

CONSTITUTIONAL CONVENTION: A WORD HAVING GREATER SIGNIFICANCE AS THE WRITTEN WORDS OF THE CONSTITUTION ITSELF

Written By **Pranav Kaushal*** & **Lakshay Bansal****

**4th Year B.A.LLB Student, Bahra University Shimla Hills*

***3rd Year B.A.LLB Student, Bahra University Shimla Hills*

Abstract

“Constitutional Convention is like a medicine which can cure even that disease which cannot be cured by the doctor”, in simple words it is the convention which can cure all difficult situation where there is no law to govern such situations”

The study of the constitutional convention is always anchored with an assumption that has been so far remained unchallenged. The constitution of India comprises both written rules enforced by the courts and unwritten rules or principles necessary for constitutional government. Talking about the constitutional conventions they are the informal and uncodified procedural agreement that is followed by the institution of the state. Written rules mandate that they are to be followed in particular specified situation and on the other hand the unwritten rules come into action when there is no given written rule to cover the situation at hand. Constitutional have always regarded to be the rules of political practices. These conventions have the binding effect to those who apply these constitutional conventions, however these conventions are not considered as laws as they are not enforced by the courts nor they are made by the legislature, still they are considered to be important. In India these constitutional convention tend to play a very important role apart from the other laws. Can anybody believe in the fact that Indian Constitution being the lengthiest, bulkiest and the most detailed constitution in the world also follows the constitutional conventions? This clearly specifies that Indian constitution in itself does not deal with all aspect. It is due this fact only that constitutional conventions are being followed. Convention has been considered as a

tool or weapon which is used to deal with the complex situation where there is no specified law. This convention has been considered as a medicine to cure the disease which is not been able to be cured by the doctor in other words where there is no law constitutional conventions come into play.

Introduction

“Convention exist to protect some principles of the constitution that would be negatively impacted”- Andrew Heard

Constitutional Conventions are used as an instrument of national cooperation and the spirit of cooperation is the essential feature of the constitution. They are the rules elaborated for effecting that cooperation.¹ These conventions are always referred as informal and uncodified procedural agreement that has been formed by the state to tackle that situation which has not been well interoperated in the constitution. These conventions have to play a vital role where law is silent. Since it is also an evident fact that these conventions are not enforced in the courts because the very important reason that is stated behind this is that the constitutional convention are not enumerated into the category of law and rules. These conventions are not interpreted by the court nor they are made by the legislature but still they assume importance in the modern scenario. Does anybody found the reason behind this? India is only the country with the highest document of laws and has framed the world’s lengthiest, bulkiest and most detailed constitution of the world. But still India is dependent on these constitutional conventions for the proper functioning. Why this is so? The reason is very simple to understand. The main purpose in order to have the constitutional convention is that these conventions ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the period. Although conventions are not legally enforceable in the court and the sanction behind these conventions is moral and political, yet some conventions of the constitution which set the norms of behaviour of those in power or which regulate the working of various part of the constitution and their relation to one another may be as important if not of greater significance as the written word of the constitution itself. This is particularly true of the role of “Constitutional Convention” in a system

¹Ivor Jennings: *The Law and the Constitution* 13 (1979).

of parliamentary democracy having the constitutional distribution of powers between two or more level of governments. Often constitutional conventions are more important than written constitutional provisions. Let's take an instance to clarify the importance of the Constitutional convention; the President of India is empowered by the constitution to appoint the Prime Minister but the constitution provides no guidance as to who should be appointed as Prime Minister. Here in this complex situation the constitutional convention came into action by guiding the President in discharging his duty mentioned in the constitution.

The term constitutional convention was first used by British Legal scholar A.V Dicey.² Dicey wrote that the actions of political actors and institutions are governed by two parallel and complementary sets of rules:

1. The one set of rules are in the strictest sense "laws", since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known [as the common law] are enforced by the courts.
2. The other set of rules consist of conventions, understandings, habits, or practices that—though they may regulate the conduct of the several members of the sovereign power, the Ministry, or other officials—are not really laws, since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution", or constitutional morality.³

Another scholar who defined well the aspect of these conventions was Peter Hogg and he defined it as follows-

“Conventions are rules of the constitution which are not enforced by the law courts. Because they are not enforced by the law courts they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another

² A. V Dicey *“Introduction to the Study of the Law of the Constitution”* 1883

³AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, pp. 23-24.

official or institution. Other conventions limit an apparently broad power, or even prescribe that a legal power shall not be exercised at all”.⁴

Characteristics of the Constitutional Conventions

1. Conventions are the rules that define non legal rights, powers and obligation of the office holder in the three branches of the government namely as the Executive, Legislature and Judiciary or the relations between the governments and government organs.
2. Conventions in most of the cases can be stated only by the general terms and their applicability in certain cases being clear, but in certain cases they are referred to be as uncertain and debatable.
3. The Constitutional conventions are distinguishable from rule of law, though they may be equally important or in certain cases they are more important than the law laid down. The power of these conventions can be seen that these conventions can modify the application or enforcement of Rule of Law.

