



CONSTITUTIONAL CONVENTIONS IN INDIA

By *Saksham Sinha & Akash Mishra*
From *National Law Institute University, Bhopal*

The British model of parliamentary system of government has exercised a profound influence on the development of Parliamentary institutions overseas, particularly in the Commonwealth Nations. The Constitution of India envisages a Parliamentary system of government both at the Union and the State level. The form of government introduced by the Constitution of India is similar to the British type of Parliamentary Government. Since the Constituent Assembly of India adopted Parliamentary System of Government based on Westminster Model of the British type there is a need to understand the significance of the unwritten rules that is the important Constitutional Conventions that are the basis of parliamentary system of government¹. The fact that the Indian Constitution is one of the most elaborate in the world does not imply that it does not have in addition tacit provisions. It is based on the recognized conventions of a parliamentary form of government which it establishes both at the Centre and in the States. For quite some time people, politicians, and others professed not to see anything but the written word, and rejected the conventions altogether. The court has recognized that the provisions of the Constitution are based on certain British conventions regarding the cabinet and that to ignore the latter would be to misinterpret the former.

Origin:

There has been a long historical difficulty in determining what ideas and documents have “constitutional status” within any given political system. Unwritten constitutional conventions have long been understood to be integral to the operation of Westminster parliamentary systems. The British legal scholar A.V. Dicey emphasized that “constitutional morality” supplemented legal rules in regulating the exercise of political power and limiting the discretion of government officials the presence of a written constitution and judicially enforceable constitutional rules has sometimes been thought to render constitutional conventions superfluous. As way of a starting point, conventions according to AV Dicey are defined as:

"Conventions, understanding, habits or practices which, though they may regulate the conduct of the several members of the sovereign power...are not really laws at all 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..."¹

This definition concentrates on what conventions are supposed to achieve. However, this view is not entirely accurate and it is important that conventions are distinguished from habits and practices. Conventions are conceptually different from habits or practices in that these concepts do not prescribe or dictate what ought to happen but are merely descriptive of what in fact does happen. A further definition of the



purpose of conventions was given by Sir Ivor Jennings as:

*"The short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas."*¹

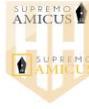
Constitutional law, however, always threatens to displace constitutional morality. The concept of a constitutional convention was popularized by the nineteenth-century British legal scholar A.V. Dicey. Conventions were understood to be key features of Westminster parliamentary systems. With long traditions of unwritten constitutions, England and many of its progeny nonetheless established and maintained limited governments and well-ordered polities. Conventions helped fill the space that might have otherwise been filled by written constitutions. Constitutional conventions, in Dicey's reading, may have written components, but they do not have the force of law and are not enforceable by courts. They can also vary over time, subject to change "from generation to generation, almost from year to year." Although not enforceable in court, Dicey thought constitutional conventions are best understood as "precepts for the guidance of public men," the "constitutional morality of the day." A convention "defines duties or obligations," but so "morally and politically" not "legally." Notably, this purposive character of constitutional conventions moves them out of the realm of mere description. The idea of a convention is not simply an analytical device to close the gap between the ideal and the reality of

political power and account for how political power is actually organized and structured within a given political system. Conventions serve a normative function within constitutional politics, leading political actors to better realize constitutional ends¹.

Constituent Assembly Debates:

In a joint meeting on June 7, 1947, the Provincial Constitution Committee and the Union Constitution Committee of the Constituent Assembly decided that, it would suit the conditions of this country better to adopt the parliamentary system of constitution, the British type of Constitution with which we are familiar. The Decision of the Constituent Assembly of India favouring Parliamentary Democracy was based on the Indian Experience of running partial responsible government in the provinces under the Government of India Act of 1919 and full responsible government under the Government of India Act of 1935. Both The Acts Contained provisions that were partly codified form of British Parliamentary Conventions.¹

K.M. Munshi, a member of the Constituent Assembly remarked regarding the conventions in the pre-independent India. He said that, during the British period political tradition of Britain was engrafted on our way of thinking. Our Constitution in consequence has come to be based largely on the British model having an unwritten constitution. The Constituent Assembly faced the challenge of codifying the conventions into the written constitution of India. At various stages of constitution making, efforts have been made by the framers of the Constitution to take note of



the provisions of the Government of India Act of 1935 and the then existing conventions in the United Kingdom. In The early stage of Constitution making, the leaders who dominated the proceedings of the Constituent Assembly of India felt that the conventions must be written and codified in order that uncertainties of memory and difficulties of interpretation might vitiate the sanctity of the convention. This was because, it was understood that the conventions are usually respected because they are reasonable rules.

