CHAPTER - 7

POSSIBLE SOLUTIONS WITHIN THE INDIAN CONSTITUTIONAL FRAMEWORK

The Constitution of India incorporates the essential feature of parliamentary system, what Bagehot called the dignified part and the efficient part.[1] The Constitution established the office of the President at the Centre and that of the Governor in States as the dignified part and provides for council of minister with the Prime Minister at its head at the Union and the council of ministers with Chief Minister at its head at the States as the efficient part. Article 75(1) provides 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. Similarly, Article 164(1) provides that the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister.

Thus under Article 75(1) the President has the power to appoint the Prime Minister and under Article 164(1) the Governor has the power to appoint the Chief Minister of a State. The important corollary to this power to appoint is the power to choose. The President has to first choose a person for appointment as the Prime Minister and then he can appoint him. Similarly, the Governor has to first choose a person for appointment as the Chief Minister and then only he can appoint him. However, the Constitution is completely silent on this question as to what are the considerations and relevant factors and what is the manner and method to be adopted by the President and the Governor in choosing the Prime

1 Walter Bagehot, *The English Constitution,* Chapman and Hall, 1867.

Minister and the Chief Minister. The only superimposition that is provided is that the council of minister shall be collectively responsible to the House.

The framers of the Constitution apparently left this matter to be governed by the British convention that the party which has secured the majority in the House would govern while the parties which are in the minority would sit in the House as members of the opposition. Thus, going by this convention, the President chooses the leader of majority political party in the Lok Sabha and appoints him as the Prime Minister. Similarly, the Governor of a State chooses the leader of majority political party in the Legislative Assembly of the State and appoints him as the Chief Minister. As a matter of fact, when the elections give a clear mandate in favour of a political party and returns a political party with a clear majority in the House, the President and the Governor have no choice but to appoint the leader of the majority political party as the Prime Minister or the Chief Minister. It is hardly a matter of choice.

The problem arises when the elections do not result in a clear mandate and no political party is returned with a clear majority in the House. In such situations the President and the Governor are required to exercise discretion and judgment as to who amongst the several aspirants has the best prospects of forming a stable ministry and secure and retain the confidence of the House. There are no written rules in the Constitution with regard to exercise of this discretion, as to what are the relevant considerations and factors and what is the manner and method to be adopted by the President and the Governor in choosing the Prime Minister and the Chief Minister. The Constitution literally gives the President and the Governor absolute discretion in the matter. However, in a constitutional democracy governed by the rule of law, there cannot be anything called as complete discretion. In the absence of written rules, Constitutional conventions are the means whereby the discretionary authority of the governmental organs are guided and regulated. The President and the Governor can, therefore, seek guidance from the convention. But in India, no conventions

have been established as yet in this matter. This is due to the fact that no uniform practice has been followed by the Presidents and the Governors over the years since independence.

In case of fractured mandate, there is always a single largest party. Apart from that there may be a single largest pre-poll alliance; there may be a single largest post-poll alliance. There have been situations in past where after the election, there was a single largest party in the Lok Sabha with its own leader, a single largest pre-poll alliance with a different leader and another single largest post-poll alliance with another leader. The various Presidents of India have, to some extent, followed a uniform practice, except in 1990 when Chandrasekhar was appointed as the Prime Minister and have appointed the leader of the single largest party as the Prime Minister. However, the scenario in the States has been entirely different. The Governors have sometimes appointed as the Chief Minister the leader of the single largest party, sometimes the leader of a pre-poll alliance, some time leader of a post-poll alliance. Thus due to this variegated approach, no convention has been developed.

As a matter of fact no convention has been established even in the United Kingdom to deal with situations of hung parliament. The British Parliament, in the twentieth century, faced hung Parliament on three occasions, 1923, 1929 and 1974. In all the three situations, the party leaders resolved the crisis by resorting to minority governments.

In a case of fractured electoral verdict, there are several possible alternatives before the President or the Governor: (a) Invite the leader of the single largest party, (b) Invite the leader of a pre-poll coalition, (c) Invite the leader of a post-poll coalition, (d) Form a National government, or (e) Dissolve the House and call for re-election.

In choosing any of the above five alternatives, the President or the Governor, again, has to exercise his discretion and subjective judgment. The

universal guiding light, that he must choose a person who has the best chance of forming a stable ministry and securing the confidence of the House, is always present. But the real question before the President or the Governor is as to how to ascertain which of the leaders has the best chance of forming a stable ministry and securing the confidence of the House of the People.

This exercise of complete discretion and subjective satisfaction is susceptible to two important criticisms. The assessment and judgment of the President or the Governor may turn out to be wrong and the person chosen and appointed as the Prime Minister or the Chief Minister may subsequently be not able to secure the confidence of the House and thus may not be able to form a stable ministry. There are myriad instances where the Prime Ministers and the Chief Ministers after their appointment, could not secure and maintain the confidence of the House and their ministries collapsed. The other criticism is that discretionary power leads to arbitrariness. Though the President and the Governor are supposed to exercise their power in impartial manner by rising above political and partisan interests, but in fact, the President and the Governors are political appointees and there have been allegations in past of their exercise of this power accentuated by political considerations.

Across the parliamentary democracies world over, fractured electoral mandate has been a recurring phenomenon. This phenomenon has been even more in the parliamentary democracies which have adopted the proportional representation system of voting. Even in parliamentary systems that have adopted the first-past-the-post electoral system, fractured Parliament is not uncommon. Every time there is a fractured electoral mandate, the Head of State is faced with the problem of choosing the Prime Minister. As discussed in the previous chapters, countries have evolved mechanisms to guide the Head of State in choosing the Prime Minister. Some countries have evolved the system of Investiture Vote, some have evolved the system of Constructive No-Confidence Vote, some have evolved the mechanism of *informateur,* and some have evolved

the system whereby the power of dissolution of the House is vested in Parliament itself. Thus the Head of State (Monarch or the President) have been distanced to some extent from the process of choosing the Prime Minister and from exercising the discretion of dissolving Parliament. Though the formal power of appointing the Prime Minister and dissolving Parliament may still be vested with the Head of State, but the discretion has been restricted to a great extent. Elaborate mechanisms has been provided and the Head of State just follows the prescribed mechanisms.

