CHAPTER - 8

CONCLUSION

India has adopted the parliamentary form of government. But the adoption of parliamentary form of government has not happened through a process of gradual evolution, as in England. In India, this form of government was deliberately adopted by the Constituent Assembly. Since adoption of the Constitution, over the years, especially after 1977, India is witnessing a phase of political transition. There has been a mushrooming growth of political parties. In spite of adoption of the first-past-the-post system, electorate is divided and is returning hung Parliament and Legislative Assemblies.

Under Art. 75(1) of the Constitution, the President has the power to appoint the Prime Minister and under Art. 164(1) the Governor has the power to appoint the Chief Minister of a State. However, apart from Art. 75(3) and 164(2), which mention about the principle of collective responsibility of the council of ministers to the respective House, there is no other guidance provided as to whom the President or the Governor should appoint as the Prime Minister or the Chief Minister. The Constitution is completely silent as to whom the President should invite to form the government in case of hung parliament. In case of clear electorate mandate, the choice for the President and the Governor is obvious. The leader of the majority party in the House of the People or the State Legislative Assembly is appointed. With the fractured electoral mandate, where no political party has a clear majority in the House, the exercise of this power by the President and the Governor has been becoming increasingly difficult.

This work therefore intended to revisit the constitutional provisions with regard to formation of ministries at the Union and State level and the working of

these constitutional provisions in the past 63 years in the still evolving political scenario in India. The basis issue, the fulcrum, around which the other ancillary issues revolve is whether there are adequate constitutional provisions and constitutional conventions to guide the President and the Governor in choosing and appointing Prime Minister and the Chief Minister in situations of fractured electoral mandate - and, if not, what mechanism should be provided, within the existing constitutional framework of federal and parliamentary democratic system, to provide guidance to the President and the Governor in appointment of the Prime Minister and the Chief Minister in situations of fractured electoral mandates. This study started with nine research questions. [1]

The first question - whether an unguided discretion has been given under the Constitution to the President and the Governor in the matters of appointment of Prime Minister and Chief Minister – apparently has an obvious affirmative answer. Art. 75(1) of the Constitution only 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". Art. 164(1), similarly, only 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". The Constitution is absolutely silent on the questions - as to whom the President shall appoint as the Prime Minister and as to whom the Governor shall appoint as the Chief Minister. The only qualification embodied in Art. 75(3) is that "the Council of Ministers shall be collectively responsible to the House of the People" and in Art 164(2) that "the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State". Whether the principle of collective responsibility embodied in Arts. 75(3) and 164(2), is any guidance to the President or the Governor in the matter of appointment of Prime Minister and Chief Minister has been subjected to varied interpretation. This varied interpretation is due to respective emphasis placed on the two words of the expression "collective" and "responsibility". Those laying emphasis on the word

1 For the research questions, kindly see *supra* Chapter-1..

"collective" interpret the expression as meaning "all ministers in the Council of Minister swim and sink together". On the other hand, constitutional authors like Geoffrey Marshall contend that one of the principal implications of the "collective responsibility" principle is that "a government can only remain in office for so long as it retains the confidence of the House of Commons"[2] Apart from the principle of collective responsibility, there is no other guidance in the Constitution. Authors like Granville Austin[3] is of the opinion that this is an important omission in the Constitution of India, which though voluminous and deals minutely even with the matters relating to day-to-day administration has not made any provision with regard to this area of major political concern. Evatt calls it a "dangerous uncertainty" in the area[4]. Rodney Brazier says, "It seems all this that there are no rules about Government formation from the hung Parliament. Such uncertainties in an area of major importance in the constitution may cry out for regulation."[5]

The Constitution of India is modelled on Westminster model and therefore, the President and the Governor are required to appoint as the Prime Minister or the Chief Minister, a person who is in the best position to secure and maintain the confidence of the House. In case of clear majority of a political party in the House, there is no difficulty and the leader of that party has the conventional right to be appointed as such. The real difficulty is posed in fractured House where no political party has a working majority. In such a situation, the choice is not obvious and the President and the Governor have to exercise their absolute discretion and individual judgment.

