

## **Hung Parliament And The Role Of The President**

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1. *Carltona v. Commissioners of Works*, [1942]2 All ER 560.
2. *Dinesh Chandra v. Chaudhary Charan Singh*, AIR 1980 Del 114.
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4. *Kalyan Singh v. Jagdambika Pal*, (unreported Allahabad High Court decision dated 23/02/1998).
5. *Keshavanand Bharati v. State of Kerala*, AIR 1974 SC 1048.
6. *Liversidge v. Anderson*, [1942] AC 206.
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13. *Samsber Singh v. State of Punjab*, AIR 1974 SC 2192.
14. *SCARA v. Union of India*, AIR 1994 SC 268.
15. *U. N. R. Rao v. Indira Gandhi*, (1971)2 SCC 118.

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### **STATUTES:**

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## CHAPTER I

# INTRODUCTION

***“ WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens ...”***

The preamble of the constitution of India does not even make the slightest of mention regarding the form of government that India has sought to adopt. The provisions of the constitution also do not make any explicit reference to the same. However the Supreme Court of India has minimized this confusion by pronouncing on the question several times.

Beginning from the decision of the court in the case of *Rai Sahib Ram Jawaya Kapoor*<sup>1</sup> to the case of *U.N. Rao v. Indira Gandhi*<sup>2</sup> and *Samsber Singh's case*<sup>3</sup>, the court has been unequivocal in saying that India has been a Parliamentary Form of government. Although the court got no assistance from the written provisions of the constitution, it went to infer the same using the Constituent Assembly Debates, trying to look into the intention of the Legislature.

In a plethora of cases, like *S. P. Gupta v. Union of India*<sup>4</sup>, *SCARA's case*<sup>5</sup> and *P. Kannadasan v. State of Tamil Nadu*<sup>6</sup>, The court has rather proceed to solve all the constitutional problems on the presumption that there exists a Parliamentary Form of government in India. This has been in the light of the so-called similarities in the office of the President and the British monarch, in as much as they both are mere ceremonial heads.

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<sup>1</sup> AIR 1955 SC 549.

<sup>2</sup> (1971)2 SCC 118.

<sup>3</sup> *Samsber Singh v. State of Punjab*, AIR 1974 Sc 2192.

<sup>4</sup> AIR 1982 SC 149.

<sup>5</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 1994 SC 268.

<sup>6</sup> (1996)5 SCC 670.

Therefore the courts have settled the fact regarding the form of government in India. The problem arises in the wake of the recent political trends, when no single party seem to be getting the majority seats in the Parliament; it becomes imperative for us to understand the constitutional ramifications of the same. Often term as the Hung Parliament, such a Lok Sabha is the center of controversies of all sorts. Since Art. 74(1) clearly states that there 'shall' be a Council of Ministers, the onus of appointing the same lies on the President, in whom the executive power of the union is vested vide Art. 53(1).

In doing so the President is supposed to also abide by the constitutional provisions especially carry on his duty under Art. 60 i.e. to preserve, defend and protect the Constitution. Therefore any act done by the President not in conformity with the constitutional scheme can not only expose his to censure but also might lead to his impeachment under Art. 61. However in the practice we see that not many of the Presidents act in a manner, which is required of them. Mostly they tend to act on the advise of the council of ministers without applying the mind. The dissolution of Lok Sabha is yet another area where such an error is often committed. Hence it becomes imperative to analyze the role of the President in the appointment of the Prime Minister when no single party gets majority in the general elections.

It is in light of this fact that this project shall endeavour to study the possible role a President can play, while keeping with the spirit of the Constitution, in the appointment of a Prime Minister. Yet another problem faced therein is the following of the conventions, in the absence of a clear law. This project shall seek to examine the importance of constitutional conventions already in practise by providing a theoretical base for the same. It would also seek to establish the utility of developing indigenous conventions, in the light of the fact that most of them have been borrowed from the British system.

It shall be the task of the researcher to try and come up with alternatives, especially in the wake of the inefficiency of the existent model of governance. In this regard the project shall focus on the role played by political parties in a pluralistic democracy like that of ours. It is here that the project shall seek to find justifications for adopting domestic conventions.

One must also keep in mind that political instability not only has an impact on the visible political processes but also has great ramifications on the economy as a whole.



