The Prince of Wales & The Duke of Cambridge: A Constitutional Analysis

DOMINIC SCULLION

1. Introduction

The marriage of Prince William of Wales to Catherine Middleton has one obvious similarity to the wedding of William’s mother and father: it is a union of future King to his chosen Queen. However, whilst Prince Charles was first in the line of succession at the time of his wedding and, indeed, was already Prince of Wales, William was neither. The author’s interest in this is of a constitutional nature, namely the various roles Prince William, now Duke of Cambridge, will undertake in his royal life. The constitutional role of the Sovereign has been written about considerably and will not be discussed in this paper. Instead, the focus will be on the constitutional role of the Prince of Wales and that of his first son. The role of the Prince of Wales will be discussed with reference to the conventions created by the present incumbent, and to those created by his predecessors. The role of the new Duke of Cambridge will be discussed more briefly, but with specific reference to the hypothetical situation of Prince William remaining but second in line to the throne for a while longer. Will he begin to assist the Prince of Wales in carrying out his duties? This paper will address this speculative question and comment on whether Prince William will inadvertently create new constitutional conventions. To begin the discussion, some time will be spent considering constitutional conventions in general, before moving on to applying that consideration to the role of the Prince of Wales and his first son.

2. Constitutional Conventions

The constitution of the United Kingdom cannot be found in a singular document. Instead, it stems from different sources and takes different forms. Constitutional conventions are a feature of the British constitution; the Sovereign, her ministers, politicians and other constitutional actors are expected
to observe this body of largely unwritten rules. John Mackintosh defines a
convention as ‘a generally accepted political practice usually with a record
of successful applications or precedents’.1 Oxford professor AV Dicey thought
them to be ‘rules for determining the mode in which the discretionary powers
of the Crown...ought to be exercised’.2

Conventions vary in life-span, import and character and found amongst
them are some of the pillars of modern-day Britain: the office of Prime Minister
is a creation of constitutional convention; the notions of collective cabinet
responsibility and ministerial accountability for the running of government
departments are conventions; and more recently, following the Scotland Act
1998 and the re-establishment of a Scottish Parliament, the Sewell Convention
established that Westminster would have to seek the consent of Holyrood
should it wish to legislate on a matter which was devolved to Edinburgh.3
Other conventions, of seemingly less constitutional importance, also deserve
notice: it is convention that the eldest son of the monarch receives the title
Prince of Wales. It is convention that the Prime Minister is selected from the
House of Commons, and not the Lords. It is convention that following a hung
parliament, the incumbent government has the first attempt to form a coalition
and to see whether it can command the confidence of the House of Commons.4
Whilst these may not go to the heart of the British constitution, they are
conventions nonetheless. Rodney Brazier has argued for sub-division and
regulation within the sphere of conventions and wishes to see some of what we
would currently call conventions re-defined as ‘constitutional practices’ which
would be ‘hierarchically inferior’ to conventions, and another species of the
constitution to be born in the superior ‘constitutional obligation’.5 However, the
present author endorses the view of Colin Munro who suggests that ‘it seems
preferable to view the non-legal rules relevant to the constitution as being of one
class, even if – perhaps because – their importance, precision, and
obligatoriness are variable’.6 The key distinction ought to remain between
conventions and laws, although this point is one of considerable controversy
and differing views.

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3 This consent is sought through a Legislative Consent Motion.
4 This must follow following the general elections in 1974 and 2010, and is now enshrined in
5 R Brazier, ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’
(1992) 43 NILQ 262.
Dicey distinguished conventions from laws in a practical manner; laws could be enforced by courts, whereas conventions could not.\(^7\) Jennings considered there to be ‘no distinction of substance’.\(^8\) Munro points to considerable case law in which the courts have refused to recognise conventions as law\(^9\) and highlights Lord Widgery CJ who said that ‘a true convention [is]...an obligation founded in conscience only’.\(^10\) The difference between convention and law can be further highlighted when one considers the differing implications of either being breached. Someone who breaks the law can be punished in a court – his actions have been deemed illegal. Someone who breaks with convention, however, cannot be punished in a court, but his actions might be deemed unconstitutional and his position may become untenable. A law which is broken does not cease to exist, but this can be the result when a convention ceases to be observed. Conventions can be made into laws by legislation.\(^11\) There is speculation as to whether conventions can ‘crystallise’ into laws over time and such speculation has received renewed energy since the Ministerial Code was re-vamped and re-published by Mr. Brown in 2007 and again by Mr Cameron in 2010.\(^12\) Whether judges have or should recognise conventions as legal rules which already exist is another area under the spotlight.\(^13\) This has received further examination in light of Freedom of Information legislation and how this co-exists with the convention of cabinet responsibility and secrecy.\(^14\) The convention that neither fact nor content of advice given by the Law Officers can be disclosed outside government without the Law Officers’ consent received scrutiny in *Her Majesty’s Treasury v. Information Commissioner*.\(^15\) However, despite a few recent articles and cases which suggest there is a potential future role for the courts in interpreting conventions, it is submitted that there is insufficient evidence to suggest that we are at that stage yet. The speech by Lord Reid in *Madzimbamuto v. Lardner-....*
Burke\textsuperscript{16}, when it was suggested to the Privy Council that Parliament had ignored convention by legislating for Southern Rhodesia without its consent, remains relevant today when he said: ‘Their Lordships in declaring the law are not concerned with these matters’.