Such an unguided constitutional discretion has been susceptible to misuse and has in fact been used, in cases of fractured electoral verdicts and consequent

2 Geoffrey Marshall, *Ministerial Responsibility,* Oxford University Press, 1989.

3 Granville Austin, *The Indian Constitution: Cornerstone of a Nation,* Oxford University Press, 1999.

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

5 Rodney Brazier, *Constitutional Practice: The Foundation of British Government,* Clarendron, 1994.

hung Parliaments and Legislative Assemblies, to subvert the democratic process especially. The second question, therefore, is also answered in the affirmative. The exercise of complete discretion and individual judgment in the matter of appointment of Prime Minister, and more so in the case of appointment of Chief Minister has been the subject matter of criticism on two counts. The assessment and judgment of the President or the Governor have on many occasions turned out to be wrong and the person chosen and appointed as the Prime Minister or the Chief Minister were after their appointment not able to secure the confidence of the House. There is an array of 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 second criticism is that discretion leads to arbitrariness. Though the President and the Governor are constitutional functionaries having taken the oath to "preserve, protect and defend the Constitution and the law" and 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 the past of their exercise of this power accentuated by political considerations.

The third question relates to whether the existing constitutional and legal framework in India efficiently guides and equips the President and the Governor in choosing and appointing Prime Minister/Chief Minister in a situation of fractured electoral verdict. And, if not, what mechanism should be provided, within the existing constitutional framework. The fourth, fifth, sixth and the seventh questions relate to what mechanism should be adopted – the system of specific guidelines for the President and the Governor, or the system of Investiture Vote in Parliament and State Legislative Assemblies, or the system of *informateur,* or the mechanism of Constructive No-Confidence Vote. The third question has an obvious negative answer as it is clear that the existing constitutional and legal framework in India does not efficiently guide the President and the Governor in choosing and appointing Prime Minister/Chief

Minister in a situation of fractured electoral verdict. The pertinent question is what mechanism should be provided, within the existing constitutional framework. Whether it should be by way of prescription of specific guidelines for the President and the Governor, or by way of investiture vote in Parliament and State Legislative Assemblies, or by way of system of *informateur,* or by way of introduction of the mechanism of Constructive No-Confidence Vote.

The alternative of providing a prescription of detailed guidelines for the President and the Governor, to some extent has been in place in India, starting from the Report of the Governors Committee, 1971 to the Report of Sarkaria Commission (1988) and more recently the Report of the Punchhi Commission (2010). These reports have gone into the issue and made recommendations. The Sarkaria Commission Report has laid down in paragraph 4.11.04 that if there is no political party with clear majority, 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.*

The Commission on Centre-State Relations, headed by Justice M.M. Punchhi, in its report submitted in March 2010 observed that *it is necessary to lay down certain clear guidelines to be followed as constitutional conventions in this regard. The Punchhi Commission* has recommended 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:

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 the survey of parliamentary governments in the present work, only the Constitution of Greece provides such detailed procedure for appointment of Prime Minister. Such detailed prescriptions are already in existence in India in the form of various reports. These Reports are only recommendatory and do not have the force of law. Further these guidelines have been sometimes followed and sometimes not followed and have not given any significant result.

In some parliamentary democracies, after a fractured electoral mandate, when the search for the Prime Minister is less self-evident and several alternatives are available, a specific institutional device has been developed to clarify this matter, without formally involving the Monarch. On such occasions the Monarch appoints an "*informateur*", usually a seasoned politician who is in

good terms with all parties and candidates for potential government office. In the name of Monarch, he or she explores the viability of different coalitions under different prime ministerial candidates. Sometimes, the Monarch will give some broad indications with regard to the type of coalition that seems desirable. Once the *Informateur* has sounded out the potential coalition parties, he advises the Monarch on the formation of a particular type of coalition, headed by a particular government formateur. If the advice is straightforward, the Monarch, in most cases, acts accordingly and appoints the formateur as the Prime Minister. The system of *informateur* is how effective, there is scant material in this regard.

The system of Investiture Vote is present is many parliamentary democracies. Though the origin of this system is not clear, but apparently, the system was devised to get rid of two constitutional issues. This system distances the high constitutional office of Monarch and the republican President from the political exercise of choosing the Prime Minister and thus enhances the sanctity of their office. After all the exercise of choosing a political leader is a political exercise and therefore it is better if it is left to political leaders to choose a leader rather than engaging the Monarch or the President in this process. Investiture vote also addresses the issue that since the Prime Minister with his cabinet is politically responsible to Parliament, and they must enjoy the confidence of Parliament, it makes more sense that the Parliament itself, through the process of political negotiations, chooses its own Prime Minister, rather than the Monarch or the President choosing and appointing a Prime Minister and then asking Parliament whether it has confidence in the said Prime Minister or not. The system of Investiture Vote by Parliament is present in many parliamentary governments, such as Germany, Hungary, Ireland, Spain, Sweden, Slovenia, South Africa, Japan, Finland and the system is working reasonably successfully. In many of these countries, which have the Investiture Vote, the system of Constructive No-Confidence Vote is also present. Germany, Hungary, Spain, Slovenia have the twin system of Investiture Vote and Constructive No-Confidence Vote. Ireland, Sweden, South Africa, Japan and Finland have only

Investiture Vote and do not have Constructive No-Confidence Vote. Belgium, on the other hand, does not have Investiture Vote but has Constructive No-Confidence Vote. Constructive No-Confidence Vote aptly supplements and complements 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.