## **RESEARCH METHODOLOGY**

### **AIM AND OBJECTIVES:**

The aim of this project is to analyse the dynamics of 'Hung Parliament' in the light of the past political developments and to reflect upon the role played by the president in such conditions. The project would also seek to examine the role of constitutional conventions in this regard especially in the light of the British conventions.

### **SCOPE AND LIMITATIONS:**

Due to the vastness of this topic and the materials available, the scope of this project has been limited to a study of the Hung Parliament only. The position of state legislatures and the role of the governors have not been covered in this project. Further, the project only tries to analyse the role of the president in a hung parliament and not tries to touch the various other issues involved with the concept of a Hung Parliament.

### **RESEARCH QUESTIONS:**

The researcher has tried to answer the following projects in the course of this project:

1. Can there be a Hung Parliament under the Indian Constitution?
2. Does the president have any substantive role to play in a Hung Parliament? If so, to what extent?
3. What is the role of Conventions in case of a Hung Parliament?
4. Should we follow the British conventions in case of a Hung Parliament?
5. What can be the solution to handle the problems in a Hung Parliament?
6. Can we evolve our own conventions to suit the Indian needs?

**METHODOLOGY:**

A mix of analytical and descriptive methodology has been used in this project in trying to answer the various research questions by analysing the various constitutional provisions and the hitherto followed conventions. The project includes a comparative methodology in as much as it tries to understand the institution of the President.

**SOURCES OF DATA:**

The researcher has primarily used secondary sources of data like books, articles, seminar papers, unpublished essays and web sites in this project.

**MODE OF CITATION:**

A uniform mode of citation based loosely on the Harvard Bluebook style has been used consistently in the project.

**CHAPTERISATION:**

- The first chapter of this project provides a framework for the understanding of the various issues involved like the form of government etc.
- The second chapter shall endeavour to see the applicability of the term 'Hung Parliament' in the light of the various constitutional provisions.
- The third chapter deals with the role of the President in appointing the prime minister in case of a 'Hung Parliament' and tries to analyse the issue relating to the import of constitutional conventions from Britain, by providing a theoretical understanding of the same.
- The fourth chapter deals with the importance and significance of the party system in India in understanding the problems relating to a 'Hung Parliament' in that light. It also deals with the issues like Party whip etc and tries to come up with viable solutions.

- In the concluding chapter, the researcher shall try to come up with possible solutions to tackle the problem of a 'Hung Parliament' and will try to sketch the need to evolve indigenous conventions relating to the appointment of the Prime Minister.

### **HYPOTHESES:**

The term hung Parliament doesn't apply to the Indian situation and therefore one has to create indigenous conventions to solve the Indian constitutional problems, than relying blindly on the British ones.

## CHAPTER II

### **HUNG PARLIAMENT: A TERMINOLOGICAL ERROR**

The term Hung Parliament has been defined in the Reader's Digest Dictionary as 'a Parliament wherein no party has won a working majority'<sup>7</sup>. Keeping this definition in mind, we must try to see if a Hung Parliament can be defined in the Indian constitutional scheme. It is clear from the Constituent Assembly Debates that the constitution makers after long deliberations opted for a multi-party system. It seems rather unfair on our part, therefore, to assume that one single party will gain 'absolute' majority in the constitution.

In fact, if we read Art. 74 with Art. 75, we can clearly see that there is no such constitutional compulsion that a Prime Minister must have an absolute numerical majority in the Parliament. All that the constitution says is that there shall be a Council of Ministers headed by the Prime Minister to aid and advise the President. Nowhere in the Constitution of India, can one find such a provision specifying that a 'specific' party must have a majority; hence the very definition of Hung Parliament is included in the term 'Parliament' itself.

Another problem with the concept of a Hung Parliament is that it entails that a party must get a majority in the Parliament. However with the rise of regional parties in the political scenario, it is but natural that their role in the national politics is bound to increase. In such a situation one can imagine of a political alliance getting a majority but not a single party. This is the precise dilemma faced in the recent Lok Sabhas. Furthermore such alliances can be either pre-poll or post-poll alliances; hence the very concept of a Hung Parliament, going by the definition given, seems impossible under the Indian constitutional set up.

