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Governor and Constitutional Conundrum: A Relook at the Discretionary Powers of the Governor in Case of a Hung Assembly

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ABSTRACT

It is surprising to note that our Constitution is eerily silent on the manner of appointment of chief ministers by the governor in case of hung assembly. Equally astonishing is its silence on the conduct of floor tests in assembly.

The questions and controversies about the role of governor remain multifold. However this paper focuses on his role under Article 163(2). I aspire to answer the following questions through this paper:

- *What is the requirement to bestow the Governor with wide discretionary powers in case of a hung assembly?*
- *In case of a hung assembly, is the Governor bound to follow the constitutional convention to call upon the single largest party to form the government and prove its majority in the House? Or, as the court endorsed in case of Goa Assembly elections and then later even in the Karnataka elections, can a political rival cobble together a post-poll alliance to form a majority that overcomes the single largest party and form the government?*
- *Looking at the recent instances of hung assemblies in Goa, Manipur, Meghalaya, and even in Karnataka, can it be said that the political power in centre tries to manipulate the powers granted to the governor? Does this show kind of malice which could attract judicial scrutiny?*
- *Has the time arrived when in the interest of democracy we need to redefine the powers of the governor in order to stall the misuse of the same especially considering the institution itself is a British legacy flowing with its inception under the government of India Act, 1935?*

Lastly, I intend to provide suggestions to make the post of governor more accountable, reduce the influence of parties and most importantly creating a balance in the exercise of discretionary powers in case of need versus misuse of power.

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I. INTRODUCTION

Federalism has been declared as the basic feature of the Indian constitution.² It cannot be abrogated either directly or through colourable exercise of power by any competent authority.³ To effectuate the features of federal structure Indian constitution clearly demarcates the powers between the centre and state in the form of the lists in the 7th schedule and the residuary powers vests with the centre.

The manner of appointment of the legislative and executive heads at both centre and state level has been clearly defined in the constitutional provisions. To maintain a link between the centre and state governments, a special constitutional post was devised-the governor-which essentially is the legacy of the British under the Government of India Act, 1935.

A governor is expected to act only as a nominal head while the real power of governance and administration lies with the chief ministers and their council of ministers. The primary function of the governor is to preserve, protect and defend the Constitution and the law as incorporated in his/her oath of office under Article 159 of the Indian Constitution in the administration of the state affairs.

In addition to important executive and legislative powers, the governors also enjoy discretionary powers in the selection of the chief ministerial candidate in situations where no party gets a clear majority and ask him/her to prove the majority as soon as possible.

Amongst the various domains in which the Governor can exercise its discretionary functions, the appointment of Chief Minister under Article 164 has become a rather controversial one. This is particularly because the order in which the Governor should invite political parties to form Government in cases of a hung assembly has been a vexed one to which no clear answers are applicable in all times. The problem gets exacerbated by the fact that both the Constitution and the Representation of People' Act are silent on the use of Governor's prerogatives in case of a hung assembly. Granville Austin in his book -Cornerstone of a Nation- speculates that this absence might be because the Constitution drafters did not anticipate a situation in which no single party would secure a majority in the house.⁴ Although if one takes a look at the constitutional assembly debates it does not remain as shocking considering these provisions were discussed in just one day out of about three years that it took to draft the Indian Constitution. Nonetheless, the Governor's use of discretionary

² SR Bommai v. Union of India, A.I.R. 1994 S.C. 1918 (India).

³*Id.*

⁴Manuraj Shanmugsundaram, *Governor's Discretion*, THE HINDU, September 24, 2018, <https://www.thehindu.com/opinion/op-ed/governors-discretion/article25021561.ece>.

power in the appointment of the Chief Minister has become an arena of political manipulation and the ambiguity attached with it has often enabled the Central Government to get into state politics through the Governor's office.

Through this paper I delve into grey areas relating to the exercise of discretionary powers of the governor in case of a hung assembly. I try to analyse the relevance of such an exercise of gubernatorial discretion. I try to bring in light the various instances of misuse of this constitutional mandate by the governor.