Constitutional Conventions develop over time and are not outlined in any document.⁵ Conventions grow out of the practices and precedents determine their existence. Such precedents are not authoritative like the precedent of the court of law. ***“Every act is a precedent but not every precedent creates rule”***⁶

Sir Ivory Jennings suggested that in order to establish a constitutional convention, three questions must be asked?⁷

1. What are precedents?
2. Did the Actors in the precedents believe that they are bound by a rule?
3. Whether there is good reason to believe the rule?

A single precedent with a good reason may be enough to establish the rule. A wrong string of precedent without such a reason will be of no avail, unless the person concerned themselves to be

⁴Peter Hogg, *Constitutional Law of Canada*, p. 7.

⁵*The Written and the Unwritten Constitution*, at http://www.canadiana.org/citm/specifique/written_e.pdf (last visited on February 11, 2018).

⁶ Ivor Jennings: *The Law and the Constitution* 13 (1979).

⁷*Re Amendment of the Constitution of Canada*, (1981) 125 DLR (3d) 1, by the Canadian Supreme Court.

bound by it. As earlier stated conventions grow out of and are modified by the practice. At any given time it may be difficult to say whether a practice has become a convention or not? Constitutional convention does not come from certain number of sources, their origin are amorphous and nobody has the function of deciding whether conventions exist or not.

Importance of Conventions in Indian Constitution

Despite the fact that our Indian Constitution is a detailed Constitution, the framers of the Constitution left certain matters to be governed by conventions, which gives the holders of constitutional offices some extra powers of discretion in respect of such circumstantial matters. Conventions lubricate the loop holes left at the joints in the constitutional structure and secure them against coagulation. The main purpose of the Constitutional conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the time. Despite the fact that these all conventions are not enforceable legally and the sanction behind them is moral and political, some conventions of the Constitution set such norms of behavior which regulates psychology of those in power. These also regulate the working of the various parts of the Constitution and their relations with one another, may be as significant, if not of greater importance, as the written word of the Constitution itself.

One lamentable fact of the Indian Constitutional situation is that enough attention has not been paid to the evolution and observance of the right codes of conduct and conventions. Even the code of conducts and conventions developed in the previous years has been broken too lightly in the working years. There is an increasing trend to depend upon to extra-Constitutional methods to force settlement of political or economic issues—imaginatively or really, as the case may be.

This would be a cause for concern even in a small multi religious country. In India, which is a heterogeneous country of huge dimensions, this cannot be a matter of grave dread. Hence, natural reaction would be that the loopholes in the Constitution which have permitted abnormal developments should be plugged. It is urged that, if these Constitutional conventions do not work, suitable constitutional safeguards must be provided.⁸ If appropriate conventions are not followed

⁸*Report of the National Commission to Review the Working of the Constitution*, Department of Legal Affairs, Ministry of Law, Justice and Company Affairs, 2002.

and the discretion provided under certain situations is misused, the whole system may become a deadwood at the first place. In order that these situational conventions and codes of conduct get evolved, it is essential that the officials holding the constitutional offices should be selected amongst the persons of admitted competence and integrity and provided with reasonable security of tenure.

Enforceability of Constitutional Conventions

*"Conventions, understandings habits or practices which, though they may regulate the conduct of the several members of the sovereign power...are not really laws at all because they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or constitutional morality..."⁹ - **Dicey***

The Constitutional conventions are not, and cannot be, enforced by the courts of law. The elementary reason for this is that according to the [Supreme Court of Canada](#), in its 1981 decision, is that, "These conventions are generally in conflict with the legal rules which they postulate and the courts was bound to enforce the legal rules."¹⁰ Most accurately, the conventions pursue towards certain acts, which would be permissible under a straightforward reading of the law but they are contraband in practice of the same law. The court ruled that the conflict between conventions and laws means that no convention, no matter how well-framed or universally accepted by all, can "crystallize" into law, unless the proper parliamentary procedure has been followed to codify the convention or legislature enacts a law or constitutional amendment codifying for a convention which should specify request and consensus' for enactment.¹¹ Moreover, the Supreme Court of India held that any convention contrary to the constitutional principles and against the basic intendment cannot be admitted as constitutional convention and its genesis must be proved within its provisions itself.¹² These principles are regarded as authoritative in a number of other jurisdictions, including the UK and in India also.