A. INCORPORATION OF SYSTEM OF INVESTITURE VOTE

Investiture Vote means a formal vote among MPs on who should be invited to form the new government. In India, which follows the British system, the choice of Prime Minister completely rests with the President. The President chooses and appoints the Prime Minister. The Prime Minister can simply assume office after being appointed by the President. As we have seen in the previous chapters, in countries like Germany, Hungary, Spain, Ireland, Sweden, Slovenia, Finland, South Africa and Japan, which also have parliamentary forms of government, the Prime Minister needs an actual vote by the parliament to legally assume office. This is called as 'Investiture Vote'. After the general elections when the Parliaments assembles, or when a vacancy arises due to vacation of office by the incumbent Prime Minister for any reason, the first business before Parliament is to elect the leader for appointment as the Prime Minister. After electing a leader for appointment as the Prime Minister, Parliament sends the name to the Monarch or the President and the Monarch or the President thereafter appoints the designated leader as the Prime Minister. Thereafter on the recommendation of the Prime Minister other ministers are appointed, who together with the Prime Minister, constitute the cabinet or the council of ministers.

Article 63 of the Constitution of Germany provides that the Chancellor shall be elected by the *Bundestag*. The person who receives the votes of a

majority of the members of the *Bundestag* shall be elected. The person elected shall be appointed by the Federal President. Similar provisions find place in the Constitution of Hungary, Art. 33(3) of the Hungarian Constitution provides, "The Prime Minister is elected by a simple majority vote of the Members of Parliament". The Constitution of the Eire also provides for nomination of the Prime Minister by Parliament. Article 13(1)(1) states, "The President shall, on the nomination of *Dáil Éireann*, appoint the *Taoiseach*, that is, the head of the Government or Prime *Minister*". The Constitution of Sweden, called as Instrument of the Government also provides for election of the Prime Minister by its Parliament. Chapter 6, Art. 4 of the Constitution of Sweden provides that the Speaker of *Riksdag* after formal consultations with representatives from each party group in the *Riksdag*, proposes a name to the *Riksdag*. If more than half the members of the *Riksdag* vote against the proposal, it is rejected. In any other case, it is adopted. When *Riksdag* adopts the proposal, the Prime Minister informs the *Riksdag* about the names of other ministers. Thereafter the Speaker issues a letter of appointment for the Prime Minister on the *Riksdag*'s behalf. The Constitution of Slovenia also provides for election of the Prime Minister. Art. 111 of the Slovenian Constitution provides that the President of the Republic, after consultation with the leaders of parliamentary groups, proposes to the National Assembly a candidate for Prime Ministership. The Prime Minister is elected by secret ballot by the National Assembly by a majority vote of all deputies. Art. 86(1) of the Constitution of South Africa provides for election of the President by its Parliament. The National Assembly, at its first sitting after the election, or whenever vacancy arises, elects one of its members to be the President. The Constitution of Japan also provides for election of the President by Parliament. Article 6 of the Japanese Constitution provides that the Emperor shall appoint the Prime Minister as designated by the *Diet*. Article 67 provides that the Prime Minister shall be designated from among the members of the *Diet* by a resolution of the *Diet*. This designation shall precede all other business. If the House of Representatives and the House of Councillors disagree and if no agreement can be reached even through a joint committee of both Houses,

provided for by law, or the House of Councillors fails to make designation within ten (10) days after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the *Diet*. The Emperor shall appoint him as the Prime Minister. The Constitution of Finland provides for election of the Prime Minister. Sec. 61 of the Constitution of Finland provides that Parliament elects the Prime Minister, who is thereafter appointed to the office by the President. Other ministers are appointed by the President in accordance with a proposal made by the Prime Minister

The Constitution of India does not provide for any kind of investiture vote by Parliament or the State Legislative Assembly and the choice of Prime Minister and of the Chief Minister are left to the discretion and subjective satisfaction of the President and the Governor. One possible solution within the Constitutional framework of India, thus, is incorporation of the system of Investiture Vote. This will distance the President and the Governor from the process of choosing the Prime Minister and Government and the task of choosing the Prime Minister and the Chief Minister shall be assigned to the Lok Sabha and the State Legislative Assembly. The Prime Minister and the Chief Minister are supposed to be the leader of the House it makes more sense if the House itself elects its leader instead of the President or the Governor.

In fact there is a growing view amongst the authors that since the Prime Minister has to secure the confidence of the House and not of the President, it should be Parliament, rather than the President, who should choose the Prime Minister. Hames and Leonard suggest that the President should be distanced completely from the process of choosing a Prime Minister and the task be assigned to the House itself.[2] They argue that since the Prime Minister is supposed to be the leader of the House it makes more sense if the House itself appoints its leader instead of the President.

2 T. Hames and M. Leonard, "Modernising the Monarchy", *Demos*, 1998.

Brian Thompson[3] is of the view that "A better solution to this problem would be to remove the power of appointment of the Prime Minister from the Sovereign and instead stipulate that the Prime Minister is to be elected by the House of Commons. This is a provision in one think-tank's proposed Constitution for the United Kingdom. Such a provision is more in keeping with the United Kingdom's form of democracy. The people elect their representative who in turn elect the Head of Government".

