional divide,[115] a boundary not only among rules but also among political and judicial censure mechanisms, impliedly enforcing a convention translates into violating core elements of the constitutional structure. Such a legalistic approach could thus lead to further destabilisation of the constitutional edifice and produce a second—derivative—political tension which, in the best-case scenario, can be resolved in the political *forum* of the electorate.

Furthermore, a proof of the continuous importance and effectiveness of conventional rules in safeguarding the stability of the constitutional edifice surprisingly comes from the US. Donald Trump's presidency has given rise to an interesting discussion among a number of scholars on informal constitutional rules and their role within the US constitutional edifice.[116] Certain authors who had previously written on informal constitutional rules[117] revisited the notion of conventions in light of Donald Trump's election and presidency.

First of all, academics have brought out the existence of conventional rules in order to prove that the have been disregarded—though not necessarily violated—by the US President.[118] This is particularly important for a jurisdiction whose dominant academic

[115] Finnis (n 109) 5.
[116] Cf Neil S Siegel, 'Political Norms, Constitutional Conventions and President Donald Trump' 93(1) (2018) Indiana Law Journal, 177, Josh Chafetz and David E Pozen, 'How Constitutional Norms Break Down' 65 (2018) UCLA L Rev. 1430.
[117] Among others, Pozen, 'Self-Help and the Separation of Powers' 124 (2014) Yale L J 2; Curtis A Bradley & Siegel, 'Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers' 105 (2017) Geo L J 255.
[118] Cf 2.3.5.

tradition neglected conventions. More important than the presentation of conventional rules, however, is the realisation of their role in stabilising the constitution[119] in times of political tension, through the promotion of democratic coexistence.[120] The relevant discussion is not restricted within the bounds of constitutional law academic literature. Steven Levitsky and Daniel Ziblatt, for example, in their book *How Democracies Die* argue for the importance of the 'unwritten rules of American politics', including among them a number of constitutional conventions. [121]

Bringing notice to the idea that 'Democracies work best—and survive longer—where constitutions are reinforced by unwritten democratic norms'[122] is of paramount importance for the future of conventional regulation. It is important to note that Ziblatt and Levitsky do not use the term 'unwritten' in the normative, but in the descriptive sense: these rules happen to be unwritten; this does not mean that they should be so.[123] What they actually want to underline is the importance of rules which are political and happen to remain to a large extent unwritten within the US constitutional edifice.[124] Conventional rules are particularly crucial for the stability of the whole US constitutional edifice, providing the rules of political confrontation. A constitution where such rules are

[119] Cf Mark Tushnet, 'The Pirate's Code: Constitutional Conventions in US Constitutional Law'45 (2018) Peperdine Law Review 481, 502.
[120] Siegel (n 116) 187 '. In the words of Neil Siegel, conventions have the ability 'to help the US government function at least tolerably well by keeping partisanship within reasonable bounds'
[121] Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History reveals about our Future* (Viking 2018) 118; Panagiotis Doudonis, 'The heritage and outlook of political constitutionalism, 40 years after J A G Griffith's Chorley Lecture' [Η κληρονομιά και οι προοπτικές του πολιτικού συνταγματισμού, 40 χρόνια μετά τη Chorley Lecture του J.A.G. Griffith] (2019) Efimerida Dioikitikou Dikaiou 393 (in Greek).
[122] Ibid 8.
[123] Morton (n 95).
[124] As Tushnet has put it 'Those who study the US Constitution in law schools have come to realise something that political scientists understood long ago' Tushnet, 'The Pirate's Code: Constitutional Conventions in US Constitutional Law' (n 119) 483.

systematically violated runs serious dangers, since the elements of 'mutual toleration and forbearance' among constitutional actors will be missing.[125] Thus, not only is the role of conventional rules realised on this issue but also the negative repercussions of their violations are becoming more obvious.[126]

The importance of the relevant discourse in contemporary US public debate has also been showcased very recently in the Supreme Court decision in *Chiafalo v Washington*.[127] The case arose following the 2016 election when three presidential electors from Washington did not vote in accord with their pledge to Hillary Clinton but instead cast their vote for Colin Powell, as part of an effort to urge other electors to vote for him instead of Donald Trump. *Chiafalo v Washington* decided the constitutionality of state laws that impose penalties like fines on electors for breaking their pledge.[128]

This case is closely connected with the constitutional convention restricting the choice of candidate made by electors, and it echoes the public debate after the popular vote for Donald Trump and various calls for electors to defect.[129] The case itself, although somehow legalistic in basing the power of the states to bind electors on the wording of