The very concept of a Hung Parliament has emerged in the context of Britain where there exists a Parliamentary form of government. In Britain, the term Hung Parliament is applied to a situation where Parliament is unable to throw up any Government or take any decision. Such a situation

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<sup>7</sup> Dr. V. Vijayakumar, "Hung Parliament Under the Indian Constitution: A Study In The Light Of Contemporary Developments", XXV(3) *IBR* 1998, at 44.

could arise in India only in the extremely unlikely event of no party or leader being able to or willing to form a Government after a general election. Merely because a single party is not returned to the Lok Sabha with absolute majority, it does not become a Hung Parliament. If some parties can come together and can form a coalition or minority government and command the support of the majority of the members of the house, it cannot be said to be a Hung Parliament.

In Britain, the concept of a coalition government has been outrightly rejected whenever such a situation arose, be it 1923, 1929 or 1974<sup>8</sup>. On all these occasions, a minority government was established and hence the conventions relating to a Hung Parliament came to existence. However that is not the case with India, where not only have we had coalition government in the past but it seems that the Indian democracy seems to be moving into an era of coalition politics. Therefore it is rather foolish on our part to try and supplant British constitutional conventions in defining and dealing with our specific constitutional problems, if any.

Furthermore majority of all the members of Lok Sabha are so elected by a fractured mandate i.e. with more number of votes cast against them than in their favour. Therefore it cannot be said that the party getting the largest number of seats in the Lok Sabha has the absolute majority, in terms of the mandate of the people<sup>9</sup>.

Lastly, the term Hung Parliament is misleading in as much as Government formation is concerned because the Constitution has made the council of ministers accountable to the Lok Sabha and not the whole of the Parliament, which includes the President, the Rajya Sabha and the Lok Sabha, vide Art. 75(3). Hence it is only the Lok Sabha, which is relevant for the purposes of a Government formation not the whole Parliament. Hence if need be the term should be a Hung Lok Sabha and not a Hung Parliament.

Therefore the researcher feels that the term Hung Parliament is a term coined in the specific political conditions of the UK and cannot be used to understand the political and constitutional problems of India.

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<sup>8</sup> *Ibid*, at 45.

<sup>9</sup> Subhash Kashyap, "Constitutional Implications Of A Hung Parliament", XXV(3) *IBR* 1998, at 41.

### CHAPTER III

## APPOINTMENT OF THE PRIME MINISTER: PRESIDENT'S ROLE IN A HUNG PARLIAMENT

In the wake of the current political trends, appointment of a Prime Minister, in case of a fractured mandate, seems to be a President's nightmare. Not only is he bound by the duty imposed upon him by the Constitution but he also has to do justice to the millions of people who have entrusted their faith in the highest executive office of the land.

The Sarkaria Commission, which was appointed to answer the same question, came up with the following recommendations:

1. The first preference is to be given to a pre-poll alliance commanding a majority in the House.
2. The second preference is to be given to the single largest party without a majority of its own.
3. The third preference is to be given to a post-election alliance with all partners joining the government.
4. The fourth, and last, preference is to be given to an alliance wherein some may join the government and others' provide 'outside support'.

However this classification of available options poses certain fundamental problems because the classification is not based on the fact that which party is closest to the majority. For e.g. even though the third option might have a majority, the President shall invite the single largest party to form the government.

Nevertheless the Sarkaria Commission report is important, as it perceives the President as having an important role in the appointment of the Prime Minister. The constitution of India uses five terms to define the ministerial berths. In Art. 74(1), the terms 'Prime Minister' and 'Council of Ministers' are used. In Art.75 clause (4), (5) and (6), the term 'Minister(s)' is used. In Art. 352(3), the term used

is 'Union Cabinet'. A reading of Art. 74(1) establishes beyond doubt that the Prime Minister is a part of the Council Of Ministers.

The next question to be answered then is whether Art. 75(2), which incorporates the '*Doctrine of Pleasure*' also applies to the Prime Minister. If the Prime Minister is included within the definition of 'Minister(s)' given in Art. 75(2), then the President would surely be required to play a significant role in the process of his appointment. Furthermore under the III Schedule of the Constitution, there is no separate oath for the Prime Minister and the other Ministers of the Union. Hence, it can be said that the Prime Minister is also a minister within the meaning of Art. 75(2) and enjoys office during the pleasure of the President. Therefore it is established beyond doubt that the President has a significant role to play as far as the appointment of a Prime Minister is concerned in all times, however in a Hung Parliament his role becomes even more important.

