Constitutional Conventions

Viswanathan Dolia Endowment Lecture Madras Bar Association Speech on 24th april 1996

It gives me immense pleasure to inaugurate the Viswanathan Dolia Lecture Trust and deliver the first lecture under the auspices of the renowned Madras Bar Association. The Bar Association consists of Senior Counsels like King's Counsel in England. Eminent leaders of the Bar have been members of this Association and they have by their erudition and integrity set noble standards and traditions. Some of them have served as Judges, Administrators and Law Officers with great distinction. It is indeed a privilege to address such an institution.

Democracy is a government by debate not only in the legislatures of the country but in Public for a where learned men contribute their thoughts and ideas for the creation of public opinion as a guide to those holding responsibility for the governance of the country. Such debates lectures, symposia and seminar add to the wealth of ideas from different facets and thus contribute to the development of what Mill called the "General Will of the people" or Public Opinion. In this respect the Bar has a vital role to play in shaping legislation. In the pre-independence days and even during the first three or four Parliaments after independence, bills used to be circulated for eliciting public opinion and sent to the Bar Association for comments. Select Committees on Bills used to provide opportunities for a Public debate and for the Bar to play a useful role in legislation. Unfortunately today Bills are rushed through without scrutiny with the result many of them suffer from structural and drafting defects. It is in this context that I welcome endowment lectures in institutions like Bar Associations, Universities and other organisations so that enlightened Public Opinion on issues of national importance may be created.

The lecture series is being organised in the names of two men of achievement in different fields. Shri. B.R. Dolia reached the front rank in the Bar by his deep knowledge, persuasive advocacy and absolute integrity. He was a man of principles and always appeared on behalf of Labour and fought vigorously for their rights. I owe personally a deep debt of gratitude to late Shri. Dolia, for taking over the editorship of the Labour Law Journal, when I became pre-occupied with Parliament, and managing it as long as he lived. It was during his stewardship that the Labour Law Journal gained recognition by the Supreme Court and High Courts. Madras Bar has produced many giants and Dolia was one of them.

Sri. S. Viswanathan joined me in 1940 and took an active interest in the cause of Labour. He conducted on behalf of Labour a number of celebrated cases like the dispute between workers and management of Amalgamations Group Companies before Justice Mack, the cause of hundred of thousands Plantation Workers before the Tribunal and the working journalists case before the Supreme Court. In short, by 1957 he had established himself as an expert in Labour Law. Late Shri. Dolia inherited Shri. Viswanathan's expertise and improved upon it. A turning point came in Shri. Viswanthan's career when he was invited to take over the management of a leading industrial group, the Seshasayee Brothers. This gave him full scope for utilising his vast talents namely his innovative genius, skill in negotiations with foreign collaborators, methodical and systematic planning and effective implementation. He was the first in India to use bagasse as pulp for writing papers and newsprint, produce High Energy batteries for submarines and so on. It is appropriate that a lecture series dealing with current problems of Industrial and Commercial Law of national importance is organised by the Trust.

I have chosen for the first lecture a subject of utmost and immediate importance to our nation namely "Constitutional Conventions" as a number of Constitutional issues are likely to be thrown up after the current general elections. It is advisable to debate them before the issues arise than after they have assumed critical proportions. At the outset, I wish to emphasize that the thoughts I shall put forth in the lecture are not positive conclusions but relevant considerations to be taken into account in the light of our own and other countries experience.

It is difficult to find a precise definition of the term Constitutional Conventions.

Sovereignty in Britain originally vested in the Crown and there was a gradual transfer of power from the Crown of Parliament which has come more and more to represent the nation. The manner in which the transfer was accomplished is a fascinating story. As stated by Dicey in "Law of the Constitution" (10th Edition P.470). "The leaders of English people in their contest with the Royal Power never attempted, except in the period of revolutionary violence, to destroy or dissipate the authority of the Crown as Head of State. The Policy, continued through centuries, was to leave the power of the King untouched, but to bind down the action of the Crown to recognise modes of procedure which if observed, would secure first the supremacy of law and ultimately the sovereignty of the nation. The King was acknowledged to be Supreme Judge but it was established that he could act judicially only in and through his Courts. The King was acknowledged as the only legislator but he could enact no valid Law except as Kind in Parliament.

A few examples of British Constitutional Conventions may be cited.

1. The Queen must invite the leader of the Party or group the majority of the House of Commons to form a Ministry. The person so called on is the "Prime Minister". In British Law the term Prime Minister until did not exist and even now is only referred to incidentally in the Statute relating to salaries and pensions. (Our Constitution recognises a Prime Minister).

