

CONSTITUTIONAL CONVENTIONS AND COURTS: HOW CAN CONSTITUTIONAL CONVENTIONS BE ENFORCED IN INDIA?

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ABSTRACT

In recent decades, the judiciary has been forced to grapple with questions relating to constitutional conventions. The breaching of established conventions by constitutional actors has raised questions of whether the judiciary can enforce conventions to make constitutional actors comply with the conventions attached to their constitutional role. The Supreme Court of India has indeed engaged in, and has been willing to engage in the enforcement of constitutional conventions on numerous occasions. In this context, the paper attempts to clarify and restrict the power that the Supreme Court should exercise when attempting to enforce a constitutional convention. The paper proposes a three-step mechanism to enforce conventions in a manner that upholds the separation of powers. The paper emphasises upon the various risks that the enforcement of conventions could pose while also providing the judiciary with an effective tool to keep the government in check.

I: Introduction

The written constitution cannot provide for every eventuality¹. Constitutional conventions are vital as they fill up the gaps and silences in the constitution². Constitutional conventions are commonly accepted as a set of uncodified norms, that can be said to have been sanctified by a tradition of practice³. The object and purpose of constitutional conventions ensure that the legal framework upholds constitutional morality and values⁴. Thus, underlying constitutional conventions are values of democracy such as parliamentary sovereignty, executive accountability, responsible government, and separation of powers⁵. Constitutional Actors adhere to these conventions out of a sense of political duty that they ought to enforce such conventions owing to principled reasons⁶. Additionally, they conform to conventions due to their fear of the political cost and criticism attached to deviation from conventions which are established social rules⁷.

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¹ I. JENNINGS, THE LAW AND THE CONSTITUTION (5th, 1959), p. 136.

² A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION CXLI (8th ed., 1915)

³ G. MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1st ed., 1984), p. 210.

⁴ *Id.*

⁵ O. Hood Phillips. *Constitutional Conventions: Dicey's Predecessors*, The Modern Law Review 29(2)(1966), 137-48

⁶ *Id.*

⁷ *Id.*

Traditionally, academic discourse concerning conventions categorizes them as non-legal social rules⁸. Thus, scholars have widely argued that constitutional conventions are always distinguishable from the law⁹. Scholars typically argue that constitutional conventions are rules not enforced by courts, although they may be recognized by courts in certain instances¹⁰. Constitutional Conventions are thus widely seen as a body of constitutional or political ethics, having little to no role in the judicial context¹¹.

Political developments in India in the recent decade show how constitutional actors have recurrently engaged in flouting conventions¹². Furthermore, the actions of the executive and legislature have often come in conflict with constitutional conventions¹³. These actions have been challenged in the Judiciary, which is increasingly facing questions relating to constitutional conventions¹⁴. These developments bring to light the importance of re-examining the traditionally advanced arguments that conventions cannot be enforced in courts.

The paper aims to provide a mechanism of how the Judiciary can enforce conventions. The paper is divided into 6 Sections. Section II assesses the Indian Judiciary's past engagement with constitutional conventions. Section III analyses the enforceability of conventions in India. Section IV assess when conventions should be enforced. Section V envisages a mechanism to enforce judicial conventions. Section VI provides concluding remarks.

II: Constitutional Conventions in the Indian Judiciary

Over the years, the Supreme Court has often made significant references to constitutional conventions¹⁵. Most notably, constitutional conventions have often been employed by judges to interpret constitutional provisions. However, in recent decades, constitutional conventions have also often seen a more central role, with judges often asked make a determination upon the scope and the content of constitutional conventions¹⁶. The advent of Judicial Review has

⁸ A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION CXLI (8th ed., 1915); G.S. WADE, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1st ed. 1885); I. JENNINGS, THE LAW AND THE CONSTITUTION (5th, 1959), p. 136; O. Hood Phillips; *Constitutional Conventions: Dicey's Predecessors*, *The Modern Law Review* 29(2)(1966), 137-48; Colin Munro, *Laws and Conventions Distinguished*, *L. Q. Rev.* 218(1), 91; Nathan Barber, *Law and Constitutional Conventions*, 125 *L. Q. Rev.* 294 (2009) 302.

⁹ Colin Munro, *Laws and Conventions Distinguished*, *L. Q. Rev.* 218(1), 91.

¹⁰ *Id.*

¹¹ Joseph Jaconelli. *Do Constitutional Conventions Bind?*, *The Cambridge Law Journal* 64(1) (2005), 149-76.

