I. CONSTITUTIONAL CONVENTIONS AND THEIR IMPORTANCE UNDER THE INDIAN CONSTITUTION: A CRITICAL ANALYSIS

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Abstract

The existence of healthy conventions has mattered in the meaningful working of a constitution, and certainly has played a significant role even in states having written Constitution. Both the Constitution and their conventions thus remain inseparable parts of a system, each helping the other to induce birth, development, maturity and change with the passage of time. This being a case in modern constitutional law domain, constitutional conventions should be playing a significant role in every constitution, written or unwritten.

Apart from providing a few definitions of constitutional conventions, their relevance even in a written constitution and the merits or advantages of constitutional conventions are discussed in brief in this paper. The specific constitutional conventions on the relations between the President and the Parliament in the context of the Constituent Assembly Debates in favour of developing such valid constitutional conventions are mentioned in this paper. Followed by this, the paper describes the constitutional conventions relating to the two Houses of Parliament and the conventions relating to the Presiding Officers and the Privileges of the Houses. The judicial

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responses to the constitutional conventions also form part of this paper.

The need for developing constitutional conventions in accordance with Article 13 (3) that provides for 'custom or usage having in the territory of India the force of law' and emphasise in the conclusion that the conventions are the very soul and spirit of law, life and democracy under the Constitution of India.

I. INTRODUCTION

Every Constitution is a political instrument articulating the what and the how, as decided by the people from time to time. In this context, democratic constitutionalism hopes to bring about a political order in which the achievement of certain social goals would be easier. As such, the rules of the political instrument are bound to be affected by the social predicament that prevails in a given society. As politics develops, the gaps between the political instrument and social aspirations are bound to increase in size as well as in complexity. In such circumstances, the Constitution generally adapts itself to bring about a viable solution to bridge the gap between politics and society.

One of the traditional as well as effective forms of adaptation of the Constitution to the social demands is the body of constitutional customs, conventions or practices. More often than not, constitutional conventions have certainly helped the development of constitutionalism from time to time. They have, in fact, helped

considerably in the growth of order in every state having a written or an unwritten Constitution. The existence of healthy conventions has mattered in the meaningful working of a Constitution, and certainly has played a significant role even in states having written Constitutions. Both the Constitution and their conventions thus remain inseparable parts of a system, each helping the other to induce birth, development, maturity and change with the passage of time.

Constitution is an instrument through which the legitimization of the authority of various institutions of the state, elected or nominated takes place. With the United States of America adopting the first written constitution in 1789, many states followed the suit as they felt that it is the most convenient technique of controlling the powers of the state as and when the state powers are exercised against the larger interest of the society.

Herman Finer referred to St. John's definition of the term constitution in his book. Accordingly, 'by constitution, we mean, whenever we speak with Propriety and Exactness, that assemblage of Laws, institutions, and customs, derived from certain fixed principles of reason...that compose the general system, according to which the community hath agreed to be governed'.[1] Similarly A.V. Dicey quoted George III who defined constitution as the most perfect of human

[1] Herman Finer, *Theory and Practice of Modern Government* (Greenwood Press 1949) 116.

formations.[2] He also referred to Holland's definition that says 'constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'.[3] There may be a written constitution, or unwritten constitution, supplemented to a greater or less extent by unwritten laws, conventions, traditions and customs. But the principle remains the same. The last word remains with the people'.[4] This approach places the constitution in the right perspective as the link between the people and their agent, the government.

These definitions tend to lead us towards not only the written constitution but unwritten portions of a constitution like the rules, conventions, customs, understandings, habits or practices as well that may regulate the conduct of various functionaries working under the constitution. They are not law in the strict sense of the term and they cannot be enforced in a court of law. At the same time these unwritten parts of the constitution certainly provide the sense of direction as well as the meanings to the written provisions of the constitution. That is why the courts in many countries have, over a period of time, started accepting the relevance of the constitutional conventions in interpreting the provisions of the constitution.

[2] A V Dicey, *Introduction to the Study of the Law of the Constitution* (OUP 1969) 2.
[3] ibid 23.
[4] Dorothy M Pickles, *Introduction to Politics* (University Paperbacks, Methuen & Co Ltd 1967) 41.

According to Dorothy M. Pickles, 'of themselves, constitutions cannot guarantee anything. Whether they work well or badly, depends much less on the text of the constitution, on whether it is technically well or badly drawn up, than on the spirit in which it is applied by the men whose function it is to apply it'.[5] Apart from this, there are certain practices and customs that revolve around the functionaries of the government or in maintaining relationships among them. These practices and customs are called as constitutional conventions. These conventions exist predominantly in an unwritten constitution. However, they do exist in all the written constitutions as well because of the fact that all the aspects of governmental functions cannot be captured in the written provisions of a constitution. A. V. Dicey described them as constitutional conventions.

K. C. Wheare described conventions as a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution.[6] Julius Stone described constitutional conventions as the group ethical conviction which tempers power in a democracy.[7] C.F. Strong, while explaining the force behind these conventions observed that 'the force at the back of the law has always been a social force. The social force by itself, however, is merely custom. Whenever a society, however rudimentary, exists and there will develop

[5] ibid 161.
[6] K C Wheare, *Modern Constitutions* (OUP 1984) 122.
[7] Julius Stone, *Social Dimensions of Law and Justice* (Maitland Publications Pvt Ltd 1966) 624.

customary ways of carrying on social activities. A body of customs develop, forming a sort of unwritten code enforced by some pressures such as parental or religious authority, or the opinion of the community concerned. Some of these customs may be found to have such a wide application for the general welfare that some stronger pressure than mere social authority or opinion is necessary to get them universally obeyed. These customs then cease to be social and become political-in fact, laws- being enforced by a constituted government'.[8] Thus the constitutional conventions play a very important role in the working of a constitution, even if it is a written constitution. In other words, the constitutional conventions become an unwritten part of the constitution as well as a source of the constitution. The courts in India have acknowledged the importance of these constitutional conventions in many a decisions.[9]

The status and significance of constitutional conventions would make it an excellent candidate for inclusion in the list of constitutional values that go to constitute not only constitutional law, but also 'constitutionalism'. Concepts like rule of law, separation of powers, independent judiciary among others form part of this constitutional unwritten value, called constitutionalism. This being a case in modern

[8] C F Strong, *Modern Political Constitutions* (M G Clarke & ELBS 1973) 5–6.
[9] *M S M Sharma v Sri Krishna Sinha* AIR 1959 SC 395; *Ram Jawaya Kapoor v State of Punjab* AIR 1955 SC 549; *Shamsher Singh v State of Punjab* AIR 1974 SC 2192; *U N R Rao v Indira Gandhi* AIR 1971 SC 1002; *Supreme Court Advocates-on-Record Association v Union of India* 1993 Supp SCALE 1.

constitutional law domain, constitutional conventions should be playing a significant role in every constitution, written or unwritten.

There may be many compelling reasons for the countries to have the framework of the constitution as well as the governments clearly spelt out in a single written document called the Constitution. The reasons for having a written constitution as against the unwritten constitution like the United Kingdom are many. Some of them include:

a. The written Constitution identifies the locus of the political sovereign in the state which is the people themselves;
b. The written Constitution becomes the supreme law of the land and all laws passed by the legislatures or executives should be within the framework of the Constitution;
c. In this sense, written constitutions seek to prevent the abuse of power by any of the organs of the state and facilitates the adherence to constitutional norms;
d. Written constitutions provide clarity and certainty that could be mandatorily imposed on all the power-holders in the state;
e. Written constitutions provide and protect the rights, the Fundamental Rights in India, of the people against the arbitrary exercise of power by any organ of the state;
f. Written constitutions provide the procedure to amend the parent constitution itself in an organised and specified manner to ensure that the supreme law of the land is not vulnerable to the whims and fancies of ruling governments. At the same time, it also provides

the necessary amendments to be carried out based on the needs of the society and other developments in the country;

g. The written constitutions also provide for one among the most important values of the constitutions, the separation of powers and checks and balances. Although no watertight separation of powers is possible in any country, every constitution seeks to provide the necessary framework for these concepts to be enforced in order to prevent one branch of government dominate over the other two branches and prevent authoritarian or dictatorial regimes that might challenge not only the written provisions of the constitutions but also question the political sovereignty in the state;
h. The written constitutions provide for distribution of legislative competence, if the country is federal in nature;
i. The written Constitution also limits the power of the legislature and the executive branches specifically and such limited constitutions cannot blindly follow the British conventions that have emerged over a period of time based on political and cultural developments.