Robert Hazell has also suggested that the House of Commons should hold an Investiture Vote to help encourage certainty and public understanding of who governs in a hung Parliament situation. He says,

> *"The conventional mechanism for testing confidence suffers from its obscure nature, which does not facilitate understanding of the process by which the government is formed amongst the general public. It might therefore be preferable for the House of Commons to hold an 'investiture vote' as in Scotland and many other countries, which would require the MPs to vote on who should lead the new government. This change would not require any legal or constitutional change, at it could be on a motion that simply made a recommendation to the Monarch on whom to appoint as PM.*
>
> *"If the election result were very close indeed, such that two party leaders both had plausible grounds to claim the ability to form the government, the debate on the investiture motion would offer an opportunity for the two aspiring PMs to make their cases, and for the parties holding the balance of power to explain their reasons for backing one or other of the candidates. It would therefore also have the benefits in terms of accountability and transparency, helping to meet critics' concern that government formation following an*

3 Brian Thompson, *Textbook on Constitutional and Administrative Law*, Blackstone Press, 1997, p. 73.

inconclusive election takes place largely behind closed doors, especially if it involves negotiations with minor or third parties."[4]

Such an approach has also been approved by the Supreme Court in *Jagadambika Pal*[5], and *Anil Kumar Jha*[6] wherein the Supreme Court directed the Speakers of the Legislative Assemblies of Uttar Pradesh and Jharkhand to convene special sessions of the House to have composite floor-test between the contending parties to see which out of the two contesting claimants of Chief Ministership had a majority in the House. In *S.R. Bommai*[7] also the Supreme Court has given clear indication in favour of this approach. Sawant and Kuldip Singh, JJ. in their separate but concurring judgment in *S.R. Bommai* held:

"In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides."[8]

4 Robert Hazell and Akash Paun, eds. *Making Minority Governments Work: Hung Parliament and Challenges for Westminster and Whitehall*, Institute for Government, 2009, p. 83.

5 *Jagadambika Pal* vs. *Union of India,* (1999) 9 SCC 95

6 *Anil Kumar Jha* vs. *Union of India,*(2005) 3 SCC 150

7 *S.R. Bommai* vs. *Union of India,* (1994) 3 SCC 1.

8 *S.R. Bommai* vs. *Union of India,* (1994) 3 SCC 1.

In *Anil Kumar Jha*, the Supreme Court specifically directed for election of the Chief Minister through a "floor-test" in the Legislative Assembly. The directions of the Court were as follows:

> *(1) The session of the Jharkhand State Assembly has already been convened for 10-3-2005 on which day the newly elected Members of the Legislative Assembly shall be administered oath. We direct the session to continue and on 11-3-2005 i.e. the next day and on that day the vote of confidence to be put to test.*
>
> *(2) The only agenda in the Assembly on 11-3-2005 would be to have a floor test between the contending political alliances in order to see which of the political parties or alliance has a majority in the House and hence a claim for Chief Ministership.*
>
> *(3) It is emphasised that the proceedings in the Assembly shall be totally peaceful, and disturbance, if any, caused therein shall be viewed seriously.*
>
> *(4) The result of the floor test would be announced by the pro tem Speaker faithfully and truthfully.*
>
> *(5) This order by the Court shall constitute notice of the meeting of the Assembly for 11-3-2005 and no separate notice would be required.*
>
> *(6) Till 11-3-2005 there shall be no nomination in view of Article 333 of the Constitution and the floor test shall remain confined to the 81 elected members only.*
>
> *(7) We direct the Chief Secretary and the Director General of Police, State of Jharkhand to see that all the elected Members of the Legislative Assembly freely, safely and securely attend the Assembly and no interference or hindrance is caused by anyone therein.*

Of course *S.R. Bommai*, *Jagadambika Pal* and *Anil Kumar Jha*, all these cases pertain to choosing of a Chief Minister after the incumbent Chief Minister was voted out in a vote of no-confidence. But the basic principle remains the same in both cases, whether it is a case of choosing a Chief Minister in a newly constituted Vidhan Sabha after elections or it is a case of choosing a Chief Minister after the incumbent Chief Minister lost the confidence of the Vidhan Sabha and thus there is vacancy. A full bench of the Allahabad High Court in *H. S. Jain* vs. *Union of India*[9] held that the Governor can send a message to the House under Article 175(2) of the Constitution to elect a leader who enjoys its confidence, so that he can invite him to form a government.

Such an approach has been approved by the Supreme Court in *Jagadambika Pal*[10] and *Anil Kumar Jha*[11] wherein the Supreme Court directed the Speakers of the Legislative Assemblies of Uttar Pradesh and Jharkhand to convene special sessions of the House to have composite floor-test between the contending parties to see which out of the two contesting claimants of Chief Ministership had a majority in the House. This also gets support from the following observations of the Supreme Court in *S.P. Anand*[12]: *"Therefore, even though the Prime Minister is appointed by the President after he is chosen by such members of the House of the People as would ensure that he has the confidence of the House and would be able to command the support of the majority."*

This modality of election of the chief executive by the House itself is not unknown to Indian polity. It is interesting to note that the Assam Autonomous Districts (Constitution of District Council) Rules, 1951[13], which provides for

9 *H. S. Jain* vs. *Union of India*, (1997) 15 LCD 140

10 *Jagdambika Pal* vs. *Union of India*, (1999) 9 SCC 95

11 *Anil Kumar Jha* vs. *Union of India*,(2005) 3 SCC 150

12 *S.P. Anand* vs. *H.D. Deve Gowda, 1996*

13 Rule 20, the Assam Autonomous District (Constitution of District Council) Rules, 1951

constitution of District Councils in the tribal areas of the State of Assam provides that the Chief Executive Member shall be elected by the District Council. The District Councils in Assam and Meghalaya constituted under the Sixth Schedule to the Constitution of India are also patterned on parliamentary form of government. District Council, which is a legislative body, consists of Members of District Council (MDCs) elected by territorial constituencies. The executive, called as the Executive Committee with the Chief Executive Member (CEM) at its head, emerges from the District Council. Similarly, Mizoram Autonomous District Council (Constitution and Conduct of the District Council) Rules, 1974[14] also provide for election of the Chief Executive Member by the members of the House (District Council) in the floor of the House.[15]

Subhash C. Kashyap[16] is one of the strongest advocates of election of Prime Minister and Chief Minister by the House. According to him, *"the best, most democratic and constitutional way out in situations of what have come to be called as 'Hung Parliament' would be for the President to ask Lok Sabha under Article 86(2) or otherwise to elect its leader and to communicate to the President his or her name so that the same person is appointed as Prime Minister. This would have the merit of keeping the President above political and partisan controversies and the decision shall be on the floor of the House. It would entirely be in keeping with the view of the Governors' Committee headed by late*

14 Mizoram Autonomous District Council (Constitution and Conduct of the District Council) Rules, 1974:

20. Formation of Executive Committee of District Council with Chief Executive Member. (1) There shall be an Executive Committee in each of the District Councils with the Chief Executive Member at the head and five other members of Pawi District Council; Four other members for Lakher District Council and three other members for Chakma District Council to exercise the functions hereafter specified in Rr. 29, 30, 31 and 32.