⁹ Dicey, A.V.(1898), *Introduction to the Study of the Law of the Constitution*. 10thed. 1959, London: Macmillan.

¹⁰Supreme Court of Canada, *Attorney General of Manitoba et al. v. Attorney General of Canada et al.*, [1979] 2 S.C.R. 1032

¹¹ <http://www.bailii.org/ew/cases/EWCA/Civ/1982/4.html>

¹² SP Gupta v. President of India, AIR 1982 SC 149, (INDIA).

Some conventions evolve or change over time. For example, In India, the question emerged when the V.P. Singh government resigned in 1990, without consulting the President to dissolve the Lok Sabha. The President, Mr. R. Venkataraman consented with the view that Prime Ministerial advice was a must for dissolution. However, when Mr. Chandrashekhar resigned as Prime Minister in 1991 and asked for the dissolution of the House, the President Mr. Venkataraman stated that “the question of dissolution of the Lok Sabha must be considered separately. The President then took a whole week before announcing the dissolution of the Lok Sabha on 13th of March 1991 and also stated that the advice of the Prime Minister was not the sole reason for taking the decision.¹³ So, this made a convention to be followed within the purview of the powers of the President under Indian Constitution.

However, these conventions are rarely even broken. Unless there is general consent on the breach, the person who breaches a convention is often wholly criticized, on occasions leading to a loss of reputation or social support. It has been said that "conventions are not worth the paper they are not written on", i.e., they are not enforceable in court of law because these conventions are not written down expressly in the law.

Instances of Constitutional Convention

***The Choice of a Prime Minister-**

India has the world’s lengthiest, bulkiest and most detailed constitution but certain aspects are left to the conventions. One of them is the appointment of Prime Minister by the President.¹⁴ The nature of monarch’s choice depends upon the status of the parties. If a party has a clear majority than it’s recognize leader would be the Prime Minister. But what happen in that situation where no party gets majority in the legislature. Here the possibility that may arise- is the formation of coalition government or the formation of minority government. The position with respect to appointment of Prime Minister is similar in India since our constitutional practices are to a large extent derived from English usages, customs and practices.¹⁵ Article 75(1) of the Indian Constitution gives the President the right to appoint the Prime Minister. In normal circumstances

¹³T. Prasanna, "Dissolution of the Lok Sabha", 12 STUD ADV (2000) 160 at p. 170

¹⁴ Article 74 of the Indian Constitution.

¹⁵*U.N.R. Rao v. Indira Gandhi*, (1971) 2 SCC 63

it is the leader of the majority in the House of the People (Lok Sabha). But, in circumstances where the Prime Minister dies in office or resigns, the President will have to exercise his personal judgment. The party may have no recognized leader, or either of the two parties may be able to form a government and command the support of the House of the People. In such circumstances the President may explore the possibility of finding a person who could form a coalition with the help of two or more parties and command the support of the Lok Sabha. It was such discretion that President Reddy exercised in 1979 after the fall of the Janta Ministry in inviting Charan Singh to form the ministry and also in not inviting Jagjivan Ram to do so after Charan Singh resigned and advised the dissolution of the House.¹⁶

***Options in Hung Lok Sabha**

Article 75(1) of the Indian Constitution states the power of the President to appoint the Prime Minister. Clause (3) adds: "75. (3) The Council of Ministers shall be collectively responsible to the House of the People." However, in an uncertain situation, in the case of hung *Lok Sabha*, how is the President to determine which of the party leaders will manage to secure majority support?¹⁷ British precedent and the dicta of eminent authorities do not support any such arithmetical test. Another example of such absurdity is that of Dr. S.D. Sharma's decision to appoint Mr Vajpayee as the Prime Minister on 15-5-1996. The sole consideration behind Mr Sharma's decision seemed to be the "arithmetic" test that Mr Venkataraman talked about in his book, *My Presidential Years*. Such decisions lower the image of the high office of the President; more so, when the appointed Prime Minister fails to secure the majority in the House as it happened in the case of Mr Vajpayee Government fell within 13 days of its appointment. Yet another example will be that of the case of Bihar where the Governor decided to ask Mr Nitish Kumar to form the Government despite the fact he was in no position to command majority in the House, and had to ultimately resign. Such decisions sully the image of the office of the President and Governors, and also go against the spirit of democracy.

***Dissolution of the House**

¹⁶M.P. Singh: *V.N. Shukla's Constitution of India* 344 (2001).

