

The Legal Relevance of Constitutional Conventions in the United Kingdom and the Netherlands

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1. Introduction

1.1 Background

Constitutional conventions are rules of political practice accepted as obligatory by those concerned in the working of the constitution.¹ This category of rules occupies a position between mere political practice and constitutional law. Conventions can be found in constitutions all over the world,² but are said to play a particularly prominent role in the constitutional system of the United Kingdom. Noteworthy examples are the rule that the monarch does not refuse to sign a Bill approved by Parliament and the rule that the UK Parliament does not legislate on matters devolved to Scotland without prior consent of the Scottish Parliament. To unscramble the complexities of constitutional conventions, UK constitutional scholars have paid a lot of attention to them. A generally accepted proposition in the debate on conventions is that conventions are not *legal* rules. Against the background of this maxim, an interesting question has come to occupy the debate on conventions in the UK: despite not being legal rules, can conventions be enforced before courts? The landmark *Miller* case before the UK Supreme Court has recently fuelled this debate once again.³

The academic debate on constitutional conventions in the Netherlands finds itself at a different stage of maturity. While it is acknowledged that constitutional conventions play an important role in the Dutch constitution, until 2014 very little attention was paid to this category of constitutional rules. That year marked the return of the constitutional convention to the constitutional debate in the Netherlands. In his inaugural lecture, with the telling title 'A blind spot in our constitutional law', Verhey points to the deplorable state of the debate on conventions and calls for a resurgence of academic interest in this category of constitutional rules.⁴ Even though the attention to conventions in the Netherlands has increased, one aspect of conventions can still be considered a 'blind spot' as it has been left untouched by constitutional scholars: the legal relevance of conventions in judicial proceedings.

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1 This formulation is derived from K.C. Wheare, *Modern Constitutions* (1966), p. 122.

2 See for instance as regards the US, Canada and Italy respectively, J.G. Wilson, 'American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior', (1992) 40 *Buffalo Law Review*, no. 40, pp. 645-738, A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (1991) and G.U. Rescigno, *Le Convenzioni Costituzionali* (1972). See also R. Passchier, *Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective* (2017), with Japan, Germany and the US as case studies.

3 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 2 WLR 583.

4 L.F.M. Verhey, *De constitutionele conventie: een blinde vlek in ons staatsrecht* (2014).

1.2 Research question and sub-questions

Against this background, this article adopts the following interrelated research questions.

(A) What is the relevance of constitutional conventions before courts in judicial proceedings in the United Kingdom and the Netherlands, and (B) what are possible constitutional reasons for differences and similarities as regards the legal relevance, or irrelevance, of constitutional conventions in these jurisdictions?

The answers to the following sub-questions, taken together, will provide an answer to the main research questions.

1. What are characteristics of constitutional conventions in the UK constitution and Dutch constitution?
2. What is the relevance of constitutional conventions before courts in the UK and the Netherlands?
3. What are differences and similarities as regards the legal relevance of constitutional conventions in the UK and the Netherlands?
4. What are possible constitutional reasons for these differences and similarities?

The first two sub-questions together lead to an answer to the first, descriptive research question (A). These two sub-questions are discussed separately for the UK (Section 2) and the Netherlands (Section 3).⁵ The third and fourth sub-questions (Section 4) lead to an answer to the second, explanatory research question (B).

To clarify and delineate the scope of the research some remarks have to be made as regards the terms ‘relevance (...) before courts in judicial proceedings’ and ‘possible constitutional reasons’. The former term refers to the extent to which judges invoke constitutional conventions in their reasoning and the question whether the outcome of a given case is determined – in whole or in part, explicitly or implicitly – by a specific constitutional convention. By using the words ‘possible constitutional reasons’ the scope of the research is delineated. The second part of the research will not focus on historical or political explanations. Its aim is to find legal reasons of a constitutional nature.⁶ This article does not intend to find causal relations or to discover conclusive reasons, but merely attempts to formulate possible, constitutionally coherent explanations for the observed similarities and differences.

1.3 Methodological remarks, relevance and aim⁷

This article takes an institutional, comparative approach as it studies a particular aspect of the institution of the constitutional convention (their legal relevance) in two jurisdictions: the UK and the Netherlands. The choice for the UK is based on the particularly prominent role played by conventions in the UK’s largely unwritten constitutional order and the rich debate that has emerged on this category of constitutional rules. The Dutch variant of the constitutional convention is considered to be a ‘constitutional transplant’ from the UK.⁸ This indicates that there exists a relevant similarity of the object of this research, which provides an adequate basis for comparison between the two jurisdictions.⁹

By looking at a foreign jurisdiction which has a rich tradition of academic debate on constitutional conventions, this article intends to contribute to the academic debate in a jurisdiction in which, up to now, the analysis of the relevance and meaning of constitutional conventions has been more limited. The

⁵ This paper deliberately chooses not to answer these questions simultaneously in order to prevent merging and mixing-up the characteristics of constitutional conventions in both jurisdictions.

⁶ This distinction is rather artificial for constitutions and can be regarded as the product of historical, economic, political and social developments. See, for example, as to how history ‘complicates’ the craft of comparative constitutional law, V. Jackson, ‘Methodological Challenges in Comparative Constitutional Law’, (2010) 28 *Penn St. International Law Review*, no. 3, pp. 323-324. However, the use of the term ‘constitutional reasons’ emphasises that this paper approaches the matter from a legal perspective.

⁷ The choices explained below all form part of the ‘preparatory phase’ described by A.E. Oderkerk, ‘The Need for a Methodological Framework for Comparative Legal Research. Sense and Nonsense of “Methodological Pluralism”’, (2015) 79 *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, no. 3, pp. 589-623.

⁸ H.R.B.M. Kummeling, ‘Conventies: Cruciale Constitutionele Curiosa’, in G.J.A. Geertjes & L.F.M. Verhey (eds.), *De constitutionele conventie: kwal op het strand of baken in zee?* (2016), p. 70.

⁹ As to which, see G. Dannemann, ‘Comparative Law, Study of Similarities or Differences’, in M. Reimann & R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (2006), pp. 407-408.

relevance of the research, however, extends beyond the Dutch legal system. The article provides an example of how comparative legal research can further the analysis of constitutional transplants by asking questions regarding that transplant that are often asked in the one state, but which have hitherto been ignored in the other state. The article shows that this type of analysis applied to the issue of the legal relevance of constitutional conventions enables legal researchers to shed a new light on case law and provides for new ventures for research in the area of (comparative) constitutional law.