It becomes necessary to understand the position and the role of the Chief Executives of the other countries to better understand the role of the President.

- **THE CONSTITUTIONAL MONARCH: THE ENGLISH CROWN**

The British Crown symbolises the sum of governmental power. This does not mean that the Monarch personally determines the major activities of the government. The position of the British Crown has been clearly worked out in the *Eisher Papers*<sup>10</sup>, which state:

*"The British Crown cannot act unconstitutionally so long as it acts on the advice of a minister supported by a majority in the House of Commons (even if the advice is wrong). Ministerial responsibility is the safeguard of the monarchy... In the last resort, the King has no option; if the constitutional doctrines of ministerial responsibility mean anything at all, the King would have to sign his own death warrant"*

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<sup>10</sup> Archana Sinha, *The Crisis Of A Hung Parliament* (New Delhi: Vikas Publishing House, 1999), at 10.

Thus, the position of the Crown is fundamentally weak because if he exercises his own judgement then the throne will not stand at all. Keeping all these points in mind, the conventions, which we copy today, without understanding the fundamental difference in the positions of the Crown and the Indian President, were evolved. Hence there seems to be no rationale in applying the same conventions without using our brains.

- **THE FRENCH PRESIDENCY**

The French Constitution has a two-headed executive like that in India but with a difference. The Constitution of the Fifth Republic of France, 1958 came about after a series of unstable republic regimes, where the Parliament could overturn a government no longer backed by a majority of elected representatives (i.e. the situation of a Hung Parliament).

Whenever the regular functioning of the constitutional powers is interrupted, the President may take any measures 'required by the circumstances'. Although he is required to take the advice of his Premier in the discharge of his functions, he is not bound by such an advice. He has a greater freedom in the appointment of the Premier itself. Although the French system has often been dismissed as being vague and ambiguous, yet it has survived without a major crisis since the three succeeding Presidents have been able to count on a majority in Parliament for supporting the governments of their choice. This could be because the framers of the new text started with the assumption that the French voters could never be expected to send coherent majorities to the National Assembly.

Under the Fifth Republic the President is instructed to see that the Constitution is respected (like Art. 60 of the Indian Constitution). Therefore, even though he is supposed to take the advice of the Premier and the Presidents of the Assemblies and the Constitutional Councils, he is not bound by such an advice. Thus the French political system gives way to the all-new concept of 'Presidential Parliamentary Republicanism' and creating a Presidency, which is weaker than the American system but far stronger than the British Crown.

It seems more logical, keeping in mind the similarities between the French Presidency and the Indian Presidency, to try and follow the French conventions, if need be than the British conventions.

- **INDIAN PRESIDENCY AND THE IRISH PRESIDENCY**

The Indian Constitution has tried to assimilate the best of all the existing constitutions by modelling its highest executive office as an intermix of the Presidential system as well as the Parliamentary system. No doubt the Indian President is more akin to the British monarch than the American President in the sense that the Indian Constitution entrusts to our Presidency no functions to be discharged in his own discretion even though the powers are being expressly vested in the office by the Constitution (as in the case of the American President<sup>11</sup>), the same are expected to be exercised on the aid and advice of the Council Of Ministers (as in the case of the British Monarch).

The point to be noted here is that the British Parliamentary system can only be useful in countries where a 'bipartite' system existed. That is the reason why this system never gave overwhelming results in the British colonies, be it India, Australia or Canada. The system worked well in England because of its strong government and a strong opposition willing to share responsibility mutually whereas in India at the time of independence itself there existed a number of parties and various interest groups. Therefore the Indian system differs from the British system.

Even while looking for a Parliamentary system in a multi-party system, the framers of the Indian Constitution seemed to have ignored the French Third Republic that was characterised by 'coalition governments'. Thus the constitution-framers created the institution of the Indian President different from the British Monarch as well as the American President. As a result, the Indian Presidency was nearer to the Irish Presidency. The Irish President is neither the 'majesty of people incarnate nor 'the repository of all powers'. However, they erred here too. They did not incorporate the concept of 'Council Of State', which includes not only the Prime Minister but also the Chief Justice, the Chairman of the two houses of Parliament, retired presidents and other persons nominated by the

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<sup>11</sup> Woodrow Wilson, *Constitutional Government In The United States* (New York: Colombia University Press, 1961), at 68.