The need to redefine conventions was stressed by Geoffrey Marshall in his book 'Constitutional Conventions.' According to him, there are many other constitutional relationships between governmental persons or institutions besides the conventional rules that govern the powers of the Crown. Such constitutional relationships illustrate the existence of rules of a conventional character. The following examples have been

given by Geoffrey Marshall as illustrative of emerging conventions in the United Kingdom:[10]

a. relations between the Cabinet and the Prime Minister;
b. relations between the Government as a whole and the Parliament;
c. relations between the Houses of the Parliament;
d. relations between the Ministers and the Civil Service;
e. relations between the Ministers and the machinery of Justice;
f. relations between the United Kingdom and the member countries of the Commonwealth.

The important feature of this definition is that it makes conventions applicable to the legislative and judicial branches of the government as well as United Kingdom's relations with the Commonwealth countries. Another important feature of Marshall's definition is that it tries to apply conventions even to the relations between the Council of Ministers and the civil service. In other words, Marshall was trying to identify the principles of accountability applicable to the public servants generally, including the civil service, the police and the armed services. These two important features of Marshall's definition may be criticized when the same definition is applied to other countries and to their Constitutions. Yet, one important deficiency in Marshall's definition is obvious. While speaking about the relations among the three branches of government, the public servants and the

[10] Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press 1984) 4.

Commonwealth, he has failed to mention the relevance of conventions in the procedures governing each branch as well as the relations among the three branches of the government.

In a limited application, Kaul and Shakdher explained the nature and purpose of the parliamentary practices. According to them, 'parliamentary practices, procedures and conventions make for orderly and expeditious transaction of business and impart an element of stability and predictability in the course of proceedings with in the chamber. The parliamentary practices are not an arbitrary standard or a product of one mind, but the result of the considered and enlightened opinion of many which have gradually evolved over the years. They provide for an efficient and effective method of accomplishing all legitimate objectives of a legislative body. Inside the House, this body of impartial rules guarantees equal rights to all, imposes responsibilities on all, offers opportunities to all, saves the time of all and in short, serves the best interest of all'.[11]

'Constitutional conventions are those non-formal legal norms or rules of political or official behaviour among the three branches as well as the procedures governing each of the three branches of the government'. This definition is almost similar to the definition given by Professor O. Hood Phillips which states that conventions are 'the rules of political practice which are regarded as binding by those to

[11] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) xii–xiii.

whom they apply'.[12] The most striking difference between these two definitions is that while Hood Phillips makes the conventions binding the other does not. Ever since the emergence of the practice of writing down the Constitution for a country, people have tried to reduce the practices and functions of the government to writing and thus tried to arrest those usages and conventions in their respective Constitutions. But this effort has proved to be an ongoing process and has not been completed in any of the written Constitutions even today. The Indian Constitution, which is the lengthiest of written Constitutions could not bring all the practices, usages, customs or conventions into the text. In other words, it may be even said that these non-formal legal rules will continue to exist for long, as long as the Constitutions exist, and the importance attached to them will also continue to increase from time to time. This is because conventions facilitate and do not hinder the working of the Constitution and the constitutional development of a country. Thus, the conventions play a significant role in the making of a Constitution and the establishment and maintenance of societal equilibrium.

Although constitutional conventions have no legal sanction (except in certain cases where they are interpreted by the courts) there is only one type of sanction behind them. This sanction is purely political in nature and depends heavily on the public opinion which forces the political

[12] O Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell 1978) 108–13.

power holders (acting as public authorities) to behave in the true spirit of the Constitution. Thus, it is more a moral, not so much a legal sanction, imperative upon which the conventions depend. Similar opinion was also expressed by A.V. Dicey who had explained as to why constitutional conventions appear to bind, even though they are not laws that courts will enforce. He thought that it was public opinion which gave 'validity to the received precepts for the conduct of public life' and that these were directed to ensuring that the will of the people prevailed. He also mentioned that the conventions of the Constitution are supported and enforced by 'something' beyond, or in addition to, the public approval. He explained the phrase 'something' to mean nothing other than the force of law.[13] A.V. Dicey continued his arguments and concluded that the violation of any existing convention would bring the offender immediately into conflict with the courts and the law of the land. It is not clear from these words of Dicey as to the consequences of such a conflict or to the nature of any punishment or any action for such violation.

The conversion of the social force behind these practices of the state into political force has been very briefly, yet clearly, explained by C.F. Strong. According to him. "the force at the back of the law has always been a social force. The social force by itself, however, is merely custom. Whenever a society, however rudimentary, exists and there

[13] Geoffrey Marshall and Graeme C Moodie, *Some Problems of the Constitution* (Hutchinson & Co 1959) 29.

will develop customary ways of carrying on social activities. A body of customs develop, forming a sort of unwritten code enforced by some pressures such as parental or religious authority, or the opinion of the community concerned. Some of these customs may be found to have such a wide application for the general welfare that some stronger pressure than mere social authority or opinion is necessary to get them universally obeyed. These customs then cease to be social and become political - in fact, laws - being enforced by a constituted government."[14] The interaction between laws and conventions has been very nicely brought out by professor J. D. B. Mitchell. According to him, 'conventions cannot be regarded as less important than rules of law. Often the legal rule the less important. In relation to subject-matter, the two types of rule overlap: in form they are often not clearly distinguishable .... very many conventions are capable of being expressed with the precision of rule of law, or of being incorporated into law. Precedent is as operative in the formation of convention as it is in that of law. It cannot be said that a rule of law is necessarily more certain than a convention. It may therefore be asked whether it is right to distinguish law from convention'.[15]

Apart from these sanctions behind the conventions of the Constitution, certain advantages of those conventions make every powerholder

[14] C F Strong, *Modern Political Constitutions* (M G Clarke & ELBS 1973) 5–6.
[15] Colin R Munro, *Studies in Constitutional Law* (Butterworths 1987) 40.

adhere to these non-formal legal norms in the working of the government. Some of these advantages are that:

1. the constitutional conventions help the machinery run smoothly;
2. the constitutional conventions allow flexibility in governmental institutions;
3. the constitutional conventions provide the flesh which clothes the dry bones of the law;
4. the constitutional conventions make the legal constitution work;
5. the constitutional conventions keep in touch with the growth of ideas; and
6. the constitutional conventions are enforced not by courts, but by the weight of public opinion, which expects politicians to behave in the true spirit of the Constitution.

The frequent cry of eminent people, jurists and others for the establishment of "healthy conventions" and the very frequent violations of the established conventions in India have raised the eyebrows of many a citizens of India. The experience since 1950 in the working of the Constitution of India reveals disrespect and disregard to the nonformal legal norms, conventions, practices, or usages in spite of the written words of the constitution that seek to recognise them. These and other pronouncements make a student of constitutional law go deeply into the question of constitutional conventions in India. Hence, on the basis of the foregoing understanding, which is fundamental, of the constitutional conventions, an attempt is made in this study to

highlight the importance of these constitutional conventions, their merits, their functions and their utility in the functioning of the Indian Constitution.

Mention should be made to Article 13 (3) of the Constitution of India. Article 13 (3) provides "In this article, unless the context otherwise requires, (a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, **custom or usage having in the territory of India the force of law**" (emphasis added). These phrases, custom or usage have not been assigned any specific context as to their applicability in social, cultural or political spheres. Therefore, one can confidently arrive at the conviction that the constitutional conventions, practices, usages or customs having the force of law would also be falling within the term law. Hence, these constitutional conventions not only have the ethical or moral value but have the full support of the constitutional provisions as well. It is in fact that no constitutional convention can go against any written provision of any law or any provision of the Constitution. The Indian constitution is not an exception to this rule.

II. SCOPE FOR GROWTH OF CONSTITUTIONAL CONVENTIONS UNDER THE INDIAN CONSTITUTION

A detailed analysis on the scope of convention in the Indian Constitution was attempted by Justice P. B. Mukharji. According to him, conventions have a larger and a more significant scope in an unwritten constitution than in a written Constitution. He went on to observe rightly so that Constitution of a country can never be so wholly written out in all its details as to completely exclude the growth and operation of conventions. By observing that 'no conventions can be allowed to grow which override the express provisions of the Constitution', he also attempted to identify the scope for the growth of the conventions under the Indian Constitution, summarised below:[16]

1. The number of times the President of India could be re-elected;
2. On Articles 74 and 75, as well as Articles 163 and 164, there is a good deal of scope for the growth of healthy conventions;
3. Article 78 of the Constitution;
4. The President's power to prorogue and dissolve the House under Article 85 (2);
5. Article 105 to 122, as well as Article 194 to 212, there is a large scope for the growth of conventions;
6. There is scope for conventions in the President's relationship with the State Governors;
7. Under Article 160 for the discharge of functions of the Governor in any contingency;

[16] P B Mukharji, *The Critical Problems of the Indian Constitution* (University of Bombay 1968) 152–53.

