Chapter - 2

Role of President: Coalition and Hung Parliament
We start with the view to examine how substantial a Presidential role may be in providing a viable proposition of government in India. The mandate is that there must be a council of Ministers at all times and there can not be a vacuum. The President can not act suo moto, pleading that there is no council of Ministers in existence. He has to create one and act according to the advice of the council. The view is apparently supported by the fact that in our system there is no such Constitutional arrangement as it is happened in the states i.e. a Presidential rule not withstanding his executive powers (Art. 53) and legislative powers under Art. 123 of the Constitution. The exception for this only is for a very short interregnum between the death of the Prime Minister and the nomination of the successor to carry on the administration till a final choice is made. From this very notion the temporary arrangement, known as "care taker government" comes into existence.

For our relevancy, let's examine the presidential position in India. Hence, it is, here, necessary to refer two views which have been expressed about his position under our constitution. The first view is that he is a constitutional head of the government and his position corresponds to that of the sovereign of the United Kingdom and like the sovereign, the president is under an obligation to act on the advice of his council of ministers. The second view is that the President swears to defend, and has the duty to defend, the constitution and the law; that he represents the unity of the nation, and has, therefore, certain powers which enable him to override his council of ministers.

"I have made this poignant and pertinent digression to dispell the misconceived notion that the position of the president of India is akin to that
of the Queen (or king) of England. This is fallacious for the simple reason
that our President like the Parliament, Supreme Court and other institutions is
a creature of the constitution while the English Queen owes her existence to
history and convention. I also submit that the full contour of Presidential,
power under our constitution has not yet been realised".1

The second view is supported partly on legal, but mostly on political
grounds. The legal ground is that the constitution provides for a council of
Ministers to aid and advice the President in the discharge of his functions.

In some respects the position of President can not be compared to
that of the sovereign of the United kingdom, because the President holds an
elective and the sovereign a hereditary office. Nor would it be correct to say
that the President embodies the unity of India in the same sense in which the
sovereign embodies the unity of the United Kingdom because holding a
hereditary office, the sovereign is, by convention, above and outside political
controversy; whereas, election to the office of the President may involve, and
has in fact involved, intense and bitter party strife since the president stands
as the candidate of a political party, or a combination of political parties.2&3

Secondly the important part played by the sovereign in the United
Kingdom is due partly to historical causes, partly to the sentiment of loyalty
and respect which have grown with the years, and partly to the fact that
Governments come and go but the sovereign remains a constant figure, so that
the acculated experience of sovereign enables him to play a part which the
President of India can not play because his office is elective and lacks the
continuity and stability of a hereditary office. At this place it is enough to say
that Samsher Singh's case has finally established, that the President is the Constitutional head of government obliged to act on the advice of his Council of Ministers. Whether there are any circumstances under which he can act in his discretion is best considered after a discussion of Samsher Singh's case. In this case a bench of seven judges of Supreme court decided very important questions about the constitutional position of the President and the Governor under our constitution. A bench of seven judges was constituted to consider whether the decision in Sardari Lal Vs. Union of India was correct. In Shamsher's case, although the appeals related to the termination of service, they raised questions of great importance about the position which the President and the Governors occupy under our constitution. Two judgments were delivered, one by Ray C.J. for himself, Palekar, Mathew, Chandrachud and Alagiriswami JJ and the other, a concurring judgment, by Krishna Iyer J. for himself and Bhagwati J. Several propositions emerged. One of them is quoted here -

Art. 163 provides for a council of Minister to aid and advise the Governor in the exercise of his functions and makes him the sole and final judge whether any function is to be exercised in his discretion or on the advice of the council of ministers. Although Art. 74 also provides for a council of Ministers to aid and advise the President, that article does not refer to any discretionary power on the President and as a consequence, there is no provision in Art. 74 corresponding to Art. 163 which makes the Governor the sole judge in any matter in which he is required to act in his discretion.
In this proposition, the distinction between the provisions of Art. 74 and 163(2) has been stated tersely by Ray C.J. and has also been referred to in the concurring judgment of Krishna Iyer J. But the conclusion to be drawn from the difference between the two Articles has not been explicitly formulated. Art. 74(1) provides that there shall be a council of Ministers to aid and advise the President in the exercise of his functions, and Art. 163(1) makes the same provision, mutatis mutandis, for the Governors. If the correct conclusion to draw from Arts. 74(1) and Art. 163(1) is that the President and Governors are not obliged to accept and act according to that advice, it would follow that in the discharge of their functions the President and the Governors have a discretion to disregard the advice of the Council of Ministers. But such a conclusion is inconsistent with the express conferment of discretionary power on the Governor under Art. 163(2), for, if Governors have a discretion in all matters under Art. 163(1), it would be unnecessary to confer on Governors an express power to act in their discretion in a few specified discretionary powers on the Governor by Art. 163(2), but not on the President by Art. 74 negatives the view that the President and the Governors have a general discretionary power to act against the advice of the Council of Ministers.\(^7\)

**Amendment of 1976 and 1978:**

Art. 74 provides that the President/Governor "shall" in the exercise of his function act in accordance with the advice of the Council of Ministers. This is a statutory expression of the British convention. As Ivor-jennings puts it, "in nearly every case she (Queen) acts on the advice of Ministers" but in exceptional circumstances the crown would be justified in refusing to accept such advice. Ivor jennings mentions that -
"If Mr. Chamberlain had (as he would not have thought of doing) advised dissolution in May 1940 when Germans were invading Belgium, the king would have been justified in refusing".