2. The Queen must appoint her other ministers such persons as the Prime Minister advises her appoint (This has been embodied in our Constitution Art. 75(1)

3. The Queen is bound to exercise her legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister.(Art. 74(1) of our Constitution embodies the same principle).

4. The Queen must assent to every Bill passed by Houses of Parliament. But there is no law requiring her to give it. (Art. 111 of our Constitution may be compared.) Powers to withhold asset.
5. The Government is entitled to continue in the office only so long as it enjoys the confidence of the majority in the House of Commons. If the Government is defeated on the floor of the House on a motion of Confidence or no Confidence, the Prime Minister is bound to advise the Sovereign to dissolve the Parliament or tender resignation.

The above list is not exhaustive (vide Hood Philips Constitutional and Administrative Law 7th edition p.124 onwards).

But none of the Conventions are laws and enforceable in a Court. If there is a conflict between Law and Conventions, Law will prevail. Conventions are sometimes called "unwritten laws". Such a definition is imperfect as Conventions are not laws at all. In England the Common Law is unwritten law but is enforceable as a statute. Nor is the statement that Constitutional Conventions are customs adequate. This may cause confusion as customary laws are laws in the strict sense. According to Dicey "Conventions of the Constitution consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers and other persons under the Constitution are not in strictness laws at all".

Hood Philips in his book Constitutional and Administrative Law (7th Ed.) gives the following working definition "Rules of Political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the Courts or by the Houses of Parliament".

Constitutional Conventions consist of various customs, practices, maxims and precepts of political ethics. Together with Statutes, the Conventions constitute Constitutional Law of the land. A study of the Constitution of only Statute Law without the Conventions will be incomplete and distorted. The formal distinction that conventions are not laws, though of importance for the lawyer is not of much relevance to the politician, Sovereign and the Statesman who regard these Conventions binding on them.

No Constitution is perfect nor can provide for every contingency that may arise in the future. Besides conditions change and new concepts emerge as a result of changes in the social, political and economic conditions and growth. The Law that does not change with the newer conditions and perceptions will soon become antiquated, archaic and stagnant.

Conventions serve as the means of bringing about Constitutional developments without formal amendments to the law.

It is wrong to imagine that Conventions are peculiar to unwritten Constitutions like the British. Until a statutory amendment was made to that effect, American Convention against a third term for the President was mostly observed. Other conventions regarding election of the President have also been developed. Canada and Australia, though they have written Constitutions, follow a number of British Conventions.

The Constitution of India is a very comprehensive document and many conventions in the British Constitution are mandatory provisions of our Constitution. Yet it has many grey areas that are filled by Conventions. There are still a few dark corners which need to be lit with the lamp of Conventions. Time is appropriate for setting up a few healthy Conventions so that different yardsticks are not applied by successors causing confusion and uncertainty.

India on becoming a Republic deliberately chose the West-minister type of Parliamentary democracy. Speaking in the Constituent Assembly Dr. K.M. Munshi who was one of the architects of the Constitution said:

"Most of us and during the last several generations before us, public men of India have looked upon the British model as the best. For the last thirty five or forty years, some kind of responsibility has been introduced in the governance of the country. After this experience, why should we go back on the tradition that has been built for over hundred years."

During the Constituent Assembly debates, Dr. Ambedkar repeatedly emphasised that we have chosen the British model of government. Even before the 42nd Amendment to the

Constitution, the Supreme Court in Shamsher Singh case in 1974 held that the President was only a Constitutional head and was bound to act in accordance with advice of the Council of Ministers. Ivor Jannings stated positively that "the President of India is essentially a Constitutional monarch. The machinery of Government is essentially British and the whole collection of British Conventions has apparently been incorporated as Conventions". In my farewell address to the Members of Parliament, I said that the President of India is like an emergency lamp. When power fails the emergency lamp comes into operation and when power is restored, the lamp becomes dormant. I also asserted that the President is not an appellate or supervisory authority over the Prime Minister and that each functions within the defined spheres of authority prescribed by the Constitution. In short, I called for adherence to the British model of government.

I am not unaware that there are a few scholars, legislators and administrators who rely on the letter of the law and argue in favour of an active role to the President. They point out the difference between hereditary monarchy and an elected president deriving powers from the Constitution. Such an interpretation is alien to the original conception of the mode of government. Any attempt to read into the present Constitution such powers and responsibilities of the President would be a distortion of the Constitution. Those who seek wider powers for the President should achieve it by amending the Constitution in the manner provided.