21. Election to Chief Executive Member.(1) The CEM shall be elected by the District Council and other members shall be appointed by the Administrator on the advice of the CEM from amongst the members of the District Council; provided that the Chairman or the Deputy Chairman of the District Council shall not be eligible to hold the office either as CEM or as a member of the Executive Committee of the District Council.

15 *Pabitra Kemprai* vs. *North Cachar Hills District Council*, (1988) 2 GLR 371.

16 Subhash C. Kashyap, "Constitutional Implications of Hung Parliament", *Indian Bar Review*, Vol. 25(3) 1998, p. 39

Bhagwan Sahai, the Sarkaria Commission and the Supreme Court in S.R. Bommai case inasmuch as the confidence of the House in a particular leader would be expressed before his appointment as the Prime Minister, there would be no need for him to be subjected to the derogatory practice of being asked to obtain the confidence of the House within the stipulated number of days - 3 days, one week, or the like. Also the proposed election by the House would not require any constitutional amendment or even new legislation."

He further says, *"the arguments that the House cannot be allowed to meet without a government being first instituted is phoney and devoid of any legal or constitutional validity. If any vindication was needed, it was provided amply on the UP case by the three Judges of the Allahabad High Court in separate judgments arriving at the unanimous verdict in favour of the desirability of the UP Governor having tried government formation by sending a message to the House for electing its leader."*

B. INCORPORATION OF DETAILED GUIDELINES FOR THE PRESIDENT AND THE GOVERNOR.

The second possible alternative is to provide guidelines prescribing in detail as to whom the President or the Governor should appoint as the Prime Minister and the Chief Minister. Though the power to appoint would continue to remain with the President and the Governor, but to eliminate the discretion, the detailed procedure in the form of prescription may be provided which will lay down the process the President and the Governor would be required to follow in choosing the Prime Minister and the Chief Minister.

As a matter of fact, the framers of the Constitution had initially proposed an Instrument of Instructions to guide the President and the Governors in the matter of appointment of Prime Minister and Chief Minister. Para 2 of the Instructions to the President enjoined the President "to appoint a person who has

been found by him most likely to command a stable majority in parliament as the Prime Minister".[17] However, this proposal was dropped in the final stages of the proceedings of the Constituent Assembly, on 11 October 1949. This instruction, otherwise also, would have been of little help. There is after all no dispute with this proposition that the President and the Governor has to appoint a person who has been found by him most likely to command a stable majority in the House. Dr. Ambedkar was quite alive to the possibility of a multi-party system working our Constitution. When a member suggested that ministers must belong to the majority party, he said, on 31 December 1948, that it would be perfectly possible and natural that in an election, Parliament may consist of various number of parties, none of which is in a majority. How is this principle to be invoked and put into operation in a situation of this sort where there are three parties, none of which has a majority? The impression that the Constitution envisaged a two-party system is false.[18]

The Committee of the Governors (Bhagwan Sahai Committee) in its report submitted in 1971 had also proposed sets of guidelines as to whom the President or the Governor should invite to form ministry in cases of fractured electoral verdicts. One of the recommendations of the Committee was that before the leader of the single largest party is appointed, he must be able to satisfy the Governor that, in combination with other parties or with the support of other members of the Assembly he is in a position to command the majority in the legislature.

The Commission on Centre-State Relations, headed by Justice R. S. Sarkaria, in its report submitted in 1988 also prescribed detailed guidelines. The Report states as follows:[19]

17 B. Shiva Rao, *The Framing of India's Constitution,* Vol. IV, pp. 84-6.

18 CAD, Vol. VII, p. 1186

19 The Report of the Commission on Centre-State Relations, 1988.

*"**Choice of Chief Minister:***

4.11.01. The leader of the party which has an absolute majority in the Legislative Assembly should invariably be called upon by the Governor to form a government. This is a time-honoured convention of a cabinet form of government. There is no controversy in this regard. However, where no party has a clear majority, there are two views as to the procedure to be adopted for identifying the person who can form a government. According to some others, the Governor, acting on his own, should summon the Assembly for electing a person to be the Chief Minister. Certain other State Governments have suggested that the person to be appointed as Chief Minister should be chosen or elected by the Legislative Assembly, even if he is the leader of a party which has secured absolute majority. Some of the State Governments consider that the Governor should try to ensure that the government to be formed will be stable.

4.11.02. It is important to note that, in appointing the Chief Minister, the Governor is required to ensure that the Council of Ministers is collectively responsible to the Legislative Assembly vide Article 164(2). Accordingly, in order to continue in office, the Council of Ministers, and not the Chief Minister alone, should continue to have majority support in the Assembly. Also, it is only against the Council of Ministers that a no-confidence motion may be moved. We are, therefore unable to agree with any suggestion which would require a Chief Minister to be elected or chosen by the Legislative Assembly. To ensure strict adherence to the principle laid down by Article 164(2), and fair-play to all the parties in the Legislative Assembly, we suggest as follows.

4.11.03. In choosing a Chief Minister, the Governor should be guided by the following principles, viz. (i) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government. (ii) The Governor's task is to see that a Government is formed and not to try to form a Government which will pursue policies which he approves. Thus, if there is a single party having an absolute majority in the Assembly, the leader of the party should automatically be asked to become the Chief Minister.

4.11.04 If there is no such party, the Governor should select a Chief Minister from among the following parties or group of parties by sounding them, in turn, in the order of preference indicated below:

1. *An alliance of parties that was formed prior to the Elections.*
2. *The largest single party staking a claim to form the government with the support of others, including "independents."*
3. *A post-electoral coalition of parties, with all the partners in the coalition joining the Government.*
4. *A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside.*

4.11.05 The Governor, while going through the process of selection described above, should select a leader who, in his (Governor's) judgement, is most likely to command a majority in the Assembly. The Governor's subjective judgment will play an important role.