The research has a non-normative (descriptive and explanatory) aim. Both Dutch and English academic literature and case law on the topic are consulted. Where necessary, methodological remarks regarding case law selection are made at the start of the relevant sections.

2. The legal relevance of constitutional conventions in the constitution of the United Kingdom

This section first introduces the notion of the constitutional convention in the UK (Sub-section 2.1). Subsequently the legal relevance of conventions in judicial proceedings is analysed by looking at a number of highly relevant cases (Sub-section 2.2).

2.1 The constitutional convention in the constitution of the United Kingdom

2.1.1 Definition, identification and examples of conventions

Due to their 'unusual significance and quantity', constitutional conventions occupy a dominant position in the unwritten constitution of the United Kingdom.¹⁰ The important role of constitutional conventions has been widely acknowledged by constitutional scholars. Consequently, many renowned constitutional scholars have provided definitions of constitutional conventions.¹¹ Dicey said that conventions constitute 'the understandings, habits or practices' that 'regulate the conduct of the several members of the sovereign power, of the Ministry or other officials'.¹² Jennings saw them as the 'flesh which clothes the dry bones of the law'¹³ and Wheare referred to conventions as the rules of constitutional behaviour accepted as obligatory by those concerned in the working of the constitution.¹⁴ Feldman regards conventions as rules that hold 'in check the tension between the formal, legal appearance of the constitution and the current practice'.¹⁵

The above traditional definitions of conventions, however colourful, are less helpful in identifying conventions. Sir Ivor Jennings established a three-step test to determine whether habits or practices qualify as a convention.¹⁶ First, are there precedents for the practice? Second, do the actors in the precedents believe that they are bound by an obligatory rule? Third, is there a reason for the practice? It is important to acknowledge that the test does not consist of binary questions, but rather is a matter of degree. Accordingly, the absence of one factor can be compensated for by the presence of another. The presence of precedents, for instance, is often deemed not to be a necessary condition for the existence of a convention. The Sewel convention, which relates to the relationship between the central and devolved governments, is a case in point. As the UK Parliament is sovereign, there are no legal limits to its lawmaking power.¹⁷ From a purely legal perspective, it would be perfectly possible to legislate on matters within the competence of the Scottish Parliament. However, when the system of devolution was brought into operation in 1999, agreement was reached that Westminster does not normally legislate on matters within the competence of the Scottish Parliament without the consent of the latter. Without there being a body of precedent,

10 N.W. Barber, 'Laws and Constitutional Conventions', (2009) 125 *Law Quarterly Review*, April, p. 294.

11 The definitions below are also referred to by M. Elliott & R. Thomas, *Public Law* (2017), p. 51.

12 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1959), p. 24.

13 I. Jennings, *The Law and the Constitution* (1959), p. 81.

14 Wheare, *supra* note 1, p. 122.

15 See D. Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)', (2005) 64 *Cambridge Law Journal*, no. 2, p. 333.

16 Jennings, *supra* note 13, p. 136.

17 Under the orthodox perception, as formulated by Dicey, the Westminster Parliament has the 'right to make or unmake any law whatever'. Dicey, *supra* note 12, pp. 3-4.

the rule was considered binding by all relevant actors, primarily because it was underpinned by a strong constitutional reason: the vertical separation of powers and the self-government of the Scottish people.¹⁸

Although originally regarded as the unwritten rules of the game, conventions are increasingly codified. This does not mean that they become laws, but rather that they are recorded in an official and authoritative form.¹⁹ The Cabinet Manual, which lays down some important conventions affecting the conduct and operation of government, provides an excellent example.²⁰ The Sewel convention equally is a case in point. The Scotland Act 2016 ‘recognises’ the existence of the Sewel convention.²¹

2.1.2 Constitutional law and conventions

One important aspect of conventions has thus far been left undiscussed: their relationship to and distinctiveness from constitutional *law*. Constitutional law and constitutional conventions are both part of the same constitutional order. Because conventions are normative expressions of fundamental constitutional values, a breach of a convention is ‘every bit as unconstitutional as a breach of constitutional law’.²² However, conventions are often regarded as fundamentally different from constitutional law for three interrelated reasons. The first reason concerns the written laws of the constitution. Those laws are the product of a formal, constitutional machinery known as the legislative process. In contrast there is no fixed procedure for the establishment of constitutional conventions. Rather their coming into being – if it is at all possible to define a moment of ‘birth’ of a convention – is the result of mutual understandings on what amounts to proper constitutional conduct within or between state institutions. While a law, once established, is (relatively) fixed, conventions are contingent and inherently malleable.²³ Second, laws and conventions operate in different institutional settings. That is, different constitutional actors are involved in determining their scope, contents and the consequences of their violation. The political branches of state and academic commentators are the main interpreters of constitutional conventions, whereas judges are assigned the task of interpreting and enforcing legal rules. It follows that ‘a judicial institution can never arrive at a statement of a convention which could be authoritative from the perspective of officers and members of other institutions’.²⁴ The third reason is intimately connected to the previous reason. Part of Dicey’s definition of conventions is that they are ‘not in reality laws at all since they are not enforced by the Courts’.²⁵ According to Dicey, conventions are distinguishable from laws precisely because they cannot be invoked in judicial proceedings. And indeed, there appears to be a general truth in this contention. For ‘full enforceability’ of conventions ‘would dissolve the distinction between conventions and law’.²⁶ This, however, does not mean that conventions cannot be of legal relevance before courts in judicial proceedings, as the analysis below shows.

2.2 Conventions and the courts in the United Kingdom

This sub-section describes the role played by conventions in several cases. The cases discussed below are considered to be the most prominent cases on the matter.²⁷

18 Elliott & Thomas, *supra* note 11, p. 56; on the need for a ‘constitutional justification’ for a convention to come into existence see D. Feldman, ‘Constitutional conventions’, in M. Qvortrup (ed.), *The British Constitution: Continuity and Change. A Festschrift for Vernon Bogdanor* (2013), p. 100.

19 Elliott & Thomas, *supra* note 11, p. 50.

20 The Manual can be found online at <<https://www.gov.uk/government/publications/cabinet-manual>> (last visited 15 April 2018).

21 Section 2 of the Scotland Act 2016 amended the Scotland Act 1998 to read, in s. 28(8), that ‘It is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’.