8. Use of discretionary powers by the Governor under Article 163;
9. Legislative powers of the Governor under Article 213;
10. In the choice of the Prime Minister by the President under various circumstances;
11. Convention that the Prime Minister should be a member of the House of the People;
12. Conventions about ministerial responsibility.

After enumerating the scope of conventions under the Indian Constitution, Justice P. B. Mukharji clearly observed that 'conventions in constitutional law are not mere ornaments to be worn on special occasions, or mere polite rules of good behaviour. There is an element of sanction behind the convention. No doubt the narrow view of the distinction between law and convention is that law is limited to those rules which are applied and enforced by the courts and conventions only thrive on the good sense of the people and the institutions to which they relate'.[17] He went on to observe that 'the final reason for observance of the convention lies in a smooth and harmonious working of the Constitution without jolts and knocks…conventions provide the content of the rules and practices for guidance of those who actually run the political institutions and the machinery of government and that the justification for convention lies in the desire to maintain the government'.[18]

[17] ibid 154-164.
[18] ibid 165.

He went on to support conventions by stating that 'convention demands that the different organs of the government, the executive, legislative and judicial, should mutually respect and regard the arena and functions of each. The actual words of the Constitution can teach prohibition and separation in this respect but it is convention alone that can teach co-operation between them'.[19] Unfortunately, the constitutional developments in India relating to the importance of conventions have not received the attention it demanded either by the power holders or the researchers in the field of political science and constitutional law. An attempt is made in this paper to outline the importance of constitutional conventions in India in a few specific areas and analyse the judicial decisions relating to them.

III. CONVENTIONS RELATING TO THE RELATIONS BETWEEN THE PRESIDENT AND THE PARLIAMENT

Article 79 provides that 'there shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People'. This provision very clearly indicates the combination of two different organs of the State under 'Parliament', not to make the President or either House of Parliament a weak body, but to bring in collective co-

[19] ibid 166.

operation between the two Houses of Parliament and between them and the President. When this provision is contrasted with the other provisions, it brings the nature and extent of the executive power to lime-light. For example, Article 53 says that there shall be a President of India. Again Article 79 says that there shall be a Parliament. Article 83(2) provides that the House of the People can be dissolved. Article 111 provides that the President may either assent to a Bill or withhold the assent therefrom. Article 123 provides the legislative power to the President in promulgating Ordinances. If these provisions are read independently they may not provide any specific line of argument excepting the existing one stating that the President has to always act on the advice of the Council of Ministers, as per the decision of the Supreme Court in Samsher Singh v. State of Punjab.[20]

Article 78 very clearly brings in the relationship between the President and Parliament, through the agency called the Council of Ministers, headed by the Prime Minister. This provision had not received the necessary attention or interpretation that it requires in the working of Parliament in India till the Rajiv-Zail Singh rift. Even then a proper interpretation of this provision has not been given although some healthy conventions have been established and followed in this area. For example, as a duty is cast on the Prime Minister to keep the President informed, Pandit Nehru used to meet the President once a

[20] *Shamsher Singh v State of Punjab* (1974) 2 SCC 831.

week to apprise him of administrative matters.[21] As such the Prime Minister, or under his authorisation, anyone else, can become the link between the President and the Parliament. In the second place, it also empowers the President to seek any information from the Prime Minister relating to the administration of the affairs of the State which will be really the requirement of 'aid and assistance.' In the third place, there is the most important provision that any individual Minister's decision need not be implemented by the President unless and until it is duly ???Generally, the conventions relating to the relations between Parliament and the President can be briefly described under the following paragraphs. These areas would bring out very clearly the nature of relations between Parliament and the President. To some extent there may be one or two appropriate provisions of the Constitution in these areas but only a series of conventions working along with such constitutional provisions make the Constitution functional today. These areas require some description both of the Constitution and the conventions that are put into service.

In the first place, (being part of the Parliament), the President is empowered to summon or prorogue both the Houses of Parliament and dissolve the Lok Sabha. However, there is only one condition imposed on the exercise of this power by the President in relation to the Parliament. Accordingly, Article 85(1) provides that the intervening period between any two sessions should not exceed 6 months. In the

[21] *The Hindu* (3 July 1987).

exercise of this power by the President, certain healthy conventions have been established in co-operation with the Presiding Officers of Parliament. The manner in which the dates are agreed upon and the manner in which the two Houses are being convened or prorogued must be looked into. As observed by Justice P.B. Mukharji, 'a fruitful field for healthy conventions arises in the President's power to prorogue and dissolve the House. Under Article 85(2) of the Constitution, conventions for proroguing the House or dissolving the House, the occasions for doing so and the method and manner of doing so should be subject matter of conventions. The Presidential right to address Parliament or to send messages to Parliament under Articles 86 and 87 should be developed by conventions. The Constitution recognises such right in the President. But what the conventions can do is to build up the method, manner and the occasion for the exercise of such right'.[22] This observation leads us to the conclusion that there is very little of the written rules in regulations to govern the powers of the President in summoning and proroguing the Houses and dissolving the House of Representatives. In actual practice, the summoning of Parliament is done by the President in consultation with the Speaker of the House of the People and the Chairman of the Council of States, irrespective of Article 85(1) of the Constitution. The Department of Parliamentary Affairs initiates the action in this regard and in consultation with the two Presiding Officers of the Houses of Parliament, fixes the date for

[22] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 156.

the meeting of Parliament and submits the proposal for the President's approval. After the President signs the order, the matter is referred to the Parliamentary Secretariat which issues the notification, under its own name, for general information.[23]

It is not necessary to summon both the Houses simultaneously on the same date, as provided under Articles 85 of the Constitution. This is a departure from the British practice and has been clearly mentioned in that Article. The same provision also imposes a condition that six months should not intervene between any two sessions. When the two Houses are not summoned simultaneously, sessions of the Rajya Sabha usually commence one week after the commencement of the Lok Sabha. When the Lok Sabha stands dissolved, the Rajya Sabha can be summoned to transact business: for example, the Rajya Sabha was summoned to meet on February 28, 1977 for a short two-day session for seeking the approval of the House for the extension of President's rule in Tamil Nadu and Nagaland, the proclamations of which were to expire on March 10 and March 24, 1977 respectively. This was the first time that the Rajya Sabha met while the Lok Sabha stood dissolved and the election process had been set in motion[24] The sessions of the two Houses are generally held on different dates, except for the first session every year and the first session after the reconstitution of the Lok

[23] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 49.
[24] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 156.

Sabha, when the President addresses the Members of both the Houses assembled together. This is as provided under Article 87 of the Constitution. With regard to the number of sessions of the Parliament, three sessions of the Lok Sabha are normally held in a year. However, there is no hard and fast rule in this regard and the duration of the three sessions is not uniform.[25]

Although the power to summon the House of the People is vested in the President, he exercises this function on the recommendation of the Prime Minister. This has developed well in the form of a convention. However, the procedure involved here is also elaborate. A proposal to summon the Lok Sabha is initiated by the Minister for Parliamentary Affairs, and by the Leader of the House, in case, the Prime Minister is not the Leader of the House, and submitted to the Prime Minister, after an informal consultation with the Speaker with regard to the date of commencement and the duration of the session.[26] The Prime Minister may agree with the suggestion or refer it to the Cabinet. The proposal as finally agreed to by the Prime Minister or Cabinet is formally submitted to the Speaker.[27] If the Speaker also agrees, he directs the Secretary-General to obtain the order of the President to summon the Lok Sabha on the date and time specified. In the case of a rare disagreement, the Speaker may refer the matter to the Prime Minister

[25] ibid 160.
[26] Lok Sabha Debates, 1 August 1972, col 211.
[27] Lok Sabha Debates, 20 February 1970, col 44.

for reconsideration.[28] However, it is not clear whether on reconsideration, the decision taken by the Prime Minister is binding on the Speaker or not. At the same time, so far, there has been no specific instance that has taken place to contradict this practice.