Thus the British Convention is flexible and provides for remote possibilities. The use of the word "shall" in Art. 74 causes confusion. If "shall" is interpreted by courts in the absolute sense without exception, situations such as the one cited by Ivor Jennings may cause havoc to the nation. One may argue that such stupid situations may not arise but the law must provide for remote and improbable contingencies.

In the light of the above passage we have to comprise all possible cases or situations. Prior to 1976, there was no express provision in the Constitution that the President was bound to act in accordance with the advice tendered by the Council of Ministers, though it was judicially established that the President of India was not a real executive, but a constitutional head, who was bound to act according to the advice of Ministers, so long as they commanded the confidence of the majority in the House of the People (Art. 75(3)). The 42nd Amendment Act, 1976 amended Art. 74(1) to clarify this position.

The word "shall" make it obligatory for the president to act in accordance with ministerial advice.

The Janata Government retained the foregoing text of Art. 74(1), as amended by the 42nd amendment Act. But by the 44 the Amendment Act, a proviso was added to Art. 74(1) the net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme
Court, the President shall have no power to act in his discretion in any case. He must act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

A vulnerable example in the Indian Constitutional history, that created a constitutional crisis was known as an appointment of Mr. Charan Singh as the Prime Minister. A very brief history is required here of Mr. Charan Singh. Mr. Charan Singh had been asked by the President to obtain a vote of confidence not later than the 20th of August 1979. Accordingly, he was to move a resolution in the house of the people expressing confidence in his Government on that day. However the support of Congress (I), led by his erstwhile arch enemy, Mrs. Indira Gandhi was withdrawn on the morning of 20th August and Mr. Charan Singh tendered his and his Cabinet's resignation to the President of India. After a few days of consultations and discussions with various persons and parties concerned, the President dissolved the House of the people and Mr. Charan Singh and his cabinet remained as "caretaker" Government, without having enjoyed the confidence of the House even for a single day.
Apart from the infirmity in Mr. Charan Singh's appointment and his continuance in office, the question arises whether the amendment of Art. 74(1) in 1976 has altered the law as laid down in Samsher Singh's case. The 42nd Amendment amended Art. 74(1) and 44th Amendment further amended it by inserting a new proviso.

As we have seen, the Supreme Court held that it was necessarily implied in the cabinet form of government adopted by our Constitution read with other provisions of our constitution, that the President was a constitutional head of Government and that he must act on the advice of his Council of Ministers. It is submitted that the amended Article 74(1), without the proviso, merely embodies in an Article of the Constitution what Samsher Singh's case had held by its judgment. This submission is further supported by the statement of objects and reasons for amending Art. 74(1) which states that "the President acts on the advice of the Council of Ministers. It has been made explicit that he shall be bound by such advice". In other words, it was implicit in Art. 74(1) as orginally enacted that the President must act on the advice of his Council of Ministers; the Amendment made explicit what was already implicit in Art. 74(1). As to the proviso to Art. 74(1), the statement of objects and reasons gives no reason for its insertion; but it is apparent from the terms of the proviso that it puts a fetter on the council of ministers by requiring them to reconsider their advice at the instance of the President. The Art. 74 as can not be read in isolation but must be read harmoniously with other relevant provisions of the Constitution. Although Art. 356 provides a safeguard in case of a failure of constitutional machinery in the states, no such safeguard is possible for union. The very fact that the president is liable
to be impeached for violation of the Constitution shows that a duty is imposed
upon him to see that the constitution is not violated. It must follow that there
are some actions of the President for which he is personally responsible, and
liable to be impeached, if his actions violate the constitution. The above
discussion shows that Art. 74(1) can not be construed literally as laying down
an absolute, and not a general rule. For if a President was always bound to
follow the advice of his ministers and they were responsible for his actions
there would be no scope for impeaching him for any of his official actions. In
the result, Art. 74(1) lays down a general rule, subject to the exception that
the advice given is not contrary to the Constitution or to the law and is not
given malafide, that is, out of personal malice or illwill\(^{13}\) or for achieving a
purpose for which the powers was not conferred on the Executive. Nor must
the advice of ministers defeat the underlying principle of the democratic
government. For example, they can not advise the president that effect should
not be given to the clearly expressed will of the people at a general elections.
It is clear therefore that Art. 74(1) cannot be literally interpreted because it
is subject to several exceptions. Furthermore, the elaboration can be brought
to the point from other angle also.

**Doctrine of Necessary Implication:**

As far as the disregard by the President of the aid and advice
tendered by the Council of ministers is concerned. The Constitution has
remained unable to specify because of the difficulty of defining precisely and
exhaustively the rare occasions in which the President may disregard the
advice. But by applying the doctrine of necessary implications the closed
situation can be unfolded. This is another angle from which we are trying our
best to tracing out the fact and circumstances that are required in furtherance of this paper of project in order to make clear picture of the situation so controversial.

It is the President who is constitutionally mandated to act on the advice given by the cabinet and here the satisfaction of the President is in reality the satisfaction of the cabinet and particularly the Prime Minister. But this constitutional command of the President acting on the advice of the Council of Ministers is subject to certain exceptions. These exceptions can be placed in two categories: first, the exception is carved out expressly or by necessary implication in the text of the Constitution itself; and secondly, arises out of the convention involved to meet unforeseen developments because the written text of the constitution is silent on the first category differs from the second also in the sense that in the former the satisfaction is in reality the satisfaction of other constitutional functionaries while in the latter the satisfaction of the President is his own satisfaction.