22 C. Turpin & A. Tomkins, *British Government and the Constitution* (2011), p. 182.

23 See e.g. P. Morton, ‘Conventions of the British constitution’, (1991-1992) 15 *Holdsworth Law Review* 1991, no. 2, pp. 130-144.

24 See Feldman, *supra* note 18, p. 119.

25 Dicey, *supra* note 12, p. 25.

26 Elliott & Thomas, *supra* note 11, p. 62. See also J. Jaconelli, ‘Do Constitutional conventions bind?’, (2005) 64 *Cambridge Law Journal* 2005, no. 1, pp. 151 and 153.

27 See, in this regard, for instance Elliott & Thomas, *supra* note 11, pp. 58-62.

2.2.1 Unenforceability as a starting point: *Canadian Patriation and Madzimbamuto*

The *Canadian Patriation* case deals with the Canadian request to the UK Government for the UK Parliament to adopt legislation that would end the then still-existing formal British control over Canada.²⁸ This process of ‘patriation’ of the Canadian constitution was unconstitutional according to a number of Canadian provinces. These provinces argued that the request breached a constitutional convention, which entailed that UK legislation amending the Canadian constitution should only be requested with the support of a majority of provinces. The Canadian Supreme Court paid lip service to the Jennings test and held that the convention indeed existed. The Court subsequently ‘reached the conclusion that the agreement of the provinces of Canada (...) is constitutionally required’ in order to proceed with the patriation process. If the Government were to continue without the support of the provinces, it would be acting ‘unconstitutional[ly] in the conventional sense’.²⁹ However, the Supreme Court concluded that there was no legal rule preventing the Canadian Government from continuing the patriation process. Therefore, the convention could not be enforced by the Court and no injunction could be granted. The convention thus was invoked in the reasoning of the Court, but did not have a bearing on the outcome of the case.

A similar conclusion was reached in *Madzimbamuto v Lardner-Burke* by the Judicial Committee of the Privy Council.³⁰ In this case it was argued that the UK Parliament had acted in breach of a convention by enacting the Southern Rhodesia Act of 1965, which reasserted the right of the UK Parliament to legislate on Southern Rhodesia. It was argued that a convention existed that stipulated that Parliament could only legislate for a Commonwealth country with the consent of the country involved. The Judicial Committee of the Privy Council held that, ‘in declaring the law’, it was ‘not concerned with these matters’.³¹ Consequently, the convention did not play a role in the outcome of the case.

2.2.2 Legal relevance: *Evans v Information Commissioner and A-G v Jonathan Cape Ltd.*

Two cases show that conventions nevertheless can be legally relevant in judicial proceedings. The cases both relate to the disclosure of confidential Government information.

Evans v Information Commissioner concerned the disclosure of letters written by Prince Charles to Government Ministers (the so-called ‘black spider memos’).³² Prince Charles used these letters to bring his charities or his own views to the attention of Government Ministers. The Government refused to disclose the letters, after having been requested to do so under the Freedom of Information Act 2000. The 2000 Act required the Upper Tribunal, Administrative Appeals Chamber (UTAAC) to weigh the public interest in disclosure against the public interest in refusing disclosure. The Government argued against disclosure and referred to the ‘education convention’, which provides that ‘the heir to the throne is entitled and bound to be instructed in and about the business of Government’.³³ The UTAAC accepted that the convention was one of the factors weighing against disclosure and engaged elaborately in defining the scope of the convention.³⁴ It held that so-called advocacy correspondence was not covered by the education convention. This informed its conclusion that the disclosure of the letters was required by the public interest. The education convention turned out to be legally relevant. It played a part in deciding whether the relevant legal test (whether disclosure was in the public interest) was satisfied.³⁵

A similar point can be made with regard to *Attorney-General v Jonathan Cape Ltd.*³⁶ The case centred on the former Government Minister, Richard Crossman, whose diaries containing records of Cabinet meetings were about to be published by the *Sunday Times*. The Attorney-General sought an injunction to stop the

28 *Re Resolution to amend the Constitution* [1981] 1 SCR 753.

29 *Ibid.*, p. 909.

30 [1969] 1 AC 645.

31 *Ibid.*, p. 723, *per* Lord Reid.

32 [2012] UKUT 313 (AAC). The case, and the subsequent Supreme Court litigation, are referred to as the ‘black spider cases’ because of the curly handwriting of Prince Charles.

33 *Ibid.*, para. 67. On this convention see Rodney Brazier, ‘The constitutional position of the Prince of Wales’, (1995) *Public Law*, Autumn, pp. 401-416.

34 *Evans*, *supra* note 32, paras. 89-112 and 161-174.

35 Elliott & Thomas, *supra* note 11, pp. 59-60.

36 [1976] QB 752.

publication of Crossman's diaries and argued that the common law doctrine of confidentiality rendered publication unlawful. The judge deciding the case, Lord Widgery, accepted that the convention of collective ministerial responsibility entailed that Cabinet meetings require confidentiality. Moreover, Lord Widgery held that the public interest is served by confidentiality of Cabinet meetings. In this case, a convention thus established a duty of confidentiality as well as a public interest in upholding that duty. The convention turned out to be legally relevant as it 'was important in helping to establish that two of the requirements for a remedy had been satisfied'.³⁷

2.2.3 The Supreme Court's conservative stance in *Miller*

The judgment in the *Miller* case shines a light on numerous constitutional issues against the background of the UK's decision to leave the EU.³⁸ For present purposes the Supreme Court's view on the role played by the Sewel convention, discussed above in 2.1.1, constitutes the most important part of the judgment. The Scottish Government argued that this convention would be engaged by an Act of Parliament triggering the British exit from the EU. Consequently, the consent of the Scottish legislature would be needed before a withdrawal Act could be passed. A majority of the Supreme Court roundly rejected this argument.³⁹ The Supreme Court referred to the *Canadian Patriation* case and *Madzimbamuto* and emphasised the 'political nature' of the Sewel convention.⁴⁰ The Court, referring to *Jonathan Cape*, held that judges can 'recognise the operation of a political convention in the context of deciding a legal question'. However, 'courts of law cannot enforce a political convention', nor can they 'give legal rulings on its operation or scope, because those matters are determined within the political world'.⁴¹ The fact that the Sewel convention is recognised by statute did not make any difference.⁴² According to the Supreme Court, conventions are not only unenforceable, but (presumably) also non-justiciable, that is inappropriate for judicial resolution.⁴³