Despite many attempts to offer a clear definition of conventions and the features of them, it is suggested that a more valuable approach may be found in leaning towards flexibility over rigidity, and in considering all opinions proffered on this matter. The reader should also be forgiven if feelings of frustration emerge at the lack of clarity offered on this complex area of constitutional law; it is suggested, however, that had the author attempted to glean any more rules or underpinnings from the research carried out, that it would have been at the expense of accuracy.

3. The role of the Prince of Wales

The constitutional role of the Sovereign was famously summed up by Bagehot when he declared that she had ‘the right to be consulted, the right to encourage [and] the right to warn’.\textsuperscript{17} The role of the Prince of Wales, however, has been an area of constitutional law that has been largely overlooked. Rodney Brazier has written one of the only articles dedicated to the topic\textsuperscript{18} but not much discussion or critique followed. Brazier separated his article into those constitutional ‘rights and duties’, ‘obligations’ and ‘qualities’ which the Prince of Wales enjoys, adheres to and should possess. This section will analyse some of Brazier’s findings, whilst keeping in mind the theme of the paper being one of constitutional conventions. Unless stated otherwise, all references to the ‘Prince of Wales’ should be taken to mean the present incumbent.

A. Brazier on the Prince of Wales

Brazier begins his study of the Prince of Wales by focussing on what he described as ‘the Prince’s right to be instructed in the business of government so as to prepare him for kingship’.\textsuperscript{19} He points to the Queen’s hand in instructing Charles on constitutional matters and to her practice of allowing him access to government papers. Brazier views this as unexceptional and, indeed, this convention may be backed up by the knowledge that many of Charles’ most recent predecessors were given the same education by the monarch of the time. Discussion of the Prince’s role as Counsellor of State, his

\textsuperscript{16} [1969] 1 AC 645 at 723.
\textsuperscript{17} W Bagehot (R Crossman (ed.)), \textit{The English Constitution} (Collins, London 1963) at p. 111.
\textsuperscript{18} R Brazier, ‘The constitutional position of the Prince of Wales’ 1995 PL 401.
\textsuperscript{19} \textit{ibid} at p. 401.
right to sit in the House of Lords\textsuperscript{20} and his special position on taxation followed. However, the ‘constitutionally much more interesting’\textsuperscript{21} part of the Prince’s role was to be found in his relationship with Her Majesty’s Government.

The Prince of Wales’ right to be instructed on and to be involved in the business of government is, as previously said, uncontroversial. There is a precedent in action, one which Charles himself believed he was following, and there was a reason for this precedent.\textsuperscript{22} However, the Prince of Wales took this further and has met privately with the Prime Minister, secretaries and ministers of state, shadow ministers and leaders of the devolved administrations. A scan of the court circular in 1994 over a twelve month period showed that the Prince met in private with ten ministers, two shadow ministers and the Leader of the Opposition.\textsuperscript{23} A scan of a nine month period between 2010 and 2011 shows that figure to have increased. Of course the minutes of such meetings are never released\textsuperscript{24} but it is thought that the Prince of Wales would have seen these meetings as opportunity to offer his opinions. As Brazier pointed out, Charles sees it as both his duty and his right ‘to raise matters of public policy with Ministers’\textsuperscript{25}. Ministers, of course, are free to ignore the advice of the Prince and there can be no consequence to them so doing. Brazier believes that ‘there are more than enough precedents to establish the existence of [a] convention’\textsuperscript{26} and that Prince William will be able to rely on this convention when he becomes heir apparent. As a concluding note, Brazier believes that should subsequent ministers have an objection to this practice, that they have no one to blame but themselves ‘for allowing the Prince’s actions to gel into a new convention rather than stifling it at birth’.\textsuperscript{27}