4.11.06 A Chief Minister, unless he is the leader of a party which has absolute majority in the Assembly, should seek a vote of confidence in the Assembly within 30 days of taking over. This practice should be strictly adhered to with the sanctity of a rule of law.

4.11.07 We are firmly of the view that when a number of Members of the Legislative Assembly approach the Governor and contest the claim of the incumbent Chief Minister to continued majority support in the Assembly, the Governor should not risk a determination of this issue, on his own outside the Assembly. The prudent course for him will be to cause the rival claims to be tested on the floor of the House. Such a procedure will be not only fair but also seen to be fair. It will also save the Governor from embarrassment consequent upon any error of judgement on his part.

Dismissal of Chief Minister

4.11.08. The State Governments are unanimous suggesting that the question whether a Ministry has lost majority support in the Legislative Assembly should be decided on the floor of the House and that the Chief Minister should be given a reasonable opportunity to establish such majority. In order that this principle is invariably followed, one of the State Governments has suggested that Article 164 should lay down that a Chief Minister will hold office so long as he continues as leader of a majority of the members of the Assembly. Another State Government has suggested that Article 164 of the Constitution should specifically provide that if it appears to the Governor that the Ministry has lost the confidence of the Assembly, he should, of his own motion, summon the Assembly to enable the Ministry to secure a vote of confidence. In this connection, it has also been suggested by one of the State Governments that a Minister may be dismissed only on the advice of the Chief Minister.

4.11.09. The Council of Ministers hold office during the pleasure of the Governor. The Chief Minister is first appointed and, on his

advice, the other Ministers are appointed by the Governor. The joint responsibility of the Council of Ministers operates through the personality of the Chief Minister. The Constituent Assembly considered a specific amendment to the effect that the Ministers could remain in office only so long as they retained the confidence of the Legislature. It was made clear by Dr. Ambedkar that the 'pleasure' should not continue when the Ministry had lost the confidence of the Assembly; and the moment this happened, the Governor would use his 'pleasure' to dismiss it. In the result, the Governor cannot dismiss his Council of Ministers so long as they continue to command the majority, and conversely, he is bound to dismiss them if they lose the same but do not resign.

4.11.10. The question of majority can be easily tested on the floor of the House when the Assembly is in session. However, during the period the Assembly remains prorogued, a Governor may receive reliable evidence (e.g. one or more letters signed by, or a non-confidence motion proposed by, a majority of members with their signatures authenticated by the Secretary of the Assembly) that the Ministry has lost its majority. Should the Governor in this situation on his subjective satisfaction dismiss the Ministry without giving it a chance to prove its 'majority' on the floor of the House?

4.11.11. Arid legality apart, as a matter of constitutional propriety, the Governor should not dismiss a Council of Ministers, unless the Legislative Assembly has expressed on the floor of the House its want of confidence in it. He should advise the Chief Minister to summon the Assembly as early as possible. If the Chief Minister does not accept the Governor's advice, the Governor may, as explained in paras 4.11.19 and 4.11.20 below, summon the Assembly for the specific purpose of testing the majority of the Ministry.

4.11.12. In deciding on the date of summoning, the Chief Minister should be allowed such time as the Governor in his judgement considers reasonable. A prolonged period of uncertainty for the Ministry in office can lead to political as well as administrative malpractices. At the same time, insistence that the Chief Minister should prove his majority in the Assembly within the period which he considers unduly short, leads to resentment and evokes avoidable criticism that the Governor is unreasonably hasty or partisan in his approach. This is one of those situations which call for all the political acumen, experience and persuasive skills of the Governor.

4.11.13. Considering all factors, we recommend that the Assembly should be summoned to meet early within a reasonable time. What is "reasonable" will depend on the circumstances of each case. Generally, a period of 30 days will be reasonable, unless there is very urgent business to be transacted, such as passing the Budget, in which case, a shorter period may be indicated. In special circumstances, it may even exceed this period and go up to 60 days.

4.11.14. Under Article 164(1), the Chief Minister is appointed by the Governor and the other Ministers are appointed by him on the advice of the Chief Minister. In dismissing a Minister other than the Chief Minister, therefore, the correct procedure is for the Governor to act entirely on the advice of the Chief Minister. In so far as we are aware, this has all along been the practice and has not been objected to by any one.

4.11.15. Defections were at one time a major cause of instability which often led to proclamation of President's rule, as no viable Ministry could be formed. With the incorporation of the anti-defection provisions in the Constitution by the 52nd Amendment, instability

should be significantly reduced. However, party-splits and breakdowns of coalition governments may continue to occur till such time as political maturity develops among the parties.

The Commission on Centre-State Relations, headed by Justice M.M. Punchhi, in its report submitted in March 2010 also held that, *" .... it is necessary to lay down certain clear guidelines to be followed as Constitutional conventions in this regard (appointment of the Chief Minister)"*. The Commission has recommended as follows:[20]

"On the question of Governor's role in appointment of Chief Minister in the case of a hung assembly there have been judicial opinions and recommendations of expert commissions in the past. Having examined those materials and having taken cognizance of the changing political scenario in the country, the Commission is of the view that it is necessary to lay down certain clear guidelines to be followed as Constitutional conventions in this regard. These guidelines may be as follows:

(a) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.

(b) If there is a pre-poll alliance or coalition, it should be treated as one political party and if such coalition obtains a majority, the leader of such coalition shall be called by the Governor to form the Government.

(c) In case no party or pre-poll coalition has a clear majority, the Governor should select the Chief Minister in the order of preference indicated below:

20 The Report of the Commission on Centre-State Relations, 2010, Vol. 2, pp. 71-75

a. *the group of parties which had pre-poll alliance commanding the largest number;*
b. *the largest single party staking a claim to form the government with the support of others;*
c. *a post-electoral coalition with all partners joining the government; and*
d. *a post-electoral alliance with some parties joining the government and the remaining including independents supporting the government from outside;*

In light of the increased dependence on party alliances, clarity with regard to the role of the Governor in his invitation to form a government assumes great significance.