Only a few members of the Constituent Assembly, proved themselves well conversant with the principles and the conventions of British Parliamentary Government. K. Santanam was a leading member who objected to the vague nature of the Constitutional provisions regarding parliamentary government¹. The Reports of the committee also reminded that these institutions cannot easily be transplanted from one part of the world to another. Everyone adopt institutions which conform to its history and tradition.

The Question present before the Assembly was that:

Should the conventions of Parliamentary Government prevailing in England, be included in the constitution in the form of provisions? But the opinion on this was divided as to whether the conventional form should be the written or unwritten. At The end the Constituent Assembly decided that there would be no written conventions.

More importantly, the nature of things shows that, it is not possible to reduce all the rules of Convention into writing and the

framers of the Indian Constitution have made no such attempt. There is no doubt that Convention must invariably grow up in order to fill up the blanks in the Constitution and to serve as a link between the letters of the constitution to meet the exigencies as they arise. Though the framers of the Constitution of India had plans to codify the important Conventions in the form of clauses of the written constitution of India they were unable to do that. And therefore we must infer that Conventions that were not included in provisions were deliberately left out.

Prof. K. Wheare observed that the system of the Parliamentary Executive is not always described or laid down in the actual constitution but rests upon other rules of law and even more upon usage and conventions¹. Further, distinguishing between the written and the unwritten Constitution a written Constitution is fixed, solid, petty much written in stone and amending it requires a lengthy process whereas, unwritten Constitution rests significantly on Conventions that have never been enshrined in Law. The benefit of an un-codified Constitution over a Written Constitution is its flexibility. Unwritten Constitution adapts it with discarding out of date or unworkable bits in favour of new procedures and formations.

During the framing of the Constitution it was understood that, the president must act on Ministerial advice. Durga Das Basu observed that, though the aim of Articles 74 and 75 was to put into writing the *Principles of Responsible government* as they existed in England upon which the Cabinet government rested but have not been



embodied therein, and even on some fundamental Points the Framers of The Constitution have left the matter to the Conventions, Usages and the personal factor. The object of the framers which appeared from the Constituent Assembly debates, was to make the President a Constitutional and formal Head of the Executive and to make him act with the advice of the Council of Ministers¹.

He argued that in matters on which our Constitution is silent we should in variably follow the English Convention on the point. There is no question of following a different rule. He said that unless the language of the Constitution itself points out that the framers of the Constitution intended to depart from the English rule, it would be safer to adhere to the latter; for, once it is conceded that we adopted the English System of Parliamentary Government because we found it more conducive to representative democracy and orderly administration. Even where there is a provision in a Constitution, but generally worded, it may have to be interpreted in the light of Conventions which have grown up by the passage of time.

India and Constitutional Conventions:

Constitutional Conventions consist of various customs, practices, maxims and precepts of political ethics. Statutes together with the conventions constitute Constitutional law of the land. A study of the Constitution focussing only on the study of only Statute law without looking into the conventions would be incomplete and distorted. No Constitution is perfect nor can a Constitution provide for every contingency that may arise in the future. Besides,

conditions change and new concepts emerge as a result of changes in the social, political and economic conditions and growth. The law that does not change with the newer conditions and perceptions will soon become antiquated, archaic and stagnant. Conventions serve as the means of bringing about Constitutional developments without formal amendments to the law. But it is wrong to imagine that Conventions are peculiar to unwritten Constitutions like the British.

The Constitution of India is a very comprehensive document and many Conventions in the British Constitution form a part of the mandatory provisions of our Constitution. Yet it has many grey areas that are filled by Conventions. There are still a few dark corners which need to be lit with the lamp of Conventions¹.

Even before the 42nd Amendment to the Constitution, the Supreme Court in *Shamsher Singh case*¹ in 1974 held that the President was only a Constitutional head and was bound to act in accordance with advice of the Council of Ministers. Article 74 of the Constitution postulates that “*there shall be a Council of Ministers with the Prime Minister at the head,*” Article 75 states that “*the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister*”. Under our Constitution, there must be a Council of Ministers at all times and that there cannot be a vacuum. The President cannot act *suo moto* pleading that there is no Council of Ministers in existence. He has to create one and act accordingly to the advice of the Council¹.

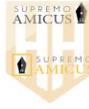


Otherwise, the President may go on appointing the leader of the largest party in the Lok Sabha as the Prime Minister, despite the fact that the appointed Prime Minister is not in a position to secure majority in the Lok Sabha. The main purpose of conventions is to guide the use of constitutional discretion. Thus, every time there is a general election or a request for dissolution of the House of People, the questions that start doing rounds are— 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 heed to the advice of the Cabinet to dissolve the House? One such convention is the appointment of Cabinet ministers. In legal theory, the Queen appoints ministers to the Cabinet when in fact the convention illustrates that the Prime Minister is responsible for the appointment of Ministers. A similar convention operates in India where President appoints ministers to the Cabinet but in reality it's the Prime Minister who makes those choices.