Let me now proceed to examine some of the important Conventions of our Constitution and see if they are adequate to our needs and what changes if any should be made.

Art. 74 of the Constitution postulates that "there shall be a Council of Ministers with the Prime Minister at the head". Art. 75 states that "the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister".

Under our Constitution, there must be a Council of Ministers at all times and there cannot be a vacuum. The President cannot act *suo moto* pleading that there is no Council of Ministers in existence. He has to create one and act accordingly to the advice of the Council. The only occasion when there can be a very short interregnum is between the death of the Prime Minister and the nomination of the successor to carry on the administration till a final choice is made.

The most important function of the Crown in England and the President of India is the appointment of a Prime Minister. As Ivor Jennings said "The King has one, and only one function of primary importance. It is the appointment of the Prime Minister". It is well established convention in both England and India that if after the general elections, a single party secures a majority in the House, its leader must be appointed as Prime Minister. As Ivor Jennings put it, "if a party secures a majority of the House and that party has a leader, that leader must become the Prime Minister".

In this context the word 'Party' would include a combination of parties which fought the elections on a common symbol or a common elections manifesto. In 1977 the Janata Paty which was one such combination won a majority of seats in Lok Sabha and was called upon to form the Government.

The constitution is silent on what the President should do if no party is in a position to command a majority in the House.

In a Bi-polar party system as in Britain one or the other party secures a majority and therefore there is no British Convention in this regard. Such a situation arose in India after the general elections in 1989. The Congress though not the majority party was the largest single unit with Janata, BJP and others in descending order of strength. After the elections, the opposition parties agreed among themselves to support the Janata Party from outside without forming a coalition. The issue before the President was: who should be invited to form the Government, there was one precedent in Britain, though by no means a Convention, where the Crown was faced with similar situation. In 1923, Baldwin, the Conservative Prime Minister advised the dissolution of House as he wanted to get a mandate from the people for his Tariff Policy and the Crown accepted it.

In the general elections which followed in December 1923, the Conservative party was defeated but still remained the largest single party with Labour and Liberals in descending order of strength. In these circumstances, Kind George V said that "if Baldwin wished to resign, he, (the Kind) would refuse on the ground that he is still the head of the largest single party in the House of Commons". (quoted from Baldwin by Montgomery Hyde p. 197). When Baldwin was defeated in the House in January 1924 on the address to the throne, the Kind had the option either of calling 'Ramsay MacDonald', the leader of the Labour Party with 191 members or Asquith, the leader of the Liberal Party with 158 members. The Kind invited Ramsay MacDonald "as the leader of the next largest party in the Commons to form the administration" (quoted from Baldwin by Hyde p.199) which he did with the help of Liberals. The point to be noted in the case is that the Crown called on the parties in succession according to their strength to take up the responsibility of governance of the country.

The Congress which was defeated in the polls in 1989 but which had the largest membership in the Lok Sabha did not stake its claim to form the government. Rajiv Gandhi realising the mood of the country wisely decided not to press his claims. The President, following the British precedent cited above, called on the next party in order of strength namely the Janata Party headed by V.P. Singh to form the government. When other political parties later met the President and pledged support to V.P. Singh the President told them that he had called the next largest party to form the government and that it was for the other parties to demonstrate their support in the House. (vide my Presidential Years p.275).

Some jurists have argued that the President's goal must obviously be to get viable government and that he should be free to call any person who in his opinion is able to provide one for the country. The Sarkariah Commission while laying down guidelines for Governors in the choice of the party for forming the Government said failing a party with absolute majority, a combination of parties which is able to command a majority in the House should be given the next opportunity. This introduces an element of subjective judgment on the part of the President or the Governor in the choice and exposes them to charges of partisan or biased decisions. On the other hand calling parties in order of their strength in the House will certainly be the most prudent and non-controversial course of action. Again in 1991 when no party had a majority in Lok Sabha, the President invited the leader of the then largest single party – the Congress party and on his acceptance of the responsibility appointed him as Prime Minister. It is also palpably fair to all parties. I therefore suggest that a convention be established by Presidents and Governors to follow the practice of inviting parties according to their strength adopted in 1985 and 1991 by the President.