II. HISTORICAL BACKGROUND: THE COLONIAL LEGACY

BEFORE 1935

The Government of India Act, 1858 was one of the most relevant statutory stratagem of its time. It essentially reassigned the exclusive management of executive affairs of the homeland to the British Crown. One of the most significant roles in this transition was delegated upon the Governor who was appointed as the representative of the Crown albeit under a direct command of the Governor General of India.

When attempts of administrative reforms were made in 1919 to steer the nation towards an accountable form of governance, the position of Governor still remained that of a fulcrum of the provinces.⁵

GOVERNMENT OF INDIA ACT, 1935

The constitutional position of Governor of a state in the current legal scenario found roots in the Indian governance in early 1930s during British Raj.⁶ The powers and position of Governor were aligned with the greater schematic design of the Raj where the British tried to divulge Indians with a greater role in governance while still maintaining a considerable hold on the state affairs. This structure was solidified through the Government of India Act of 1935 which marked a complete overhaul in provincial governance for multiple reasons which included almost complete transfer of power to the Indians. However, this power transfer was a strategic step to pacify the ever growing resentment against the Raj within the nation as the British had vested majority of decision making power with the Governor who was essentially a pawn of the British to rule the provinces through centre where the British still maintained complete control.

⁵ William Macneile, *Summary of Constitutional Reforms for India : being proposals of Secretary of State Montagu and the Viceroy, Lord Chelmsford,* 24, <https://archive.org/stream/summaryofconstit00grea#page/6/mode/1up>

⁶ Constituent Assembly Debates, Vol. VIII, p. 213-217.

The genesis of Article 164 of the current Indian constitution can be found in Article 51(1) of the Government of India Act, 1935 which states “Article 164 was based on section 51 of the GoI Act 1935. Section 51(1) of the GoI Act 1935 reads as follows: “(1) The Governor’s ministers shall be chosen and summoned by him, shall be sworn as members of the Council, and shall hold office during his pleasure...”

The practical impediments surrounding this arrangement were brought to light immediately in the following years during the 1937 elections. Congress asserted majority in many of these provinces which seemed redundant in light of extremely wide gubernatorial powers which allowed for him to dictate his will upon ministers while exercising his special remits. Only Viceroy’s reassurance that gubernatorial discharge of his special functions would be limited to avoid any conflict with the elected Government led the congress to decide to undertake office.⁷

INDIA (PROVINCIAL CONSTITUTION) ORDER, 1947

The Order eliminated from the 1935 Act, any phrases that granted the Governor an unlimited discretion such as “exercising his individual judgement” and many others. This implied the limitations imposed on the exercise of powers of the Governor specially in circumstances which allowed for his individual discretion. This Order mandated the advice of the Council of Ministers while fulfilling any of his duties.

THE CONSTITUTIONAL ASSEMBLY DEBATES

The debates on this provision happened on June 1, 1949. It is indeed surprising to note that the members of the Constituent Assembly chose to focus on two points and completely missed the elephant in the room.⁸

However, Pandit Thakur Das Bhargava, the odd man out, made the following remarks:

“...Here his discretion is too wide. Now, the Governor, if he so chooses, can appoint his Ministers and the Premier may be called upon to form a ministry from any party which is not the biggest party in the House. There is no bar against this. I would have liked a provision that the Governor shall only call for the leader of the biggest party in the Assembly to form the ministry.”

The concerns regarding the abuse of gubernatorial discretion were raised even by H.V. Kamath, Shibban Lal Saxena, and Rohini Kumar Chaudhuri, all expressed apprehensions that

⁷Pankaj A., *Governor in Indian Federal Constitution—I: Constituent Assembly debates revisited*, 4 INDIAN JOURNAL OF PUBLIC ADMINISTRATION, 600, 611–632 (2015).