Comparative political studies elsewhere indicate that the system of Investiture Vote promotes government stability in fractured electoral mandates and governments last longer.[6] It leads to greater level of legitimacy of the government.[7] It makes governments and the Prime Minister more steadfast and strong in implementing policies that are closer to Parliament's median members.[8]

The Constitution of India, at present, does not incorporate the system 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. This can be a preferred solution within the Constitutional framework of India, to incorporate the system

6 *See,* Jose Antonio Cheibub, Shane Martin, and Bjorn Erik Rasch, "The Investiture Vote and the Formation of Minority Parliamentary Governments", paper presented at the workshop on the Importance of Constitutions: Parliamentarism, Representation, and Voting Rights, Istanbul, Turkey, October 23-25, 2013.

available at http://www.sv.uio.no/isv/english/research/ projects/evolution-parliamentarism/ events/ seminars/ istanbul-cheibub-martin-rasch.pdf

7 Ardre Blais, Peter Loewen, and Maxim Ricard, "The Government Life-Cycle", in Bill Cross, ed. *Democratic Reform*, Canadian Scholars Press, 2007.

8 *Supra,* Note 5.

of Investiture Vote together with Constructive No-Confidence 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 political leaders through the process of political negotiations and bargains and political permutations and combinations, will choose a Prime Minister and a Chief Minister in the House. The President or the Governor would then appoint the said candidate as the Prime Minister/Chief Minister. Constructive No-Confidence Vote ideally complements Investiture Vote. This will obviate the possibilities of misuse of this discretionary power by the President and the Governor.

In fact this system is finding great favour among the constitutional authors. Brian Thompson[9] is of the opinion 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. 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.

Such an approach has also 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. In *S.R. Bommai*[12] also the Supreme Court has given clear indication in favour of this approach. In the words of Sawant and Kuldip Singh, JJ., "*.....in all cases where the support to the Ministry*

9 Brian Thompson, *Textbook on Constitutional and Administrative Law*, Blackstone Press, 1995, p. 73.

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

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

The *S.R. Bommai*, *Jagadambika Pal* and *Anil Kumar Jha*, 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*[13] 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.

This modality of election of the chief executive by the House itself is already present in India at subordinate level. The Assam Autonomous Districts (Constitution of District Council) Rules, 1951 and Mizoram Autonomous District Council (Constitution and Conduct of the District Council) Rules, 1974 which provide for constitution of District Councils patterned on parliamentary form of government, provide that the CEM shall be elected by the District

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

Council. This system is working successfully in District Councils for over sixty years now.

The next issues are what should be the course of action to be adopted in cases where House has been fractured to such an extent that there is no possibility of formation of any ministry, and whether the President or the Governor should have the discretionary power of dissolving the House or the matter should be referred to the House for a decision which would decide the question by passing a resolution as to whether the House should be dissolved and fresh elections be called for or not and such decision of the House would be binding on the President and the Governor. As far as the eighth question is concerned, the answer is very clear that if House is fractured to such an extent that there is no possibility of formation of any ministry, the only course of option available is to dissolve the House and call for mid-term elections. However, the more pertinent question here is who should have the power to take a call on dissolution of the House.

The power of dissolution of Parliament is intrinsically connected with the process of appointment of the Prime Minister and Chief Minister in fractured Houses. Under the Constitution of India the power to dissolve Parliament is vested in Parliament, 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 in the President. Normally, the members of Parliament and State Legislative Assemblies are elected for a term of five years, the President and the Governor have the power to dissolve the House "from time to 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. There have been several controversial cases regarding dissolution of Legislative Assembly in exercise of this power by the Governor. 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.

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 has been regarded as one of the royal prerogative powers, the said power has been curtailed to a considerable extent by the Fixed-Term Parliaments Act, 2011. The Act now vests this power in the House of Commons. The Constitutions of Hungary, Belgium and South Africa also vest the effective power of dissolution of Parliaments in Parliament. Thus vesting the effective power to dissolve the House of the people in the House of the People itself, rather than the President, would resolve the problems to a considerable extent. Similarly, vesting the effective power to dissolve the State Legislative Assembly in the Legislative Assembly itself, would also address the problems of unconstitutional use of this power by the Governors to a considerable extent.