Occasions had arisen in State Assemblies where the ruling party had split and rival claims presented to Governors for forming the government. In some cases, the Governors had assumed the responsibility of trying to find out which group had a majority. The Constitution states that the Council of Ministers shall be collectively responsible to the House which means that the Council of Ministers shall have majority of the membership of the House is required. Whether a group has majority in the House or not can be tested only in the House and not in the gardens of Raj Bhavan. In 1990 when the Bharatiya Janata Party, whose support ensured a majority in the House to V.P. Singh's government, communicated to the President their withdrawal of support to the ruling party, the President did not take note of it but allowed the majority to be tested in the House. The President however advised the then Prime Minister V.P. Singh to seek a vote of Confidence in the House (vide my Presidential years Page 361 and 362). Unfortunately as some Governors did not follow this precedent, the chance of developing a Convention in this regard has been lost. I have every confidence that the Supreme Court, if called upon to pronounce on this issue will endorse the objective test of majority in the House rather than vague assessment of majority by the President or Governor. This is a grey area where a well defined convention should be established sooner or later.

Art. 74 provides that the President / Governor "shall" in the exercise of his function act in accordance with the advice of the Council of Ministers. This is a statutory expression of the British Convention. As Ivor Jennings puts it ***"in nearly every case*** she (Queen) acts on the advice of Ministers". But in exceptional circumstances the Crown would be justified in refusing to accept such advice. Ivor Jennings mentions that "If Mr. Chamberlain had (as he would not have thought of doing) advised dissolution in May 1940 when Germans were invading Belgium, the King would have been justified in refusing". Thus the British Convention is flexible and provides for remote possibilities. The use of the word "Shall" in article 74 causes confusion. If "shall" is interpreted by Courts in the absolute sense without exception, situations such as one cited by Ivor Jennings may cause havoc to the nation. One may argue that such stupid situations may not arise but law must provide for remote and improbable contingencies.

It is therefore my suggestion that a Convention should be developed by political as well as judicial process that notwithstanding the use of the word "shall" in Art.74, the President's power of declining the advice of the Prime Minister in extraordinary situations remains unaffected.

The use of the "Shall" in Article 74(1) is also likely to cause difficulties in the case of advice by the Prime Minister to the President to dissolve the Lok Sabha.

The British Convention in this regard is as follows:

1. The Sovereign should dissolve Parliament when requested by the Prime Minister to do so.
2. The Sovereign should not dissolve Parliament unless requested by the Prime Minister to do so.

Opinion is however divided on whether the advice of the Prime Minister defeated in the House is binding on the Crown. Some jurists have argued that the Crown should examine before ordering dissolution whether a viable alternative government could be formed and whether the conditions in the country would warrant the holding of general elections. Others however hold that the advice of the Prime Minister whether in office or defeated has never been rejected by the Crown in the last one hundred years and that the Sovereign's right to refuse dissolution has become obsolete (vide Halsbury 4th Ed. Volume 8, para 938).

Hood Philips in his book "Constitutional and Administrative Law" (7th Ed. Page 155), after setting out the two views concludes that a limited personal prerogative to the Sovereign (to refuse dissolution in appropriate cases) appears to be the better one. He adds that it is more in consonance with the traditions of British Parliamentary Government. According to him the reason for the general convention that the Sovereign is bound by the advice of her ministers is not applicable if they do not represent the wishes of the electorate (or Commons) Among the factors on which sovereign could properly refuse a dissolution would be whether the question in issue is of great political importance, whether supplies, have been voted, whether there is a minority government, whether there is a war on etc. Most people would agree with this balanced formulation of the prerogative of the Crown.

In Indian context, the words used in Art. 74 C1 (1) of the Constitution are that the President shall act in accordance with the advice of the Prime Minister and Council of Ministers. If strictly interpreted, would leave no option to the President but to order dissolution of the House even if the advice was perverse or the conditions did not warrant such action.

In 1990, when Prime Minister V.P. Singh lost the confidence motion, he did not advise the dissolution of the House but tendered resignation "so that the process of formation of a new government could begin". Therefore the President engaged himself in the task of finding an alternative government by sounding the other parties successively in order of their strength.

In 1991, when Prime Minister Chandrasekar resigned without facing a vote of the House on the Motion of thanks, he sought dissolution of the House. Though technically Chandrasekhar was not defeated in the House, it was obvious that he did not have the support of the majority. In view of the fluid Constitutional Law on the issue, the President on that occasion relied on an additional factor for ordering dissolution namely that no political party had staked a claim to form the government. (*vide* my Presidential Years P.412.) The President in that case did not commit himself that he was bound by the advice of the outgoing Prime Minister.

It is therefore necessary that a healthy convention on the line of the British convention should be established either by judicial interpretation or by a political consensus. It appears to me that the Governors Conference presided over by the President with the participation of the Prime Minister, is an appropriate forum for evolving a consensus on this issue.