There are two express exceptions to the established parliamentary norms that the figurehead executive will act on the advice of the elected and accountable executive. First Article 103 enjoins the President to act on the advice of the election commission in matters pertaining to disqualification of a Member of Parliament or State Assembly, a view recently enforced by the Supreme Court in a matter concerning the disqualification of Jayalalithaa, the Chief Minister of Tamil Nadu. Second, Art. 217 mandates that the President will act in consultation with the Chief Justice of India in a matter concerning the determination of the age of High Court Judges. To these two expressly
engrafted exceptions, one may add by necessary implication the third exception resulting out of the pronouncement of the highest court of the land in the second judges case\textsuperscript{14} that the President shall appoint judges of High Courts and the Supreme Court under Articles 217 and 124 respectively with obligatory consultation (read concurrence) of the Chief justice of India. After this historic judgement of our Supreme Court, the primacy in the appointment of Appellate Judges has shifted from the executive to the chief justice of India thereby reducing the advice of the Cabinet in the appointment of Appellate Judges under Art. 174 to a mere formality and of no significance whatsoever.

Exceptions spelt out explicitly or implicitly in the written text of the constitution itself is not as problematic as exceptions springing from the existence of the grey area which in turn is the result of constitutional tacit unity. In this category also there exists two exceptions: First the choice of the Prime Minister; and second, dissolution of the Lok Sabha on the advice of a lameduck Prime Minister who ceases to enjoy the confidence of the House. So far as the dissolution of the House is concerned, it is submitted that the President is not bound at all to act on the advice of the Prime Minister who has lost his majority in the House and the President can act entirely in accordance with his discretion. Similarly Presidential discretion in the appointment of the Prime Minister in normal times is extremely circumscribed and almost negligible if any party secures a comfortable majority and its leader stakes his claim to form a government. But if no party is in a position to form a government on its own, then the Presidential discretion assumes tremendous significance.
Thus, though the Parliamentary system of government, and the constitutional conventions requires the existence of the Council of Ministers for advising the President, yet it is the Council of Ministers holding the command of the House that can bind the President by its advice. On the other hand, the care taker government that is for mere fulfilment of the vacuum limited by not to take major policy's decisions, can not bind the constitutional head by its arbitrary advice. Therefore it is submitted that Art. 75(1) which provides that the Prime Minister shall be appointed by the President necessary implies that the President has discretion in making the appointment. If after a general election, the party in power is returned with a clear majority, the discretion of the President in appointing the Prime Minister would ordinarily be a matter of form. But if in general election the party in power is defeated, and no party with a clear majority is returned to the House of the People, then, notwithstanding that the Ministry continues in office till a new Ministry is sworn in\textsuperscript{15}, the President has a real discretion to ascertain for himself, first, which party or combination of parties can form a stable government, and secondly, which of the persons contending for leadership is accepted by such party or parties as their leader. There are two other provisions of the constitution - Art. 60 and 61 - which necessarily imply discretionary power in the President in certain exceptional situations. Under Art. 60 the President swears that to the best of his ability, he will preserve, protect and defend the constitution and the law", and Art. 61 provides a sanction for the fulfilment of the oath, because under Art. 61 the President can be impeached "for violation of the Constitution". It is a necessary implication of Art. 60 and 61 that if the Council of Ministers advise the President to take action which is admittedly
contrary to the constitution and the law, or which the ministers are driven to
admit is contrary to the constitution and the law, the President can reject such
advice and if necessary dismiss the ministry if it persists in its advice. And if
he is unable to form another Ministry, he can direct a dissolution of the
House of the people and order the fresh general election.\(^{16}\)

So hitherto, it is very much clear that the President is constitutional
head and not a rubber doll. Also it is very much clear that in case, where no
party is having clear majority, the President can proceed on his own
satisfaction, not on Cabinet's one, to protect the constitutional spirit and
sanctity. Let us now move towards the situation which invites allied governing
arrangement that can be a solution of the problem. So before proceeding
further it is proper to mention as to what the hung parliament is.

**Hung Parliament:**

Our recent constitutional history is one of the Hung Parliaments,
long Presidential consultations before inviting someone to form a
government, short-lived governments thereafter and the phenomenon of the
"outside support" which is withdrawn for the flimsiest of reasons. This has
cast a grave doubt on the survival of our present constitutional arrangement. It
has emboldened those who have been advocating the presidential system to
renew their campaign, which is now finding fresh adherents. Those who wish
to see the preservation of parliamentary form of government must devise new
constitutional doctrines and conventions to meet the challenges posed by
current political realities, which are likely to make "hung" parliaments a
recurring feature.
Dr. Granville Austin, a leading American scholar who has worked extensively on the Indian constitution is struck by the fact that the Indian constitution is silent on the issue of "hung parliaments" and states that the framers did not anticipate a situation in which no single party would have a majority in Parliament. While many constitutional luminaries point out to the wide gap between the words of the constitution and practice, the parliamentary impasse is often seen as a result of outright majoritarianism, during the first three decades of republic.

