



EVOLUTION OF CONSTITUTIONAL CONVENTION IN INDIA

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ABSTRACT

This Article begins with the concept, nature, development Constitutional conventions. Conventions are not laws but they are sometimes considered to be unwritten laws of the Constitution of a nation. Constitutional conventions are regarded as rules of political practice in a State and these rules will be binding on those to whom they apply. The Article then focuses on the purpose and importance of conventions as the Conventions are the elaborated rules for the developing the spirit of cooperation of the Constitution. For maintaining the flexibility of the Constitution and for the proper working of the parts of the Constitution without inconsistency and for the better relations to one another, the Conventions are important for every Constitution. The focus then shifts to the British Conventions which are made provisions in Indian Constitution. During the Constituent Assembly debates, Dr. Ambedkar (the Chairman of the Constituent Assembly) has clearly emphasized that Our Constitution has chosen the British model of Parliamentary government. Many provisions related to the Government and the Executive are taken from the British Conventions and made provisions with slight changes. This article elaborates on the British Conventions and Indian Constitutional provisions in detail and the instances which have taken place in India related with those

Constitutional Conventions. Thus the convention helps the Constitution to make amends as per the needs and desires of the society.

Conventions are not laws but they are sometimes considered to be unwritten laws of the Constitution of a nation. If there is a conflict between a law and convention, there is no doubt that law will prevail over it. The Conventions cannot enforceable in the Court of law. It is just an informal agreement and un-codified procedural agreement between institutions of a State. Every Constitution comprises of two rules. One which is written and is enforceable by courts and other is unwritten and there is no chance of enforceability of such rule. Generally Constitutional conventions are regarded as rules of political practice in a State and these rules will be binding on those to whom they apply.

THE PURPOSE AND IMPORTANCE OF CONVENTIONS

For the development and changing of laws as per the needs and welfare of the society, it is required to amend the rules by following amendment procedures mentioned in the Constitution. Here the conventions indirectly serve as means for the development of the Constitution without the formal amendments to the law. The conventions are important as they are elaborated rules for the developing the spirit of cooperation of the Constitution. For maintaining the flexibility of the Constitution and for the proper working of the parts of the Constitution without inconsistency and for the better relations to one another, the Conventions are important for every Constitution. This will make the



clear understanding of the statute and without them the law will be distorted.

In United States, the convention regarding the election of the President is mostly developed. In Canada and Australia, though they have written Constitutions, they follow a number of British Conventions. According to the Thoughts of Dicey, the Constitutional law of a nation mainly consists of two elements. The first one is the law of the Constitution and the other one is the Conventions of the Constitution which are not strict binding laws. The Conventions of the Constitution consists of various customs, political rules and ethics & practices.

Thus through the basic meaning and definitions of Conventions, there are some of the essential characteristics which are relevant and required to constitute convention. This includes the certainty and uncertainty of application as per the circumstances and there will be some modification in the application and enforcement of rules of law because of this convention in a Constitution.

CONVENTIONS AND INDIAN CONSTITUTION

The Constitution of India is very comprehensive and bulky Constitution in which all laws are written in one document. Indian Constitution is one of the bulkiest Constitutions as it comprises of 443 Articles and 12 Schedules. It can be clearly noticed that many of the British Conventions are made provisions and these provisions fills the grey area of the Constitution. Constituent Assembly members agree the fact that the India chose the West-minister type of Parliamentary democracy. During

the Constituent Assembly debates, Dr.Ambedkar (the Chairman of the Constituent Assembly) has clearly emphasized that Our Constitution has chosen the British model of Parliamentary government. Thus the Parliamentary system of government in India is adopted from the unwritten Constitution of United Kingdom. The Union Committee recommended Parliamentary System of government with elected President of India as the Head of the State.

Following are the British Conventions which are followed and made provisions in the Constitution of India:

I. FIRST CONVENTION

In England, it is the monarchy who takes the decision and this choice depends upon the advice of members of the House of Commons. The monarch exercises the prerogative powers in accordance with the ministerial advice in special situations.