President in his discretion<sup>12</sup>. In Ireland there are certain functions, which according to the Constitution, are exercised by the President not on the aid and advice of the Council Of Ministers but by his own discretion with the help of the Council of State. In India however we have no such council or 'discretion'.

Therefore we see that the Indian Presidency is not the exact replica of any other country but has taken inspiration from many other sources.

After having overviewed the essential characteristics of the Indian President, the questions that needs to be addressed is what can the President do in the eventuality of a Hung Parliament and what should he do. In 1979, perhaps for the first time, the Indian Polity came face to face with such a situation where there are more than three parties and none of them had an absolute majority.

None other than Mr. H. M. Seervai was of the opinion that the single largest party should be called in such a situation relying upon the British conventions. He based his argument on the conventions that arose in England in 1923, when Stanley Baldwin succeeded Bonar Law as the Prime Minister. King George V thus chose to invite the Conservative Party, the single largest party to form the government. However, the question remains whether the British conventions can be applied in the Indian scenario.

- **CONSTITUTIONAL CONVENTIONS - THE THEORY**

In the working of the executive branch of the government and its relationship with the legislature, the Constitution is regulated to a large extent by rules, which do not belong to the normal legal categories. These rules are called Constitutional Conventions.<sup>13</sup> It is important to know that the growth of constitutional conventions in Britain was as a result of the royal prerogative, which was a gradually diminishing residuum of customary authority. They emerged in a specific context i.e. in the British constitutional system. As Dicey put it, the British Constitution was a 'judge made Constitution'. Thus these conventions were very specific in as much as they emerged around an unwritten Constitution.

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<sup>12</sup> Article 31 of the Constitution Of Ireland.

<sup>13</sup> S. A. de Smith, *Constitutional and Administrative Law* (London: Longman, 1971), at 37.

It is also important to remember that in the Constituent Assembly Debates, the necessary and relevant conventions were taken into consideration by the assembly and thus incorporated as written provisions, like the provisions relating to the dissolution of the House. The very reason why they weren't codified was because of the fact that codification would kill any scope for flexibility and our Constitution makers were aware of the fact that the socio-economic-political situations in India were to be very different from those in Britain, hence there would be a need to modify and suit the British conventions to our needs.

In fact, leading British Constitutional Law expert, S. A. de Smith, felt that evolution by conventions was still needed in the countries having written constitutions.<sup>14</sup> Sir Ivor Jennings said:

*"Constitutional conventions provide the flesh which clothes the dry bones of the law; they make legal constitutions work; they keep it in touch with the growth of ideas"*<sup>15</sup>

Prof. K. C. Wheare goes a step ahead to say that:

*"The definition of Constitution conventions may thus be amplified by saying that their purpose is to define the use of constitutional discretion. They are non legal rules regulating the way in which legal rules shall be applied."*<sup>16</sup>

It is a rule of statutory interpretation that conventions will be used to interpret a provision of law in case of ambiguity. However the insistence of the Indian judiciary to apply the conventions even when the provisions of the Constitution are clear, is not a step to be applauded by the believers in constitutional ethics. This was even held back in England from where these conventions originated.

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As Dicey rightly puts it, the purpose of Constitutional conventions is to give effect to the principle of governmental accountability that constitutes the structure of a responsible government. In the light of the above statement, it seems absurd that how can the British conventions which are suited to the needs of a totally different governmental structure help in solving the Indian problems.

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<sup>14</sup> *Supra* note 13, at 55.

<sup>15</sup> *S. R. Bommai v. Union of India*, (1994)3 SCC 1.

<sup>16</sup> *Ibid*, at 194.

<sup>17</sup> *Liversidge v. Anderson*, [1942] AC 206. See Also *Carltona v. Commissioners of Works*, [1942]2 All ER 560.

Indian judiciary has shown more than a keen interest to try to settle the issue by being magnanimous to the extent of permitting the ‘blind import’ of constitutional conventions for meeting the Indian needs. In *S. P. Gupta v. Union Of India*<sup>18</sup>, the honourable Supreme Court was pleased to declare that India was ‘*Parliamentary Form Of Government*’ and hence the import of such customs was justified. The case relies upon *U. N. R. Rao v. Indira Gandhi*<sup>19</sup> in reaching this conclusion. However the decision in U. N. Rao’s case has many glaring errors.