¹² Gautam Bhatia, *Judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy*, July 16, 2019, available at <https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/>; Gautam Bhatia, *How the Constitution was betrayed*, November 26, 2019, available at <https://www.hindustantimes.com/columns/how-the-constitution-was-betrayed/story-MCweF1LKbQZGuQwQ5rQK7N.html>; Rakhahari Chatterji, *Recurring controversy about Governor's role in state politics*, June 6, 2020, available at <https://www.orfonline.org/expert-speak/recurring-controversy-governor-role-state-politics-67433/>.

¹³ *Id.*

¹⁴ Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648; K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.

¹⁵ A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed., 2006); U.N.R. Rao v. Smt. Indira Gandhi, (1971) 2 SCC 63.

¹⁶ Govt. of NCT of Delhi v. Union of India, 2019 SCC OnLine SC 193

caused the judiciary to actively engage with constitutional conventions. Courts have also begun witnessing constitutional questions relating to the enforcement of certain constitutional conventions¹⁷.

The traditional perspective on the limited role of conventions in the judiciary is becoming increasingly inconsistent with judicial practice in India. Arguably, the *Second Judges Case* provided the most significant impetus to such a development¹⁸. The judgement of Justice Kuldeep Singh laid the foundation for much of the subsequent judicial involvement with constitutional conventions.

In the *Second Judges Case*, the Judiciary used constitutional conventions to 'read into' the provision of the constitution relating to judicial appointments¹⁹. Justice Singh held the judicial primacy in the appointment process to be a firmly established convention²⁰. He argues that constitutional actors must follow such conventions as binding precedent²¹. Thus, Justice Singh concludes that an established convention becomes part of the constitutional law of the land²². Therefore, the judgement upholds the collegium system of appointments.

The judgement is indeed radical, and not free from lacunae. However, what is significant to note is the change in judicial attitudes, from merely employing constitutional conventions in the act of reasoning and interpretation²³, to actively enforcing them. Thus, the judicial practice is that once a court finds a constitutional convention, they tend to enforce it. This attitude continued with the *NJAC Case*²⁴ as well as with the *National Tax Tribunal Case*²⁵. These, and other cases will be assessed subsequently.

III: An assessment of the enforceability of constitutional conventions in India

There exists significant debate surrounding the status of conventions as laws²⁶. Justice Singh argued that conventions enjoy the same status as a law²⁷. Thus, he argued that conventions in India have indeed crystallized to the status of laws²⁸. However, such a determination would necessarily depend upon the jurisprudential lens used to assess the question. Although Justice Singh's determination of the 'crystallization' of conventions into law in India is flawed due to

¹⁷ Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648.

¹⁸ Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441, ¶ 531.

¹⁹ *Id.*, ¶ 532

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed., 2006).

²⁴ Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1.

²⁵ Madras Bar Association v. Union of India, 2015 S.C. 1571.

²⁶ T. R. S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (1st ed., 1995), p. 253; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*. *Oxford University Commonwealth Law Journal*, 11(1), 29–51; T. R. S. Allan "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case." *The Cambridge Law Journal* 45(2), 305-20; Joseph Jaconelli. *Do Constitutional Conventions Bind ?*, *The Cambridge Law Journal* 64(1) (2005), 149-76; Colin Munro, *Laws and Conventions Distinguished*, *L. Q. Rev.* 218(1), 91.

²⁷ Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441, ¶ 532.

²⁸ *Id.*

the lack of any preceding practice of enforcing conventions, the judiciary seems to have adopted Justice Singh's views of enforcing conventions in the same way as laws²⁹. Indeed, a growing body of case law suggests that judges are increasingly willing to enforce conventions, viewing the same as a constitutional duty³⁰. Thus, to argue that conventions must not be treated as laws by the Judiciary may have limited practical implication owing to recent judicial practice in India.

This development indicates that the judiciary is increasingly willing to uphold constitutional values and morality by enforcing conventions. A situation of judicial intervention to ensure that constitutional actors follow established conventions is not ideal. However, in a political climate where conventions are often flouted, the court is often forced to intervene. Through the judicial review of the actions of constitutional actors, the courts can uphold the core essence of a convention, and thus, the constitution. Indeed, the Indian judiciary treats the infringement of an established convention to be unconstitutional. The Court has indeed adopted this framework in recent cases.

However, this pattern also presents significant dangers. Excessive engagement with constitutional conventions could blur the separation of powers, while threatening parliamentary supremacy. Thus, it is extremely important to clarify and restrict the powers that the Judiciary has seemingly given to itself with respect to enforcing conventions. This caveat forms the basis of the subsequent sections of the paper which assesses how the judiciary should engage with conventions in the future.