After the President has signed the order, the Secretariat notifies the dates in the Gazette Extraordinary and issues a press communique for wider publicity in the press as well as over the All India Radio and Doordarshan. The procedure for advancing or postponing the summoning of the Lok Sabha, after all the formalities have been complied with including the notification, under extraordinary circumstances, is settled. For example, after the President had summoned the Lok Sabha to meet on November 19, 1962 by his order dated September 14, 1962, published in the Gazette Extraordinary (II), the Prime Minister proposed that in view of the situation created by the Chinese aggression, the date of commencement might be advanced to November 8, 1962. The President's orders were taken again and fresh summons dated October 29, 1962, were issued to members summoning them to the Lok Sabha on November 8, 1962.[29]

A close look at this procedure reveals that at one point, the Prime Minister refers the matter to the 'Cabinet' for taking a decision to summon the House at the appropriate time, whereas, the Constitution

[28] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 160.
[29] ibid.

mandates that the Prime Minister should consult the entire Council of Ministers and not the Cabinet in particular. This practice of taking the decision by consulting only the Cabinet has been well established even against the written constitutional provisions and raises a fundamental question 'can there be a practice against any existing Constitution'? Theoretically speaking, there can be no valid practice, usage or convention that goes against an existing law. But here, from the very beginning, the practice of consulting only the Cabinet has been followed and as such it violates the very basis of the principles on which the conventions can stand.

In the matter of prorogation of the House, again, the President acts on the advice of the Prime Minister in the exercise of his powers, irrespective of Article 85(2) of the Constitution. The Prime Minister may in turn consult the Cabinet, not the entire Council of Ministers, before the advice is submitted to the President. The prorogation may take place at any time, even while the House is sitting. However, the general practice is that prorogation follows the adjournment of the sitting of the House *sine die.* There is no fixed time limit for the prorogation of the House from the date of adjourning sine die. On some occasions, the Lok Sabha was prorogued on the same day that it was adjourned *sine die*. The second and third sessions of the Second Lok Sabha, the Fifth, Seventh and the Eleventh Sessions of the Third Lok Sabha and the Second Session of the Seventh Lok Sabha were prorogued on the same day that they were adjourned *sine die*. However,

the general practice followed in the time lag between the adjournment of the Lok Sabha *sine die* and its prorogation is 2-4 days or even more on a few occasions. This healthy convention has contributed to the positive and effective relations between the Parliament and the President so far.

However, during May 1994, the House of the People was adjourned to meet again on a particular date but failed to meet as scheduled. In fact, the Lok Sabha without meeting on the stipulated date was prorogued by the President. Both the Houses were not adjourned *sine die* to enable the President to exercise his constitutional powers to prorogue them. Never in the past have the two Houses been adjourned to meet again on a particular date and failed to meet as scheduled.[30] This lapse on the part of both the Presiding Officers as well as the President was raised by the opposition party which said that proroguing of Parliament was against the established conventions of parliamentary democracy.[31] Thus, the long-standing convention with regard to the procedure adopted by both the Parliament and the President had been violated. As there is no apparent serious consequence to it, such a violation of an established healthy convention has not been critically looked into. Only when such sessions were not convened, the Supreme Court in State of Punjab v. Satya Pal Dang [32] held that the Executive has the power to convene the sessions as against the orders of the Speaker.

[30] *Indian Express* (24 May 1994).
[31] *Deccan Herald* (25 May 1994).
[32] *State of Punjab v Sat Pal Dang* AIR 1969 SC 903.

According to Justice P.B. Mukharji, 'convention demands that the different organs of the government, the Executive, Legislative and Judicial, should mutually respect and regard the arena and functions of each. The actual words of the Constitution can teach prohibition and separation in this respect but it is convention alone that can teach co-operation between them. That the convention of co-operation between the different organs of the government is sorely needed in India today to give life and vitality to her Constitution and to make it creatively dynamic and purposeful, and make the administration truly responsible'.[33]

Article 111 of the Constitution speaks about the power given to the President to assent to Bills, or withhold his assent, or return the Bill to the House for reconsideration, if it is not a Money Bill, along with his recommendations. The scope of this power has also been restricted by conventions established in the exercise of this power. This provision is read with Article 74 and the President is made subject to the advice of the Council of Ministers or the Cabinet in the exercise of his power under Article 111. Except in three cases, the President has always been giving his assent to the Bills. Even among these three, in one case the President withheld his assent because his assenting would have rendered the Bill meaningless. Thus, the assent to the Patiala and East Punjab States Union Appropriation Bill, 1954, which was passed by

[33] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 166.

both the Houses of Parliament, was withheld by the President, as by the time the Bill was presented to the President, he had revoked the Proclamation under which he had assumed functions of the Patiala and East Punjab States Union. This information in regard to the withholding of assent by President was conveyed to the House by the Speaker.[34]

The Constitution does not specify the time limit during which the President can keep the Bill pending with him. The Indian Post Office (Amendment) Bill, 1986, was presented on December 19,1986 to the President for assent, but till now he has neither given his assent nor sent it back for reconsideration by the Rajya Sabha.[35] President R. Venkataraman withheld his assent to the Salary, Allowances and Pension of Members of Parliament (Second Amendment) Bill, 1991, as the procedures laid down in Article 117 was not followed in that case.[36] There is stronger reason for the President to withhold assent to a Bill if any of its provisions be repugnant to any of the provisions in Part III especially, and indeed, if Articles 13(2) be read with the oath of the President/Governor, there is scope for preview of constitutionality by the President/Governor as the case may be.

Dr. Ambedkar had observed that 'every Constitution, in so far as it relates to what we call parliamentary democracy, requires three

[34] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 26.
[35] ibid 531.
[36] *Indian Express* (23 March 1991).

different organs of the state, the Executive, the Judiciary and the Legislature. I have not anywhere found in any Constitution a proposition saying that the Executive shall obey the Legislature, nor have I found anywhere in any Constitution a provision that the Executive shall obey the Judiciary. Nowhere is such a provision to be found. That is because it is generally understood that the provisions of the Constitution are binding upon the different organs of the state. Consequently, it is to be presumed that those who work the Constitution, those who compose the Legislature and those who compose the Executive and the judiciary know their functions, their limitations and their duties. It is therefore, to be expected that if the executive is honest in working the Constitution, then the Executive is bound to obey the Legislature without any kind of compulsory obligation being laid down in the Constitution ... Similarly, if the Executive is honest in working the Constitution, it must act in accordance with the judicial decisions given by the Supreme Court. Therefore, my submission is that this is a matter of one organ of the state acting within its own limitations and obeying the supremacy of the other organs of the State. In so far as the Constitution gives a supremacy to that is a matter of constitutional obligation which is implicit in the Constitution itself'.[37] Dr. Ambedkar also said that 'we are just commencing a big experiment in democracy'.[38] Instead of working the Constitution as expected by the framers of the

[37] Constituent Assembly Debates, vol X, 269.
[38] ibid 271.

Constitution, there has always been a tendency to strengthen the position of the Prime Minister, not only at the cost of the other two branches of the government, but also against democracy itself.

Dr. K. M. Munshi also in his book observed that the President under the Indian Constitution is ‘an independent organ of the State representing the whole Union and exercising independent powers and treated the Constitution as a composite one in which the parliamentary form of executive and a President with power and authority are combined’. According to him, this is provided to prevent a parliamentary government from becoming parliamentary anarchy and he has regarded the importation of English conventions as 'tantamount to an amendment of the Constitution. The election of the President, his oath of Office, his specific powers and his obligation to prevent Cabinet dictatorship, have been marshalled by this respected statesman in support of his view. He has climaxed his reasoning by taking the view that 'aid and advice' in Article 74, do not imply that the advice must be accepted in all cases. Shri K. Santhanam, another elder statesman, also shared this view. Even Dr. Rajendra Prasad is reported to have had second thoughts on the denudation of presidential powers.[39]

It is submitted that the presence of specific constitutional provisions, a few conventions have evolved in India during the first four decades and followed thereafter. The diminished single party rule at the centre,

[39] K M Munshi, *The President under the Indian Constitution* (Bharatiya Vidhya Bhavan 1963) 44–45.

emergence of multi-party system, political and emergency situations have all contributed to these developments. Judicial decisions seem to be certifying these practices or conventions based on British conventions, and at times even against the written provisions of the Constitution of India.