The non-justiciability of the Sewel convention in *Miller* has elicited criticism. By holding that courts cannot rule on the operation or scope of conventions, the Supreme Court took a conservative stance and adhered to a 'strikingly narrow view of the proper extent of judicial engagement with conventions'.⁴⁴ The judgment is hard to reconcile with existing case law. In *Evans* and in *Jonathan Cape* the courts did decide on the scope and relevance of conventions. Moreover, the abundant references to the *Canadian Patriation* case in *Miller* are unconvincing, because in that case the Canadian Supreme Court did take a view on the scope and operation of a convention.⁴⁵ According to Elliott, the Supreme Court may very well take a view that is at odds with the case law of lower courts, but one might expect the Supreme Court to acknowledge and justify its departure from their jurisprudence.⁴⁶ More importantly, the Supreme Court's reasoning is flawed. The Supreme Court acknowledges that judges can 'recognise' the operation of conventions when deciding legal questions, but they cannot take a view on their operation and scope. However, if the courts retreat whenever issues relating to conventions arise, the notion that conventions can be recognised when deciding relevant legal questions is emptied of content: 'the Court cannot have it both ways'.⁴⁷ In addition, if the Supreme Court had granted legal relevance to the convention, this would have had major political

37 Feldman, *supra* note 18, p. 117. However, due to the passage of a long period of time Lord Widgery held that confidentiality was no longer required. The diaries were eventually published between 1975 and 1977 in a highly revealing, three-volume edition entitled *Diaries of a Cabinet Minister*.

38 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 2 WLR 583. The case has been covered extensively by both the media and academic commentators. As to the latter, see e.g. M. Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle', (2017) 76 *Cambridge Law Journal*, no. 2, pp. 257-288; N.W. Barber et al., 'Reflections on *Miller*', *Oxford Legal Studies Research Paper* no. 54/2017, available at SSRN: <<https://ssrn.com/abstract=3034110>> (last visited 15 April 2018) and (in Dutch) D.E. Bunschoten, 'Re *Miller*, de Brexit-zaak', (2017) 8 *Tijdschrift voor Constitutioneel Recht* 2017, no. 2, pp. 150-169.

39 None of the dissenting judges (Lords Reed, Carnwath and Hughes) disagreed with the majority's judgment on the Sewel convention.

40 *Miller*, *supra* note 38, paras. 141-144.

41 *Miller*, *supra* note 38, para. 141 and para. 146.

42 *Miller*, *supra* note 38, paras. 147-150. See also *supra* note 21 for the relevant legislation.

43 Barber et al., *supra* note 38, p. 29.

44 Elliott, *supra* note 38, pp. 275-276.

45 *Ibid*, p. 276; Barber et al., *supra* note 38, pp. 29-30.

46 Elliott, *supra* note 38, p. 276.

47 *Ibid*.

ramifications as it might have allowed the Scottish Government to block the Brexit process. The sensitive nature of the case might have influenced the Supreme Court's reasoning on the Sewel convention.

2.2.4 Summary

There are only a few cases that highlight the legal relevance of conventions. According to the *Canadian Patriation* case and *Madzimbamuto*, conventions are not legally enforceable. They do not generate legal obligations without separate legal rules being present.⁴⁸ In *Evans* and in *Jonathan Cape*, however, conventions were raised 'by way of a defence in legal proceedings'.⁴⁹ It appears that conventions can influence the application of constitutional law to the facts of a given case. Conventions can have a bearing on the outcome of legal cases and thus are capable of assuming legal relevance. *Miller* might lead one to argue that conventions are non-justiciable. However, the Supreme Court's incoherent and politically sensitive reasoning might equally indicate that *Miller* is an authoritative, but very peculiar, easily distinguishable judgment that does not impinge on the potential legal relevance of conventions. Whichever proposition holds true remains to be seen whenever new issues pertaining to conventions are contested before the courts.

3. The legal relevance of constitutional conventions in the Netherlands

This section adopts the same structure as the previous section. It first introduces the notion of the constitutional convention in the Netherlands (Sub-section 3.1). Subsequently, the legal relevance of conventions in judicial proceedings is analysed by looking at a number of possibly relevant cases (Sub-section 3.2).

3.1 The constitutional convention in the constitution of the Netherlands

3.1.1 Definition, identification and examples of conventions

The constitutional convention is considered to be a 'constitutional transplant' from the UK.⁵⁰ After having been introduced in Dutch constitutional law through the writings of Oppenheim,⁵¹ the constitutional convention was discussed only occasionally. The 2014 inaugural lecture of Luc Verhey marked the revival of the constitutional convention as an object of academic study. Verhey defines conventions as informal rules regulating the behaviour of political institutions.⁵² He regards conventions as an important intermediate category between mere constitutional practice and the legal rules that constitute the Dutch constitution.⁵³ While the hard core of the constitution – i.e. the document called the Constitution of the Kingdom of the Netherlands – has remained unchanged for a long time, the society in which it operates has undergone significant transformations. In part, these transformations are reflected in constitutional conventions. These conventions determine the workings of the constitution in practice. As such, constitutional change by constitutional convention can be seen as a specific type of 'informal constitutional change', that is constitutional change that occurs where the meaning of the written constitution changes without prior formal constitutional revision.⁵⁴ Kummeling succinctly summarises the function of conventions in the Netherlands: they are constitutional 'grease' granting flexibility to the constitution and providing guidance to constitutional actors, thereby preventing constitutional chaos.⁵⁵ An often-invoked example is the convention that the monarch always assents to Bills approved by Parliament.⁵⁶ Another example is the process of

48 For this definition of enforcement, see Barber, *supra* note 10, p. 298.

49 Feldman, *supra* note 18, p. 117.

50 Kummeling, *supra* note 8, p. 70.

51 J. Oppenheim, *De theorie van den organischen staat en hare waarde voor onze tijd* (1893).

52 Verhey, *supra* note 4, p. 6. This definition is also used by G.J.A. Geertjes, 'Het primaat van de wetgever in de wetgevingspraktijk: de invloed van constitutionele conventies op de totstandkoming van AMvB's', in L.F.M. Verhey & G.J.A. Geertjes (eds.), *De constitutionele conventie: kwal op het strand of baken in zee?* (2016), p. 57.

53 Verhey, *supra* note 4, p. 7.

54 In this regard see R. Passchier, 'Formal and Informal Constitutional Change in the Netherlands', in G. Ferrari et al. (eds.), *The Dutch Constitution beyond 2000: tradition and innovation in a Multilevel Legal Order* (2018), available at SSRN: <<https://ssrn.com/abstract=2975751>> (last visited 19 May 2018).

