

# Are constitutional conventions necessary



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## Are Constitutional Conventions Necessary Are Constitutional Conventions Necessary To Preserve The Legal Structure Of Government? Illustrate By

Example Introduction A constitutional convention is an informal and uncodified procedural agreement that is followed by the institutions of a state. The Constitution of a country comprises both written rules enforced by courts, and "unwritten" rules or principles necessary for constitutional government. Written rules mandate that they be followed in a particular specified situation, and on the other hand unwritten rules come into play when there is no given written rule to cover the situation at hand.

Constitutional conventions are said to be rules of political practice, which are regarded as binding by those to whom they apply, but they can't be called exact laws, as they are not enforced by courts or by the Houses of Parliament. Notwithstanding the fact that ours is a detailed Constitution, the Constitution-framers left certain matters to be governed by conventions, thereby giving to the holders of constitutional offices some degree of discretion in respect of such matters.

The main purpose of the Constitutional conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the period. Although conventions are not legally enforceable and the sanction behind them is moral and political, yet some conventions of the constitution which set norms of behavior of those in power or which regulate the working of the various parts of the Constitution and their relations to one another, may be as important, if not of greater significance, as the written word of the Constitution itself.

This is particularly true of the role of 'conventions' in a system of Parliamentary democracy having a Constitutional distribution of powers between two or more levels of Government. Often constitutional conventions are more important than written constitutional provisions. For example, the President is empowered by the Constitution to appoint the Prime Minister, but the Constitution provides no guidance as to who should be appointed as Prime Minister. Here conventions regarding the appointment of the Prime Minister play an important role in guiding the President.

Following are some of the characteristics of the conventions: Conventions are rules that define non-legal rights, powers and obligations of office-holders in the three branches of Government, or the relations between governments or government organs. Conventions in most cases can be stated only in general terms, their applicability in some circumstances being clear, but in other circumstances uncertain and debatable. They are distinguishable from rules of law, though they may be equally important, or more important. They may modify the application or enforcement of rules of law.

Sir Ivor Jennings suggested that in order to establish a convention three questions must be asked: What are the precedents? Secondly, did the actors in the precedents believe that they were bound by a rule? Thirdly, whether there is a good reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless the persons concerned regard themselves to be bound by it. Conventions grow out of and are modified by practice.

At any given time it may be difficult to say whether or not a practice has become a convention. Conventions do not come from a certain number of sources, their origins are amorphous and nobody has the function of deciding whether conventions exist or not. As the researcher's topic requires proving whether or not the constitutional conventions are necessary to preserve the legal structure of the government (with an example), the researcher would confine his study to the one of the most debated and controversial constitutional conventions - the appointment of the Prime Minister .

The conventions are compared with British conventions since most of our constitutional practices are derived from the United Kingdom and through this example, the researcher will try to illustrate the importance of Constitutional Conventions. Appointment Of The Prime Minister British Precedents In England, it is the monarchy whereas in India it is the President who makes this choice. This choice demands independence of status and familiarity with political conditions, but no method of choice can altogether avoid bias. The nature of the monarch's choice necessarily depends upon the status of parties in the House of Commons.

If a party has a clear majority, its recognized leader will be the Prime Minister. A completely different situation arises where no party gets a majority in the legislature. Here two possibilities arise—the formation of a coalition government or the formation of a minority government, as another dissolution at that time is not practicable. It is an accepted rule that when a government is defeated, either in Parliament or at the polls, the monarch

should send for the leader of the opposition. This rule is based on the assumption of impartiality of the crown.

British constitutional history also shows us that the Queen has consulted the outgoing Prime Minister on some occasions, but it is not an invariable rule (but more sought of a convention). Indian Scenario However, these considerations are not suited to a country like India with its diversity and plurality where the regional parties are making an impact on our political scene. Even though our Constitution is bulky, certain aspects are left to conventions. One of them is the appointment of Prime Minister by the President. Most of our constitutional conventions are derived from the United Kingdom.

However, the British precedents offer no specific answers to the problems raised by elections in India. Article 75(1) of the Indian Constitution gives the President the right to appoint the Prime Minister. In normal circumstances it is the leader of the majority in the House of the People (Lok Sabha). But, in circumstances where the Prime Minister dies in office or resigns, the President will have to exercise his personal judgment. Also in circumstances when the party may have no recognized leader or either of the two parties may be able to form a government and command the support of the House of the People.

In such circumstances the President may chose for a person who could form a coalition with the help of two or more parties and command the support of the Lok Sabha. " It was such discretion that President Reddy exercised in 1979 after the fall of the Janta Ministry in inviting Charan Singh to form the ministry and also in not inviting Jagjivan Ram to do so after Charan Singh

resigned and advised the dissolution of the House. " Options In A Hung Lok Sabha The Prime Minister must command a majority in the House at the time of the vote of confidence.

However, in an uncertain situation, say in the case of hung Lok Sabha, how is the President to determine which of the party leaders will manage to secure majority support? Being leader of the single largest party does not necessarily mean being the leader of the majority members of the House. A person need not be the leader of the single largest party in the House to command the support of the House. The practice now more or less seems to be settled that the leader of the party who is able to secure the support of the House should be invited to form the Government.

This again brings us back to the question, when and how does a practice become a convention? Ivor Jennings's three-stage test mentioned before might be helpful in deciding whether a practice has crystallized into a convention or not but that is not a conclusive test for determining the existence of a convention. There has been demand from several quarters to codify the convention with respect to the appointment of Prime Minister and Chief Ministers. The reason given is that having a written Constitution, we should not leave the appointments to these high offices on conventions.