¹⁷ A.G. Noorani: *Constitutional Questions in India* 69 (2000)

The *Lok Sabha* and the *Vidhan Sabha* of each State are dissolved at the end of their terms, that is after every five years. However, this article only deals with irregular dissolutions, which occur before the term of a House is over. The theory behind the right to advise dissolution is that when the Government loses the confidence of the House, it may, instead of resigning, assert that the House itself has ceased to reflect the will of the electorate, which constitutes the political sovereign. Dissolution is thus an appeal to the electorate.¹⁸ Two major controversies in the dissolution of the House are first, whether the advice to dissolve the House should be tendered by the Prime Minister alone or the Cabinet as a whole and second, whether the President's discretion with respect to dissolution can override express advice to the contrary tendered by the council of Ministers. The former controversy had been raging among British jurists particularly in the last century, but has not been of much relevance in India, so the discussion and debate regarding this will be confined to the Presidential discretion in dissolving the House.

President's discretion

The question that always has been in controversy or often come up whether it is binding upon the President to follow the advice tendered by the Prime Minister, regarding dissolution of the House, when the Prime Minister has lost the confidence of the House. When the Prime Minister enjoys the support of the House in the Parliament, advice to dissolve the House would be binding, since no alternative government is possible. Article 74(1) provides that the President shall act in accordance with the advice tendered by the Council of Ministers with the Prime Minister being its head. However in the case of *Samsher Singh v. State of Punjab*¹⁹ Krishna Iyer, J. laid down certain exceptions in which the President was not obligated to act in accordance with the advice given by the Council of Ministers and was required to exercise his discretion. Such instances included situations regarding the dismissal of a government which had lost its majority in the House, but was refusing to quit office and the dissolution of the House of the People was required. However, the judgment also stated that even in cases regarding dissolution, the President should avoid getting involved in politics and act on the advice of the Prime Minister. Thus, the limits of the President's discretion are carefully circumscribed. However, the President, according to his oath of office, has

¹⁸ D.D. Basu: *Shorter Constitution of India* 153 (1999)

¹⁹ 26 (1974) 2 SCC 831

to preserve, protect and defend the Constitution.²⁰ So the President should not be bound by the unconstitutional advice of a ministry to dissolve the House. The House represents the will of the electorate, but the will of the electorate is subject to the Constitution.²¹ Hence the President will be bound to reject the advice if such advice is against the spirit of the Constitution.

Constitutional Conventions and Constitutionalism

“Constitutional Conventions are the rule of behaviour accepted as obligatory by those concerned in the working of the Constitution and propounds the theory of Constitutionalism” - Kenneth Wheare

One of the interesting aspects of Constitutional Conventions is its relation with Constitutionalism. Constitutionalism, in simple terms, can be signified to the idea that the powers of the Government should be legally limited and that its legitimacy is dependent on that limitation. These ideas were propounded by many jurists and scholars like John Locke, David Fellman etc. The theories and ideas relating to Constitutionalism propose that such limitations should be entrenched in the Constitution and should form a body of fundamental law. The clash with Constitutional Conventions comes due to many scholars claiming that such limitations should not just be rooted but also enshrined in written words in the Constitution. It was Dicey, who by giving the example of the British Constitution stated that the Constitutional System had various Constitutional Conventions that limits the Government effectively. But the question that remains is, whether legal limitations in the form of written text prove to be more efficient in limiting Government power or whether the flexibility of the Constitution and its conventions are better in the long run to ensure governmental limitation. Dr BR Ambedkar had consistently emphasized on the fact that we had chosen the British Model of Government and called for adherence to Westminster system. Ivor Jennings stated that “the machinery of Government in India is essentially British and the whole collection of British Conventions has apparently been incorporated as Conventions”. The Conventions of the Constitution that set the norms for behaviour for those in power and which regulates the working of the different parts of the Constitution are crucial, if not more important

²⁰Article 60 of the Constitution.

²¹*B.R. Kapur v. State of T.N.*, (2001) 7 SCC 231

than the written words of the Constitution itself. Taking the example of India, under the Constitution, the President is empowered to appoint the Prime Minister. But no guidance is provided in the written words of the Constitution as to who should be appointed as Prime Minister. In such an instance the Conventions regarding the appointment of the Prime Minister play an imperative role in guiding the President.²²

Another aspect in relation to Constitutionalism is the argument that, even if such limitations are inscribed in the Constitution and a comprehensive written constitution exists, it is not necessary that Constitutionalism is truly followed in spirit in such instances. Not enough attention has been paid to the evolution, cohesion and the proper application of Constitutional Conventions. Lately, many instances have been noticed, where codes and conventions which were being observed for a long period of time have been broken easily. Such an approach is resulting in the recourse to extra constitutional methods for resolving issues, which is a complete subversion of the intention of the Constitutional makers, who left certain aspects of the document uncodified so that the Constitution stayed flexible and open to adapt to the future times. This adaptive nature of the Indian Constitution creates the way to the existence of the conventions which have been thought to cover the loop holes of the framework of our constitution.