If specific guidelines are not laid down with regard to determining the claims of a post-poll alliance, it would result in ambiguity and the Governor would follow the established convention of inviting the single largest party to form the Government. In cases of narrow majorities, there are no uniformly accepted conventions and this can be remedied by adopting constitutional amendments, which lay down specific guidelines and approaches which ought to be followed by the Governor. This would result in greater clarity and certainty.

The Constitution of Greece provides such detailed procedure for appointment of Prime Minister. Art. 37 of the Constitution of Greece provides in detail, as to whom the President shall appoint as the Prime Minister. Art. 37(1) stipulates that the leader of the party having the absolute majority of seats in Parliament shall be appointed Prime Minister. If no party has the absolute majority, the President shall give the leader of the party with a relative majority an exploratory mandate in order to ascertain the possibility of forming a Government enjoying the confidence of the Parliament. If this possibility cannot be ascertained, the President shall give the exploratory mandate to the leader of

the second largest party in Parliament, and if this also proves to be unsuccessful, to the leader of the third largest party in Parliament. Each exploratory mandate shall be in force for three days. If all exploratory mandates prove to be unsuccessful, the President summons all party leaders, and if the impossibility to form a Cabinet enjoying the confidence of the Parliament is confirmed, he shall attempt to form a Cabinet composed of all parties in Parliament for the purpose of holding parliamentary elections. If this fails, President entrusts the President of the Supreme Administrative Court or of the Supreme Civil and Criminal Court or of the Court of Audit to form a Cabinet as widely accepted as possible to carry out elections and dissolves Parliament. In case a mandate to form a Cabinet or an exploratory mandate is given, the proposal for the assignment of a mandate must occur within three days of the Speaker's or his Deputy's communication to the President about the number of seats possessed by each party in Parliament; the aforesaid communication must take place before any mandate is given. Further, as far as exploratory mandates are concerned, when parties have an equal number of seats in Parliament, the one having acquired more votes at the elections, precedes the other. A recently formed party with a parliamentary group, as provided by the Standing Orders of Parliament, follows an older one with an equal number of seats. In both these instances, exploratory mandates cannot be given to more than four parties. The other ministers and undersecretaries are appointed by the President on the recommendation of the Prime Minister [Art. 37(1)]. The Government is obliged to request a vote of confidence by Parliament within fifteen days of appointment of the Prime Minister. The Greek Constitution does not leave any discretion with the President. It lays down in detail that the President should first nominate the leader of the largest party in Parliament, and if he fails to form a government, the leader of the second largest party is given a chance and so on.

Evatt[21] is of the opinion that specific guidelines should be provided to the President by way of constitutional amendments or statutory enactments or by developing a code of conventions as to the course of action the President or the Governor should adopt in a given situation of hung parliament. Working on this line, the Australian Constitutional Commission has proposed a number of principles to govern the exercise of the power in situations of a hung parliament[22].

C. DEVELOPING MECHANISM FOR TAKING SERVICES OF INFORMATEUR FOR APPOINTMENT OF PRIME MINISTER AND CHIEF MINISTER

As discussed in the previous chapter, some parliamentary democracies use the mechanism of *informateur* in selection of Prime Minister. *Informateur* is a trusted elder statesman, sometimes Speaker of the House. He is the special emissary or envoy of the Crown who aids and assists the Monarch in choosing a Prime Minister by consulting, negotiating and facilitating talks between political parties and finding out an acceptable Prime Minister. The Monarch appoints an "*informateur*", who then consults and facilitates talks between leaders of various political parties in Parliament and explores the viability of different coalitions under different Prime ministerial candidates. Based on the talks and discussions, the *Informateur* identifies a *formateur, i.e. the* potential Prime Minister who has or who can garner majority support in Parliament and conveys it to the Crown. If the Crown is convinced about the prospect of that candidate being able to secure the confidence of the House, the Crown than appoints that candidate as Prime Minister. The advantage of *informateur* is that the Crown is distanced from the process of political negotiations and bargaining amongst the political parties. This is one possible solution within the existing Constitutional framework.

21 H.V. Evatt, *The Jing and His Dominion Governors, (1936),* Routledge, New York, 2013.

22 The Report of the Australian Constitutional Commission, 1988.

D. INCORPORATION OF PROVISIONS OF CONSTRUCTIVE NO-CONFIDENCE VOTE

Fractured electoral mandate not only poses problems for formation of ministry at the initial stage, it also causes frequent collapse of ministries even after a ministry is installed. A fractured House makes it easier for the opposition parties to realign politically and cause downfall of government by moving no-confidence motion against the incumbent government. A solution to this problem has been devised in the form of Constructive No Confidence Vote. It is a modified form of parliamentary no-confidence motion. Under this system, a Parliament can withdraw its confidence from a ministry by passing a no-confidence vote only if there is a positive majority for a prospective successor to the office of the Prime Minister. The concept was invented in West Germany but today is used in other countries such as Germany, Belgium, Spain, Hungary and Slovenia. Thus, under this system, a parliamentary majority must not only depose the current government but also simultaneously elect an alternative government which must be specified before the vote takes place. In case the incumbent Prime Minister is voted out, the alternative candidate named in the motion of no-confidence is appointed as the Prime Minister. This system encompasses the twin aspects of negative as well as positive parliamentarism. It reduces the chances of frequent no-confidence motions because it restrains the opposition parties from moving a no-confidence motion unless they have an obvious successor. This system sometimes even enables a minority government to sustain. This is another possible solution under within the constitutional framework of India, to incorporate the system of Constructive No Confidence Vote. This will restrict, to a large extent frequent over-throwing of governments which are occasioned largely due to frequent mindless dissensions, defections and political permutations and combinations.

The Constitution of Germany, in Art, 67 provides that the *Bundestag* may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected. Art. 67 further provides that forty-eight hours shall elapse between the motion and the election. This provision is made apparently to give enough time to the members to deliberate and come to a conclusion before the actual voting takes place.