The controversy invariably surrounding every appointment (in cases where no one party has absolute majority) of the Prime Minister and Chief Ministers further strengthens the demand for codification of conventions. One of the suggestions that have been put forward is the amendment of Article 75 of the Constitution so as to have the following effect: " The Prime Minister shall be appointed by the President on the recommendation of the House of the

People which recommendation shall be binding on the President". Thus the onus will be on the legislature to choose the Prime Minister, than on the President.

Such a move is welcome since it will help in avoiding confusion and controversies in the appointment of the Prime Minister and Chief Ministers. However, at the same time it must also be kept in mind that a Constitution cannot contain all and sundry provisions concerning a matter including that for the appointment of Prime Minister. Moreover, the discretion to appoint the Prime Minister has been vested in none other than the President who is the head of the republic. Hence, the presumption that he will act impartially should always weigh in his favour. Thus The Importance Of Conventions???

Notwithstanding the fact that ours is a detailed Constitution, the Constitution-framers left certain matters to be governed by conventions, thereby giving to the holders of constitutional offices some degree of discretion in respect of such matters. Conventions lubricate the room left at the joints in the constitutional structure and protect them against ossification. The main purpose of the Constitutional conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the period .

Although conventions are not legally enforceable and the sanction behind them is moral and political, yet some conventions of the constitution which set norms of behaviour of those in power or which regulate the working of the various parts of the Constitution and their relations to one another, may be as important, if not of greater significance, as the written word of the Constitution itself. One unfortunate fact of the Indian situation is that enough

attention has not been paid to the evolution and observance of the right codes of conduct and conventions.

Even the codes and conventions evolved in the earlier years have been broken too lightly in the later years. There is an increasing tendency to resort to extra-Constitutional methods to force settlement of political or economic issues—imagined or real. This would be a cause for concern even in a small homogeneous country. In India, a heterogeneous country of huge dimensions, this cannot be a matter of grave anxiety. Hence, natural reaction would be that the loopholes in the Constitution which have permitted aberrant developments should be plugged.

It is urged that, if conventions do not work, appropriate constitutional safeguards should be provided. If appropriate conventions are not followed and the discretion provided under certain circumstances is misused, the entire system may collapse. In order that appropriate conventions and codes of conduct get evolved, it is essential that incumbents of constitutional offices are selected from among persons of admitted competence and integrity and provided with reasonable security of tenure. Conclusion The main purpose of conventions is to guide the use of constitutional discretion.

Thus, every time there is a general election or a request for dissolution of the House of People, the questions that start doing rounds are—whom will the President invite to form the next government? What if the President invites someone to form a government who does not have a clear majority in the Lok Sabha ? Will the President heed to the advice of the Cabinet to dissolve the House? These are some of the important questions to which the



Constitution provides no answer to, and this is where conventions play their part as a catalyst.

Some conventions are well-established and may be relied upon absolutely, while some are vague and may lead to manipulation for political purposes. For example, appointment of the Prime Minister is to be done by the President and the prevailing convention is that the person enjoying support of the absolute majority of the House concerned is appointed to the respective office. The snag lies in ascertaining that support. The task of the President becomes difficult and open to criticism, as he has to often follow vague conventions and foreign precedents.

The conventions being vague, the President may go on appointing the leader of the largest party in the Lok Sabha as the Prime Minister, despite the fact that the appointed Prime Minister is not in a position to secure majority in the Lok Sabha . Hence if the conventions are codified and the effect of that codification is to give jurisdiction to the courts to enforce the codified conventions then in such a scenario the flexibility of the conventions will be lost. Moreover, codified laws cannot cover any and every situation that might arise. Hence, it makes more sense to leave the conventions uncoded.

Therefore, since the main purpose of the Constitutional Conventions is to ensure that the legal framework of the Constitution retains its flexibility to operate in tune with the prevailing constitutional values of the period, it helps the Constitution to adapt and make amends according to the needs and desire of the changing times, as the Founders of our Constitution couldn't have foreseen and safeguarded the Constitution from future loopholes and hence left certain matters to be governed by conventions as

they are as important, if not of greater significance, as the written word of the Constitution itself.

Sources of Constitutional Law As mentioned, the constitution in the UK is derived from several sources. One of the most important is Acts of Parliament. The Parliament Acts of 1911 and 1949, for example, allow the House of Commons, in certain limited circumstances, to pass legislation without the consent of the House of Lords, and consequently to act in a manner which would otherwise be unconstitutional. This is very rare, however, and has happened less than five times in the last sixty years.

The threat of using the Parliament Acts may be sufficient to pass legislation which is unpopular in the House of Lords. Case law also forms an important part of the constitution. The decisions of the judiciary have occasionally imposed limits on executive power. Constitutional conventions, although not legally binding, also play an important role in the UK's legal fabric. By convention, the monarch appoints as prime minister the person who commands a majority in the House of Commons after a general election.

By law, however, there is nothing to stop the monarch from appointing his or her head gardener as prime minister. This would never happen, of course, but in strict legal theory remains a possibility. Finally, EU law and international treaties may also contribute to the UK's constitution. In fact, in one case concerning EU law the House of Lords went so far as to grant an injunction to 'disapply' a legitimate Act of Parliament.

Again, this is an extremely rare occurrence, and decisions affecting the constitution are not taken lightly. Devolution The Labour government which came to power in 1997 has made several significant changes to the UK's <https://assignbuster.com/are-constitutional-conventions-necessary/>

constitution. The most notable of these have been the creation of the Welsh Assembly and the Scottish Parliament. The main powers that have been delegated include those regarding health and education. Other more serious powers, such as those on defence, remain the sole preserve of Westminster.