In Indian Constitution, Article 74 clearly states that there will be a Council of Ministers with the Prime Minister at the head, to aid and advise the president of the State in the exercise of his functions and powers.

There is a difference between the powers of the President in United States and the powers of the President in Indian Constitution and also with the powers of President under English Constitution. Under the Presidential system of United States, the President is considered as the Chief Head of the Executive and the administrative powers are vested in him. There are secretaries in charge of different departments under the



President. The President is not bound to accept any advice from any of his secretaries. He also has the power to dismiss any secretary at any time.

Under Indian Constitution, the President is the Head of the Executive. The president will have ministers in charge of different departments under him. The President is bound by the advice of his ministers and bound not to do anything contrary to their advice or without their advice. The President has no power to dismiss any of the ministers. Under English Constitution, the President is considered as the Head of the State and not the Head of the Executive. The President in United Kingdom only represents the nation and has no power to rule the nation. Generally the President is considered to be the symbol of nation.

The ministerial advice does not mean that the President is always bound to follow their advice. The President has the right to ask for reconsideration. Article 74 impliedly provides that it is the function of the Council of Ministers to advise the President. Under Indian Constitution, as the President is the Constitutional head of the Executive, in the same way the governors are head of the State and the Governors are appointed by the President. His functions in the sphere of the State Government are similar to those of the President in the Union Government. Under Article 163 of the Indian Constitution, it clearly states that there will be Council of Ministers along with the Chief Minister of the State to aid and advise the Governor in the exercise of his functions. The 42nd Amendment which was inserted in the year 1976, provides that the President shall act in accordance with the advice of the

Council of Ministers was not only redundant but has the potential of being harmful. Before this Amendment the Supreme Court has ruled in *Shamsher Singh v. State of Punjab*¹, that the President has the power to refuse the advice of the Council of Ministers in extra ordinary circumstances and is subject to the interest of Good Governance. Justice Krishna Iyer in this case captured the correct picture in this regard:

“The President and the Governor, custodians of all executive, exercise their power upon and in accordance with the advice of their ministers save in few well-known situations. Here the exceptional situations relate to (a) the choice of the Prime Minister (CM), restricted though this choice is by the paramount consideration that he should command a majority in the house; (b) the dismissal of a government which has lost its majority in the house but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous. This is not headed by the head of the State but has to be performed as per advice by his Prime Minister, even though it can be happen and done by the President. We do not examine the detail the Constitutional proprieties in this predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory.”

In 1987, the President Zail Singh has exercised his power under the proviso added to Article 74 (1) by the 44th Amendment. He has sent the ‘Indian Postal Amendment Bill Act, 1986 to the government for reconsideration.



In years 1977 and 1978, the President K.R. Narayan has exercised his power under the proviso of the Article 74 (1) for reconsideration in regard to the imposition of President's rule under Article 356 Emergency in the State of Uttar Pradesh and the State of Bihar respectively.

In the year 2006, the President Abdul Kalam also exercised this power and has sent the profit bill for reconsideration but the bill was passed without any changes.

In *S.R. Bommai v. Union of India*,¹ the Supreme Court held that the Article 74(2) is no bar to the production of all the material on which the ministerial advice is based.

II. SECOND CONVENTION

Though the power of the Sovereign is deprived of most of the prerogatives, the Sovereign has three rights, namely the right to be consulted, the right to encourage and the right to warn.

In Indian Constitution, Article 78, Duties of the Prime Minister as respects the furnishing of the information to the President, etc., states that the Prime Minister is duty bound to communicate and to furnish all information and decisions of the ministers relating to the administrative affairs of the Union and proposals for legislation as the President may call for.

The last clause generally speaks about the successful working of the rules of collective responsibility i.e. the minister should not make a statement of policy or take any important action on his own responsibility without the previous approval of the Council.