Therefore, it is suggested that, *first*, suitable amendments may be made in the Constitution to incorporate the system of Investiture Vote for election of Prime Minister and Chief Ministers by the members of the House of the People and State Legislative Assembly on the floor of the House. This will ensure greater transparency in the political process of appointment of Prime Minister and Chief Minister. This will also promote democratic process by allowing the leaders of various political parties in Parliament and the Legislative Assemblies to choose their own Prime Minister and Chief Minister. Moreover, this will keep the high constitutional offices of the President and the Governor beyond the pale of partisan party politics. This may be done by incorporating the following amendments in the Constitution:

Clause (1) of Article 75 may be amended and substituted with the following:

(1) The Prime Minister shall be elected by the House of the People. The person who receives the votes of a majority of the members of the House of the People shall be elected. In case, no person receives the votes of a majority of the members of the House of the People, the person receiving the maximum number of votes shall be deemed to be elected. The person so elected by the House of the People shall be appointed as Prime Minister by the President. The other ministers shall be appointed by the President on the advice of the Prime Minister.

For appointment of Chief Minister, Clause (1) of Article 164 may be amended and substituted with the following:

(1) The Chief Minister shall be elected by the Legislative Assembly of the State. The person who receives the votes of a majority of the members of the Legislative Assembly of the State shall be elected. In case, no person receives the votes of a majority of the members of the Legislative Assembly of the State, the person receiving the maximum number of votes shall be deemed to be elected. The person so elected by the Legislative Assembly of the State shall be appointed as Chief Minister by the Governor. The other ministers shall be appointed by the Governor on the advice of the Chief Minister.

Secondly, it is also suggested that the system of "Constructive No-Confidence Vote" may also be incorporated along with the system of "Investiture Vote" by making suitable amendments in the Constitution. This will restrict to a considerable extent frequent throwing out of governments which are occasioned largely due to frequent mindless dissensions, defections and political realignments. With Constructive No-Confidence Vote in place, the political parties will not be able to topple a ministry unless they first choose their own Prime Minister or Chief Minister.

Article 75(2) may be amended and substituted with the following:

(2)The Ministers shall hold office during the pleasure of the President.

Provided that the Ministers shall resign, if the House of the People by a majority vote of members present and voting adopts a motion of lack of confidence in the Council of Ministers.

Provided further that the House of the People shall adopt a motion of lack of confidence in the Council of Ministers only by electing a new Prime Minister in the same motion.

Clauses (1A) and (1B) of Article 164 be renumbered as (1B) and (1C) respectively and a new Clause (1A) be inserted after Clause (1) as follows:

(1A)The Ministers shall hold office during the pleasure of the Governor.

Provided that the Ministers shall resign, if the Legislative Assembly by a majority vote of members present and voting adopts a motion of lack of confidence in the Council of Ministers.

Provided further that the Legislative Assembly shall adopt a motion of lack of confidence in the Council of Ministers only by electing a new Chief Minister in the same motion.

Thirdly, it is also suggested that the effective power of dissolution of the House of the People be vested with the House of the People, and that of dissolution of the State Legislative Assembly be vested with the State Legislative Assembly, by making suitable amendments in the Constitution. This will eliminate possibility of colourable exercise of this power by the President and the Governor in dissolving Parliament and State Legislative Assembly.

The present Clause (2) of Article 85 may be amended and substituted with the following:

(2) The President may from time to time-
(a) prorogue the Houses or either Houses
(b) dissolve the House of the People if the House of the People has adopted a resolution to dissolve the House of the People by a majority of total membership of that House and by a majority of not less two-thirds of the members of that House present and voting.

The present Clause (2) of Article 174 may be amended and substituted with the following:

(2) The Governor may from time to time-
(a) prorogue the Houses or either Houses
(b) dissolve the Legislative Assembly if the Legislative Assembly has adopted a resolution to dissolve the Legislative Assembly by a majority of total membership of that House and by a majority of not less two-thirds of the members of that House present and voting.

Incorporation of Investiture Vote for the House of the People and the State Legislative Assembly for electing the Prime Minister and the Chief Minister together with Constructive No-Confidence Vote and vesting of effective power of dissolving the House of the People and the State Legislative Assembly to the respective House will instil greater transparency and accountability in the political process and will also keep the high constitutional offices of the President and of the Governors beyond the shadow of party politics. This will be in tune with the representative republican parliamentary democracy which our Constitution has adopted.