It says:

*“In interpreting the Constitution, which established a Parliamentary Form of Government as in the United Kingdom, the conventions prevalent at the time the Constitution was formed, should be kept into mind.”*

Firstly, it uses the word ‘established’. According to Merriam-Webster’s Collegiate Dictionary<sup>20</sup>, the word established means ‘to put beyond doubt’. The researcher fails to understand that despite the various provisions of the constitution, which differ from the British Constitution and are similar to the American one, how is it ‘proved beyond doubt’ that India is a Parliamentary Form of government and if we agree with the Court’s statement, the question still remains to be answered that how is it established? Such questions must be answered if we want to find a solution to the problems haunting the political scenario today.

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<sup>18</sup> 1981 Supp SCC 87.

<sup>19</sup> (1971)2 SCC 63.

<sup>20</sup> Merriam Webster’s Collegiate Online Dictionary , <http://www.m-w.com/cgi-bin/dictionary> (as visited on December 7<sup>th</sup>, 2000 ).

Secondly, the decision doesn't try to reason out whether there exists a 'Parliamentary Form' of government but blindly relies on the previous judgement of *Ram Jawaya Kapoor's* case<sup>21</sup> for the same (which has its own flaws).

Thirdly, the court at the end goes on to say:

*"But on the whole we receive assurance from the learned authors and the speeches that the view we have taken is the right one, and in accordance with the conventions followed not only in the United Kingdom but in other countries following a similar system of responsible Government."*

It fails to make any sense why the court should give decisions, which have the endorsement of the learned few. Is it the court's job to pacify the intelligentsia through its judgements or to interpret the constitution and dispense justice?

The decision in *Ram Jawaya Kapoor's* case is also full of various errors in as much as it fails to appreciate the distinction between 'functions' and 'powers'. It is also 'presumed' in the decision that India has a Parliamentary Form of Government, yet without going into the reasons for the same. It is interesting to note that the decision begins by saying that the Indian Constitution, though federal in nature, is modelled on the British Parliamentary system (a correct proposition), but by the end it clearly changes its stance to the fact that the Indian System is a Parliamentary Form of government. There seems to be a logical fallacy in the decision itself. Also the judgement in *Ram Jawaya's* case again relies upon *Motilal's case*.<sup>22</sup>

However, the court in *Motilal's* case clearly said that the Indian Constitution was essentially different from that of Britain. It further said that:

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<sup>21</sup> *Rai Sahib Ram Jawaya Kapoor v. State Of Punjab*, AIR 1955 SC 549.

<sup>22</sup> *Moti Lal v. Uttar Pradesh Governement*, AIR 1951 All 257.

*“It should be remembered that the Indian Constitution does not confer upon the executive organ of the State those residuary governmental functions, which are vested in the English Crown. Whatever legislative powers the President or the Rajpramukhs enjoy are specifically stated in the Constitution...On the question of the spirit in which a Constitution must be interpreted, the Courts must never forget that it is a Constitution they are expounding...The executive power of the Indian Union and the U. P. state has to be gathered, not from our fixed notions of what the prerogative powers of the Crown are and were applicable to India before 25-01-1950, but from the text of the Constitution itself.”*

In the light of the above statement, it seems illogical as to why we should rely upon the Constitutional conventions of Britain, especially when we have a written Constitution (incidentally one of the lengthiest written constitutions in the world).

## CHAPTER IV

### THE PARTY SYSTEM AND THE 'HUNG PARLIAMENT'

In the light of the above discussions, it becomes necessary for us to understand the concept of 'Hung Parliament' in the context of a party system as we have in India. It is also important to note that India has a multi-party system, hence the British conventions, which are evolved in the context of a strong 'bipartite' system are of no use here.

In order to apply the British conventions in the Indian scenario, the argument can be two-fold. Either we'll have to opt for a two-party system like that in Britain or develop our own conventions. The first solution is simply not possible because plurality is an essential feature of democracy, which is reflected through a multi-party system. Hence, it is impossible to do away with a multi party system, as it would be unconstitutional on grounds of being against the Basic Structure of the Constitution<sup>23</sup>. Therefore the other alternative seems to be the only logical solution.