The clause © empowers the President to require a matter on which a decision taken place by minister without the consideration by the Council of Ministers, to be submitted to the Council of Ministers for its consideration. This does not mean that it authorize the President to reopen any decision already taken by the Council of Ministers.

Jennings has pointed out the essentials elements of the doctrine of collective responsibility and this doctrine implies three things, Firstly that the prime Minister is frequently in a position to pledge his colleagues support because the only alternative is his resignation. Secondly, a minister should not announce a new policy without Cabinet consent, but if he does, the Cabinet must either support him or accept his resignation. Thirdly, the minister ought to be chary about expressing personal opinions about future policy except after consultation and if the circumstances are such to pledge the government, the Prime Minister has real cause of complaint.

In Article 167, the Chief Minister of each State – duties of the Chief Minister as respects the furnishing of information to Governor, etc. In this Article, there is same obligation on the Chief Minister as the Prime Minister has in Article 78.

Shri K.M. Munshi, Member of Drafting Committee has explained about the scope of clause© saying that “under this clause, the Governor has right to consult about information regarding to the policy making of a State and the power to sending the policy back to Cabinet for reconsideration. Therefore, this clause is a safeguard which



preserves the Collective Responsibility and the powers of the Prime Minister. There is great advantage if the Governor of the State exercise such influence over his Cabinet, because then they will be able to get confidential information and advice from a person who has completely identified himself with them and yet is accessible to the other parties.”¹

III. THIRD CONVENTION

In British Parliamentary System, the Sovereign has some importance in choosing the Prime Minister of his choice. But in reality, there is no choice at all. Further, The Queen appoints the other ministers on the advice of the Prime Minister. Here the Prime Minister is given full liberty to choose the Council of Ministers. There can be implied power given to the powers of the Prime Minister to recommend dismissal. Thus on his advice, the president has power to dismiss the ministers. Here, the Prime Minister must have the support of a stable majority in the lower house. This is generally called as the Principle of Parliamentary System of Government.

In Indian Constitution, Article 75, other provisions as to ministers, states that the Prime Minister will be appointed by the President and the other minister will be appointed by the President on the advice of the Prime Minister. In case of *S.P. Anand v. H.D. Deve Gowda*,¹ the Supreme Court held that it is not the Prime Minister as a person must be member of either of the Lower or any of the two houses of the Parliament at the time of appointment. The President first invite and appoint him the Prime Minister and then the person has to prove his majority

or seek vote of confidence in Lok Sabha within a reasonable time.¹

While appointing the Prime Minister, there can be discretion in the choice of Prime Minister if there is less than majority support or it may be because of sudden death of the Prime Minister.

In 1979, after the fall of Morarji Desai Government, there was discretion where the President Reddy has exercised by inviting Charan Singh to form the ministry and not inviting the Jagjivan Ram.

Appointment of other ministers: Other ministers are appointed by the President only on the advice of the Prime Minister. The Prime Minister Gives advice of such people who can work together and by doing this, the Prime Minister will secure the support of the House of the people. If it fails, he must find another party for securing the support of the lower house and it must be a strange house that is willing to support alternative governments.¹

Removal of Ministers: Clause (2) of Article 75 only applies to the dismissal of minister and of the dismissal of the Council of Minister. Generally, if there is lost in the confidence of Lower House, PM must either resign and sought dissolution of Lok Sabha. In 1970, Indira Gandhi and in 1999, Atal Bihari Vajpayee had lost to the vote of confidence, but still the President has allowed to continue till the completion of election and no one else were able to form the government at that time.

In Constituent Assembly, debate, the speech of Dr. Ambedkar, Chairman of the Drafting Committee, has said:



“In case of no Prime Minister, every minister will be subject to the control of the President. Here, there would be a possibility where, President who is not ad idem, while controlling the ministers can cause disruption in the cabinet. Thus, there must be collective responsibility and this will be only achieved through the instrumentality of the Prime Minister. Therefore, the Prime Minister is really the keystone of the arch of the cabinet and unless and until we create that office and endow that office with statutory authority to nominate and dismiss ministers there can be no collective responsibility.”¹

As discussed in Article 75 about the appointment of PM and appointment of other ministers in the same manner, under Article 164 the appointment of Chief Minister takes place by the Governor and the other minister will be appointed by the Governor on the advice of Chief Minister.