⁸Constitutional Assembly Debates Vol IX, August 22, 1949, available at<<http://www.tnpsc.gov.in/TNPSC%20Assembly%20debates.pdf>> last visited on Oct 11, 2019.

the discretion accorded to the Governor would be wrong in principle and contrary to the tenets of constitutional government. It was considered all the more serious as the Governor was to be nominated and not elected. The view was that the discretion under Article 143 (as it then was) was a colonial relic that should have been done away with. To this, B.R. Ambedkar's only response was the Article should be retained as the constitutions of Australia and Canada had similar provisions and there had been no need to delete them even after nearly a century.⁹

It is also pertinent to note that the whole set of articles relating to state governments were passed in a hurry in one day.

In the Constituent Assembly, Nehru had sought to downplay the role of a governor by calling him a benign link with the Centre, promising that governors would be "people who have not taken too great a part in politics".¹⁰ Yet, as it is quite clear, the governor has a political role to play by definition.

III. THE COLONIAL LEGACY CONTINUES: DISGUISED UNDER A NEWLY FRAMED INDIAN CONSTITUTIONAL

Article 153 of the constitution provides for the office of Governor for each Indian State, who shall be appointed by the President of India and hold office during his pleasure.¹¹ Holding office during the pleasure of the President implies not his individual discretion rather on the aid and advice of the council of ministers as has been clarified by the Supreme Court in many cases.¹² Being the nominal executive head of a State,¹³ he is empowered to discharge his duties in accordance with the Constitution.¹⁴ However, an irrefutable stipulation is presented in the same Constitution whereunder the Governor undertakes and discharges nearly all of his responsibilities in accordance with the "aid and advice of the Council of Ministers".¹⁵ Therefore, in all expediency the executive power is truly exercised by the Council of Ministers, and not in his "personal capacity"¹⁶, with the exception of the "limited sphere" of his "discretionary powers".¹⁷ Therefore, it is pertinent to note here that when it comes to legal matters the liability is that of the State Government and the Governor with respect to any

⁹*Supra* note 4.

¹⁰*Supra* note 7.

¹¹ INDIA CONST. art.154 & art. 156 cl. 1.

¹² Samsher Singh v. State of Punjab, (1974) 2 S.C.C. 831.

¹³ INDIA CONST. art. 166(3).

¹⁴ INDIA CONST. art. 154.

¹⁵ INDIA CONST. art. 163 cl. 1.

¹⁶*Supra* note 11 p. 832.

¹⁷*Id.*

action taken on his part in his official capacity.¹⁸

However, as mentioned earlier the governor does have limited functionary sphere where he may discharge his functions under complete discretion. Whereas the general provision of Article 163(1) mandates him to function with the “aid and advice of his Council of Ministers”. The exception clause to the said provision allows for his discretion in matters where “he is by or under the constitution required to function in his discretion”. The noteworthy phraseology perused in the exception clause is “...required to...” which by default connotes that this discretionary power bestowed upon him can be called into force only if and when he finds himself in a compelling situation to act upon his discretion. Additionally, it has been clarified by the Supreme Court that “by or under this constitution” signifies that the need for such invocation of discretionary power may crop up from any express constitutional provision or even by necessary implication.¹⁹

It becomes abundantly clear from the above discussion that even though there are express clauses for gubernatorial discretion in the constitution, they are limited in their scope by reading the said clauses along with the Exception to Article 163(1) and Article 163(2). Article 163 does not give the Governor a general discretionary power and the same is limited whereby his choice of action should not be arbitrary or fanciful.²⁰ It must be a choice dictated by reason, actuated by good faith and tempered by caution.²¹

There are self-evidentiary instances when it becomes impossible or impracticable for the Governor to seek or act on the advice of the Council of Ministers which may be in the circumstances mentioned hereinunder:

- a. In cases where it becomes obligatory for the Governor to exercise his discretion for unavailability of advice from the council, for instance when the Governor is to appoint the CM of a State immediate on the resignation/dismissal of the council.²²
- b. Certain circumstances compels the Governor not only to exercise discretion but also to even act against the ministerial advice for instance when the ministry gets dismissed for not resigning on losing a No-Confidence motion.²³

The discretionary actions taken by the Governors under the above-mentioned circumstances, amongst others, raise diffidence regarding their political neutrality. Their steadfastness in

¹⁸ INDIA CONST. art. 361, art. 299 cl. 2 & art. 300.