It would be futile to try to understand the very problems, which stem under the aegis of 'Hung Parliament' until and unless one tries to make sense of the Indian party system. A well-known political and constitutional commentator rightly said:

*"No evaluation of a constitutional system can be worthwhile if it ignores the structure of the party system".*<sup>24</sup>

It is here that the Indian Constitution that proved to be inadequate- it makes no reference to the role and structure of political parties, except perhaps in the Tenth Schedule, the value of which, again, has been marginal. It would be no exaggeration to say that the present constitutional crisis has been one created by the malfunctioning of the party system.

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<sup>23</sup> Democracy has held to be a part of the 'Basic Structure' of the Constitution in a number of cases right from *Keshavanand Bharati v. State of Kerala*, AIR 1975 SC 1048 to *S. R. Bommai v. Union Of India*, AIR 1994 SC 1918.

<sup>24</sup> A.G. Noorani, *The Presidential System – The Indian Debate* (New Delhi: Sage Publications, 1989), at 79.

The biggest problem as experienced during India's recent experiments with coalition governments has been that while political compulsions may have brought parties together to form such governments, what is sadly lacking is responsible political management.<sup>25</sup>

The President under the Indian Constitution is empowered to appoint a Prime Minister, but his choice, grounded in politico-legal reality necessitates that he may appoint a person who can form a government, which will enjoy the confidence of the Parliament.<sup>26</sup>

However the whole problem stems up when no single party gets a clear majority in the Lok Sabha. The President in such a case should ask the leader of the single largest party to form the government. In the circumstance that such an arrangement is not possible the biggest pre-poll alliance should be invited, failing which the largest post-poll alliance should be called upon by the President to form a government. No problem seems to rise in all the three above-mentioned situations; however the problem begins when none of them is possible.

In such a formidable circumstance, the President should ask the Lok Sabha to elect its own leader who should form the government. The Constitution envisages Presidential responsibility in choosing the Prime Minister. The most democratic way would be for the President to ask the Lok Sabha Under Art. 86(2) or otherwise to elect its own leader, for being appointed as the Prime Minister, in case of a 'Hung Parliament'. It would be in keeping views of Governors' Committee by Late Shri Bhagwan Sahai, the Sarkaria Commission and the Supreme Court decision in S. R. Bommai's case.<sup>27</sup>

The process of election of Prime Minister on the floor of the house would constitute national vote of confidence in the ministry to be formed and it would not be necessary for the Prime Minister to seek a vote of confidence after formation of ministry assuming the office. The Prime Minister is not of a party but of the country as a whole, thus representing all parties too.

The Allahbad High Court in December 1996, in *Kalyan Singh v. Jagdambika Pal's* case<sup>28</sup>, has given the guideline for government formation by the governor sending a message to the house for electing

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<sup>25</sup> Dipak Malik, "Politics Of Coalition", *Mainstream*, April 12, 1997, at 4.

<sup>26</sup> *Vide* Art. 75(3) of the Indian Constitution.

<sup>27</sup> Arun Mishra, "Problem of Hung Parliament", XXVI(1) *IBR* 1999, at 9.

<sup>28</sup> *Id.*

their leader. The judgement lays down taking into account Art. 175(2) to elect the leader on the floor, taking the clue from the Japanese Constitution's Art. 6, which provides:

*“The Emperor shall appoint the Prime Minister as designated by the Diet”*

In the case of *Jagdambika Pal v. Union of India*<sup>29</sup>, which was pronounced by the Supreme Court, it has been held that election of the leader should be made on the floor of the House. The decision provides a beacon light in the case of a ‘Hung Parliament’.

This requires a great deal of maturity on behalf of the parties. One of the major nuances of the British model, which we have blindly copied, is the adoption of the '*Party Whip System*'. According to this system, a party may issue a direction (whip) to all its members who are a part of the legislature, asking them to vote in a particular manner and for a specific person. Any violation of such a whip may call for serious disciplinary proceedings against that member. However while copying this practise also, we have erred greatly. In Britain, where this system originated, such a whip does not bind the members.

It is submitted in this regard that the legislators represent their constituencies and the interests of the people. The rationale behind adopting the party system was to facilitate the formation of public opinion. Thus, the parties especially the Opposition party is supposed to play a constructive role in the governance of the nation. Such is a duty imposed upon them and which they have to comply with by virtue of the oath they take.