[125] Levitsky and Ziblatt (n 121) 138.
[126] Pozen and Chafetz (n 116) make a distinction between 'norm destruction' and 'norm decomposition' Cf 2.3.5.
[127] *Chiafalo et al v Washington* 591 U.S.
[128] Cf *Ray v. Blair*, 343 U S 214, 228 (1952), where the argument that the Constitution demands freedom of choice of electors were rejected.
[129] Cf Allen Guelzo and James Hulme, 'In defense of the electoral college' (*The Washington Post*, 15 November 2016) https://www.washingtonpost.com/posteverything/wp/2016/11/15/in-defense-of-the-electoral-college/?utm_term=.3cdc13d97d0c#comments> accessed 28 October 2017; Christopher Suprun, 'Why I Will Not Cast My Electoral Vote for Donald Trump' (New York Times, 5 December 2016) <https://www.nytimes.com/2016/12/05/opinion/why-i-will-not-cast-my-electoral-vote-for-donald-trump.html?smid=tw-share> accessed 25 October 2017.

Article 2 of the US Constitution,[130] contains interesting references to what it calls 'long-settled and established practice', which may have 'great weight in a proper interpretation of constitutional provisions',[131] as well as to the work of Keith Whittington,[132] who has characterised the relevant practice as a 'putative convention'.[133]

The kind of laws at issue in the case—fines of a couple thousand dollars and laws demanding removal of faithless electors (where effectiveness depends on the elector confessing his intention)—are not the most effective deterrent against electors voting for another candidate. What actually keeps them from becoming 'faithless electors' is the underlying reason for the conventional rule[134] and the censure that would be entailed by breaching the convention. So, in my view there exist two rules on the same issue, asking for the same thing: on the one hand, legal rules in some (not all) states, which provide for fines for faithless electors, and on the other hand a political rule—convention—which binds them politically. Deviation from the convention could create such public outrage that a candidate be elected based on the vote of faithless electors might refuse to accept the position.[135] Any President elected on the basis of such votes would face a crisis of legitimacy.

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[130] Vermeule, 'Fidelity and Faithfulness' (*Ius and Iustitium*, 6 July 2020) < file:///C:/Users/pdoud/OneDrive/Documents/Fidelity%20and%20Faithfulness%20%E2%80%93%20Ius%20&%20Iustitium%20Vermeule%20Supreme%20Court.pdf> accessed 24 August 2020.

[131] *Chiafalo v Washington* (n 123) 2, citing *The Pocket Veto Case*, *Bands of the State of Washington v. United States and Okanogan, Methow, San Poelis, Nespelem, Colville, and Lake Indian Tribes v. United States (The Pocket Veto Case)* 279 U.S. 655 (1929279 U S 655, 689.

[132] *Chiafalo v. Washington* 14; Whittington, 'Originalism, Constitutional Construction, and the Problem of Faithless Electors' 59 Ariz. L Rev (2017) 903, 911.

[133] , Keith E Whittington, 'The Status of Unwritten Constitutional Conventions in the United (n 102) 111.

[134] Closely connected to democracy.

[135] James Albert Woodburn, *The American Republic and its Government* (2nd ed New York 1916) 216-217, Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' (n 102) 111.

To sum up, the recent discussion in the United States and elsewhere, although initiated by fears of deviations from conventional rules, is carrying a positive message for the future of conventional rules and the appreciation of their role within the constitutional edifice. Even in countries without an academic tradition regarding conventions, there are voices which highlight their importance and criticise any deviation from them as unconstitutional. Regardless of political tensions, scholars and an informed public can guarantee the continued importance of the political nature and normativity of conventional rules and through them, the stability of the constitutional edifice and the democratic accountability and coexistence of political actors.

Conclusion

Some areas of the constitution should be regulated by conventions, namely particular constitutional issues are better regulated by conventional rules. The nature and normativity of conventional rules provide invaluable guidance for considering conventions as the optimal regulatory technique in certain cases. Flexibility, non-justiciability and political character provide the basic arguments for the conventional regulation of political areas of the constitution—enabling us to say that exploring the nature and normativity of conventions is actually an exercise in constitutional design.