IV. CONVENTIONS RELATING TO THE TWO HOUSES OF PARLIAMENT

Some of the important sources for parliamentary procedure in India include the Constitution, Rules passed by both the Houses of Parliament, Regulations, recommendations of Business Advisory Committee, resolutions of the Houses, Directions issued by the Speaker/Chairperson/Presiding Officers, relevant laws made by the Parliament, and the conventions, practices and usages followed by both the Houses independently as well as in relation with each other.

The Constitution specifies the procedure to be followed by the Parliament in passing the money Bills and other Bills, the requirements for a joint sitting of both the House of Parliament. The details of the majority of the procedures of the Houses are laid down in the Rules of Procedure and Conduct of Business by the Lok Sabha and the Council of States, the Rules relating to Schedule X as made by the Houses, and the Houses of Parliament (Joint Sittings and communications) Rules 1952, made by the President. Some of the 'Regulations for Holding of

Elections to Committees by Means of Single Transferable Vote', and Business Advisory Committee (BAC) recommendations of a procedure for 'Regulating discussion in the House on cut-motions, Publication of Minutes of Dissent to the Reports of the Select Committees, and disposal of amendments also play and important role. Some of the laws enacted by the Parliament, like Parliamentary Proceedings (Protection of Publication) Act, 1956 and Salary, Allowances and Pension of Members of Parliament Act, 1954 etc., along with the Conventions/Practices/Usages etc., become the sources of Parliamentary Practices in India.

The main objectives secured by these conventions are: (1) Polite behaviour and good manners towards each other and especially to the opponents; (2) Orderly and dignified conduct of proceedings in the House; (3) Keeping the dignity and authority of the House; and (4) acting fairly and with a sense of justice.[40] S. L. Shakdher with reference to the role of constitutional conventions in India observed that, 'the practice and procedure of the Indian Parliament have thus been evolving all the time as much as a result of the compulsions of the developing situations as through conscious, continuous search for more adequate methods of work for the better fulfilment of its growing tasks'.[41] Justice Evatt has given a word of caution by observing that 'it would be better to rely on strict law in the new countries, since a

[40] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 192.
[41] S L Shakdher, *Glimpses in the Working of Parliament* (Metropolitan 1977) 30.

preponderance of non-constitutional factors in determining the course of events is apt to be so heavy that the terms in favour of a convention are necessarily weak'.[42] The Presiding Officers are vested with all powers relating to the procedures, the necessary powers to enforce these conventions and canons of Parliamentary conduct have also been vested with the Presiding Officers, and the convention secures a predicable uniformity and certainty about the exercise of these vast powers.

In order that the Address delivered by the President forms part of, and is incorporated in, the proceedings of the Houses, a separate sitting of the House is held half an hour after the conclusion of the President's Address when a copy each of the Hindi and English versions of the Address duly authenticated by the President is laid on the Table by the Secretary-General. This practice was adopted for the first time in 1952 when the President addressed both the Houses of Parliament on May 16, 1952 after the first General Election under the constitution, and is being followed even today. In the absence of 'specific rules, a number of conventions have evolved. As a convention, no member leaves the Central Hall while the President is addressing. The members are requested to take their seats five minutes before the President arrives in the Central Hall, and to remain in their seats till the President leaves

[42] Rajagopala Iyengar, *Indian Parliament: A Critical Study* (University of Mysore 1972) 14.

the Hall after the conclusion of the Address.[43] Whenever this practice is violated by the members, they are reprimanded by the Speaker after the Member is given an opportunity to explain. On February 18, 1963, three members walked out when the President was delivering his Address to both the Houses of Parliament. On February 19, 1963. the speaker appointed a 15 Member Committee to investigate the conduct of these three members, which submitted its report on march 12, 1963, recommended that the three members be reprimanded for their undesirable, undignified and unbecoming conduct during the President's Address. On March 19, 1963, the House adopted the recommendation and the Speaker reprimanded the three members.[44] Similarly, the House, sitting as a Committee adopted a motion on February 28, 1968 disapproving the conduct of two members reprimanding them for their undesirable, undignified and unbecoming behaviour.[45] The speaker can appoint a Committee to go into such matters and the concerned member can be reprimanded by the Speaker based on the reports submitted by such Committees.[46] There is a general practice in the Lok Sabha to adjourn the House after the President addresses both the Houses of Parliament in the Central Hall.

[43] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 183–86.
[44] S L Shakdher, *Third Lok Sabha, 1962–1967: A Souvenir* (Lok Sabha Secretariat 1967) 38.
[45] Lok Sabha Debates, 28 February 1968, cols 467–487.
[46] Lok Sabha Debates, 2 April 1971, cols 188–223.

A convention has developed that before the business commences, the Speaker *pro tem* calls upon the members to stand in silence for two minutes to mark the solemnity of the occasion. A few days before the first sitting, the Prime Minister is informed about the practice regarding observance of silence. The Speaker *pro tem*, while calling upon the members to stand in silence, makes the following observation:

'We meet today on a solemn occasion. A new House has been constituted under the Constitution, charged with great and heavy responsibilities for the welfare of the country and our people. It is fit and proper that we all stand in silence for two minutes before we begin our proceedings'.[47]

This practice is a healthy one which reminds the members of their obligations towards the nation and the people at the very beginning of the session. For the Members who are entering the House for the first time, this also reminds them of the solemnity of the occasion, which by and large can serve to condition the behaviour of the members with sincerity and dedication in the proceedings of the House later.

With regard to the joint sitting of both the Houses of Parliament, the President in consultation with the Presiding Officers has framed certain rules based on Article 118 (3) of the Constitution. These rules do not provide all the procedures to be followed at a joint sitting of both the

[47] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 325.

Houses. Hence, reliance has be placed on some Parliamentary conventions. For example, at a joint sitting, no amendment can be proposed to the Bill other than such amendments if any, as become necessary by the delay in the passage of the Bill Only such amendments and such other amendments as relate to matters with respect to which the Houses have not agreed shall be proposed to the Bill. The decision of the person Presiding as to the admissibility of the amendments is final.[48] Although such Joint sittings have been convened only twice so far, there is much scope for the development of healthy conventions in this regard.

The 'Calling Attention Notice' is basically an Indian innovation which enables a member to draw the attention of the government to any matter of urgent public importance. The 'Short Duration Discussions' is another such practice evolved by the Indian Parliament. According to Shakdher, S. L., both these devices have helped to a considerable degree the smooth running of Parliamentary business.[49] The Procedures followed by the Committees of both the Houses of Parliament also reflect new procedures which are not found in Britain. Commenting on these developments Shri. N. Sanjiva Reddy at the emergent conference of Presiding Officers held at New Delhi on August 23, 1975, observed that 'the Parliamentary institution like all

[48] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 197.
[49] S L Shakdher, *Working of Indian Parliament: A Review* (Lok Sabha Secretariat 1974) 4.

human institutions, is ever in the making. While the values it symbolizes and its foundational principles may be of continuing validity, its working methods and procedures have certainly to be adapted appositely with the changing times and the immediate needs of the hour. Anyone who is a familiar with the procedures in our legislatures knows how far we have travelled from the Westminster and even our own procedures of the pre-independence days. And it is a tribute to the adaptability and innovative capacity of our legislatures that they have always measured themselves up to the needs of the situation'.[50]

When the budgets are being discussed on the floor, the Members can move motions called 'cut motions.' When the Speaker accepts it, the Members who had initiated the cut motions are permitted to speak on the motions. Such speeches on a cut motion must relate to the specific matter referred to in the cut motion and no general discussion is permissible. It is a well-established practice that cut motions cannot be moved to discuss the action of the Speaker in any matter. Likewise, cut motions relating to the Vice-President, who is also the *ex officio* Chairman of Rajya Sabha, are not admissible. Cut motions are not admissible if they are to ventilate personal grievances, or if they cast aspersions on individual government officials. Cut motions cannot be moved if there is no time for proper discussion and voting, nor can they

[50] ibid 31.

be moved by proxy. The mover of the cut motion has no right of reply to the debate on his cut motion.[51]

One among the first functions of the House after the Members are sworn in is to elect the Speaker and the Deputy Speaker. Here also, by and large, a convention has developed that the Speaker is from the majority party and the Deputy Speaker is from the opposition party.[52] Occasionally this practice has also been violated, but the spirit behind this convention is laudable and can be continued as a valid practice irrespective of the violations.