¹⁹ Indramani Pyarelal Gupta v. WR Nathu and Ors., 1963 A.I.R. 274 (India).

²⁰ Bommai *supra* note 1, para 432, 433.

²¹ Rameshwar Prasad and Ors. v. Union of India, A.I.R. 2005 S.C. 4301 (India).

²² INDIA CONST. art. 164 cl. 1.

²³ INDIA CONST. art. 164 cl. 2.

many instances have left little qualms about their inclining propensities tilted in favour of their political affiliations. Consequently, their certitudes pertaining to political parties apparent in their exercise of discretionary powers give the impression to endorse the concerns and trepidations of dominant party at the Centre. Such instances are predominantly witnessed in cases where the Governor has had a history of being concomitant in active politics. However, these partialities are detrimental not only to the basic structure principles of parliamentary democracy and federalism but also weaken the centre state dynamics.

IV. NECESSITY FOR GOVERNOR'S OFFICE: CONVENIENTLY EVIL

Despite the nominal status of the Governor as the head of the State he does not act in his individual discretion for the most part except in case of necessity with defined precincts foisted by the Constitution itself. The Governor's role is inconceivably germane to espouse prolific Centre-State relations in our federal democracy. He is not merely the representative of the State but acts as an unbreakable cord of balance and comprehension between the Centre and the State. In essence, he is the custodian of the Constitution in the State who is appointed by the Central Government.

ROLE TO UPHOLD THE CONSTITUTIONAL APPARATUS IN STATES

The Governor is not merely a name-sake executive figurehead unlike his union counterpart, the President. His role is of tremendous relevance in Indian federal design irrespective of manner in which he exercises his powers whether performing his discretionary functions or otherwise. Amongst his various functions is an extremely important function which is particularly relevant to this paper is the discretionary power given to him whereby he chooses and appoints the CM on the constitutional mandate of him being able to command a majority in the legislative assembly. Other important functions include: acquiescence to bills for it to become law,²⁴ his prior authorisation is required to introduce money bills in the Legislative Assembly,²⁵ his approval is required to summon or prorogue the Houses,²⁶ he can dissolve the Assembly with or without the aid and advice of his Council of Ministers particularly when there is no apparent person able to procure majority support.²⁷

ROLE IN THE ASSURANCE FOR THE CONTINUITY OF THE GOVERNMENT

A noticeable provision in the Indian Constitution regarding the tenure of Governor that it does not depend on majority support of the assembly. He holds the office during the pleasure

²⁴ INDIA CONST. art. 200.

²⁵ INDIA CONST. art. 199 cl. 4.

²⁶ INDIA CONST. art. 174 cl. 1. & 2a.

²⁷ INDIA CONST. art. 174 cl. 2b.

of the President which does not necessarily culminate into termination with the dissolution of assembly owing to a successful No-Confidence motion or simply losing majority support in the House. His position goes on amidst the power change at ministerial level and remains immune to a dissolution as well. Hence, the gubernatorial institution remains a continuous political force of governance amidst the chaos of changing Government at the State level. The frequent instances of constitutional failure which calls for “Governor’s rule” being imposed in the State is another instance of the relevance of this consistent stable institution for preventing complete breakdown of governance in the State. Lastly, even in simple situations where the aid of Council is unavailable, Governor by acting under his own discretion sustains the constitutional machinery of the State.