IV. FOURTH CONVENTION

The Ministers are collectively responsible to Parliament and this led to establishment of the basic principle of parliamentary government. In England, by middle of the 19th century, this doctrine got established. Generally the doctrine generally operates in all the important parliamentary government like Australia, Canada, Ireland and New Zealand. The principle of collective responsibility is both the cause and effect of the cabinet solidarity.

In Indian Constitution, Article 75(3) states that the Council of Ministers will be collectively responsible to the House of People. Thus, this Article clearly and expressly embodies the principle of

collective responsibility in the Indian Constitution.

The Supreme Court has explained the concept of collective responsibility as follows:

“Collective Responsibility” has two meanings: the first meaning which can legitimately be ascribed to it that all members of a government are unanimous in support of its politics and would exhibit that unanimity on public occasions although while formulating the policies they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet, are thereby personally and morally responsible for its success and failure.¹ Here, in spite of the fact that the Cabinet of Ministers is collectively responsible to the House of the People, there may be an occasion when the conduct of a Minister may be censured if he or his subordinates have blundered and have acted contrary to law.¹

Thus the whole issue of collective responsibility relates to the continuance of a minister or a government in office and the only sanction for its enforcement is the pressure of public opinion by the support of members of the legislation.

As discussed above the collective responsibility of the Council of Minister in Article 75(3), there will be the collective responsibility of the Council of Minister to the Legislative Assembly of the State as mentioned in Article 164(3) of the Constitution. Any decision given as per this provision is a collective decision from which



no ministers can dissociate. Here the minister who does not resign is absolutely and irrevocably responsible.

V. FIFTH CONVENTION

The Prime Minister must be a member of the Parliament immediately after his appointment by the President i.e. the member of the House of Commons. This also means that the ministers who are being appointed by the President with the advice of Prime Minister must also be member of one of the House of Parliament. This generally means that there must be secure membership in either of the house and this is because, it will be impose direct responsibility on the member on the members of the house of the Parliament and the Prime Minister.

In Indian Constitution, Article 75(5) and 164(4) provides that the minister who has been appointed by the President or Governor must be a member of the Parliament and State Legislature respectively within a time period of six months, and the expiration of such time period ceases to be a minister. In India, six months is the concession time period given to all the ministers including the Prime Minister to secure the membership of either house of the Parliament.

These clauses were taken by the Constitutional makers from the Government of India Act, 1935. In Indian Constitution, there is no special provision with regard to the compulsion on the Prime Minister or Chief Minister to become member of the Lower House.

A person who is not a member of either house and he is appointed as a minister or

the Prime Minister, if he does not become the member of any house of the parliament, he may continue to be so up to a period of six months.¹

VI. SIXTH CONVENTION

One of the distinguishing essential or characteristic of parliamentary system of government or British parliamentary system is the dissolution of the parliament on the advice of ministers.

Generally, in non-Parliamentary system, the legislatures are elected for the fixed time period. In this parliamentary system, the power of dissolution is in the hands of the head of the State. This dissolution is considered as a means of retain the support of the majority in the house of common.

In Indian constitution Article 83, duration of Houses of Parliament, it is clearly stated under clause (2) that the House or the people shall continue for five years from the date approved. Unless dissolved and after the expiration of time period of five years, it will operate as a dissolution of the house. Here the parliament cannot extend nor has the right to extend the life of the House of people except during proclaimed emergency, where it may prolong its life by a year at a time (Article 352). This will not extend the continuance beyond a period of six months after the proclamation of emergency has ceased to operate.

