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A Conundrum of Constitutional Mandate and Discretionary Powers of a Governor in the Event of a Hung Assembly

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ABSTRACT

The office of the Governor is a constitutional one, he is not considered as one belonging to the legislative organ, but he is reckoned to be the head of state executive structure. The main aim of the Governor is to support the concerns of both- the States and the Union and to ensure a continuous flow of powers with no overlap. The Governor stays in office at the pleasure of the President and, hence attributes his appointment to the President. To facilitate an effective balance of powers between the union and state, the Indian constitution has accurately given some powers to the Governor. Nevertheless, there have been several occasions wherein the Governor has misemployed his constitutional powers, one such occasion being at the time of appointment of the Chief Minister of a State in a situation of a hung assembly. Hence, the main objective of this paper would be to analyse the scope of discretionary powers of a Governor with respect to a hung assembly in light of contemporary events. Also, the paper will lay down the judicial developments in this regard and what innovative solutions can be implemented to resolve this State-Governor dilemma.

Keywords: Governor, discretionary power, constitutional provisions, hung assembly.

I. INTRODUCTION

The Indian Constitution is the most extensive constitution in the world. This is because the founders of the Constitution focused on the smallest detail while formulating the fundamental law of the land. Still, several grey areas have come up in this otherwise ambitious document that were not foreseen even by our founders but gradually turned out to be a cause of concern. Some of them emerged as complicated concerns in which sometimes the citizens dissented against the State or two or more State bodies were entailed. Several times the structure remained firm to efficiently address the concerns and thrived in settling them as well, while other times in spite of immense attempts, it only aggravated the complexity of the concern.

One of the occurrences has been the manner discretionary powers have been employed by the Governors as per Article 163 in several States in situations of a hung assembly. These grey

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areas are known as Constitutional silences, a phrase first devised by Lawrence H. Tribe in his distinguished work “Invisible Constitution.”² According to Tribe, “the scope and impact of the written Constitution are not as irrefutable as we contemplate.” The framer will either leave certain portions unaddressed so that they are treated in a way they need to be in the future. Or it might occur that in spite of the best of attempts, certain portions might unintentionally be skipped.

II. CONSTITUTIONAL PROVISIONS

Considering the discretionary powers of the Governor in the case of a hung assembly, Article 163(1)³ and (2)⁴ of the Indian Constitution discusses these powers and states that-

- 1) There would be a Council of Ministers with the Chief Minister at the front to assist and guide the Governor in the performance of his functions, except as far as he is “by or under this Constitution” necessitated to perform his functions or either of them in his discretion.
- 2) If any concern emerges whether any issue is or is not an issue regards which the Governor is by or under the Constitution needed to function in his discretion, the Governor’s decision shall be final, and the rationality of anything undertaken by the Governor shall not be challenged on the basis that he ought or ought not to have performed as per his discretion.

The honourable Justice P.N. Bhagwati and Justice Krishna Iyer while hearing a case related to discretionary powers stated that it is the President and the Governor who are the overseer of the executive and they shall perform their constitutional functions only as per assistance and suggestions of the Council of Ministers except in certain exceptional circumstances.⁵ With respect to functions related to his exclusive discretion, the Governor’s immunity is absolute and goes beyond even the writ jurisdiction of the High Court. The power of the Governor over the Chief Minister’s appointment is one that he has exclusive discretion over, and hence the court cannot put it under question.^{6 7}

Furthermore, the Indian Constitution does not describe the term “hung assembly.” The common meaning of a hung assembly is that it is a condition where no political party or pre-election

² Lawrence H. Tribe, *The Invisible Constitution* 47 (Oxford University Press 2008).

³ INDIA CONST. art. 163, cl. 1.

⁴ INDIA CONST. art. 163, cl. 2.

⁵ *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

⁶ *Madan Murari Verma v. Choudhari Charan Singh*, AIR 1980 Cal 95.