Political neutrality is what Brazier defines as a constitutional obligation to which the Prince must adhere.\textsuperscript{28} Whilst all members of the Royal family should remain neutral, it is particularly important that the Prince adhere to this, owing to his future role as monarch. His impartiality, however, has been questioned throughout his 60 year ‘reign’ and he has been accused of meddling and even of being a dissident. Brazier gives examples of some of his controversial remarks, but these will be replaced by more recent examples in

\textsuperscript{20} Since abolished by the House of Lords Act 1999.
\textsuperscript{21} R Brazier (n 17) at p. 402.
\textsuperscript{22} Thus satisfying Sir Ivor Jennings’ test for the creation of a constitutional convention. Jennings (n 7) at p. 131.
\textsuperscript{23} As highlighted by Jonathan Dimbleby in his authoritative autobiography on the Prince of Wales. The Prince of Wales (Little Brown & Co, London 1994) at p. 405.
\textsuperscript{24} Freedom of Information Act 2000 s37(1): ‘Information is exempt information if it relates to (a) communications with Her Majesty, with other members of the Royal family or with the Royal Household.’
\textsuperscript{25} R Brazier (n 17) at p. 404.
\textsuperscript{26} ibid.
\textsuperscript{27} ibid at p. 405.
\textsuperscript{28} ibid.at p. 406.
the analysis section which follows. Brazier hypothesises on whether the Prince of Wales could ignore formal advice given by ministers and suggests that the Prince would be 'constitutionally bound to act on any formal...advice which might be given to him which affects his constitutional position'.

Brazier reaches this conclusion based, principally, on the fact that the Sovereign must accept the advice of her ministers and so, too, must the Prince. At the time of writing, Brazier questioned whether there would ever be a situation in which ministers would have to tender formal advice to the Prince, instead of going through the Queen or through informal channels. Although the answer to this is still unknown, it is not farfetched to suggest that there would have been occasion to give advice to the Prince, as well as the Queen, in the lead up to his marriage with Mrs. Parker-Bowles. In the final sections of his article Brazier discusses, amongst other things, what would prevent Charles acceding to the throne short of death or abdication. He speculates on divorce and remarriage and concludes by stating that whilst the day-to-day job of the Prince remains that of his choosing, that there is now a 'sizeable body of convention and law' to help understand his position.

B. Analysis

Brazier’s writing on the Prince of Wales filled a gap in our understanding of constitutional law in Britain. The aim of this article, however, is to focus on the conventions which Prince Charles has adhered to or created. The author has already noted Brazier’s arguments for the differing categories of constitutional convention and it is in this respect that differences between our analyses may emerge. This paper will adopt Munro’s view that constitutional conventions are of one category, regardless of how rigidly a convention is followed or of the level of constitutional import which can be attributed to it.

Brazier termed the Prince of Wales’ ability to seek information from government ministers as a ‘constitutional right’ and concluded that this right was now a convention. Whilst the present author agrees with Brazier that a constitutional convention has been established allowing the Prince of Wales to meet with and seek information from ministers, a cautious approach will be taken in further defining that as a constitutional right. This definition and sub-categorisation implies that it is different from, for example, the Prince’s

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29 ibid. at p. 409.
30 The Queen would have been advised on whether to consent to the marriage, as required by the Royal Marriages Act 1772.
31 Namely marrying a Roman Catholic or converting to Catholicism.
32 Both of which have since occurred.
33 R Brazier (n 17) at p. 416.
34 See generally, Munro (n 5).
‘obligation’ to remain politically neutral. Whilst Brazier undoubtedly adopted these terms for the ease of the reader, it is submitted that this, in fact, could add confusion to the student of the constitution. The term ‘constitutional right’ could be taken to imply that this convention had started crystallising into law and that no one could deny the Prince this right. Brazier seemed to endorse this implication by suggesting that future ministers could not ignore this convention if future Princes of Wales sought information from them. It is suggested that there is a danger in following this argument. It is worth considering what the implications would be should a future minister refuse to allow a future Prince of Wales access to government papers? As stated above, if a convention is no longer followed, it can spell the end of a convention, and short of Parliament enacting legislating to make the one-time convention law, not much else can be done. A future Prince of Wales could raise an action in court but, as we have seen, the case law seems to suggest that the courts would be unwilling to enforce a convention. Would a Prince of Wales appeal to an MP to introduce a bill to Parliament affirming his right to seek government papers? Perhaps, but this would be a very unlikely course of action and any such bill would be unlikely to get past the committee stage. It is submitted, therefore, that this particular convention highlights the difficulties which can occur should one attempt to declare a particular convention as being of higher importance than another; conventions have one thing in common, regardless of the role they play: they are not laws and are not rigid in nature.