The Constitution of Hungary also provides for constructive no-confidence vote. Art. 39/A provides that, a constructive no-confidence vote may be launched, with the designation of a new preferred candidate for Prime Minister, on written proposal of at least one-fifth members of Parliament and if the majority of the Members of Parliament express no-confidence in the motion, the candidate named as the choice for the new Prime Minister must be regarded as elected. Arts. 113 and 114 of the Constitution of Spain also provide for constructive motion of censure and stipulate that a motion of censure must be proposed by at least one tenth of the Members of Congress and shall include a candidate for the office of the Presidency of the Government. In case the Congress adopts a motion of censure, the Government has to submit its resignation to the King, and the candidate proposed in the motion of censure shall be deemed to have the confidence of the House and the King shall then appoint him as the Prime Minister. Similarly, Belgium and Spain also have Constructive No-Confidence Vote. Art. 96 of the Constitution of Belgium provides that if the House of Representatives, adopts a motion of no-confidence proposing a successor to the Prime minister for appointment by the King, the incumbent government has to resign and the King then appoints the proposed successor as Prime minister and forms his government. Article 116 of the Constitution of Slovenia provides that the National Assembly may pass a vote of no confidence in the Government only by electing a new Prime Minister .

Subhash C. Kashyap[23], besides being a votary of the system of election of Prime Minister and Chief Minister by the House, is also a votary of the system of Constructive No-Confidence Vote. He says, *"after the Prime Minister is appointed by this process, the next question would be of assuring some stability to the government. This can be done by making a small amendment to the rules of parliamentary procedure to the effect that a motion of no-confidence in the Council of Ministers would also include the name of the proposed successor, i.e., if the motion is passed, while unseating the existing government it would at the same time be deciding the name of the next leader of the House in whom the House has confidence and who can then be appointed as the Prime Minister. Hopefully this would bring greater stability, not erode accountability and reduce horse-trading considerably."*

E. INCORPORATION OF PROVISIONS OF FIXED INTERELECTION PERIOD WITH POWER OF PARLIAMENT/LEGISLATIVE ASSEMBLY TO RECOMMEND DISSOLUTION OF THE HOUSE BY A PARLIAMENTARY OR ASSEMBLY VOTE.

The power of dissolution of Parliament is another aspect which is intrinsically connected with the process of appointment of the Prime Minister and Chief Minister in Hung Assembly. Under the Constitution of India the power to dissolve Parliament is vested in President. The power to dissolve Legislative Assembly is vested in the Governor. During proclamation of emergency for failure of constitutional machinery in State, this power to dissolve State Legislative Assembly is vested with the President.[24] Though the members of Parliament and that of the State Legislative Assemblies are elected for a term of five years, the President and the Governor have the power to dissolve the House

23 Subhash C. Kashyap, "Constitutional Implications of Hung Parliament", *Indian Bar Review*, Vol. 25(3) 1998, p. 39

24 *State of Rajasthan* vs. *Union of India*, (1977) 3 SCC 592,

any time. Again, there are no guidelines provided under the Constitution as to when and how the President and the Governor are to exercise this power of dissolution. Complete discretion has been vested with the President and the Governor. Though, so far, no major controversy has erupted as far as past instances of dissolution of Parliament by President is concerned, there have been several controversies with exercise of this power by the Governor. There have been several cases, where the Governors, acting in a *mala fide* manner and for political considerations, thwarted the prospects of other political parties having their Chief Minister and forming the ministry. The most blatant case was of Kerala in 1957 when the opposition parties had more seats in the Assembly and the Governor, even without making the slightest effort to install a ministry, dissolved the Legislative Assembly. The actions of the Governors have attracted the wrath of the Supreme Court on many occasions, so much so that the Supreme Court in *Rameshwar Prasad (VI)*[25] had to observe:

> *"Whether it is a case of the existing Government losing majority support or of installation of a new Government after fresh elections, the act of the Governor in recommending dissolution of the Assembly should be only with the sole object of preservation of the Constitution and not promotion of political interest of one or the other party."*

Dissolution of the Legislative Assembly of the State by the President during proclamation of Art. 356 has also attracted a lot of judicial criticism. In *Bommai*, the Court has emphasized that the President exercises the power under Article 356(1) on the advice of the Central Ministry which is a political body. In a pluralistic democracy and federal structure, the parties in power at the Centre and the States may not be the same. Hence it is necessary to confine the exercise of power under Article 356(1) strictly to the situation mentioned therein which is a condition precedent to its exercise.[26]

25 *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1, at page 86 .

26 AIR 1994 SC 1918, at 1970.

Some countries have curtailed this discretionary power of the Head of State. Even in the United Kingdom, where the power to dissolve the House of Commons is considered to be one of the royal prerogative powers, the said power has been curtailed to a considerable extent by the Fixed-Term Parliaments Act, 2011. Under the provisions of the Act, parliamentary elections must be held every five years, beginning in 2015. Section 2 of the Act also provides for two ways in which a general election can be held before the end of this five-year period: *first*, if the House of Commons resolves "That this House has no confidence in Her Majesty's Government", an early general election is held, unless the House of Commons subsequently resolves "That this House has confidence in Her Majesty's Government". This second resolution must be made within fourteen days of the first; and *secondly*, if the House of Commons, with the support of two-thirds of its total membership resolves "That there shall be an early parliamentary general election". In either of above cases, the Monarch appoints the date of the new election by proclamation and Parliament is dissolved 17 working days before that date. Sec. 3(2) further provides that apart from the automatic dissolution or dissolution under Sec. 2, "Parliament cannot otherwise be dissolved". The Act thus removes the traditional royal prerogative to dissolve Parliament and vests this power in the House of Commons itself.

Constitutions of Hungary, Belgium and South Africa also vest the effective power of dissolution of Parliaments in Parliament. Under the Constitution of Hungary, Article 28(2), the power of dissolution of Parliament is vested in Parliament which may proclaim its dissolution before the expiry of its terms.