The Reader's Digest Dictionary defines a "Hung Parliament" as a Parliament wherein no party has won a working majority. When such a situation occurs, there is no obvious choice of government. Therefore, four possible consequence arise, they are, in no particular order, a coalition government, a minority government (a government formed with "outside support), a national government (incorporating the possibility of all political parties i.e. multiple parties without a coalition) and lastly, the most extreme of all solutions, re-elections:

It is also necessary to note, at this stage that a Hung Parliament is not a time specific definition. Even where anyone party or pre-electoral alliance has received a majority mandate and formed government, any reduction in the membership strength of this party or pre-electoral alliance may also result in Hung Parliament. Since my paper is concerned with the coalition solution of the problem, I am not going to advocate the option of the National Government, whereas this is one of the solution of the problem of Hung Parliament. Therefore, it can be submitted that the coalition
arrangement of the government is not a time-bound phenomena, it may occur at any time. Ironically a Hung Parliament is a triumph of democracy, being infact, a preferable avoidable phenomenon.  

In the context of first, there was a hung parliament in India as a result of the general elections held in 1989 when no party secured an overall majority of the seats in the Lok Sabha. However, the single largest party was invited to form the government with the outside support. The very fact that the party in power is supported by a party from outside to make up the deficiency, makes the government not a minority one but a majority one. Whether the party that is extending its support joins the government or not is immaterial from the point of view of English constitutional conventions. In other words, it may be treated at par with the coalition having the required majority, whether formed prior to the election or after the declaration of the results following the general election. In the context of the latter situation, there was a hung parliament during 1979 when the ruling party got split into smaller factions. What happened then was that the leader of a party having about 80 members of parliament was requested to form the government with the outside support extended by the other political parties. In the end, such a government was forced to resign even before facing the vote of confidence and the dissolution of Lok Sabha became inevitable. Taking both the situation together it may be said that the term hung parliament need not be consequent only as a result of the general elections, but should also include the consequences of any split or defections through which the ruling party or the coalition is reduced to a minority.
England's View:

So the result or consequence of a hung parliament is either a minority government or a coalition which can command a majority in the House. In this regard, a fundamental question that comes to everybody's mind is whether such a majority is a condition precedent for the formation of a government in the parliamentary system of government. If one looks at the experiences outside India, and more particularly from England, then such experiences should be analysed carefully in the context of the written provisions of the Indian Constitution rather than simply following those practices with any valid reason. In England, the hung parliament occurred as a result of general elections held in 1923, 1929 and 1974. On all these occasions, the minority governments were established. The coalition government of any sort was not preferred under those circumstances. This uniformity in having minority governments whenever there is hung parliament can be taken as a norm or a constitutional convention in England because of the practice established in 1923 and the same that has been followed in 1929 and 1974.

The existing party system in England, the nature of parliamentary supremacy that the legislature is enjoying in the light of an unwritten Constitution and long standing social, cultural and political factors that are unique to Britain have led to the establishment of such a norm or a Constitutional convention. Could such norms be made applicable to other Constitutions as well remains a valid question. In this regard, the statement made by Edmund Burke must be kept in mind, that is the Constitution can be copied but not the sentiments.
Option with the President and Shared Will:

What happens when such a situation arises either due to no party having majority after general elections or by splitting or defecting from the ruling party. The constitutional institution of the President comes under the constant vigil of the will of the people as some author put their elaboration by recommending as to how much wills of the People of the country, the party or combination of the parties are holding.

As one of the eminent Constitutional expert, Mr. Subhash C. Kashyap\(^2\) puts forward his views that the founding father of our constitution, in their wisdom, adopted the first past-the-post or majority system of election where under the person getting the largest number of votes cast is deemed to have got the mandate of the people and is declared elected. Majority of all members of Lok Sabha are so elected by a fractured mandate i.e. with more votes cast against each one of them than for them. Therefore, on the same logic, under our electoral system, the party or alliance that obtains the largest number of seats - not necessarily absolute majority - should be presumed to have received the mandate of the people.

On the same time, the other jurist\(^2\) has even suggested that it is necessary to provide in the Representation of People Act 1951 that no candidate shall be declared elected from a constituency unless he has secured at least 50 per cent of the total votes polled, there should be a repoll to elect one of the two candidates who have secured the largest and the next largest number of votes in the first poll. Moreover, to make an elected candidate a representative of the constituency in the real sense, there has to be a provision
in the Representation of People Act 1951 to the effect that unless at least 40 per cent of the total number of votes in a constituency are polled, the election will not be valid and there should be a repoll.

With these submissions, it can logically be deduced that, the constitution incorporates within it a form of self-government not mere good government, therefore the president who is supposed to be a protector of the constitutional sanctity and spirit is constitutionally bound to honour the will of people in terms of self-government.

With these principles and propositions, it is necessarily required to observe the suggestions and ways to the President to break such impasse of hungness. Jennings says that the Queen has three possibilities in case of splitting and defection and two, when no party obtains a majority at a general election.

In case of first -

(i) formation of a coalition ministry
(ii) formation of a minority government by any one party with the intention of advising dissolution and
(iii) formation of a minority government able to maintain itself.

In the second case Jennings points out, as :

(i) formation of coalition government, and
(ii) formation of a minority government with opposition support.