Brazier speaks of the ‘obligation’ that the Prince of Wales remains politically neutral. Again, the author would question the need to sub-categorise this convention as a ‘constitutional obligation’ and will refer to it simply as a constitutional convention, albeit one which ‘obliges’ the Prince not to act in a certain manner. The Prince’s observation of this convention has sparked the most criticism from the press and he has been repeatedly criticised for his out-spoken remarks. In August 2008, Prince Charles gave an interview to the Daily Telegraph on the matter of companies developing genetically modified crops. The Prince said that it was ‘a gigantic experiment with nature and the whole of humanity which has gone seriously wrong’ and that reliance on these corporations for food would end in ‘absolute disaster’.

Following the Prince’s interview with the Daily Telegraph, the then Environment Minister, Phil Woolas, ‘challenged Prince Charles to prove his claim that GM crops could cause a global environmental disaster’. In 2004, Education Secretary Charles Clarke, described Prince Charles as ‘very old-fashioned and out of time’ for his

views on education.\textsuperscript{37} Charles has been out-spoken on climate change, urban planning, architecture and religion. A documentary produced by Channel 4’s Dispatches programme entitled \textit{Charles: The Meddling Prince} tried to expose Charles’ public views on political issues as something which, post coronation, could lead to a constitutional crisis. As a result of the programme Sir Michael Peat, Private Secretary to the Prince, wrote a letter to Channel 4 countering all allegations which, in his view, were inaccurate and he went on to provide further information about the Prince’s role.\textsuperscript{38} Sir Michael distinguished between ‘political issues’ and ‘matters of public policy’ and indicated that Charles’ comments were directed towards matters of public interest but were not party-political issues. Charles did not directly criticise the government for its policy on GM foods and, as Sir Michael noted: ‘If an issue becomes party political or politically contentious after His Royal Highness has raised it, for example GM crops, he will not do so in public again’.

In light of the above, it is unsurprising that questions have been raised regarding Prince Charles’ observation of the convention to retain political neutrality. It is submitted, however, that the Prince has not ignored this convention. On his official website, Charles describes himself as ‘acting... as a catalyst to facilitate change’.\textsuperscript{39} He has not sided with a political party nor has he directly criticised the government.\textsuperscript{40} Being an activist and a prince need not be mutually exclusive; provided that Charles continues to avoid party political issues, the author can see no constitutional objection to the Prince continuing campaigning. Additionally, it is possible to view this activism as a creation of a new constitutional convention. It would be difficult to sub-categorise this into a ‘right’ or ‘obligation’ of the Prince, but as stated above, the present author would not wish to do so. It could, however, be considered convention that the heir to the throne need not remain as silent as the monarch and there can be a place for campaigning on matters of public interest. Indeed, should William when Prince of Wales begin campaigning on certain issues, it would be difficult to circumscribe his doing so on constitutional grounds. A caveat will be added at this juncture. Whilst this paper has touched upon what the outcome would be were a convention ignored, it is submitted that should the Prince align

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\item \textsuperscript{37} T Halpin, ‘Charles v Charles head to head’ \textit{The Times} (19 November 2004) available at <http://www.timesonline.co.uk/tol/news/uk/article392874.ece> (accessed 5 April 2009).
\item \textsuperscript{40} See, for example, Tony Blair’s response to a question on the matter, from The Website of the Prime Minister, ‘Monthly Press Conference 23 February 2006 – Full Transcript’ available at <http://www.number10.gov.uk/Page9098> (accessed 6 April 2009).
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himself politically and therefore cast doubt on whether he is capable of neutrality when King, that the result would be a growing republican movement and would pose a serious threat to the future of the British monarchy.

C. Additional Observations

A few additional observations on the role of the Prince of Wales can be made at this point. It is established convention through centuries of precedent that the primary role of the Prince of Wales is to support the monarch. This will take the form of representing the Sovereign at official functions, the carrying out of investitures and receiving foreign delegations. The Prince of Wales is also expected to support the government of the day by undertaking trips abroad to further British interests. The increased use of air-travel during Charles’ time as Prince meant that he undertook many more foreign trips at the request of the Foreign Office than many of his predecessors. Perhaps ‘supporting Her/His Majesty’s Government’ has become a distinct role, falling alongside the traditional role of ‘supporting the Queen’.