The constitution is silent on what the President should do if no party is in a position to command a majority in the House. In a Bi-polar party system as in Britain one or the other party secures a majority and therefore there is no British Convention in this regard. Such a situation arose in India after the general elections in 1989. The Congress, though not the majority party, was the largest single unit with Janata, BJP and others in descending order of strength. After the elections, the opposition parties agreed among themselves to support the Janata Party from outside without forming a coalition. The issue before the

President was: who should be invited to form the Government. There was one precedent in Britain, though by no means a convention, where the Crown was faced with similar situation. The Congress which was defeated in the polls in 1989 but which had the largest membership in the Lok Sabha did not stake its claim to form the government. Rajiv Gandhi realising the mood of the country wisely decided not to press his claims. The President, following the British precedent cited above, called the Janata Party, which was the next party in order of strength, headed by V.P. Singh to form the government. When other political parties later met the President and pledged support to V.P. Singh the President told them that he had called the next largest party to form the government and that it was for the other parties to demonstrate their support in the House.

The Sarkaria Commission while laying down guidelines for Governors in the choice of the party for forming the Government said if any party fails to gain an absolute majority, the next opportunity should be given to a combination of parties which is able to command a majority in the House. This introduces an element of subjective judgment on the part of the President or the Governor in the choice and exposes them to charges of partisan or biased decisions. State Assemblies have seen various occasions where the ruling party had split and rival claims were presented to Governors for forming the government. In some cases, the responsibility of trying to find out which group had a majority was assumed by the Governor himself.



In Indian context, the words used in Article 74 Clause (1) of the Constitution are that the President shall act in accordance with the advice of the Prime Minister and Council of Ministers. If strictly interpreted, the President is left with no option but to order dissolution of the House even if the advice was perverse or the conditions did not warrant such action. In 1990, when Prime Minister V.P. Singh lost the confidence motion, he did not advise the dissolution of the House but tendered resignation “so that the process of formation of a new government could begin”. Therefore the President engaged himself in the task of finding an alternative government by sounding the other parties successively in order of their strength. In 1991, when Prime Minister Chandrasekar resigned without facing a vote of the House on the Motion of thanks, he sought dissolution of the House. Though technically Chandrasekhar was not defeated in the House, it was obvious that he did not have the support of the majority. In view of the fluid Constitutional Law on the issue, since no political party had staked a claim to form a government, the President on that occasion relied on an additional factor for ordering dissolution.

Again the use of the word “*shall*” in Article 74 (1) if interpreted as mandatory will rise to a host of problems in dealing with a ministry which has resigned but has been asked to continue till alternative arrangements were made.

It is however, a well established British Convention that the Crown has a clearly defined" right to advice, the right to encourage and the right to warn" the Prime Minister. The Crown can also seek for

information, clarification and official reports. As stated by Ivor Jennings the Sovereign’s capacity to influence the government and course of events “depends upon his personal qualities”. The same position is maintained in India under Article 78 of the Constitution. The 42nd Amendment, which inserted the part 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. Even without this amendment, the Supreme Court had ruled in 1974 in Shamsheer Singh case that the President is a Constitutional Head of State and is bound by the advice of the Council of Ministers. That ruling admitted a flexible approach in extraordinary situations such as those noted earlier. It also noted that developing a Convention acknowledging the power of the President to refuse the advice of the Council of Ministers in extraordinary circumstances is necessary in the interest of good governance.

The National Commission to review the working of the Constitution argued that strengthening the institution of the Prime Minister could be one of the methods of restoring the stability and cohesion of functioning in the parliamentary system of government and one of the ways of doing so is to empower the Prime Minister to advise dissolution of the House whenever he thinks that the House has exhausted its mandate and a fresh appeal to the electorate is called for. This is based on the view that the recognition of such power in the Prime Minister would impart much needed stability to the political system in the country and would enable the leader of the House to address determinedly issues of



development, national security, etc. But, such a proposition contemplates a power in the Prime Minister even after he has lost confidence of the House. The Commission however, finally concluded that the present constitutional position warrants no modification.

Writing about the importance of Constitutional Conventions, Ivor Jennings said that *Constitutional Conventions provide the flesh which clothes the dry bones of the law; they make legal Constitution work; they keep in touch with the growth of ideas*¹. Expressing his opinion about codification of British Conventions and Customs relating to Parliamentary Government he said that we must be aware of assuming that the incidents of responsible Government must everywhere be the same or that the Conventions must be repeated. Responsible Government is not the same in Britain, Canada, New Zealand, South Africa, and Eire; still less in the Countries of Europe, which have adopted it.