It is desirable here to note the six propositions advocated by Rajeev Dhavan based on the political developments in India during 1989 the
propositions are:

1. A government defeated in the House may, in certain circumstances, appeal to the electorate. But a government which is defeated at the polls, prima facie, totally exhausts its opinion to stake a claim to form a government for the next parliamentary term;

2. In the event of a defeat of the previous government at the polls, the people have willed a change in the government. Effect must be given to the will of the people by first exploring the possibility of an alternative government to the one that has just lost the election;

3. In the circumstances outlined above, the Prime Minister defeated at the polls must offer his resignation - the resignation to take effect when the process of selecting the Prime Minister has been completed. Such a resignation should be made even if the outgoing prime Minister's party having lost the majority, remains the largest single party after the election;

4. The President must explore first the possibilities of the opposition forming the government, giving first choice to the person who claims the largest support;

5. Where a leader singly, and without competition, states that he is able to form a government such government must be permitted to test its strength on the floor of the House; and

6. Where the opposition refuses, or gives up the attempt to form a government, the President must then (and only then) explore the
possibilities of the party defeated at the polls forming a government, and testing its majority on the floor of the House.

These propositions, in the opinion of Rajeev Dhavan, are extracted from the constitution and principles of electoral, parliamentary democracy on which the constitution is founded. These propositions propose that there shall be some sort of majority or the other in the Lok Sabha for the appointment of a government.

Going with them, what Sarkaria Commission has determined, the guidelines are added value on scaling the thread inshrined them. The Sarkaria commission has some important recommendations to make on the choice of government in such scenarios, that have been use in the part on two previous occasions by past presidents Mr. R. Venkataraman and Dr. Shankar Dayal Sharma. In brief, the commission recommended that the President follow the undermentioned guidelines in inviting parties (alliances/coalitions included) to form government:

1. The first preference is to be given to a pre-poll alliance commanding a majority in the House (option 1).

2. The second preference is given to the single largest party without a majority of its own (opinion 2).

3. The third preference is given to a post-election alliance with all partners joining the government (option 3).

4. The fourth, and last, preference is to an alliance wherein some may join the government and others provide, outside support (option 4).
It can, thus, be submitted that the outcome of the President's act, in relation to the formation of the government, is either in form of coalition government based on pre-poll alliance, or post-poll alliance or minority government supported by the outside or alliances supported by the outside support not sharing the responsibility of the ruling combination in case of hung parliament. Except them, the extra-constitutional demands for national government or presidential form of the government, do not sustain here because of our system which is based upon the Westminster FPTP model of elections but we forgot that it presupposed for its success a two major parity system and the demand for presidential form of government cannot draw our attention as the Supreme Court has pronounced the "parliamentary form of government" as the basic structure of the constitution that can not be destroyed due to the ruling provided by the Apex Court in Keshavananda Bharati's case (1973).

Now what remains is the only option of coalition government which is historically proved in Indian sense as feeble, week and unstable government. This chaos not only causes the economic loss but hampers the country over all progress. It can better be estimated by taking account of the last Lok Sabha's expenditure which cost the exchequer about Rs. 5,000 crore and many times more than that amount was spent by political parties. All this money ultimately came from people's pockets. A country where indirect taxes amount to 80 per cent of the revenue and money-bags who give money to political parties, either white or black, do not give it from their pockets but recover them by increasing prices. Thus the ultimate burden of elections falls on the people. It is the poor section of society that suffers most when
premature elections are inflicted on them for no fault of theirs but of their "representatives" in elected bodies.

As far as the minority governments supported by outside are concerned, though they are recognised by the constitutional system, even recognised by British system of the government, yet they are not politically sound or even morally constitutionally sound. They can not be said to be a fraud on the Constitution but a fraud on people's mandate for government, so it can be submitted that in applied sense, they are not in tone of self-government. They are week, feeble government. In place of them the coalition government is a better option to execute the people's will if certain safeguards be provided for lack of stability and execution of the people's will.

Coalition as Solution:

A few ways are suggested below in which the concept of good governance can be reconciled with that of a coalition government so as to solve the deadlock in a Hung parliament. Some are concrete measures enacted through positive law, others are intangible normatives requiring an internalisation by all the actors in the nation's political theatre. All accept the proposition that coalitions can not be avoided in a Hung Parliament, though they can certainly be regulated. At another level, they even encourage the formation of effective coalitions.

1. Prohibition on Regional Parties: Democracy is part of the basic structure of the Indian constitution. Therefore the idea of banning a regional party from contesting national level elections would seem prima facie unconstitutional. But a closer look at this approach may be useful when
discussing modes of eliminating an unstable situation of Parliament. While Art. 19(1)(c) gives every citizen the right to form associations, it is subject to the right of the state to make any law affecting such right in the interests of the sovereignty and integrity of India or public order or morality. Therefore, it can be concluded that where the right to form a political party is itself subject to reasonable restrictions, law may circumscribe the jurisdiction of its operations, irrespective of democracy being the basic structure of the constitution. What is advocated is that only National parties be permitted to contest National elections. What exactly a National party is would be beyond the scope of this paper for it would be necessary to examine the seats that each party holds in every states to determine a national presence. However it can be stated safely that there must be two variables involved in the determination of a national party. The first of these should be the number of states the party must have a presence in and the second, a minimum number of seats to be held by a party in each of these minimum number of states. Regional parties should not be allowed to contest national elections. This is in consonance with the Indian constitution's commitment to federalism. The idea of having separate politics at the centre and in the states would be rendered useless if states provided a fragmented centre.