Establishing a charitable enterprise is an innovation of the current Prince. The Prince’s Charities, which includes The Prince’s Trust, is the brainchild of Charles. Whilst future Princes could not be forced to be as actively involved in charity as Charles has been, the precedent which has been set by him in undertaking hundreds of engagements a year and being a campaigner for charities will be hard to ignore.

4. The Duke of Cambridge

As a final section to this paper, a short discussion of the role of Prince William, now Duke of Cambridge, will take place. Unlike the title ‘Prince of Wales’ which has always been reserved for the eldest son of the monarch, the title ‘Duke of Cambridge’ has been held by a variety of different royals throughout history. The discussion which follows, therefore, will focus on the constitutional position of William as son of the Prince of Wales, as opposed to any constitutional significance attached to the title Duke of Cambridge. The reader should by now be comfortable in the knowledge that a constitutional convention is usually held to exist because of precedent. It is of interest therefore to discuss conventions which might be created when there is no precedent available. The role of the new Duke of Cambridge affords us an opportunity to speculate on potential future conventions. What will his role be?

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41 This is the principal role of the Prince of Wales, as stated on his official website. The Official Website of The Prince of Wales, ‘At work’ available at <http://www.princeofwales.gov.uk/personalprofiles/theprinceofwales/atwork/index.html> (accessed 19 February 2009).
Will it change over time? Will conventions be created? These questions will be addressed.

The role of the Duke of Cambridge, at least for the near future, will presumably not be too different from his role prior to marriage. He will continue to serve as a search and rescue pilot at RAF Anglesey and will continue to support his charities. It is likely that he will begin to make more public appearances over time and will represent Britain in an official capacity with increased frequency. This, however, is not noteworthy. In fact, any constitutional interest in the Duke of Cambridge will begin only if the Queen continues to reign for a time longer, and as long as her son, Charles, does not predecease her. A hypothetical, but not un-realistic, scenario will be considered. Should the Queen reign for another ten years, she will be ninety-five years old and the Prince of Wales will be seventy-three. Over the past few years, Charles has started to take over some of his mother’s duties in order to lighten her load. This is unremarkable and expected practice of the Prince of Wales.\(^{42}\) However, should this hypothetical situation become a reality, it is not far-fetched to suggest that the seventy-three year old Prince, who is assisting the ninety-five year old monarch, might seek assistance from the thirty-nine year old Duke. The Duke, who is already a Counsellor of State by statute and can, for example, give assent to bills in the absence of the monarch, might find himself treading on unchartered waters. Will the Prince of Wales begin to show the Duke cabinet papers in order to prepare him for his role as Prince of Wales? If he does, it is submitted that this would create a new constitutional convention but would be uncontroversial. Jennings’ requirement that there be a reason for the convention’s existence would be satisfied;\(^{43}\) the Duke would be being prepared for a future role. Would this same reasoning be applied should the Duke begin to seek meetings with ministers and secretaries of state? It is suggested that it would. The Prince of Wales is permitted to do so because he is being prepared for kingship. It follows, therefore, that the Duke would be permitted to do so in preparation for becoming Prince of Wales. Conversely it is submitted that should, for example, Prince Henry (Harry) of Wales attempt to seek government information or meet with ministers of state, that this should be refused by ministers as there would be no reason to allow it; he will never be King nor will he ever be Prince of Wales.\(^{44}\) Therefore, owing to the advanced age of the British monarch, the British constitution might begin to see new conventions created in the practice of her grandson, the Duke of Cambridge. This section is, by its nature, entirely speculative but there can be value in considering potential new conventions prior to their creation. It could add a little more certainty to a very uncertain area of constitutional study.

\(^{42}\) And, indeed, of a son!

\(^{43}\) Jennings (n 7) at p. 131.

\(^{44}\) Unless, of course, The Duchess of Cambridge does not produce an heir, in which case Prince Harry would remain next in line after William.
5. Conclusion

The marriage of the Duke and Duchess of Cambridge has given reason for an article of this nature to be written. William will have three main roles in his life: that of second in line to the throne; heir to the throne; and monarch. As stated in the introduction, the constitutional role of the monarch has been written on in depth. Sixteen years ago, Brazier enlightened the constitutional enthusiast with an article on the Prince of Wales. This article has attempted to analyse Brazier’s work on the Prince of Wales and to provide some commentary on the constitutional role of the Duke of Cambridge by focussing on the constitutional conventions which underpin the two royal positions.