IV: When should conventions be enforced?

The enforcement of certain conventions often involves political issues and implications. It has been argued that in the interests of separation of powers, the Judiciary should not engage with conventions due to their inherently political and social nature³¹. These arguments also cite the political questions doctrine, which is modelled on a similar premise³².

However, this argument cannot promote a blanket prohibition on the enforceability of all conventions. Thus, the question courts should ask should not be whether the issue arises in political circumstances, but whether the issue poses a legal question. This would ensure that the government is not given unencumbered power to trample the constitutional values that conventions protect by hiding behind the garb of politics. Thus, the determination of justiciability with regard to the enforcement of convention should depend upon the specific issues of each case³³.

The enforcement of conventions must be subjected to important restrictions. Firstly, through it conduct, the judiciary must uphold the separation of powers and constitutional supremacy.

²⁹ A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed., 2006).

³⁰ Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648; K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.

³¹ Colin Munro, *Laws and Conventions Distinguished*, L. Q. Rev. 218(1), 91; Nathan Barber, *Law and Constitutional Conventions*, 125 L. Q. Rev. 294 (2009) 302.

³² *Id.*

³³ T.R. S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (1st ed., 1995), p. 253.

Secondly, the court should ensure that they do not act in a manner that inhibits the intrinsic flexibility and adaptiveness of conventions. Such actions could defeat the very essence of the convention the court is trying to protect. Thirdly, the court must ensure that it does not involve itself in the day-to-day political affairs, which could have dangerous implications on judicial independence and separation of powers. Fourth, the Judiciary should only implement certain conventions, as would be assessed below. The following section envisages a mechanism of enforcement of conventions that is built upon these principles.

V: The Process of Enforcement of Constitutional Conventions.

The previous sections conclude that Judicial conventions have significant scope for enforcement by Indian courts. This section envisages a mechanism to address the process of enforcement of constitutional conventions in a consistent manner that upholds the separation of powers while aiming to protect the constitutional values embodied in conventions.

The enforcement of Constitutional Conventions should be subjected to a three-step process. The first step is the recognition of a Convention. if a Convention indeed exists, then the second step would be for the court to engage in assessing the nature of such Convention to determine whether such Convention is of a nature that should be enforced. The third and final step would be the actual implementation of the convention, which could be undertaken through different means.

The Recognition of a convention

The first step towards judicial involvement with a convention is recognition. Recognition is a fact-finding activity, where the court engages with the convention's existence or scope on a factual basis³⁴. Thus, if the convention's scope or existence is of an uncontroversial or obvious nature, the court would take judicial notice of the convention. If there exist questions of fact relating to the existence of the convention itself, then the court will consider evidence to determine whether the convention in question indeed exists.

A test for assessing the existence of a convention has been expounded by Sir Ivor Jennings. This test has been accepted by the Indian Judiciary itself³⁵. According to the test, three questions have to be assessed. The first part relates to the precedents with respect to the convention in question. The second part relates to whether the constitutional actors engaging in such precedent believe what they were bound by a rule. The third part determines whether there is a reason for such a rule³⁶. Thus, according to the 'Jenning's test' a convention would exist when there exist precedents amounting to more than mere practice³⁷. Thus, in the case of a convention, the constitutional actors are under a belief that they have to respect and

³⁴ Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*. *Oxford University Commonwealth Law Journal*, 11(1), 29–51; Farrah Ahmed, Richard Albert, Adam Perry, *Enforcing Constitutional Conventions*, *International Journal of Constitutional Law* 17 (4), 1146–65.

³⁵ *Supreme Court Advocates on Record Association v. Union of India* (2015) 11 Scale 1; *Madras Bar Association v. Union of India*, 2015 S.C. 1571; *Consumer Education Research Society v. Union of India*, 9 S.C.C. 648; *K. Lakshminarayanan v. Union of India*, LNIND 2018 SC 635.

³⁶ I. JENNINGS, *THE LAW AND THE CONSTITUTION* (5th, 1959), p. 138.

³⁷ *Id.*, p. 139.

reinforce such precedents³⁸. This is backed by a principled reason that has sustained this conventional practice³⁹.