Another convention has developed in India that at least one minister of the cabinet rank should remain present in the House at all times.[53] It is also a parliamentary convention that the Minister in charge of the subject must remain in the House when the debate on that subject takes place.[54] In the Rajya Sabha, the then Deputy Chairman, Dr. Najma Heptullah pointed out that it was a convention in the House (Rajya Sabha) that any Minister could move the motion or lay papers on behalf of his colleagues.[55] Another convention, based on healthy parliamentary tradition, is that the criticism in Parliament of a government department and its working must be answered by the

[51] M N Kaul and S L Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 641–43.
[52] *Deccan Herald* (16 July 1991).
[53] S H Belavadi, *Theory and Practice of Parliamentary Procedure in India* (N M Tripathi 1988) 195–96.
[54] bid 176.
[55] Times of India, dated August 22, 1990.

Minister responsible for the department. The Minister must assume by convention, the responsibility and must not pass it on to the departmental officer who cannot answer the criticism either in public or from the floor of the House. No Minister would be allowed to shield himself by blaming his official.[56]

As a matter of convention, the Leader of the House is generally consulted when a motion for suspension of a Member from the service of the House is moved or a question involving a breach of privilege either of a Member or of the House or of a Committee is raised in the House.[57]

One among the significant conventions developed by the Indian Parliament and being followed is the procedure relating to 'Zero Hour'. In the words of Prof. N.S. Ranga, a former Member of the Parliament, "the Zero Hour' has come to assume parliamentary status since 1962, as such, because so many questions of great public urgency have begun to crop up, which could not be raised in accordance with the earlier parliamentary practices because the opposition parties have somehow broken their earlier patience with the set of parliamentary agenda paper, thanks to Dr. Ram Manohar Lohia's open pressures against the agenda-bound 'Order, Order', decorum etc., emanating from the Chair... The 'Zero Hour' has come to be a permanent but

[56] P B Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 164.
[57] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 127–30.

unacknowledged feature of our parliamentary agenda".[58] This particular convention has brought in some amount of transparency in the working of the government.

Whenever, any leaflet or printed material is to be distributed to the Members of a House, prior permission from the Chair is always obtained. This practice of seeking prior permission from the Chair for distribution of any printed matter or leaflet within the House is followed in both the Houses of Parliament. On one occasion, when a distribution of a leaflet within the Rajya Sabha took place, the Deputy Chairman pointed to the existence of the well-established convention in the Rajya Sabha that nothing should be distributed in the House without the prior permission of the Chair. The Deputy Chairman also observed that 'I do hope every honourable Member will follow this well-established convention and whoever has done it will realise that he must never do it again. This statement brings the convention almost on par with a rule and as such, the Member concerned can also be reprimanded by the Chair, if such information is available to the Chair.[59]

In the composition and working of the Public Accounts Committee, many such healthy conventions have been established and followed from the beginning. For example, since 1954-55, seven Members of

[58] SL Shakdher (ed), *Constitution and the Parliament in India* (National Publishing House 1976) 271.
[59] 579 Parl Deb HC (13 September 1963) col 4045.

Rajya Sabha have been associated with the Public Accounts Committee, which is a healthy convention based on Rule 309 (1) of the Lok Sabha Rules.80 Rule 309 (1) itself does not speak about this practice but it has been evolved, established and followed in the parliamentary procedure. With regard to the appointment of the Chairman of this Public Accounts Committee, another healthy convention has been established and followed. The Chairman of the Public Accounts Committee is to be from the non-ruling party and generally from the opposition party. The proposal to appoint the Chairman of the Committee from the non-ruling party was proposed by Shri. V. K. Dange and was approved by the then Prime Minister Nehru.[60] The other important conventions and procedures in the working of the Public Accounts Committee have been highlighted by the former Speaker, Sardar Hukum Singh, as follows:

'I should like to refer here briefly to some of the important conventions which have grown up since the independence, in the functioning of the Public Accounts Committee:

i. The Committee functions as a single team, irrespective of party affiliations of its members;
ii. The Committee's Reports have always been unanimous;

[60] 579 Parl Deb Rajya Sabha (2 September 1958) col 1724.

iii. The Committee's Reports are not discussed in the House. The government departments are required to intimate to the Committee what action has been taken on its recommendations;

iv. All the information and documents required by the Committee, pertaining to the subject matter under discussion are made available by government departments; and

v. When the Committee comes across cases requiring a detailed examination, it usually appoints a Sub-Committee with specific terms of reference. The Sub-Committee, in the first instance submits its findings to the main Committee. This procedure serves the dual object of saving the time of the whole Committee and also facilitating a detailed scrutiny'.[61]

The recommendations of the Public Accounts Committee are treated with respect by the government and most of them are accepted and implemented. The Committee also appoints a Sub-Committee to examine the 'action taken' notes received from the Ministries/Departments and draws up separate 'action taken' reports which are subsequently adopted by the main Committee and then presented to the House. Whenever, the government deviated from this procedure, the Speaker has directed that a circular sent to all Ministries about the procedure. The Public Accounts Committee also has expressed the view that in accordance with the well-established parliamentary practice the consideration stage by the House should

[61] *Journal of Parliamentary Information* vol 12, no 1 (April 1966) 9.

arise only after the Committee has made its final recommendation after reconsideration of the government's view.[62] Again, the Speaker has explained the consequences of departing from these well-established practices and rule that any departure from these practices may be regarded as a serious breach of conventions and may even provoke a motion of censure against the government.[63]

These are some of the important practices and usages which can be termed as parliamentary conventions with regard to the procedures followed in the summoning, prorogation, dissolution, sittings, joins sittings, procedures within, and in between, the Houses of Parliament and in the Committees including the Joint Committees. By no stretch of imagination can it indicate exhaustively every parliamentary convention. These practices indicated above are only illustrative of the different parliamentary conventions. These practices or conventions exist irrespective of the Constitution as well as the Rules of Procedure as adopted by both the Houses of Parliament in India. Thus, the different provisions of the Constitution and the Rules of Procedure lay down only to certain guiding principles. Within these broad outlines, there exist a large mass of rulings, precedents and conventions which, to a large extent, supplement the written code of conduct present in the Constitution as well as the Rules of the Houses. As such, the relevance

[62] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 744.
[63] SL Shakdher, *Third Lok Sabha, 1962–1967: A Souvenir* (Lok Sabha Secretariat 1967) 42.

and importance of these parliamentary conventions are very clearly felt and established even in the working of written Constitutions.

As the Speaker/Chairman is the Presiding Officer, the Houses depend upon the knowledge and wisdom of the Presiding Officers to a large extent in giving effect to well established and healthy conventions. The Presiding Officers can thus be a guiding star to all the usages, practices and conventions for the Members of the House. At the same time, even the House has a positive role to play if the existing conventions are to be followed effectively, or for the establishment of new ones. The knowledge and wisdom of each and every Member in the House are necessary for the very effective utilization of the parliamentary convention because the Presiding Officers have to get the support of the entire House in the implementation of the parliamentary conventions. Unfortunately, the second element is not present in the legislative bodies today, probably because of the defects of democracy including those of party politics, more specifically the emergence of multi-party system. But when both these elements are present, unquestionable respect to the Parliamentary conventions would definitely be the result, and it would enable the legislative bodies which have the task of policy making to carry out their functions smoothly and effectively.

The role of constitutional conventions in smoothening the working of Parliamentary institutions is universally acknowledged. D.C. Jain is of the opinion that to (no) parliamentary conduct should be developed on

convention and public opinion, such conventions should be deliberately established in India and followed with determination.[64] It is submitted here that certain practices and conventions have been violated time and again for no proper or valid reasons and no effort seems to have been taken by the Presiding Officers from time to time to order the House on the basis of established conventions irrespective of the fact that there is no legal sanction for violation of the same these established conventions need to be followed with conviction as they only encourage a healthy and fruitful use of parliamentary time. As the basis for the establishment of a convention is 'reason' if that particular convention is followed with conviction, then such a convention can well be equated with a written rule or regulation.

V. CONVENTIONS RELATING TO THE PRESIDING OFFICERS AND PRIVILEGES OF THE HOUSES

The term Presiding Officer is used to include the Speaker and the Deputy Speaker of Lok Sabha, the Chairman and Deputy Chairman of Rajya Sabha and any other Member of the House for the time being Presiding over the House and discharging the functions of the Speaker or the Chairman as the case may be. There is a whole lot of practices/conventions existing with reference to the selection or the

[64] DC Jain, *Parliamentary Privileges under the Indian Constitution* (Sterling Publishers Pvt Ltd 1975) 221.

removal of the Presiding Officers. The British convention that once a Speaker is always a speaker is totally inapplicable to the speaker of the Lok Sabha, a fact which amply goes to prove that the parliamentary conventions of one country need not be followed in other countries also. The political climate in India is not suitable for incorporation of the British practice *ipso facto.* The lack of proper understanding among the different political parties with respect to the office of the Speaker, and the partisan attitude of the Presiding Officers at times, thus making the British convention largely unsuitable to the Indian Context.