55 Kummeling, *supra* note 8, p. 69.

56 Verhey, *supra* note 4, pp. 11-12. This convention exists in the UK as well. See Feldman, *supra* note 18, pp. 332-333.

Cabinet formation.⁵⁷ This process consists of a fixed series of steps – which can be labelled as conventions – that lead to the formation of a new Cabinet after elections.⁵⁸ In 2012 this set of conventions changed due to the coming into force of Article 139a of the Rules of Procedure of the House of Representatives (*Reglement van Orde van de Tweede Kamer*), which gives Parliament a more prominent role in the process. This example shows the ‘formalisation’ of a convention and its ability to change rather abruptly. Verhey refers to the Jennings test as the means to identify a convention in Dutch constitutional law, albeit with a modification as to the third part of the test. There must be a good reason for the convention (the subjective criterion) *and*, Verhey adds, the convention must ‘fit’ within the Dutch constitutional system (the objective criterion).⁵⁹ The objective criterion entails that a convention may not run counter to constitutional law.⁶⁰

3.1.2 Unwritten constitutional law and conventions

Kummeling supplements Verhey’s definition of conventions by explicitly adding that conventions are not legal rules, which (again) raises the question of the difference between constitutional law and conventions.⁶¹ One specific category of constitutional law warrants particular attention in this regard: unwritten constitutional law.⁶² A rule is classified as a rule of unwritten constitutional law if there exists a strong body of precedent, the actors involved regard the rule as a rule of unwritten constitutional law and non-compliance with the rule would lead to the paralysis of Government.⁶³ Accordingly, only two rules can irrefutably be identified as rules of unwritten constitutional law: the ‘confidence rule’ between Government and Parliament and the rule that the Government may dissolve Parliament not more than once regarding the same conflict.⁶⁴ It is clear, however, that the distinction between conventions and unwritten constitutional law can be blurred.

The debate regarding conventions is still in its infancy. Consequently, whether a rule counts as a convention or as a rule of constitutional law can be unclear. A lot of discussion centres on the problem as to which rules amount to conventions and which rules do not. Whereas Verhey tends to adopt a more generous approach and identifies quite a number of examples of conventions,⁶⁵ Kummeling adheres to a narrower stance and classifies some of the very same examples as rules of constitutional law.⁶⁶ The question is whether all of this truly matters. Verhey argues that the distinction between conventions and constitutional law is only of trivial significance, because both conventions and large parts of Dutch constitutional law are unenforceable before the courts.⁶⁷ The following sub-section analyses the validity of the previous sentence in so far as the legal relevance of conventions before courts is concerned.

3.2 Conventions and the courts in the Netherlands

There are no cases in which conventions have been explicitly invoked by Dutch courts, i.e. no cases have been decided in which a court qualifies a practice as a convention and decides the case with reference to

57 As to both examples see Passchier, *supra* note 54.

58 See C. van Baalen & A. van Kessel, *De kabinetsformatie in vijftig stappen* (2012), p. 12, referred to in Verhey, *supra* note 4, p. 12.

59 Verhey bases this new, additional criterion on the writings of Hirsch Ballin. See Verhey, *supra* note 4, p. 15.

60 L.F.M. Verhey, ‘De constitutionele conventie: kwal op het strand of baken in zee’, in G.J.A. Geertjes & L.F.M. Verhey (eds.), *De constitutionele conventie: kwal op het strand of baken in zee?* (2016), p. 147.

61 Kummeling, *supra* note 8, pp. 69, 71 and 77.

62 For a comprehensive study on this category of constitutional rules see A.H.M Dölle, *Over ongeschreven staatsrecht* (1988).

63 Geertjes, *supra* note 52, pp. 58-59.

64 P.P.T. Bovend’Eert & H.R.B.M. Kummeling, *Het Nederlandse parlement* (2017), p. 22.

65 See the examples mentioned throughout Verhey, *supra* note 4, e.g. Cabinet formation, homogeneity of the Cabinet and position of the Senate.

66 See Kummeling, *supra* note 8, pp. 70-71 as regards collective ministerial responsibility and Verhey’s response to Kummeling’s approach in Verhey, *supra* note 60, p. 155.

67 Verhey, *supra* note 4, pp. 11-12. Accordingly, Verhey regards the fact that conventions are not the product of a formal, regulated process the main distinguishing feature between the two.

this convention. However, a closer look at some constitutionally significant cases shows that it is at least arguable that conventions have played a legally relevant role in judicial proceedings.⁶⁸

3.2.1 Homogeneity of the Cabinet: the Cabinet records on MH17 and the Iraq war

In 2017 the Council of State handed down its judgment relating to the disclosure of confidential information on the downing of flight MH17 above Ukraine.⁶⁹ Under the Freedom of Information Act (*Wet openbaarheid bestuur*) the Dutch Broadcasting Foundation (*NOS*) requested the Minister of Security and Justice to disclose about 255 documents (such as minutes, diaries and reports) of a ministerial sub-committee set up to coordinate and take decisions regarding flight MH17. The Minister refused to do so. Under Article 10 of the Freedom of Information Act the Government can refuse to disclose information if it would be unreasonably disadvantaged by disclosure. In arguing that Article 10 applied, the Minister referred to the need to preserve the unity of Government policy and to the value of an undisturbed exchange of views within the Cabinet. These interests are expressed in Article 45(3) of the Dutch Constitution, which states that the Cabinet shall promote the coherence of Government policy and Article 26 of the Rules of Procedure of the Cabinet (*Reglement van Orde voor de Ministerraad*), which specifies that discussions in Cabinet are confidential. The Council of State agreed with the Minister and held that disclosure would hamper the functioning of the Cabinet. The confidentiality regime and the coherence of Government policy constituted the main grounds for dismissing the claim made by the Dutch Broadcasting Foundation. Seven years earlier, another case before the Council of State was decided based on an (almost) identical reasoning.⁷⁰ The case concerned a request by broadcaster *RTL Nieuws* to disclose records of Cabinet meetings on the Iraq war. In that case the Council relied on exactly the same constitutional rules and held that it was not unreasonable for the Minister not to disclose the documents concerned.