⁷ *S. Dharmalingam v. His Excellency Governor of Tamil Nadu*, AIR 1989 Mad 48.

coalition obtains a majority in the Parliament at the Union level or in the legislature at the State level. As explained by Oxford Dictionary a hung assembly is an assembly where no party obtains a clear majority. In such a condition the option is either to organize fresh polls or summon a political party (pre-election coalition, post-election coalition, or single party) that a Governor believes could confirm its majority on the floor of the House and obtain the confidence vote. And if the stated requirements are satisfied then that party's leader is summoned to undertake an oath as the Chief Minister of the State. In a nation like India while it is not practicable to organize new polls due to the population, formulating a post-election coalition calls for several concerns in this respect.⁸ To solve this issue the Governor performs his functions and employs his discretionary powers in this respect.

III. ISSUES INVOLVED IN THE CONTEMPORARY CONTEXT

The major issue that emerges here is that the way to employ this discretion has been given in neither the Representation of Peoples' Act 1951 nor even in the Constitution. Also coequally surprising is its silence on the performance of floor tests in assembly. Though it is not provided anywhere, the Governors have to attempt to recognize a party or a coalition that can formulate a stable government in the State. There can be distinct situations arising post elections and there is no robust arrangement for summoning parties to formulate a government.

Such employment of this discretionary power was not even foreseen by Dr. B.R. Ambedkar who in regard to the issue of Pandit Thakur Das Bhargava during the Constitutional Assembly debates with respect to the limit of discretion stated that identical clauses were present in the Constitution of Australia and Canada and they are mentioned there as they were a century ago. This necessarily means that Constitutional silence could have been communicated at the start itself but it could not be foreseen on the grounds of the kind of politics in the future.

Current years have witnessed huge political disruption if a condition of hung assembly emerges post-assembly polls or the Chief Minister misses out on an absolute majority during his term. The Court has exhibited an unbiased approach while handling such matters by not filling the legislative gap. A similar initiative was undertaken after the latest Goa polls when BJP gained victory in the formulation of the Government through a post-election coalition in spite of Congress arising as a party with the highest number of seats.⁹ Karnataka Assembly polls were another extension to this vacuum, in fact broadening it the most, and then the apex court had to

⁸ Mithlesh Kumar Pandey v. Election Commission of India, 2014 SCC Online Del 4771.

⁹ Chandrakant Kavlekar v. Union of India, AIR 2017 SC 1435.

arrive for resolving the matter by ordering to perform the floor test in 24 hours.¹⁰

The phrase “by or under this Constitution” relating to the discretionary power of the Governor has encompassed the establishment with numerous accusations, majority of them related to the supposed tinge of partiality in his performance supporting the party in power at the Union level. An occurrence of the same is displayed by both Goa and Karnataka State Assembly polls along with several others. In Karnataka, Mr. Yeddyurappa of BJP was inducted as CM on the first occasion. Nevertheless, the apex court’s intervention and the floor test resulted in a post-election coalition of Congress- JD(S) directing the majority support.¹¹ Such an unsteady type of Government can never be labelled to be a directive of the Constitution and one of the Governor’s operations is to safeguard this stability for the effective functioning of the Government that he was unable to do, not just in Karnataka but in several other states.

Though the earlier judgment of the Goa Assembly matter ensued with no fixed recommendations in deciding the limit of discretionary powers of the Governor in the choice of CM of a State, another petition has been recorded. The major matters for concern in this instance are-

1. Irrespective of the immunity conferred upon the Governor as per the Constitution under Article 163(2) and Article 361, whether the court can evaluate his performance under the given Articles.
2. Whether the performance undertaken in the employment of discretionary powers as per Article 164(1), mainly in the appointment of a CM in the situation of a hung assembly, can be judicially reviewed.