With regard to the election of the Deputy Speaker, a new convention was established by the National Front Government in 1989 in having the Deputy Speaker from the single largest opposition party. This practice was also followed by the Congress (I) party when its spokesman Mr. C. P. Thakur made it clear that it would follow the precedent set by the National Front Government.[65] Based on this practice, Shri. Mallikarjuniah of the Bharatiya Janata Party, which was the single largest opposition party was elected as the Deputy Speaker. The convention that the Deputy Speaker[66] should occupy the first seat to the left of the Speaker was established in 1927, and is being followed even now.[67]

[65] *Deccan Herald* (16 July 1991).
[66] R Venkataraman, *My Presidential Years* (Indus 1994) 562.
[67] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 329.

One important development has taken place in the establishment of a convention, which has been time and again not only followed, but the practice has been reiterated by different Speakers. This convention is followed even in the absence of any specific rule prohibiting the adjournment motion on the day of the President's Address. On February 17, 1965, Smt. Renu Chakravarty, a Member of the Lok Sabha inquired about the notice of adjournment motion tabled by her immediately after the President's Address. The Speaker then refereed to the decision taken by the House in 1962 and ruled that the adjournment motion would be taken up the next day. While Shri. H. V. Kamath, and another Member pointed out that there was nothing in the Rules of the Lok Sabha prohibiting discussion on adjournment motions on the day of the President's Address, the Speaker observed that he himself had not relied upon any particular Rule but had referred only to the convention that had been established by the House.[68] He expressed his desire that the House would continue to respect and observe that convention.

Another important convention has been established in the discharge of his functions by the Speaker. Whenever a matter is taken up for discussion by the House in which the Speaker has direct or indirect interest, the Speaker would not preside over the House till such matter is discussed and a decision has been taken by the House. For example, on November 19, 1959, before the Andhra Pradesh and Madras

[68] SL Shakdher, *Prime Minister as a Member of Lower House: Position in Various Countries* (1966) 12(1) Journal of Parliamentary Information 50, 50–51.

(Alteration of Boundaries) Bill, 1959, was taken up for consideration, the Speaker, Ayyangar, observed. 'Before we take up the next item of business, I would like to make a brief statement. This boundary matter relates to my constituency and, therefore, I do not propose sitting here. However, just I may try to be, I do not want to create an impression that I am deciding one way or the other. I shall, therefore, ask the Deputy Speaker Sardar Hukum Singh, to take the Chair and get through this Bill'. The Speaker then vacated the Chair and did not preside over the sittings of the House while that Bill was under discussion by the House.[69] This practice is being followed by successive Presiding Officers, which goes to prove the strength of such practices in the working of the House.

The decisions taken by the Presiding Officers, both in the House of the People and the Council of States, from time to time, have a positive role to play in the development of healthy practices, and might even result in specific Rules of the Houses. The rulings of the Speaker or the Chairman as the case may be, constitute precedents by which the subsequent Presiding Officers, Members and other officers are guided. Such precedents are collected, and in course of time, formulated as Rules of Procedure or followed as conventions. Generally, the rulings of the Presiding Officer cannot be questioned except on a substantive

[69] MN Kaul and SL Shakdher, *Practice and Procedure of Parliament* (Metropolitan 1991) 329.

motion. Moreover, a Member who protests against the ruling of the Speaker or the Chairman commits contempt of the House as well as the contempt of the Presiding Officer. Such decisions of the Speaker are equally binding whether given in the House or on a departmental file and he is not bound to give reasons for his decisions. Again, when the Speaker's or the Chairman's power in this regard is questioned, the well-established convention of the House is referred to in this regard. A proposal to have a specific Rule to the effect that the Speaker shall not be bound to give reasons for his decision on a notice or any matter was discussed by the Rules Committee on April 26, 1966, and the Committee felt that such a Rule was not necessary as the Speaker had the inherent power not go give reasons for his decisions on notices or other matters. This was a well-established practice of the House which was understood by everybody and the Committee felt that there was no need to make a Rule in the matter. The Members cannot criticize directly or indirectly, inside or outside the House, any ruling given, opinion expressed or statement made by the Speaker.[70]

VI. JUDICIAL RESPONSE TO CONSTITUTIONAL CONVENTIONS

After the commencement of the Indian Constitution, it has been the expectation of the framers of the Constitution that India would be

[70] ibid 110 – 111.

developing healthy constitutional conventions in the light of the developments in the Indian context. However, such an expectation, by and large, has remained a dream and no constructive efforts have been taken to establish healthy conventions. In fact, constitutional conventions, practices and usages were permitted to be developed in India even against the cardinal principle thus resulting in the establishment of constitutional convention even against the written provisions of the Constitution as well as the laws made thereunder. Even the judiciary supported such a development through narrow interpretations of different provisions of the Constitution. Passing references were made by the courts in India to British Parliamentary practices and imported them to read the different provisions of the Constitution the British way. As such when the Constitution itself is Supreme, no one can, by any means of interpretation, make any one of the branches of government powerful or weak. Attempts in the recent past were made by the Courts to interpret specific provisions by imaginary British conventions without elaborating on the justification for the same.

In U. N. R. Rao v. Indira Gandhi[71], a constitution bench of the Supreme Court held that 'it was said that we must interpret Art. 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it

[71] AIR 1971 SC 1002.

must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed… Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State'.

The Supreme Court went on to observe that "in India, as in, England, the executive has to act subject to the control of the legislature; but in what way is this control exercisable by the legislature? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain

in regard to the Government of States-, the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part.' The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them… and is in accordance with conventions followed not only in the United Kingdom but in other countries following a similar system of responsible Government".

It is submitted that the Supreme Court interpreted the written provisions of the Constitution of India in the light of the conventions prevailing in the United Kingdom and other Commonwealth countries. However, the court has not referred to the observations of the Privy Council on the importance of written provisions of the Constitution over and above the conventions or practices in England. Two specific decisions of the Privy Council are referred to in this context.

The first one is the Privy Council decision in Attorney General for Ontario v. Attorney General of Canada, decided on 16th May 1912.[72] In this case, the judgment was delivered by Lord Chancellor Loreburn for self and on behalf of Lord Macnaugtan, Lord Atkinson, Lord Shaw and Lord Robson. Dismissing the appeal from the Canadian Supreme Court, the Privy Council held that 'In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids (emphasis added). When the text is ambiguous, for example, when the words establishing two mutually exclusive jurisdictions one wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the state itself or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the British North America Act. It certainly would not be sufficient to say that the exercise of power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously,

[72] *Privy Council Appeal from the Supreme Court of Canada* [1912] AC 571.

bestowed by British North America Act. Indeed, it might ensue from the breach of almost any power.'[73]

It is equally significant to mention the second judgment of the Privy Council in Alhaji D. S. Adegbenro v. Chief S. L. Akintola[74] to propose the manner in which the provisions of the Constitution need to be interpreted. This judgment was delivered by Vicount Radcliffe for himself and on behalf of Lord Jenkins, Lord Guest, Lord Devlin and Sir Kenneth Gresson on 27th May, 1963. This case came before the Privy Council on appeal from the Federal Supreme Court of Nigeria. The Privy Council observed by referring to the words of the Constitution of the Federation of Nigeria, that '… by these words, therefore, the power of removal is at once recognized and conditioned; and since the condition of constitutional action has been reduced to the formula of these words for the purpose of written Constitution, it is their construction and nothing else that must determine the issue'. Responding to another argument that the Nigerian Constitutions are modelled on the current constitutional doctrines of the United Kingdom, the Privy Council held that '… In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where the dismissal is an actual possibility: and the right of removal which is explicitly recognized in the Nigerian Constitution

[73] ibid 583.
[74] *Privy Council Appeal* No 5 of 1963.

must be interpreted accordingly to the wording of its own limitations and not to limitations which that wording does not import'. (emphasis added)

The Privy Council also referred to the observations of Lord Bryce who once said that 'the British Constitution works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. This instrument now stands on its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording and never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution' (emphasis added). Apart from this, it is also observed that the concept of separation of powers and checks and balances, considered by the Supreme Court as basic structure of the Indian Constitution take a big hit.