During the last 20 years, conventions have successfully addressed great challenges in a rapidly changing constitutional environment in the jurisdictions examined. Not only have they retained their conventional character after being formalised in the UK, for example in the Cabinet Manual, but also important constitutional reforms have been in

many cases accomplished through or accompanied by new conventions. In the economic and constitutional environment of the Greek crisis, conventional regulation has faced pressures. Nevertheless, it has succeeded in providing the framework for a minimum of national unity and institutional stability. Coalition governments in both the UK and Greece, initially viewed as threatening for conventional regulation, amended and enriched conventions and gave rise to new constitutional practices that could evolve into conventional rules in the near future. Finally, the need to seek approval of the House of Commons before deployment of armed forces overseas is an example of the emergence of a new convention that, by effectively holding the executive to account, can show the way for conventional regulation in the 21st century. Conventions retain their importance, since there will always be cases where major areas of the constitution need to be regulated with flexibility, based on the principles of democratic accountability.

The current political tensions in the UK and the US, following the Brexit referendum and the election of President Donald Trump, bring out the importance of conventions in the discourse of political crisis. In the UK, the Supreme Court, although respecting the non-justiciable character of the Sewel convention in *Miller (no 1)* impliedly turned parliamentary accountability into a legal and judicially enforceable rule in *Miller/Cherry*. In the US, the recent shift of interest of some academics towards conventional regulation implies the importance of the normativity of conventional rules for democratic coexistence and democracy in times of political tension.

CONCLUSION

'...αὖτως δὲ ναὸς ὅστις ἐγκρατῆ πόδα
τείνας ὑπείκει μηδέν, ὑπτίοις κάτω
στρέψας τὸ λοιπὸν σέλμασιν ναυτίλλεται'
Σοφοκλέους, Ἀντιγόνη 715-717

'And so it goes for boats. When the captain tightens all the sails and goes against the wind, the boat will overturn and he will have to start swimming.'
Sophocles, *Antigone* 715-717

This thesis began with Plato and ends with a passage from Sophocles. It seems that ancient Greek writing is more illuminating with regard to conventions than its modern Greek counterpart with its disregard for the issue. In this short passage, Haimon tries in vein to persuade his father Creon about the catastrophic consequences of inflexibility in crafting the rules of the *polis*, using the image of a sailboat. Constitutional reality, like the wind in *Antigone*, tends to destroy stiff constitutional edifices, while favouring more flexible ones.

This thesis has stressed the importance of the flexibility of conventional rules. Moreover, it has refrained from associating it with their unwritten nature. Not only can conventional rules be written and codified, but they also retain their conventional character and flexibility in this scenario. This happens because flexibility is in actuality connected with the political, non-justiciable character of conventions: disputes and ambiguities arising from conventional rules are not resolved in the judicial *fora*, which are characterised by rigidness. A constitution comprised exclusively of rigid, legal and justiciable rules runs

the risk of being overturned by the winds of political and constitutional crises, like the boat in Sophocle's allegory.

Rigidity stands on the opposite side of flexibility, which is needed in political interaction; the present thesis has shown that the constitution is not only comprised of legal rules but also of political rules, with the central case of the latter being constitutional conventions. Arguing for the political nature of conventions translates into arguing for the special, non-legal character of their normativity. Proving that conventions are equipped with normativity and analysing its character and function as coordination towards the enhancement of democratic accountability has been conducted in this thesis through various stages.

Firstly, I have chosen three jurisdictions where academic literature has a completely different stance towards conventions: in the UK, their homeland, conventions are theorised on a case-by-case basis, though academic writings lack systematic character. In the US, references to conventions have been so infrequent that it could be said that conventions are neglected by the dominant authorities of the past. In Greece, conventions are considered as a UK peculiarity and are almost rejected as of no particular importance for the Greek constitutional system. Despite the different academic traditions and attitudes towards them, conventions are present in constitutional reality and have a role to play in all three jurisdictions examined.

These differences in academic position pose a strong influence on the perception of conventions and showcase the importance of proving that conventions exist as a category of rules and that they are the best way to describe the relevant practices and their normative

character. This is why the next stages of the thesis involved the presentation of the normative character and rule-quality of conventions as well as their *genus* and *differentia*. Regarding the former, it has been shown that conventional rules do not simply describe but guide the conduct of political actors, not only in the traditional sense of limiting their action but also through conferring powers on them, enabling the machinery of government to fulfil its role and attain the objectives of the state.[1] Many cases which are traditionally considered a violation of conventional regulation actually simply constitute a decision by a political power not to exercise a power or right.

This observation opened up discussion regarding the violations of conventional rules and their consequences. It has been shown that many cases that are presented as breaches of conventional rules and cause doubt among scholars about the overall ability of conventions to regulate effectively the constitution are based on misconceptions regarding the true nature of the normativity of conventional rules.