In alternative way, it can be submitted that there may be a trend towards developing a system of two major federal parties or alliances. It may be possible for several broadly like-minded parties to come together on the basis of a common minimum programme or a national agenda and form a coalition government, with another similar coalition forming the opposition. The emergence of the National Democratic Alliance Government after the
thirteenth general elections in 1999 has been a pointer in that direction. But, it should not preclude any party on its own occupying in future a predominant position on the basis of popular support to its policies and programmes.

However, if it is to be assumed that the idea of prohibiting regional parties from contesting national elections is repugnant to the Indian constitution, then a viable alternative is to look at and import the principles of contract law into election law. Every candidate subscribes to a manifesto. The manifesto is a collection of promises made to the public. The public votes in return for these promises. The expectations of the public aroused in lieu of promises made in the manifesto, constitute a form of legal consideration and complete the process of formation of valid contract, binding the offeror to perform or, rather to honour the promises made. The vote is, hence a manifestation of legal consideration and a contract exists between every successful candidate and each person who voted for him. Therefore, every time a candidate attempts to change his party it is in fact a variance of promises, a repudiation of contract resulting in the necessity for such candidate to resign from such public office forthwith. The Anti-Defection law in the X Schedule of the Constitution remedies this to some extent when it states that a valid defection occurs when one-third of the members of a party defect. This, however, has to be viewed in the light of two criticisms. Firstly, one-third of the party does not constitute sufficient percentage to be deemed to have been the party whose manifesto was "actually" voted for. Such a deeming provision would be tenable only where half or more of the original party defect. This would create a reasonable doubt as to which is the 'real' manifesto and both factions would be saved from the breach of contract.
Furthermore, if regional parties are allowed to contest, their gains in parliament can not be very large and one-third of their party would not be a very substantial amount. Therefore, once again, to prevent easy defections, there needs to be a substantial raise in the defection percentage. It is necessary here to discuss X schedule from other angle also i.e. from hung parliament's.

**Hung Parliament and the Tenth Schedule:**

There will be large scope for defections from one vulnerable party to another, circumventing the relevant provisions of the Tenth Schedule to the Constitution. It would therefore be proper to study the various provisions of the Schedule and suggest ways and means to deal effectively with the evil of defection.

Despite the constitution (52nd Amendment) Act, 1985, popularly known as the Anti-Defection Law, which seeks to outlay defections, the legal provisions thereof so far led the presiding officers of the State Assemblies to give different interpretations of the concerned cases, not resulting in the curtailment of the evil of defections but in giving tremendous impetus to its growth. The general phenomenon increasingly noticed has been that more than one-third of the members of a party represented in the legislative bodies stage defections on the specious ground of a 'split' which is legally exempt from incurring disqualification. It is most unethical for legislators to use this armour and shift their loyalty after elections to another party from the one on whose ticket and symbol they have been elected. Such shifting of loyalty normally confers on the defected members power and pelf which they were
not originally enjoying. It is also apprehended that corruption and bribery were behind some of the defections.

This sad phenomenon had been increasingly noticed after the 1967 elections to the Lok-Sabha when the political picture of a monolithic party ruling the Centre and a number of State changed with no political party securing absolute majority thereby creating the necessity of forming coalition governments of parties not necessarily like-minded. As these were opportunities of alliance not being based on any common ideology but based on the sole purpose of clinging to power, these Governments were quite unstable and encouraged the evil of defections.

A number of legislators crossed the floor of the House for monetary considerations. Ministries fell because of large-scale defections and new Ministries were formed with the support of fresh defectors. Some of the MLAs even changed sides three or four times during the course of a single day. 'A new phraseology Aya Rams and Gaya Rams' was coined to describe defections. It was also estimated that after the 1967 general election during the one-year period, 175 Congressmen defected to other parties and the Congress party gained 139 members by way of defections from other parties. It was estimated that after the 1967 general election, 800 MLAs defected between 1967 and 1970. We have had the sorry spectacle of the entire flock of our elected representatives on one State led by their shrewd leader shifting loyalty.

The act of defection was known in the House of Commons as 'floor-crossing'. Even Sir Winston Churchill and Lloyd George had at least at one
time or the other stage 'floor crossing'. Of course in that country, floor-crossing was quite often the outcome of honest deferences of opinion. The underlying principles of the Tenth Schedule to the Constitution, otherwise termed as Anti-Defection Law, are quite laudable. But putting the legal provisions thereof to actual practice produced ill effects.

These provisions require urgently drastic changes in the following manner to make the law quite effective.

(i) First, the Speaker or Chairman (vide paragraph 6 of the Tenth Schedule) is made as the final arbiter in determining the disqualification cases under the Anti-Defection Law. Paragraph 7 of the Schedule barring the jurisdiction of the courts has been struck down and the decision of the presiding officer is now made subject to the judicial review by High Courts and the Supreme Court. Still making the Presiding Officers the deciding authorities in this important matter passes one's comprehension since the Speakers in our country are elected every time in a contest with the support of the majority party in the House which is the ruling party unlike in UK and elsewhere where the principle of "once a Speaker always the Speaker" normally applies.

(ii) The Election Commission should be made the deciding authority as in all other types of disqualifications under the Constitution.

(iii) Till the Commission decides the legal issues, there is scope also for an interim order passed either by it or by the Presiding Officer of the House concerned disqualifying the member from holding 'any office' under the government or participating in any debate or voting in the House.
(iv) A reasonable time-limit, say three or six months should be fixed in the law, for the final disposal by the Election Commission of a disqualification case.