Role of Judiciary:

In the case of *U.N.R. Rao vs. Indira Gandhi*¹, the Court held that, 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.

In the case of *Vidadala Harinadhababu and Etc. vs. N.T. Ramarao, Chief Minister*¹, 1989 it was held that, it is clear that the rules of conduct do not have a constitutional or statutory sanction, and cannot be enforced by the Court. The Code of Conduct evolved by the Union or the State Government does

not confer any rights upon citizens and, therefore, cannot be enforced through Court. The respective Codes specify the authority empowered to enforce the same. The Court does not enter the picture. Indeed, we had been, at pains to point out to the counsel for the petitioners from the very beginning that it would neither be permissible, nor advisable for this Court to evolve a Code of Conduct by itself, though we do not deny the necessity of such a Code in the interest of good Government and fair administration.

The Indian Supreme Court had also recognized as much in the 1977 case of *State of Rajasthan vs. Union of India*¹, finding that “... it is not for Courts to formulate, and, much less, to enforce a convention however necessary or just and proper a convention to regulate the exercise of such an executive power may be.” Again in the *Judicial Accountability* case, the Supreme Court refused to interdict a member of the Judiciary from continuing to perform judicial functions pending an inquiry into alleged misbehavior.

Reliance on English authorities on the subject of constitutional conventions is questionable with respect to India insofar as the English constitution is unwritten. Scholarly works on conventions in England primarily deals [with codes of political behavior](#) and not express constitutional provisions. Therefore, Jennings’ enquiry was often with respect to political behavior, and not justifiable or even express codes of conduct. *Consequently, its application to a written constitution should be, at most, limited to governing unwritten codes of behavior and not those which are explicitly and clearly provided for by the*



constitution. A similar view was adopted by The Calcutta high Court in *Ashok Sengupta vs. Union of India*¹, where despite the existence of an English convention that the Prime Minister is generally appointed by the elected members of parliament, the Court refused to interfere if an appointment is made otherwise by the President in light of textual Constitutional provisions, opining that “A characteristic of a convention as far as India is concerned, is that a convention cannot be used to cut down or limit any constitutional position whatever the pedigree of the convention.

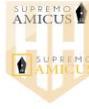
At present, the doctrine of separation of powers states that there is to be a complete separation between the three branches of governance. The legal enactment of constitutional conventions would produce a breach of the doctrine of separation of powers and present a shift in the power amongst the three bodies of the state. The judiciary would have an exceptional amount of power in regulating the power of the legislative and executive. Apart from being unconstitutional this would create an issue of balance of power. At present, there has to be a complete separation between the judiciary and any political matters.

Conclusion:

There are many things which cannot be written in a Constitution and are required to be done by Conventions and in such scenario, Indian Constitution even though the lengthiest and most elaborate one in the world is not different. Deviating from certain Conventions may create complications in the working of the governmental machinery. Modern political

thinker Harold Laski, giving his observations about the Constitution of India in 1950, said that “*I think that the Indian Constitution is too complicated. I believe in simple Constitutions. The admixture of British, American and Australian Constitution may not work well in India. At any rate the chances of success are much better if India follows Conventions more than the written laws. Rigid Constitutions do not make for elasticity in the political organization of a country*”¹.

But within the limits of its Constitutional framework, Indian Parliamentary System has worked admirably well. Unlike so many new countries, the essentials of a free polity are preserved in India. Parliamentary democracy forms the bedrock of Indian Constitution. It is a basic Structure of the Constitution of India. All theorists are united on the question regarding the principle against arbitrary government¹. India, therefore, a virtually unique among contemporary post colonial countries since independence, have functioned well with parliamentary system despite some challenges and it may be said that although Indian Constitution seeks to give maximum possible expression to the principles of parliamentary government, it leaves a vital gap to be filled in by conventions for the actualization of parliamentary form of government. But to make conventions into laws means that it would be a subsequent break from a system which is primarily ridden by tradition however, to make conventions enforceable by courts would mean lack of flexibility and adaptability to modern change.



Last year while hearing a petition filed in the Supreme Court regarding the issue as to whether the Governors of both the states of Goa and Manipur were correct or not to call a party to form the government which was relatively a distant second and not the one which has won the most number of seats in the legislative assembly election where neither had the full-fledged majority thereof. From the remarks Hon'ble Chief Justice it can be inferred that, it was only a Convention to call the single largest party to form the government and it is clear from various precedents that Conventions are not enforceable in the Court of Law. Moreover, if in the floor test that particular political party is able to prove the required majority, then the act of the Governor cannot be questioned. Furthermore, enforceability of conventions by courts would be an infringement of the doctrine of the separation of powers. Therefore, at present there is no reason to enact legally the conventions as there would be very little or even no change in the problems and issues surrounding the country currently.