The Constitution of Belgium, Art. 46, provides that the King may dissolve the House of Representatives, in case of resignation of the incumbent government and if the King receives an agreement from the members of the House of Representatives expressed by the absolute majority of its members. Art. 46 also provides that the King has the right to dissolve the House of Representatives only if the House of Representatives, with the absolute majority

of its members, (a) either rejects a motion of confidence in the Federal Government and does not propose to the King, within three days of the day of the rejection of the motion, the appointment of a successor to the Prime minister; or (b) adopts a motion of no confidence with regard to the Federal Government and does not simultaneously propose to the King the appointment of a successor to the Prime minister. Thus in both cases, Belgian Parliament has an active role and the King can dissolve the House only if Parliament is of the opinion, either explicitly or in implied terms, that the Parliament should be dissolved.

Under the South African Constitution, also the effective power to dissolve National Assembly is vested in National Assembly itself, although the formal power is vested in the President. Art. 50(1) of the Constitution of South Africa categorically provides that the President must dissolve the National Assembly if the Assembly adopts a resolution to dissolve with a supporting vote of a majority of its members. The only condition imposed is that three years must expire since the election.

F. RESTRICTING POLITICAL PARTIES IN CONTESTING ELECTIONS

The Constitution of India, though nowhere in the entire body of the Constitution mentions the words "political party", but while adopting the Westminster model of parliamentary government, has impliedly adopted the multi-party system and the first-past-the-post electoral system. Elections are held on party lines and political parties profess their political manifesto and set up their candidates at elections. Under Art. 324 of the Constitution the Election Commission of India has been conferred the power of superintendence, direction and control of elections to Parliament and to the State Legislatures and of elections to the office of the President and Vice-President. Election Commission of India has promulgated the Election Symbols (Reservation and Allotment) Order, 1968 thereby making provisions, both for the registration of political parties and also for their recognition as National and State parties, and also for the specification

and allotment of election symbols to contesting candidates. As on 10th March 2014, there were 6 National Parties and 47 State Parties besides 1693 registered-unrecognised Political Parties registered with the Election Commission of India.[27]

Prima facie, designation and recognition of the political parties as National Party and State Party gives an impression that only the National Parties can contest the national elections (elections to the Lok Sabha and Rajya Sabha) and only the State Parties can contest the State elections (elections to the State Legislative Assembly). However, that is not the rule and any political party, be it a National Party, State Party or even Registered-Unrecognised political party, can contest the national elections as well as the State elections. So much so that even independent candidates can contest all these election. Further the criteria laid down that - to be recognised National Party, a party has to win at least 6% of the votes polled in any four or more states and has to win at least 4 seats in the Lok Sabha OR it has to win 2% seats (11 seats) in the Lok Sabha from at least three States – and to be recognised as a State Party, a party has to win at least 6%

27 In 2000, the Election Commission had revised the criteria for registration of political parties as follows:

(a) A political party shall be eligible to be recognised as a National party if :-

(i) it secures at least six percent of the valid votes polled in any four or more states, at a general election to the House of the People or, to the State Legislative Assembly; and

(ii) in addition, it wins at least four seats in the House of the People from any State or States.

OR

it wins at least two percent (2%) seats in the House of the People (i.e., 11 seats in the existing House having 543 members), and these members are elected from at least three different States.

(b) A political party shall be eligible to be recognised as a State party if:-

(i) it secures at least six percent of the valid votes polled in the State at a general election to the House of the People or, to the State Legislative Assembly of the State concerned; and

(ii) in addition, it wins at least two seats in the Legislative Assembly of the State concerned.

OR

It wins at least three percent (3%) of the total number of seats in the Legislative Assembly of the State, or at least three seats in the Assembly, whichever is more.

of the votes polled in general election to the House of the People or, to the State Legislative Assembly of the State concerned; and at least two seats in the Legislative Assembly of the State concerned OR it has to win at least three percent (3%) of the total number of seats in the Legislative Assembly of the State, or at least three seats in the Assembly, whichever is more – are totally out of the sync with the present situation and is in fact encouraging further fracture of electoral mandate.

P.P. Rao[28], is of the opinion that we have to clearly define 'Political Party', 'National Party', and 'State Party' keeping in view the basis aims and objects of the Constitution. According to him, *"the present classification of political parties in the Election Symbols (Reservation and Allotment of Symbols) Order, 1968 is unrealistic and out of date. The norms of National Party should be laid down in more stringent terms"*.

There is a view that the benchmark criteria for recognition of political parties as National Party and State Party should be enhanced and only the national parties should be allowed to participate in the national elections and the State Parties of the concerned State in the State elections. National Committee for Review of the Working of the Constitution also adverted to this issue, wherein it observed that some are centered around reducing the number of recognized national parties or pre-poll alliances by changing the present criteria for their recognition. For example, at the moment a political party in order to be recognised as a national party needs to secure at least 6% votes in 4 States or have one MP elected for every 25 MPs from four States. It is proposed by some scholars and elder statesman like the former President Shri R. Venkataraman that this percentage should be increased to 10% of votes polled. It is also proposed by some that the number of States should be increased to half of the total States and Union territories. This would certainly trim down the list of national

28 P.P. Rao, "Hung Parliament", *Indian Bar Review*, Vol 25(3)1998, p. 17

parties/alliances. A de-recognition would mean the loss of many benefits including a common symbol nationwide. Coupled with the suggestion that non-national parties should not be permitted to contest national elections, this would force many pre-poll alliances or growth of federal parties. It further observed that one set of suggestions centers around permitting only recognized "national parties" or qualifying pre-poll alliances to contest national elections to Lok Sabha. In their view this would, by prompting pre-poll alliances, automatically consolidate the vote and help in evolving some sort of federal parties or alliances providing more stable governments. Candidates who thus come to occupy seats in the national parliament will have a more national perspective on things as opposed to those who come on a purely local or regional platform.[29]

This view may not find favour with some, but this is definitely one of the possible solutions to address the issue of fractured electoral mandate.

29 Report of National Commission to Review Working of the Constitution, 2002, paragraphs 21.8 and 21.9