(v) Having regard to the sacred principles of democracy, there is absolutely no justification for treating differently the types of members namely, the one-third of the members of a party on the ground of 'split' as in paragraph 3; merger of parties if two-thirds members of the party agreed to such merger as in paragraph 4 of the said Schedule; independent and nominated members. In fact, there should not be any legal question of a member 'voluntarily giving up his membership' of his party being separately treated.

(vi) In all such cases, the result should be made the same. After elections are over and the House is constituted or functioning, if any one of the above mentioned contingencies arises, the seat should be declared by the Election Commission as vacant. In other words, the member should not be made entitled to continue as such member once a declaration is made by the Election Commission. Of course, the rule of law and principles of natural justice should be applied before the Election Commission takes a final decision in a given case.

The object of passing the Anti-Defection law in the tenth schedule was to constrain deflections, to restrict horse trading and to get rid of the myriad of suitcase politics, but, in effect, it had become an enabling law for larger deflections. As the Constitution Commission has said, "en bloc defections are permitted". Defectors are usually lured with ministerships or
other political offices and perquisites "so openely that it really makes a mockery of our democracy". The commission recommended that all defectors - whether individual or group - must resign and contest fresh election. They should be debarred from holding any public office of a minister or any other remunerative political post without winning at a fresh election. Also, votes cast by them to topple a government should be treated as invalid. However recent events testify, splits, splits within splits, making and breaking of countless parties have not only tainted the political scene but also smeared it with unprecedented pettiness. Whilst considering the topic of 'hung parliament' the discussion can not be just limited to the aftermath of elections and any proposed solution must also comprehend events wherein a functioning government is reduced to a minority due to defections.

Tackling the problem in a different focus, one can question the propriety of allowing defections at all. Most political parties, on record, have gone to state that they would suitably amend the Anti-Defection law to reduce the frequency and ease of splits. However, the apathy of hung parliaments and assemblies could perhaps be better solved had political parties looked to German and French experiences to root out defections in its entirety which can be explained as follows : people do not vote for candidates but for parties i.e. the ballot paper of a constituency contains a list of political parties as against the name of candidates. If a political party is voted in a constituency, then it would designate its party worker of that constituency to represent it in the parliament. The logic that follows, is that if a M.P. defects, he not only ceases to be member of the political party but would necessarily and logically
ceases to be an M.P. because, he owes his seat to his party and cannot under any circumstance part with it.

2-Pre-Poll Coalitions as a Norm: The first is what one may call a change in political attitude. Till now political parties have resorted to coalitions and outside support techniques to meet their ad hoc political aspirations splits and defections are constantly engineered to meet these aspirations at least at the state level. The general opinion then is that coalitions can not lost. There is no proof to the effect that coalitions can not lost. There are countries which have proved the contrary. However, the difference lies in the reasons for the coalition. In India, till now coalitions are the result of all the wrong reasons. Hitherto, political parties have been too shortsighted to realize the futility of ad hoc overnight coalitions. Thus there is a general trend of one party aligning with the other so as to survive a vote of confidence the next day. There seems to be an evident failure of perception here. Is it really possible for two parties divergent in ideology, with hostile opponents in recent elections and with contradictory manifestoes, to foresee a longlasting alliance. This is a myopic view created by the distasteful craving for the power. It is suggested that though coalitions are the right step in making the best out of hung parliaments, there is a need for a mature understanding of the implications of co-alignments. Political parties now have a wealth of experience as to what can go wrong in a coalition. These problems must be pre-empted, one national party has already taken the correct step in this direction, having secured a coalition before heading to the polls. However, even this party only secured a national agenda after the polls. It is necessary that pre-poll coalitions become the norm. This is doing justice to an
electorate which is often forced to be ruled by a coalition consisting of the party it voted against in the polls. However, such a change is possible only if there is a political will for it. Parties must realise that their responsibility extends beyond forming a government. It extends to providing a justly formed government, according to democratic norms. The conscious realization of this imperative responsibility is what we call a change in political attitude.

3. A Statute Regulating Party Politics: Following from this last point, it is suggested that there should be a statute regulating party politics in the case of hung parliament. This statute may either be a constitutional one or a legislative one. This statute must regulate at one level coalition governments. It may provide against post-poll alliances since these are basic violations of democratic norms. Another provision may be to disqualify a party from national politics if it withdraws from a coalition within a specific period of time. Of course, this shall require a proper definition of the term "withdrawal". For instance, if the party officially continues to support the coalition but its members constantly vote against that coalition, it must be considered in pith and substance, a withdrawal of support. The disqualification of those who have retreated on their word to the nation is not only an apt punishment but also serves as a sufficient deterrent to withdrawal. The statute must also provide against one party supporting a minority party from outside, since in effect the supporting party is propping up the government. It should, therefore, be forced into accountability by making it sit on the treasury benches. One may question the democratic worth of such a statute. For instance, can the main coalition party take advantage of situation where the minor partner is forced to vote for a statute despite the statute being potently against its ideology. There are
many reason why this is unlikely to happen. Firstly, the implication of getting involved in a coalition being what they are under the envisaged statute, it is likely that parties shall choose the partners carefully. Further, the sanction on a partner wishing to pull out shall only be for a minimum time period whereby stability can be secured. Also, those tactics shall reflect badly upon the major party and it shall lose out in the next election that by itself must be deterrent enough. Besides this, since the minor party shall also be part of the council, there shall be a filter process at the policy making stage in the cabinet itself. Also, in exceptional circumstances, the party may be allowed to pull out of the coalition, the power to decide whether a circumstance is exceptional, must lie with a tribunal constituted by parliamentarians themselves. Lastly this is a classic situation where a change in political attitude would come in handy. It would give rise to a healthy convention such as the restraint of the major partner from impinging upon its minor partners ideological sensibilities despite the fact that the minor partner has made clear its desire to leave the government. Such an attitude may even lead to a reconciliation between the two.