IV. JUDICIAL DEVELOPMENTS

Against the backdrop, it is quite visible that Constitutional silence is not golden. The apex court had a main part to play as the ultimate interpreter of the Constitution to put an end to this silence that has taken the shape of a vacuum. Discretionary power without an authorized method and arrangement of performance in a situation of hung assembly led to exclusion and the Court has limited itself from extracting words from the noise of silence since it would lead to extensive intrusion into the boundary of the legislature to put down a law controlling the executive. Nevertheless, the Supreme Court has been resolute in its opinion to safeguard the spirit of the Constitution by not permitting serious abuse of the rule of law.

¹⁰ G. Parmeshwara v. Union of India, (2018) 16 SCC 46.

¹¹ The Hindu, <http://www.thehindu.com> (last visited 25th November, 2022).

Earlier, the Court has undertaken a limited perspective when in *Samsher Singh v. State of Punjab*,¹² it was decided that the appointment of a CM is one of the instances where the Governor has the power to perform his discretionary powers but it should be considered that the objective of the performance is that the candidate should be capable to benefit. The Supreme Court in the same judgment as well as in *B.R. Kapur v. State of Tamil Nadu*¹³ did not consider the feature of judicial review of discretionary acts along with absolute immunity provided for such activities as per Article 361. Correspondingly, the chances of putting down legal recommendations did not take place.

Later, in the remarkable decision of *S.R. Bommai v. Union of India*,¹⁴ the Court stated that judicial review was an integral aspect of the Constitution and therefore a part of the fundamental framework of the Constitution of India. For the first time, the Supreme Court considered the facet of judicial review of discretionary activities in matters of maladministration, unreasonableness, or insignificant basis however it was not with the objective of appointment of Chief Minister but for declaration of State Emergency. Assumption of misuse of discretionary power by government officials has also been recognised in *Chintalingam v. Government of India*¹⁵ and *Shiv Sagar Tiwari v. Union of India*¹⁶ and it was stated that no exemption can be made in support of any official.

Nevertheless, the Court also formed an unusual departure in the matter of *M.P. Special Police Establishment v. State of M.P.*¹⁷ when it stated that there are certain situations in which for protection of rule of law, it is relevant for the Governor to employ his intellect autonomously and these situations involve cases of propriety where he can perform at his own discretion. But situation improved in *Rameshwar Prasad v Union of India*,¹⁸ where the Court ultimately provided voice to Constitutional Silence where it clearly stated that Article 361 does not provide absolute immunity to the Governor and this can be inspected in a court of law if the basis of maladministration and ultra vires are observed. The judgment was later confirmed in *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*.¹⁹

The court stated that the idea of Constitutionalism has to dominate over colonialist likelihood. As the Court has displayed excessive convenience by adopting the perspective of judicial

¹² *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.

¹³ *B.R. Kapur v. State of Tamil Nadu*, AIR 2001 SC 3435.

¹⁴ *S.R. Bommai v. Union of India*, (1994) 3 SCC 296.

¹⁵ *Chintalingam v. Government of India*, 1971 SCR (2) 871.

¹⁶ *Shiv Sagar Tiwari v. Union of India*, AIR 1997 SC 2725.

¹⁷ *M.P. Special Police Establishment v. State of MP & Ors*, 2005 SCC (Cri) 1.

¹⁸ *Rameshwar Prasad & Ors v. Union of India*, AIR 2005 SC 4301.

¹⁹ *Nabam Rebia and Bamang Felix v. Deputy Director, Arunachal Pradesh Legislative Assembly*, 2016 SCCOnLine SC 694.

negligence with regards to not formulating any suggestions related to the way in which discretionary power has to be employed but an ordinary characteristic in its decisions is to guide the contesting parties to have a combined floor test even if it needs summoning a distinctive session of the Assembly as carried out in *Jagdambika Pal v. State of U.P.*²⁰

V. POSSIBLE SOLUTIONS FOR THE ISSUES INVOLVED

The Central Government has to come to terms with the idea that no Chief Minister will be appropriate to carry out governance if he/she does not possess a majority in the Assembly since finally a floor test has to be organized either at the start of term or at any instance during the term. A constitutional amendment is the only robust answer that can bring the matter to rest. It will save the parties and the Governor from corroding the purity of the Constitution ideals and decrease the possibility of horse trading, reinforcing the anti-defection law in the course. A stable government that not only retains the confidence of the Assembly but also of the citizens should always stay in power. People's confidence takes a secondary place once the outcomes are announced, in the current scenario. Constitution silence also provides an opportunity to the judiciary to understand the Constitution.