In many Scandinavian countries, minority governments survived their full terms because the opposition would not pull the rug from under the ruling party's feet<sup>30</sup>. The main factor to be remembered here is that a member of the House represents a particular constituency, the hopes, needs and aspirations of the people and then only his party. Party is a mere platform for people desirous of working for the society, having common ideology, to come together and take collective political action.

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<sup>29</sup> (1999)9 SCC 95.

<sup>30</sup> Dennis Kavanagh, *British Politics And Continuities Of Change* (3<sup>rd</sup> edn., New York: Oxford University Press, 1996), at 47.

Thus, the party politics in India should and must prepare itself to deal with the problems caused by the 'Hung Parliament' or else the democratic process shall perish.

## **CHAPTER V**

### **CONCLUSION**

Therefore we see that the term 'Hung Parliament' does not apply to the Indian situation because by adopting a democratic form of government, we have accepted the fact of existence of multi-party system. Thus it will be rather immature to assume that a political party would secure majority of seats in any elections. Further more, as it has been discussed, the researcher feels that India is not a Parliamentary form of government as our courts have declared it to be. In that circumstance the question of a 'Hung Parliament' does not arise at all.

One can also deduce that constitutional conventions are non-legal rules in as much as they are supposed to fill in the gaps in a constitutional set up but in case where the provisions of law are clear and specific, these conventions have no role to play. The British conventions in specific arose in a particular socio-economic and political condition and were meant to regulate the working of an unwritten Constitution. Therefore importing them to solve the problems in Indian scenario seems to be a foolish task.

The courts have very eagerly quoted Dicey in as much as he talked about the importance of such conventions but have failed to appreciate the later part of his statement, which is a warning against importing the conventions of Britain to a written Constitution. Such ignorance by our courts can cost us heavy.

Yet another area, which requires attention in this regard, is the callous attitude of the political parties in India. Much can be attributed to the immature actions of political parties than any other external cause when the problems relating to the working of Indian polity is concerned. Party whip, which was supposed to be a mere direction from the party high command to vote or not to vote on a particular issue, has become a direction guiding the manner in which to cast the vote.

Therefore in the absence of any clear provision relating to the manner in which a government should be appointed in case of a 'Hung Parliament', we must evolve our own conventions. Asking the house to elect its own leader seems to be a wise step in this regard. It is time that political parties

rise from petty politics and devote their energy and resources in keeping the people's trust alive, which they are obliged to do.

In the light of the above discussions, it can be seen that the President's role is not only confined to installing a relatively stable government but also extend to constantly and carefully scrutinising its activities, rectifying its mistakes and in devising new and effective methods of governance.

The President must personally supervise the appointment of Governors to the states, and carefully monitor their functioning. The appointment of suitable candidates can pre-empt situations wherein the gubernatorial posts could be used for partisan political designs. Art. 356 is another area which the President would have to prevent from being misused. The fiasco in UP and the rare political sagacity and constitutional propriety, which the President displayed in asking the Union to reconsider its recommendations was laudable.

The very fact that the Cabinet did not press the matter further is clearly indicative of the fact that the Cabinet acknowledged the latent power of the President, acting as a check on the unbridled exercise of power by the Council of Ministers. This is especially important in the light of the fact that 'Hung Parliaments' are also being replicated in the States at an even faster rate. Thus the President has a very big responsibility on his shoulders, as he is the defender of the constitutional ethics.

The President may also reactivate the Interstate Council as provided for in Art. 263, which may prove to be of immense utility, in forging a national consensus and facilitating better governance. It is obvious that if the President is to play such a vital and pro-active role, we cannot foolishly stick to the errors we have been committing all this while by blindly following alien conventions.

Need is to construct our own conventions which suit the political and legal needs of the country. As Sir Ivor Jennings<sup>31</sup> put it:

*"The laws provide only a framework; those who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow, and when they have been followed long enough, they acquire the sanctity and the respectability of age."*

Thus it is upto the President to interstitially fill in the constitutional grey areas and create logical precedents for the resolution of the 'Hung Parliaments' in the future.

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<sup>31</sup> Colin R. Munro, *Studies In Constitutional Law* (London: Butterworths, 1987), at p.38.

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