Thus, these are the political parities which participate in the democratic processes of nation’s governance must themselves be democratic in their internal organisation. They need to be regulated by law. Party membership must be open to all citizen without any distinction, party elections must be regular, free and fare.  

4. A Great Role of the President: Finally, it is suggested that there should be a greater role of the President in the situation where a hung parliament exists. The Constitution must be amended to at least allow for an efficient
President in a Hung Parliament scenario. As yet, situation is that the President continues to be bound by the advice of the caretaker council of Ministers even where that Council has lost the support of the house, theoretically meaning the support of the nation. Fortunately convention has developed so as to prevent this illegitimate council from taking major policy decisions while it exists. However, what this means is that the nation floats aimlessly in space. Until a new government comes along. In a Hung Parliament scenario this new government can be long in coming. Till then at least the President should have the run of the Government. He already has inherent powers of legislation (Art. 123) and execution (Art. 53). He must now be enjoined and enabled to exercise them. As a result the nation shall at all times have some sort of government.

The question remains as to what the President must do in the case of a hung parliament. This is undoubtedly a situation incomparable to one where a single party commands the majority of the house. Where in the latter case the President is bound to invite that party to form the government, the former case affords him an opportunity to exercise his personal discretion. There have been arguments to the effect that even this personal discretion should be guided by a constitutional express provisions. Greater freedom may also be given to the president in deciding on the method of government in the interregnum. For instance, if the President so desires, he may wish to follow the precedent set by Ireland where a Council of Elder Citizens sits in the absence of a Parliament.

One may be tempted to criticise the views submitted above in that we have assumed the fact that a coalition is in fact possible every time under
a Hung Parliament. We submit that it is not. However, it is also submitted that
the above given suggestions facilitate, at one level, the necessary formation
of coalitions, and at another level, the existence, at all times, of a government
in the real sense of word, for the nation. A conscious change in political
attitude shall lead to the realisation that coalitions can not be done away with.
They are India's version of democracy. This shall encourage all to make the
best possible coalitions.

In the end it is submitted that though coalitions are not the logical
outcome of a Hung Parliament, they can certainly become the most desirable
one if regulated in the right way the only other option is an election, and
though elections are the price for democracy, it must also be remembered
that democracy does not come cheap and India can not afford the cost
frequently. With this analysis, the desirable outcome produced by the situation
in terms of viable proposition, it is now required to go through the influence
over the text of the provision of Article 356 as to whether it constitutes a
democratic check on the political version of the provision.
NOTES & REFERENCES


2. It is a matter of history that the election of Shri V.V. Giri, to be the President, split the Congress party into two and led to bitter political feuds.

3. Unlike the monarch in England, the President in India owes his office to the party in power at the centre. All but three Presidents have been professional politicians. So, as Sir Ivor Jennings in *Cabinet Government.* 328 (Cambridge, paperback 1969) put it, while the constitutional monarchy is free of party ties, a promoted politician can not forget his past; even if he can, others cannot, it does not mean, however, that the monarch has no political sympathies.


5. AIR 1971, SC 1547.

6. AIR 1974, SC 2196.

7. This submission is by eminent constitutional author H.M. Seervai in *Constitutional Law of India (IIIrd Ed.)*, p. 1713.


9. Ibid.

10. Art. 74(1), as so amended, reads:

   "There shall be a Council of ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

11. "Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration".
12. Supra no. 8.

13. *Shah Commission Report*, para S. 47 and S. 48 which show that on 25th July 1975, the locking up of the HC had been considered but later given up.


19. The sanctity of a 'majority' is understood to be one of the four essential factors of a parliamentary govt. (The four being the principles of majority rule; the willingness of the minority to accept the decision of the majority; the existence of great political parties divided by broad issues of policy rather than by sectional interest; and finally, the existence of a mobile body of political opinion: Shamsher Singh Vs. State of Punjab (1974) 2 SCC 831: also Ramjawaya Kapur Vs. State of Punjab (1955) 3 SCR 505 : .B. Rao Vs. Indira Gandhi (1971) 2 SCC 63. The term majority has different connotations under the Constitution....
while Art. 4, 169(3) and Art. 239-A and the passing of ordinary pieces of legislation requires a simple majority, Art. 368 speaks about a two-third majority. However, as explained by S.R. Bommai Vs. Union of India (1994) 3 SCC 1, the "floor test" is satisfied on a party proving a simple majority. Also Soli Sorabjee "Bommai's case (1994) 3 SSC (J).


22. P.P. Rao, Senior Advocate, SC.


24. The Indian Express, Nov. 27, 1989.

25. P.V. Narasimha Rao's case. Two judges of the SC declared that "parliamentary democracy is a part of the basic structure of the constitution" without any dissent by the remaining three judges on the bench.


27. Supra, Chapter I ref. n. 23.