We should consider the rich universe of the normativity of conventions and ask relevant questions before speaking of an outright breach of a 'full-blooded' convention. These questions pertain first to the nature of the conventional rule at hand (whether it is duty-imposing or power-conferring), the reason for the rule, and its importance for the democratic functioning of the constitution. We should further ask how broad the rule is and whether it can be equally served through another interpretation or whether the creation of an exception/change leaves the reason unharmed. Finally, if all the previous questions are answered and we find that there is a breach or a claimed exception to the rule that goes

[1] N W Barber, The principles of constitutionalism (OUP 2018) 6.

beyond its reason, we should ask whether there is a constitutional justification such that the conduct of political actors should cause a change to or abrogation of the rule.

Turning to the issue of *genus* and *differentia* of constitutional conventions, in other words to the question whether they constitute a separate category of rules, conventions have been shown to belong to the broader category of constitutional norms or constitutional regulatory techniques, which include rules regulating the area of the constitution. Conventional rules differ from the other members of their *genus* since they are non-enforceable in court due to their political nature. Their relationship with constitutional custom has been indicative of the difference between legal and political informal constitutional rules: flexibility is a trait associated with conventions, regardless of whether they are unwritten or codified, whereas unwritten constitutional customs lack flexibility and thus are of less practical use due to their legal and justiciable element. At the same time, the traditional comparison of convention with law is in a sense erroneous: not all categories of law are species of the *genus* of constitutional norms. In order to be compared with constitutional conventions, law should have a constitutional content: this happens with both provisions of constitutional statutes and codified constitutions.

Thus, non-enforceability of conventions in court and resolution of the relevant disputes in the political *fora* is not just an element of the comparison of conventions with law, as traditional theory supports, but rather something more important: it constitutes the *differentia* of constitutional conventions, the characteristic which distinguishes them from other members of the *genus* of constitutional norms. It is closely connected to their political character and flexibility.

Based on these findings, the next stage involved further exploring the political nature of conventions, in relation to constitutional history, theory, and the structure of the constitutional edifice. First, it has been shown that there is a close connection between the 'political' character of the UK constitution and the prominence of conventional rules. The importance of conventions as political constitutional rules is, however, not restricted to UK constitutional history: there are examples where conventional political regulation has been of exceptional importance for different jurisdictions. Conventions present a commonality of purpose and method to what has been described and recently revisited as political constitutionalism. The constitution is a *synthesis* of legal and political elements. Politics is not simply a descriptive science, and since it has a pervading *telos* in Aristotle's political work—'the well-being of the citizens'—can include within its bounds normative rules, like conventions The academic debate over the relation between law and convention is at the end of the day also a debate over the methods of legal and political constitutionalism, as well as over the *forum* for the resolution of questions which arise out of the implementation of constitutional rules

The next, crucial stage of the analysis has answered the twin questions of whether conventions should be normative and what is the reason behind the normativity of conventional regulation. The answer to the former question has been approached through imagining two alternative scenarios: a constitution with non-normative conventions or a constitution comprised solely of legal rules which replace constitutional conventions. Both these scenarios were shown to be far from ideal. At the end of the day, either depriving conventions of their normativity or replacing them with legal rules would seriously risk the

stability of every constitutional edifice, affecting the balance of powers between constitutional organs.

The reasons for the normativity of conventions do not amount to simple coordination of political actors. The nature of the constitution precludes any pure coordination approach without a consideration of the content of the relevant rules. Thus, coordination considerations like those included in Finnis's discussion of customary authority should be accompanied with a goal-oriented component. The general aim of coordination by conventions is democratic accountability. This general purpose is present at the level of the framework principle of conventions as a category of rules but also specified through the reason for the existence of individual conventions. In this way, conventions vary in importance depending on how close their reason is to the framework purpose of democratic accountability. Regarding the relationship between conventions and democracy, it should be recalled that the sanctioning mechanism for deviations from conventional rules is the democratic procedure itself.

Finally, I have made some remarks on the present and future of conventional regulation. Firstly, it has been shown that there are areas of the constitution that are better regulated by conventions; in other words, they should be regulated by conventional rather than legal rules. Moreover, conventions have been proven to successfully address challenges posed by political crises and constitutional developments in recent years in all three jurisdictions examined. Conventions play a crucial role in regulating novel situations, such as the desire to involve Parliament in decisions to go to war in the UK and coalition governments in both the UK and Greece and they can address challenging developments

like the Trump administration in the US. These and countless other situations witness to the continuing importance of constitutional conventions and their normative foundation.

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