Several efforts have been made by several commissions to suggest certain guiding concepts relating to employment of absolute discretion in the situation of hung assembly. The suggestions of Sarkaria Commission were restated by the Punchhi Commission in 2010. The principal compliance specified by the mentioned reports involves engaging that section holding the largest support in the Assembly. Nevertheless, non-existence of this section permits the Governor to select in the manner determined by these Commissions, i.e., Sarkaria Commission proposed that:²¹

- i. The party or collaboration of parties that holds the extensive backing in the Legislative Assembly should be summoned to formulate the Government;
- ii. The Governor's job is to ensure that a Government is formulated and not to attempt to formulate a Government that will follow policies that he permits."

In situation where no party or coalition can declare of holding absolute majority, the manner in which blocs are to be summoned is:

- i. "A coalition of parties which are formulated before the polls.

²⁰ *Jagdambika Pal v. State of UP*, AIR 1998 SC 998.

²¹ Ministry of Home Affairs, <http://www.mha.gov.in> (last visited 25th November, 2022).

- ii. The largest single party formulating a claim to formulate the government with the backing of others, inclusive of “independents.”
- iii. A post-electoral alliance of parties, with all the individuals in the alliance uniting with the Government.

Furthermore, to resolve this issue, the approach must be three-forked:

- i. Stringent defection legislations which must comprise disqualification from directing polls for at least 10 years;
- ii. The governor’s discretion must comply with the Constitutional mandate of summoning parties in the manner of arrangement laid down in the Sarkaria and Punchhi Commission recommendations;
- iii. In situation the Governor is required to deviate from the mentioned mandate his performance must go through the litmus of judicial review;

This would be the most viable end to the Karnataka like enigma. In this way, the constitutional directives of absolute discretion are not completely crumbled and can be put into effect when entailed by any later uncertainties. In addition, when Governor’s acts are carried out within agreed framework and inclined to being judicially reviewed, constitutional authority is maintained over institutional predominance that is contradictory to constitutional democracy.

In the end, compressing executive intervention in the formulation of State to completely demand predetermined events is sufficient to secure rule of law and safeguard the pillar of parliamentary democracy where it is only the judiciary that can be the “justifiable repository of complete discretion.”

VI. CONCLUSION

In spite of the fact that the complete discretion in relation to the appointment of Chief Minister in a hung assembly is really broad for the absence of direct constitutional restrictions. Even when directing principles prevail, they are not irrevocable and thus, fears related to the abuse of powers are adequately present.

One limitation is to easily discard complete discretion that does not appear to be a viable choice in view of the motive with which such a clause determines its place in the Constitution. What prevails is a restricted discretion of the Governor by which he must be permitted to summon the party competent of directing majority support but not at the expense of demeaning constitutional democracy. He must be confined to the given recommendations while summoning the leaders to formulate a majority. The only other choice is re-polling which imposes an immense danger

of misuse of public money while directing to a likelihood of identical result leading to hung assembly.

Constitutional predominance accompanied by democratic concepts of the country are of paramount significance and must remain secured from the invasion of any establishment.

The idea that the Governor is an exclusive establishment bearing the burden of State Extremist inclinations does not serve in a current political setting. Nevertheless, determined and biased political intervention on the Governor's part, especially in the establishment of State governments, has been observed lately more often than ever. The remedy lies in putting direct concerns regarding the significance of the establishment, especially the broad discretionary powers entrusted upon it, instead of attempting to scribble the surface and offering satisfying remedies to insignificant portions of the significant matter.