It can be argued that in *MH17* and in *Iraq war* the Council of State gives legal relevance to a constitutional convention: the homogeneity of the Cabinet. The notion of homogeneity is connected closely to collective ministerial responsibility and means that the Cabinet must operate as a single entity; internal differences of opinion may not be made apparent to the outside world. This rule is said to be reflected in a provision of the Constitution (Article 45(3)) and provisions of the Rules of Procedure of the Cabinet, including the provision on the confidentiality of Cabinet meetings referred to by the Council of State.⁷¹ Verhey classifies Cabinet homogeneity as a constitutional convention, traces of which have been laid down in the previously mentioned provisions.⁷² The homogeneity rule meets the requirements of the Jennings test. There is a strong body of precedent regarding confidentiality of Cabinet meetings. The fact that parts of the convention have received recognition in the Rules of Procedure of the Cabinet provides evidence that the members of the Cabinet regard themselves to be bound by this precedent.⁷³ There is a good constitutional reason for the convention: the unity of Government could be seriously endangered if no obligation of confidentiality existed.⁷⁴ The convention fits within the constitutional system as it does not run counter to constitutional law. Importantly, it can be argued that homogeneity is not a legal rule. The notions of collective responsibility and homogeneity have evolved mainly through the piecemeal development of constitutional practice, rather than being driven by constitutional amendment or the codification of the Rules of Procedure of the

68 The selection of cases was made by means of a survey of well-known cases referred to in authoritative textbooks (C.A.J.M. Kortmann, *Constitutioneel recht* (2012) and Bovend'Eert & Kummeling, *supra* note 64) and the use of the search engine of <www.rechtspraak.nl> and <www.raadvanstate.nl>. The queries '*constitutionele conventie*' and '*staatsrechtelijke conventie*' (constitutional convention), '*constitutioneel recht*' and '*staatsrecht*' (constitutional law), '*staatsrechtelijke positie*' (constitutional position) and '*staatsrechtelijke praktijk*' (constitutional practice) were inserted in these search engines. This led to a selection of about 150 cases of which five appeared to warrant further inspection in this paper, because they might involve constitutional conventions.

69 ABRvS 25 October 2017, ECLI:NL:RVS:2017:2883. Hereafter, referred to as 'the *MH17 case*' or '*MH17*'.

70 ABRvS 17 February 2010, ECLI:NL:RVS:2010:BL4132. Hereafter referred to as 'the *Iraq war case*' or '*Iraq war*'.

71 Kortmann, *supra* note 68, pp. 153-155. The other provisions are Art. 11 (which reads that in the event of a tie the Prime Minister has the decisive vote) and Art. 12 (which provides that Cabinet members may not act contrary to decisions of the Cabinet).

72 Verhey, *supra* note 4, p. 13.

73 Official writings can constitute evidence that the second requirement of the Jennings test has been met. See Verhey, *supra* note 4, pp. 13-14 and Geertjes, *supra* note 52, p. 58.

74 See p. 23 of the explanatory memorandum (*nota van toelichting*) of the Rules of Procedure (*Stb.* 1994, 203).

Cabinet. The relevant provisions of the Rules of Procedure do not constitute the *source* of a legal rule, but merely *record* a political rule.⁷⁵

Two obvious, interrelated objections can be made to such reasoning. First, the notion of homogeneity is not uniformly regarded as a constitutional convention; Kummeling sees it as a rule of partially unwritten constitutional law.⁷⁶ Second, one might argue that the reasoning is far-fetched. The Council did not explicitly invoke a convention. All it did was to adjudicate the *MH17* case based on separate and established legal rules. However, if one regards the homogeneity of the Cabinet as a constitutional convention, and those exact legal rules as reflections of this convention (as Verhey appears to do), then the case that the convention of homogeneity was granted legal relevance in this case can very well be made. The Council of State did not enforce the convention, but written elements of the convention appeared to be legally relevant. Indeed, they turned out to be decisive for the outcome of the case.

3.2.2 Cabinet formation, secrecy and the position of the ‘informateur’

Two other cases relate to the disclosure of confidential Government information in the process of Cabinet formation. In one case, the Prime Minister was requested to disclose the analysis of the economic and budgetary effects of the proposed coalition agreement, conducted by the Netherlands Bureau for Economic Policy Analysis (*Centraal Planbureau, CPB*).⁷⁷ This document, however, had not been officially handed over by the person charged with the formation of a new Government (*informateur*) to the Prime Minister. In arguing that the documents could not be disclosed, the Council of State held that the *informateur* is not hierarchically subordinate to the Prime Minister. In the other case a similar request was aimed at the Minister for Economic Affairs.⁷⁸ The Council held that the disclosure of documents discussed in the process of Cabinet formation would affect the protection of the confidentiality in which Cabinet formation takes place. Disclosure could disturb the relationship between the coalition parties, ministers and political parties.⁷⁹

As mentioned before, the process of Cabinet formation consists of a series of conventions.⁸⁰ The post of *informateur* can be regarded as a ‘conventional construct’ as it owes its existence to the process of Cabinet formation. By stating that the *informateur* is not hierarchically subordinate to the Prime Minister and that discussions during the Cabinet formation are to remain undisclosed, the Council takes a view on the scope and content of constitutional conventions. These conventions were part of the reasoning of the Council and played a legally relevant role, as their content and scope – as interpreted by the Council – influenced the outcome of the cases.

3.2.3 The legality of legislation and ‘established constitutional practice’

Another case centred on the legality of legislation in the area of immigration law.⁸¹ The Central Agency for the Reception of Asylum Seekers Act (*Wet Centraal Orgaan Opvang Asielzoekers*) referred to the Minister of Health as the Government Minister responsible for matters relating to the shelter of asylum seekers. In 1994 this responsibility was transferred from the Minister of Health to the Minister of Justice. This transfer took place through the enactment of a Royal Decree (*Koninklijk Besluit, KB*). The Decree referred to Article 44 of the Dutch Constitution, which states that ministries are established through a Royal Decree.⁸² In 1998 the Minister of Justice amended a specific regulation relating to asylum seekers, which stated that if the person

75 See M.J. Vetzo & R. Nehmelman, ‘Bijlage 6: Collegiale ministeriële verantwoordelijkheid niet strijdig met Grondwet’, in Raad voor het Openbaar Bestuur, *Sturen én verbinden. Naar een toekomstbestendige Rijksoverheid* (2015), pp. 76-78 with references to D. Slijkerman, *Het geheim van de ministeriële verantwoordelijkheid* (2011). The use of the terms ‘source’ and ‘record’ in this regard are derived from Elliott & Thomas, *supra* note 11, pp. 50-51.