In Article 85, Sessions of parliament, prorogation and dissolution, the clause (2) of the Article states that the president may from the time to time -

- Prorogue the houses or either house
- Dissolve the house or the people



As per A.N ray (Chief Justice), the main purpose of this article is to give effect to the collective right of house and this article is not a provision regarding the contribution of parliament but of holding of session.¹

As mentioned and discussed in the above article 83 and 85 in the same way, there are articles 172, duration of state legislature and 174 Sessions of the State legislature, prorogation and dissolved the concept of dissolution is same as of the dissolution of the house of parliament. Hence the dissolution by the parliament after proclamation would be as good as dissolution by the Governor of a State whose powers are taken over.¹

VII. SEVENTH CONVENTION

The Queen is considered to be an essential part of parliament as a law-making organ of a State. In UK parliamentary system, the parliament is the supreme legislative authority and the Parliament consists of three elements, mainly the Queen and the two Houses of parliament.

In Indian Constitution, Article 79, Constitution of Parliament, it is stated that there will be Parliament for the Union which consists of the President and two houses to be known respectively as the House of the people and Council of states.

Articles 168, Constitution of legislatures in States, it is stated that there all be legislature for the states which consists of the governor and one house in some states and the governor and two houses in some of the States.

One house is the legislative council and the other is the legislative assembly, where there is only one house along with Governor, it means the house is the legislative assembly. In six states of the Union, namely Andhra Pradesh, Bihar, Maharashtra, Karnataka, Tamil Nadu and Uttar Pradesh, the legislature is bicameral and in other states, it is unicameral.

VIII. EIGHTH CONVENTION

The Queen shall not withhold the Royal assent from a Bill duty passed by the Parliament; here the queen shall declare her assents to the bill which are passed by Parliament. The Queen in England has the right to veto a bill, but this right has not been exercised since the reign of Queen Anne.

In the Indian constitution, under Article 111, assent to bill, it is clearly stated that when there is a bill passed by the house of Parliament, it will be presented to the President, and the President thereafter will declare either that he accents to the bill or he withholds assent. Here the president sends a message for reconsideration and then the houses shall reconsider the bill and will presented again for the President assent.

There are some instances where, the President has sent back the bill for reconsideration. In 2000, President Abdul Kalam sent the amended Parliament (Prevention of Disqualification) Act, 1959 for such reconsideration. Then after reconsideration, it was present to him, without any amendments the president asserted to it.



As discussed in Article 111, in the same way there will be assent to the Bills by the Governor in the case of State, can withhold assent or assents to the Bill same as the President. This provision is mentioned under Article 200. Here regarding assent of the bill, it will be politically impossible for a Governor or Prime Minister to refuse their assent to a bill and exercise Veto power. In Madhya Pradesh, the Governor for the consideration of the President has returned the bill on the ground that some of the provisions of the Madhya Pradesh Panchayat Bill, 1961, were undemocratic and opposed to the Directive Principles of State Policy.

Once a bill is reserved for the consideration of the President and thereafter, the President assents to it, then the bill becomes an Act and after passing of the Act, nobody has the right to question about its validity on the ground that it was not necessary to reserve the bill for the consideration of the President.¹

IX. NINTH CONVENTION

If there is election of the new Speaker, the Speaker should be elected normally unopposed and the Speaker is expected to be above the parties and politics. In Parliamentary System, the office of Speaker is considered to be held in a very high esteem and respect. The position and the role of the Speaker are governed by the Convention.

Articles 93-97, and Articles 178-181 of the Constitution are related to the office of the Speaker and provide the duties and powers of the Speakers and more. This office of the Speaker for the first time was created by the Government of India Act, 1919. Here the

position of the Speaker is made impartial and independent in Indian Constitution.

Conclusion

From the above conventions it can be observed that the main purpose of convention is to retain the flexibility of the Constitution and to ensure the legal framework. The convention helps the Constitution to make amends as per the needs and desires of the society. Some conventions are well-established but some are vague and because of that, it may lead to manipulation for political purposes. Thus the convention will guide the use of Constitutional discretion. The framers of our Constitution have left certain matters of the Constitution to be governed by the Conventions.