Thus, if the court determines that the Jennings test is fulfilled, it would conclude that a valid constitutional convention exists. The Court could then move towards the next step of enforcement. If the Court determines that there exists no constitutional convention based on the Jennings test, the question of enforcement would not arise. Indeed, the Indian Judiciary has adopted a similar framework. In the *Lakshminarayanan* Case, the court engaged in an examination of whether requirement of the concurrence of the Chief Minister is required for nominations of to the legislative assembly⁴⁰. More Significantly, in the *Consumer Education Research Society* Case, the validity of the act was challenged on grounds of violation of a convention⁴¹. The Court upheld the validity of the act, but only because the alleged practice did not amount to a constitutional convention, but only to a parliamentary procedure⁴². Thus, in both these cases, the court first engaged in a determination of whether the constitutional convention exists only to conclude no enforcement is possible as the practice is not a valid constitutional convention. This presents a significant shift in judicial attitudes towards enforcing valid constitutional conventions when infringed upon.

The assessment of the nature of the convention

Conventions can, and should, be distinguished based upon their nature. This is especially true when confronting the question of their enforcement. Conventions can broadly be categorized as follows.

Internal conventions of Institutions

Internal conventions of institutions regulate the internal affairs of a governing institution⁴³. In India the process of nominating the speaker of the Lok Sabha could be seen as one such convention. Here, the speaker is nominated by the majority party after informal consultations with the leaders of the other parties in the parliament⁴⁴. Judicial enforcement of such conventions would necessarily compromise on the separation of powers between different organs of government. This would cause the judiciary to overreach by interfering in the internal matters of another organ of government. Indeed, it would necessarily compromise on the ability of the organ of government to fulfil the role it is provided by the constitution. Thus, the Judiciary should not enforce such conventions.

Conventions of accountability

³⁸ *Id.*

³⁹ *Id.*, p. 136.

⁴⁰ K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.

⁴¹ Consumer Education Research Society v. Union of India, 9 S.C.C. 648, ¶ 39.

⁴² *Id.*

⁴³ Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.

⁴⁴ Role of the Speaker of Lok Sabha, office of the speaker Lok Sabha, Available at <https://speakerloksabha.nic.in/roleofthespeaker.asp>.

Conventions of Accountability make a political institution or a constitutional actor accountable to another political institution or actor⁴⁵. The essence of such conventions is a form of political accountability; accountability by political actors through political means. Thus, legally enforcing conventions of accountability would entail judges, and not democratic representatives, holding the government to account⁴⁶. This would defeat the purpose behind such conventions in the first place.

Conventions of power-shifting

Conventions of power-shifting aim to transfer powers granted in a constitution from one person to another⁴⁷. Thus, power-shifting conventions grant *de facto* authority to an actor who has not been granted *de jure* authority. Such conventions reflect the collective judgement of constitutional actors that the legitimate exercise of power would be with another actor, who perhaps enjoys greater accountability or expertise⁴⁸. Thus, these conventions reflect the legitimate allocation of power according to constitutional actors themselves. When an actor breaches a power-shifting convention, the actor breaches a standard established by his own constitutional community⁴⁹.

Thus, enforcement of power shifting convention would in fact uphold the legitimate allocation constitutional power⁵⁰. Furthermore, unlike accountability conventions, the enforcement would not defeat the purpose behind the convention. It would instead uphold its purpose, which is to shift power to another authority that has not been conferred *de jure* authority. Similarly, it would not undermine intra-institutional conventions as it does not relate to the internal workings of an institution. The Supreme Court's enforcement of the collegium can indeed be seen as an implementation of a power-shifting convention.

Thus, this section presents a significant finding. Not all constitutional conventions are of a nature that should be enforced. In certain cases, the enforcement of conventions may indeed defeat rather than protect constitutional values. This is a significant restriction on the judiciary's powers of enforcing conventions. In essence, the Judiciary should only enforce power-shifting conventions⁵¹.

The types of enforcement of conventions

The final step towards the enforcement of a convention is the means that the Judiciary will employ to enforce the convention. This enforcement must be guided by two considerations. The first is that it may be determined on the basis of the willingness of the actor who

⁴⁵ Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.

⁴⁶ Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787-806.

⁴⁷ Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.

⁴⁸ Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787-806.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

breached the convention to adhere to the court's decision. The second is that the intervention must be one that is the least intrusive

Declaration

A Convention can be enforced by declaring that a constitutional actor's conduct violates a rule⁵². Thus, after a judicial declaration, the constitutional actor would, in an ideal scenario, alter their behavior or make amends for the violation⁵³. Although a declaration is a mild remedy as it neither leads to an invalidation of the act or any damages, it could be an effective remedy⁵⁴. This is due to the public nature of constitutional actors and such proceedings, as well as due to the very essence of conventions as social rules. In the very least, it ensures that violations of established conventions are met with a formal legal consequence. Thus, a declaration of illegality of conduct is a possible means of judicial enforcement for a convention. Significantly, the landmark *patriation reference* in Canada can be in fact be seen as a declaration, post which the constitutional actors in question altered their behavior to conform to the convention⁵⁵.