76 Kummeling, *supra* note 8, p. 73.

77 ABRvS 6 May 2004, ECLI:NL:RVS:2004:AO8867.

78 ABRvS 6 May 2004, ECLI:NL:RVS:2004:AO8873.

79 Both decisions have been criticised by J.A. Peters, ‘Achterkamertjespolitiek ten onrechte tot norm verheven’, *NRC Handelsblad*, 18 May 2004.

80 See Sub-section 3.1.1.

81 ABRvS, 10 October 2001, ECLI:NL:RVS:2001:AD4637.

82 *Stb.* 1994, 682.

concerned applied for asylum for the second time, he would not be given shelter.⁸³ In 2000 the Minister of Justice refused the appellant shelter based on this regulation. The District Court declared the decision of the Minister of Justice to be invalid as the transfer of responsibility from the Minister of Health to the Minister of Justice should have taken place through an Act of Parliament, rather than by Royal Decree. The District Court deemed the relevant regulation to be invalid and it quashed the decision based on this regulation. The Council of State, to the contrary, referred to Article 44 of the Constitution and held that tasks and responsibilities can be transferred between ministries based on a Royal Decree. No Act of Parliament is needed to realise such a transfer of power, although an Act of Parliament has often been enacted afterwards to 'confirm' the shift of power from the one Minister to the other. At this point the consideration that is most relevant for present purposes comes in: the Council states that it is 'established constitutional practice' (*gevestigde staatsrechtelijke praktijk*) that confirmation by an Act of Parliament is not needed for the lawful exercise of legislative authority by a Minister when powers have been transferred to him by Royal Decree.⁸⁴ The main question to be answered is whether this practice amounts to a constitutional convention. If it does, this convention has been shown to be legally relevant by preserving the legality of legislation.

According to the judgment, a body of precedent exists. However, when assessing the second part of the Jennings test, a peculiar characteristic of the practice becomes apparent. All other conventions referred to in this article had an obligatory character. They required the constitutional actors involved to do something. The practice referred to in this case, however, is of a permissive nature. It allows for the transfer of power without enacting an Act of Parliament. When the relevant constitutional actors *omit* to do something, they act in accordance with the practice. It is hard to determine whether the actors feel bound by the practice, because there is nothing that binds them. This case, therefore, highlights another characteristic of conventions: conventions must require constitutional actors to do something in a certain way, for otherwise they would be acting in breach of the convention. The practice identified by the Council of State cannot qualify as a convention for this reason.

The case, however, does highlight something important. The Council deems something 'extra-legal' (mere constitutional practice) to be of legal relevance. Established constitutional practice informed the interpretation of Article 44 of the Dutch Constitution. It is arguable that established practices which are classified as conventions could assume a similar role in future legal proceedings.

3.2.4 Summary

Dutch courts do not explicitly engage with conventions. From this it follows that conventions are not enforced in a direct sense. However, there are a few cases that indicate that conventions can assume legal relevance before courts in judicial proceedings. It can be argued that the convention of Cabinet homogeneity has played a legally relevant role in two cases on access to Government information. In addition, the Council of State has taken a view on the contents of conventions relating to the process of Cabinet formation. Also, constitutional practice informed the interpretation of the Constitution in a number of cases in the area of immigration law, which opens up the possibility that conventions – essentially being rules of constitutional practice – are used in a similar fashion in future cases.

4. Possible constitutional explanations for differences and similarities

This section discusses possible constitutional explanations for the main differences (Sub-section 3.1) and similarities (Sub-section 3.2) as regards the legal relevance of constitutional conventions in the United Kingdom and the Netherlands.

83 Regulation on supplies to Asylum Seekers and other categories of aliens (*Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen* 1997, *Rva* 1997), Art. 4.2.

84 This reasoning has been applied in a number of subsequent cases. HR 21 March 2003, ECLI:NL:HR:2003:AF2845, Rb. Den Haag, 28 November 2003, ECLI:NL:RBSGR:2003:AO4176, Rb. Den Haag, 22 January 2007, ECLI:NL:RBSGR:2007:AZ6755, Rb. Den Haag 17 January 2014, ECLI:NL:RBDHA:2014:930 and Rb. Den Haag, 29 April 2014, ECLI:NL:RBDHA:2014:5750.

4.1 Differences

4.1.1 British explicitness versus Dutch implicitness

The British courts deal with conventions in an open and explicit manner, whereas, on the contrary, the term ‘constitutional convention’ is nowhere to be found in Dutch case law. A possible explanation for this can be found in the different levels of maturity of the concept of constitutional conventions in the respective jurisdictions. The constitutional convention occupies a stable and dominant position in the UK constitutional order. Conventions have been a prominent feature of the British constitution for a long time and have received a good deal of attention from constitutional scholars. This has led to a situation in which a clear catalogue of conventions has come into being. Consensus consists as to the existence and general meaning of specific conventions. Consequently, lawyers and judges are likely to know when conventions are relevant to a case. It was hardly possible for Lord Widgery to decide *Jonathan Cape* without reference to the convention of collective ministerial responsibility. The convention was relevant to the case and the litigants invoked it in their reasoning. The Scottish Government in *Miller* could confidently refer to the Sewel convention, because it knew for certain that this convention constituted an important part of the constitutional relationship between Scotland and the UK Government. Also, given the unwritten nature of the UK constitution, courts are familiar with constitutional reasoning in which elements other than sole written constitutional provisions play a role. Judges will not elicit criticism when they invoke other constitutional constructs, such as conventions, in addition to the melting pot of customs, principles (such as the Rule of Law and Parliamentary Sovereignty), prerogatives and written constitutional rules upon which they normally base their decisions. Conventions are just one specific category of constitutional rules that can play an explicit role in constitutional adjudication.

In the Netherlands the constitutional convention is a marginally developed concept. Consequently, a large part of academic debate still focuses on the question as to which practices count as a convention. The debate between Kummeling and Verhey on Cabinet homogeneity is illustrative in this respect. Scholars, rather than judges or lawyers involved in legal proceedings, are likely to know whether conventions exist and when they are relevant to cases of a constitutional nature. Therefore, conventions will not explicitly surface in judgments. Moreover, given the written nature of the Dutch constitution, constitutional adjudication is legalistic and based primarily on written (constitutional) law. There is simply no added value to be had in referring to conventions when there are legal rules available upon which a decision can be based. The Council of State would probably have attracted a good deal of criticism if it had referred explicitly to the ‘convention’ of Cabinet homogeneity in *MH17*. The Council could do its job perfectly well simply by solely referring to the relevant provisions of the constitution and the Rules of Cabinet Procedure. And so it did.