However, a detailed analysis of the constitutional conventions and practices was taken up by the Supreme Court only recently. The Court

in Supreme Court Advocates on Record Association v. Union of India[75] made an earnest attempt to explain the nature and scope of constitutional conventions under the Indian Constitution. Some of the interpretations regarding constitutional conventions as looked into by the Court needs to be explained here briefly.

In the first place, the Court tried to explain the meaning, nature and scope of constitutional conventions by saying that the practices turn into conventions and create rules of binding conduct because they are not inconsistent with the provisions of the Constitution but are implicit in its provisions. The Court went on to say that the conventions have no place where the provisions are clear and explicit. However, in other areas, it is only those which have been established over a period of years that are recognised as conventions e.g., some parliamentary convention as well as the convention regarding the choosing of the Prime Minister which can be said to be well established. It would not be proper to elevate all practices into the status of convention. From this, it is possible to have the inference that only the practice coupled with good reason can result in the establishment of conventions. Again, as the conventions develop, they become valid and meaningful although they cannot be strictly enforced in a court of law. Thus, the relevance of conventions even in relation to a written Constitution has been formally accepted by the Court. The Court further held that conventions are found in all established Constitutions and have soon

[75] JT 1993 (5) SC 479; AIR 1994 SC 268.

developed even in the newest. In another context the Court said that there are two sets of principles that make the rules of constitutional law; one set of rules is contained in the written Constitution of a country and the other set is referred to as 'conventions of the Constitution'. Conventions are a means of bringing about constitutional development without formal changes in the law.

Again, after referring to the writers like Ivor Jennings, Mill, Dicey and Anson, the Court observed that the short explanation of constitutional conventions is that they provide the flesh which clothes the dry bones of the Law; they make the legal Constitution work; they keep in touch with the growth of ideas. A Constitution does not work itself; it has to be worked by men. It is an instrument of national cooperation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that cooperation. Also, the effects of a Constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate. The Court also hastened to add that the written Constitution cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow with the passage of time. Conventions are vital in so far as they fill-up the gaps in the

Constitution itself, help solve problems of interpretation, and allow for the future development of the constitutional framework. Whatever the nature of the Constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulate the' exercise of that discretion, a power which, juridically, if conferred upon a person or body of persons may be guided, or canalised by the operation of the conventional rule. Thus, one among the important functions of constitutional conventions is to regulate the exercise of discretion, presumably to guard against the irresponsible abuse of powers. However, there was no process by which constitutional conventions can get crystalized into law.

The Supreme Court of India, relying on the judicial interpretations of their counterparts in England, Canada and Australia, came to the concluded that the courts have recognised the existence of conventions and have relied upon them as an aid to statutory interpretation. The Court also agreed that a convention, while it is a convention, is to be distinguished from the law. But this does not mean that what was formerly a convention cannot later become law. When customary rules are recognised and enforced by courts as law, there is no reason why a convention cannot get crystallised into a law and become enforceable. For the first time the court observed that once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such a convention the status of law. In this

regard, the Supreme Court went on to observe that there is no distinction between the 'constitutional Law' and an established 'constitutional convention'.

Two specific paragraphs of this judgment need to be mentioned here.

"351. It is not necessary for us to delve into this subject any more. We agree that a convention while it is a convention is to be distinguished from the law. But this does not mean that what was formerly a convention cannot later become law. When customary rules are recognised and enforced by courts as law, there is no reason why a convention cannot be crystallized into a law and become enforceable. 'Conventions can become law also by judicial recognition' stated K.C. Wheare in Modern Constitution (1966 Edn.). It is no doubt correct that the existence of a particular convention is to be established by evidence on the basis of historical events and expert factual submissions. But once it is established in the court of law that a particular convention exists and the constitutional functionaries are following the same as a binding precedent then there is no justification to deny such a convention the status of law.

353. We are of the view that there is no distinction between the 'constitutional law' and an established 'constitutional convention' and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is

operating then the convention becomes a part of the 'constitutional law' of the land and can be enforced in the like manner" (emphasis added).

Thus, a detailed analysis of the role played by the constitutional conventions even in the lengthiest written Constitution of India and equating them with the law and conferring the status of law is an important development in the sphere of constitutional law of India. Treating the constitutional conventions as a part of constitutional law that can be enforced in the like manner, is in fact, an important milestone in realizing constitutionalism in India.

VII. CONCLUSION

Among the three branches of the government in India, the legislature seems to have respected many conventions it developed over a period of time. Although there have also been violations of established conventions, still it remains as the only branch of the government that respects the constitutional conventions in comparison with the other two branches. As far as the Executive branch is concerned, it is submitted that many conventions have been followed based on the British conventions, thereby obliterating the executive branch totally from the constitutional developments in India. This has also been supported ably by the Supreme Court through its interpretative decisions. However, in the recent past the Supreme Court, in a catena of cases, emphasises the doctrine of separation of powers and checks

and balances as basic structure or essential features of the Constitution of India.[76] The Supreme Court on one side acknowledges the existence of three branches of government, the Executive, Legislature and Judiciary and on the other combines the legislative branch and the executive branch, the legislative branch ultimately subsumes in itself the executive branch, thus obliterating the independent status and powers of the President and the Governors.

However, in this process, the attempt made by the Supreme Court in Supreme Court Advocates on Record Association v. Union of India[77] in analysing the importance of constitutional conventions needs to be appreciated. Along with this the attempt to treat constitutional conventions as part and parcel of the Constitution and that too on par with the written provisions would go a long way in the process of judicial interpretations in the years to come. If the Constitution is looked at as a complete document and conventions are permitted to take deep root, it would definitely remove the difficulties already caused by looking at different provisions independently.

A three-judge bench of the Supreme Court analysed the facts in detail of the practices in the nomination of members to Legislative Assembly of Puducherry in K. Lakshminarayanan v. Union of India.[78] As the practices adopted were not uniform, the court held that ‘we do not find

[76] *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225; *I. R. Coelho v. State of Tamil Nadu* (2007) 2 SCC 1.
[77] ibid.
[78] *Civil Appeal* Nos 11887 and 11888 of 2018.

any established practice or convention to the fact that names for nominations to members of the Legislative Assembly has to emanate from Chief Minister and can be made by the Central Government only after concurrence by Chief Minister'. The continuity required as one among the important facets in the convention was missing in this case and the court rightly rejected the diverse practices at different points of time.

At times, the Supreme Court, depending upon ground realities, specifically go against the British conventions. Particularly, the English convention that the Prime Minister should be a member of either House of Parliament, preferably the House of Commons was taken up for consideration in S. P. Anand v. H. D. Deve Gowda.[79] A division bench of the Supreme Court rejected the English convention outright stating that 'it is not our constitutional scheme since our Constitution clearly permits a non-member to be appointed a Chief Minister or Prime Minister for a short duration of six months'. The court went on to observe that 'even though the Prime Minister is not a member of either House of Parliament, once he is appointed he becomes answerable to the House and so also his ministers and the principle of collective responsibility governs the democratic process…we are, therefore, of the view that the British convention to which the petitioner has referred is neither in tune with our constitutional scheme nor has it been a recognised practice in out country'. The court also relied upon two of

[79] AIR 1997 SC 272.

its earlier decisions in this regard, a constitution bench decision in Har Sharan Verma v. Tribhuvan Narain Singh,[80] and Har Sharan Verma v. State of U.P.[81] Thus, the written provisions of the Constitution of India have clearly prevailed over the British convention. If this is the case, then, the question arises as to why not the written provisions of the Constitution of India in all cases allowed to prevail over the British conventions? This will enable uniformity in application of written provisions of the Constitution over the conventions, British or Indian.

The Supreme Court could have used its power as well as skills of interpretation based on Article 13 (3) that provides necessary support to 'customs or usages having the force of law' and promote and sustain the meaningful role played by constitutional conventions in India. To conclude, the observations of Justice P. B. Mukharji deserve to be summed up here on conventions. According to him 'convention is the necessary hyphen between form and substance in constitutional law…no Constitution can provide for good and responsible behaviour. It is only convention which can make that possible. But these conventions are the very soul and spirit of law, life and democracy under the Constitution'.[82]

[80] AIR 1971 SC 1331; (1971) 1 SCC 616.
[81] AIR 1985 SC 282; (1985) 2 SCC 48.
[82] PB Mukharji, *The Critical Problems of the Indian Constitution* (Bombay University 1968) 167.