Nullification

A convention can be enforced through nullification. Through nullification, the court can enforce a convention by holding an act that is contrary to the convention in question as invalid⁵⁶. Thus, Courts can hold legislation inconsistent with conventions as invalid. Indeed, the Indian judiciary itself has quashed executive acts that are inconsistent with Constitutional conventions.

In *the National Tax Tribunal Case*, The Supreme Court assessed the National Tax Tribunal Act's validity⁵⁷. One of the grounds of assessment was its compliance with the convention that requires that upon the constitution of a tribunal or a court to substitute another, the Security of tenure for the judges as well as the appointment must be the same as the court that is sought to be substituted⁵⁸. Thus, as this convention was contravened by the Act, the Court nullified the same.

In the *NJAC Case*, the Supreme Court of India quashed the 99th Constitutional amendment⁵⁹. This amendment established the NJAC, which sought to establish a commission to appoint

⁵² Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*. *Oxford University Commonwealth Law Journal*, 11(1), 29–51; T. R. S. Allan "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case." *The Cambridge Law Journal* 45(2), 305-20

⁵³ Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, *International Journal of Constitutional Law* 17 (3): 787–806.

⁵⁴ Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, *International Journal of Constitutional Law* 17 (3): 787–806; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*. *Oxford University Commonwealth Law Journal*, 11(1), 29–51.

⁵⁵ *Patriation Reference*, [1981] 1 S.C.R. 753; Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, *International Journal of Constitutional Law* 17 (3): 787–806.

⁵⁶ Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, *International Journal of Constitutional Law* 17 (3): 787–806; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*. *Oxford University Commonwealth Law Journal*, 11(1), 29–51.

⁵⁷ *Madras Bar Association v. Union of India*, 2015 S.C. 1571.

⁵⁸ *Id.*

⁵⁹ *Supreme Court Advocates on Record Association v. Union of India* (2015) 11 Scale 1.

High Court and Supreme Court Judges⁶⁰. This commission sought to replace the collegium system. However, with a 4-1 Majority, the Supreme Court held the Judicial primacy of the Chief Justice, established the Collegium system as a Constitutional Convention⁶¹. Thus, the judgement argued that such Judicial primacy was part of the basic structure of the constitution⁶². Accordingly, it 'nullified' the amendment to the constitution as it contravened an established convention.⁶³ Whether the Collegium system indeed formed a valid constitutional convention is a question relating to recognition, as outlined above. What is important to note is the Supreme Court's position of nullifying a procedurally compliant constitutional amendment based upon its contravention with a convention. This indicates a significant development in the enforcement of conventions.

Political remedies

The Judiciary could often be faced with a situation where legal solutions are neither ideal, nor effective. Thus, in a case where there exists significant bad faith on the part of a constitutional actor through the flouting a convention, the court may employ political remedies. The Supreme Court's decisions in the controversy in Karnataka in 2018, where it recommended a floor test could be seen as a model for such cases⁶⁴. Thus, the court was able to provide a remedy which found a solution to the crisis through the existing democratic process, by making it difficult for constitutional actors to violate conventions⁶⁵.

In this case, the court struck the fine balance between respecting the sovereignty of the parliament and ensuring that constitutional values are upheld. Indeed, subject to the caveats mentioned above, political remedies can be an effective means of upholding conventions.

VI: CONCLUDING REMARKS

The importance of conventions in the constitutional framework of India cannot be understated. Conventions are built upon the values and principles that the judiciary otherwise seeks to protect. The traditional perspective on constitutional conventions emphasises on its non-legal and unenforceable nature. However, recent judicial practice indicates that the Indian Judiciary has indeed engaged in a trend of enforcing conventions. The paper thus envisages a mechanism that subjects this enforcement to certain important restrictions. It argues that after a convention has been recognized, only power-shifting conventions should be enforced by courts. This enforcement can be through a declaration, nullification and notably through political solutions, which the judiciary has successfully employed in the past.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Gautam Bhatia, *Judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy*, July 16, 2019, available at <https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/>

⁶⁵ Gautam Bhatia, *Judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy*, July 16, 2019, available at <https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/>



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The enforcement of conventions in India is indeed path-breaking innovation. In the current political climate, it could provide a important power to the judiciary to keep the government in check.