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

The Constitution does not recognize an interim, temporary or caretaker Prime Minister. According to the letter of the law, a Prime Minister asked to continue till the general elections or till the formation of a new ministry is a Prime Minister and his Cabinet, the Council of Ministers, without any Constitutional limitations. But according to political theory, a Prime Minister who has been defeated or who has resigned, forfeits his right to govern and he functions at the sufferance of the President. In Britain, the time lag between the dissolution of the House and the Constitution of the new House is only a few weeks and no Prime Minister had during the interregnum sought to exercise substantive powers. In India the interval between the dissolution of the House and constitution of a fresh House takes several months as in the case when Charan Singh stayed as Prime Minister in 1979.

The Constitutional issue whether the President was bound by the advice of a ministry which has resigned and which was continuing in office at the request of the President till alternative arrangements were made arose during the period when Chandrasekar Ministry continued in office after its resignation. The ministry wanted to enter into some contracts involving several thousand crores of rupees and buy some aircrafts. The President advised that the Ministry continuing in office after resignation should not commit the future ministry to heavy financial obligations nor initiate new policies pending elections. It was then argued that the Constitution did not place any such restrictions on the Ministry continuing the office after resignation and that the President could at best return the proposal for reconsideration by the Council of Ministers under the proviso to Art.74 (1) which empowers the President to require the Council of Ministers to reconsider its advice. Fortunately the crisis was resolved by the Prime Minister Chandrasekar with statesmanlike wisdom accepting the President's view. Likewise, on an earlier occasion, when in similar circumstances V.P. Singh's ministry continuing in office after resignation, wanted to issue a number of Sugar Mill licenses the Prime Minister gracefully accepted the President's advice against the proposal without demur and dropped its proposals. (*vide* My Presidential Years Page 423 onwards). Therefore it must now be regarded as settled Convention that the Ministry continuing in office after resignation has only limited authority.

Another area which has led to a controversy regarding the President's power relates to the imposition of President's rule on State under Art. 356 of the Constitution. It is well established that the President's satisfaction regarding the need for imposition of President's rule in a State is not his personal satisfaction but that of the Union Government and the legality or propriety of the Government's action is justiciable. Yet the use of the words, "if the President is satisfied" creates in public mind the impression that the President is reasonable for the decision.

Normally the President acts in such cases in accordance with the advice of the Council of Ministers. The Government is answerable for such acts to the Parliament and to the judiciary. Affected Parties however often approach the President to withhold his concurrence on some ground or other and the President is criticised for not responding to such requests.

As I had mentioned earlier the President is not an appellate or supervisory authority over the Prime Minister nor should he try to become a second centre of authority in the State.

Secondly if the President delays the acceptance of the advice and in the meanwhile the law and order situation deteriorates, the President is not answerable to the House but the government will have to face a serious situation.

However, if the advice of the Government suffers from a Constitutional infirmity or is flawed otherwise the President may return such advice for reconsideration by the Council of Ministers subject to the Proviso to Art. 74(1) of the Constitution. It is necessary to draw guidelines for the exercise of Power under Art. 356 which is sensitive issue before the nation.

Thirdly it is a moot point whether the President can decline to act in accordance with the advice of the Government in the face of Art. 74(1) of the Constitution.

It is sometimes argued that in conformity with his oath of office to "preserve, protect and defend the Constitution", the President should intervene to prevent abuse of authority. This plea will have validity when the advice of the Prime Minister is contrary to the Constitution. I am not sure whether the President can interview in administrative decisions.

It is however, a well settled British Convention that the Crown has a clearly defined 'the right to advice, the right to encourage and the right to warn" the Prime Minister. The Crown can seek for information, clarification and official reports. The Sovereign's capacity to influence the government and course of events as stated by Ivor Jennings "depends upon his personal qualities". The same position is maintained in India under Art.78 of our Constitution.

The 42nd Amendment which inserted the part that the President shall act in accordance with the advice of the Council of Ministers was not only redundant but has the potential of being harmful. Even without this amendment, the Supreme Court had ruled in 1974 in Shamsher Singh case that President is a Constitutional Head of State and bound by the advice of the Council of Ministers. That ruling admitted a flexible approach in extraordinary situations such as those noted earlier. It is necessary in the interest of good governance that a Convention should be developed acknowledging the power of the President to refuse the advice of the Council of Ministers in extraordinary circumstances.

I have endeavoured in this lecture to highlight the need for developing Conventions in areas where the Constitution is silent. Any attempt to make statutory provisions for every situation may make the Constitution cumbersome and even contradictory. Healthy conventions accepted by all parties provide better solutions.