Constitutional Convention v. 99th Amendment Act

“Let judges remember that Solomon’s throne was supported by lions on both sides: Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty”- Francis Bacon

No democracy can develop without having an independent judiciary and a framework free from fear or favor, or with malafide faith. This judicial system should exercise a sovereign authority with respect to the other branches of government. It uplifts the fraternity and integrity of the social order. Art.124²³ and Art.217²⁴ of the Constitution of India provides that every Judge of the Supreme Court and High Court should be appointed by the President or by the Governor, by

²²Dr. Venkata Rao, NLSIU, International Conference on CONSTITUTIONAL CONVENTIONS AND PRACTICES, See, <https://drive.google.com/file/d/1sLvVavINiLvGCAMrjtyN xu9CnasOMQRI/view>

²³ Art.124, Constitution of India, 1950

²⁴ Art.217, Constitution of India, 1950

warrant under his hand & seal after consultation with the CJI and Chief Justice of the High Court respectively. These are the provisions inculcated by the framers in the Constitution. But, as the society is dynamic in nature, the system started to change in the following manner:

Firstly in 1st Judge Case,²⁵ the Supreme Court consigned the Chief Justice of India with the position of the advisor and gave the substantial control of the appointments of the judicial process to the executive. However, the final verdict ran contrary to the constitutional conventions practiced in India.

Secondly in 2nd Judges Case,²⁶ the court held that the judicial appointments must be consultative and also overruled the opinion given in 1st Judges Case. This worked better and led to the existence of the Collegium system.

Later in 3rd Judges Case,²⁷ the court observed that the judicial appointments must be put in accordance with the decision in 2nd Judges Case and the only revision that has been made by the court was that for the appointment of judges to the Supreme Court, the collegium must be made of the CJI and four senior judges of the Supreme Court of India.

The process under the judicial advancement led to the birth of 99th Amendment Act by the virtue of which Art. 124-A, 124-B and 124-C were inserted within the purview of the Constitution of India which empowered the judiciary to become completely independent with respect to the appointment of the judges in Supreme Court and in High Court respectively. But the provisions of the aforesaid Act were challenged in the Supreme Court of India in the 4th Judge Case²⁸ where the Supreme Court struck down the matter and declare that the amendment violates the constitutional ideals and hence, it was unconstitutional and void in nature.

It has been observed that the absolute power of appointing the judges must be dealt only by the pre-existing Constitutional conventions and not under the 99th Amendment Act which was in violation with the fundamental principles of the Constitution of India.

²⁵S.P. Gupta v. President Of India, AIR 1982 SC 149

²⁶Supreme Court Advocates on Record Association v. Union of India, 1993

²⁷Re: Under Article 143(1) v. Unknown, AIR 1999 SC 1.

²⁸ SCARA v. Union of India, 16th October 2015.

Conclusion

According to Dicey, constitutional conventions are means whereby the discretionary authority of the government is regulated. The main purpose of these conventions is to guide the use of the constitutional discretion. Thus, every time there is a general election or there might be the situation in which members can request for dissolution of the House of People, the questions that always arises is that whom will the President invite to form the next government? What if the President invites someone to form a government who does not have a clear majority in the *Lok Sabha*? Will the President need to the advice of the Cabinet to dissolve the House? These are some of the important questions to which the Constitution provides no answer to anyone else. These might be that complex situation in which no law or no constitution of country has answer. The thing that solves all these situations is “Constitutional conventions”. These constitutional conventions are referred as “Catalyst” which makes certain things possible which in absence would not be possible. It is also a evident fact that some of the constitutional conventions are well established and may be relied upon those conventions absolutely. While some of these conventions are vague and may lead to manipulation for political purpose. There have always been demand for the codification of these constitutional conventions but if these conventions are codified then in such scenario the nature of the flexibility of these conventions will be lost. Therefore, the main purpose of the Constitutional Conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the period, or even in those times of complex situation it helps the Constitution to adapt and make amends according to the needs and desire of the changing times, as the Founders of our Constitution couldn’t have foreseen and safeguarded the Constitution from future loopholes and hence left certain matters to be governed by the constitutional conventions as they are as important, and have **“a greater significance, as the written word of the Constitution itself”**.