4.1.2 Specific differences

It is difficult to draw detailed, substantive conclusions from the limited amount of ‘convention cases’ decided by the Dutch and UK courts. In general, it should be borne in mind that each case discussed in this article consists of a unique combination of specific legal rules operating within a larger constitutional sphere in which conventions turned out to be of relevance to the specific judges deciding the cases. Accordingly, numerous possible explanations can be provided for the peculiarities of each case and the myriad differences between the cases, varying from the judge deciding the case (the Council of State in *MH17* and Lord Widgery in *Jonathan Cape*) to the respective phrasing of the Dutch and English Freedom of Information Acts (in *MH17*, *Iraq war*, *Evans* and *Jonathan Cape*) and the presence of different conventions in the UK and the Netherlands. This article will not delve into these matters.

4.2 Similarities

4.2.1 A legally rare and not straightforwardly enforceable phenomenon

Conventions in the Netherlands, being a constitutional transplant from the UK, perform largely similar functions to their UK counterparts. They hold in check the tension between the formal, legal appearance

of the constitution and constitutional reality. In addition, they serve as constitutional ‘grease’ granting flexibility to the constitution and providing guidance to constitutional actors. It is clear that both Dutch and British conventions are not laws. Against this background one similarity between the situation in the Netherlands and UK is to be assessed. Conventions feature only in a very limited number of cases and, if they do so, they are not enforced directly by courts: they do not generate legal obligations without the presence of a separate legal rule.

Many conventions deal with matters that are generally regarded as unsuitable for adjudication by courts. Based on the notion of separation of powers, it would be constitutionally illegitimate for the courts to interfere in the organisation of Parliament or the functioning of Government. This would hamper the autonomy of the political branches of state. Moreover, it would disregard the fact that some matters are simply more conveniently handled by political actors. Conventions can be regarded as belonging to this category of matters, because they are inherently political in nature. As regards the Netherlands, the primacy of political actors in enforcing constitutional norms can be regarded as an additional reason for the lack of ‘convention cases’. Dutch courts show a reluctance to interfere in political matters and the internal workings of the legislative process. A general constitutional authorisation to interfere in highly political matters on the relationship between Government and Parliament is lacking.⁸⁵ The absence of cases in which conventions generate legal obligations without the presence of separate legal rules, can be explained by the fact that in both jurisdictions judges are to decide cases based on the *law*.⁸⁶ And conventions are not legal rules.

4.2.2 The legal relevance of conventions (in cases relating to access to Government information)

Despite not being straightforwardly enforceable, conventions can be of legal relevance in judicial proceedings in both the UK and the Netherlands, as the analyses in section 2.2 and 3.2 has shown. A clear explanation in this regard is provided by Feldman:⁸⁷

Where the existence or scope of a constitutional convention (...) is relevant to a question of law (...) the courts will form a view of the scope of the convention. (...) [T]he judiciary creates a vision of the constitutional convention that is effective, at least for the court’s own purposes.

Courts are assigned the task of deciding legal disputes. In deciding legal disputes, they have to take into account all relevant circumstances and arguments brought forward by the litigants. If conventions turn out to be a relevant part of the context of a case, it might be inevitable for a court to form a view of the convention and take it into account in its reasoning. That is what happened in *Evans* and *Jonathan Cape* and in the *MH17*, *Iraq war* and the Cabinet formation cases. Granting legal relevance to a convention is not a goal as such, but rather it can be a necessary consequence of a unique combination of facts, occurring in a politically sensitive environment, which end up before a court of law. In this regard one further common peculiarity merits discussion. Many of the previously mentioned cases are based on the Freedom of Information Act 2000 in the UK and the Freedom of Information Act (*Wet openbaarheid bestuur*) in the Netherlands. These pieces of legislation appear to be a primary gateway through which conventions enter the judicial arena. The reason for this might be that these Acts require courts to have a closer look at the exact functioning of and relations within Government. In this area conventions play an important role as they are the very rules that regulate the functioning of and relations within Government. Another similarity is that in *Evans*, *Jonathan Cape*, *MH17*, *Iraq war* and the Cabinet formation cases, conventions were invoked by the Government. They were used as a defence to prevent disclosure of information. The structure of the relevant Acts provides that citizens have a right of access to Government information, subject to certain

85 Bovend’Eert & Kummeling, *supra* note 64, pp. 23-24.

86 In the Netherlands this is explicitly laid down in a number of statutory provisions. Kortmann, *supra* note 68, p. 342 refers to Art. 117 of the Constitution and Art. 11 of the General Provisions Act (*Wet Algemene Bepalingen*). Specific provisions apply to the Dutch Supreme Court in this regard (Art. 118 of the Constitution and Art. 79 of the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*)). This might explain the absence of Supreme Court case law on conventions. The explicit reference to the courts as guardians of the rule of *law* in *Miller*, indicate that the ‘constitutional remit’ of the courts is no different in the UK. See *Miller*, *supra* note 38, para. 151.

87 Feldman, *supra* note 15, p. 343.

exceptions. Government bodies invoke the exceptions when they argue against disclosure. Conventions turn out to be relevant to those bodies in substantiating their claim that the exceptions apply. This can be explained by the fact that the conventions that were invoked (e.g. Cabinet homogeneity and the education convention) all involved the need for confidentiality. The practice of confidentiality, in turn, informed the application of the law.

5. Conclusion

While not being straightforwardly enforceable, conventions have assumed legal relevance before courts in a limited number of cases in both the UK and the Netherlands. The exact legal relevance of conventions depends on the specifics of each particular case. Possible reasons for differences and similarities by and large relate to the bigger constitutional picture in the UK and the Netherlands. In this picture the 'maturity' of the constitutional debate on conventions, the written or unwritten character of a constitution and the relationship between the political branches of state and the courts all feature prominently.

This article highlighted the possibility of drawing upon insights and questions derived from one jurisdiction to overcome constitutional blind spots in another jurisdiction. It did so in the area of constitutional law by focusing on the issue of the legal relevance of constitutional conventions in the UK and the Netherlands; an issue which features prominently in scholarly research and case law in the UK but which had not yet been analysed in the Netherlands. It turns out that conventions are capable of assuming legal relevance in judicial proceedings in the Netherlands too, which adds a new layer of complexity to an already complex constitutional phenomenon. This article can be seen as a first attempt to venture into this uncharted constitutional territory. ■