THE SAFEGUARDS

The sole constitutional mandate regarding limitation on the wide discretionary powers of the governor requires him to act on his discretion *only* when he is “by or under this constitution required to do so”.²⁸ There are no definite guidelines on what this necessity must entail which render the institution of Governor prone to a tirade of criticism and condemn. While I concur that cultivating a set of definite guidelines on governor’s discretionary powers may go a long way in asserting the integrity of the Governor’s office, I don’t believe that such a fortification can be brought about by amending it into the constitution itself. Many a times the nature of the institution itself demands that the safeguards remain in the nature of guiding principles as explicit rules and binding guidelines on the conduct of the Governor defeats the whole purpose of the office that is to maintain a functional constitutional machinery in any State. However, the directive guidelines must be sought to be achieved to its fullest if any semblance of integrity is desired for the office not merely by the Governor but also by the political parties, and the ruling Governments.

V. RATIONALE BEHIND ENTRUSTMENT OF DISCRETIONARY POWERS WITH THE GOVERNOR

It is believed that there is no real need for the discretionary powers of the Governor to exist still and the same must be done away. It has been suggested to us that the discretionary power of the governor under Article 163 should be removed.²⁹ The entrustment of discretionary powers with the Governor is exclusively to serve the public interest and patronage continuance of constitutional machinery in situations which do not respond amicably to the

²⁸*Supra* note 14.

²⁹*Supra* note 9.

general scheme of governance.³⁰ However, it has been argued that times are changing to give more voice to the States and hence the office of Governor especially the discretionary powers must be done away with. Any discretion which needs to persist in light of unforeseeable exigencies, must refrain from being carried out arbitrarily. For the same reason, the framers of the Constitution abstained from defining in black and white the discretionary powers of the Governor.³¹

The institution of Governor, despite being the British legacy to India, was given wide powers to act in his own discretion with a view to preserve the newly found integrity of nation which was not at its optimum at the time to say the least. quite at its best during the framing of constitution.³² While I do not completely assert or deny the allegations against the governors for expending colourable actions while exercising their discretionary powers, attempting to revise the same would require more than mere allegations for instance demonstrating the insignificance of such grant of power. The abovementioned facts present an arguable case in favour of the office of Governor including the wide discretionary powers. However, the need for some guiding principles in form of conventions and directives cannot be emphasised enough. For all these reasons, the discretionary power of the Governor as provided in Article 163 should be left untouched. What is required is that these discretionary powers be used sparingly and only when other alternatives have been exploited.³³

CHOICE OF CHIEF MINISTER IN CASE OF A HUNG ASSEMBLY

The long standing tradition regarding formation of Government at State level has been to invite the leader of the party commanding absolute majority support in the Assembly.³⁴ This is possible only in circumstances where there is party enjoying absolute majority. However, this is not necessarily applicable when there is no clear majority following the elections. It in this dubious state of affairs that the role of Governor becomes of utmost importance. He needs to determine, in his own discretion, who is better suited to become the CM warranting the procurement of a stable Government upholding the promises of the constitutional mandates.

However, the choice of the Governor in appointment of the CM is not entirely without any constitutional mandate. One of them is to is required to warrant collective accountability of

³⁰*Supra* note 5.

³¹*Id.*

³²*Supra* note 7.

³³*Id.*

³⁴*Supra* note 5, p. 215.

CoM to the Legislative Assembly.³⁵ This is not an easy task and must be undertaken in a way which allows for an equal opportunity to all factions involved. Recommendatory guidelines have been formulated by Sarkaria Commission in this regard which suggest the following:³⁶

- (i) *“The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government;*
- (ii) *The Governor's task is to see that a Government is formed and not to try to form a Government which will pursue policies which he approves.”*

Hence, if any party commands absolute majority, the same must be called forth to formulate the Government in the State. However, when no single party commands absolute majority, it has been recommended by the Sarkaria Commission that the Governor must exercise his discretion in choosing the CM from among the factions in the designated order of predilection mentioned hereinunder:³⁷

- (i) *“An alliance of parties that was formed prior to the Elections.*
- (ii) *The largest single party staking a claim to form the government with the support of others, including “independents.”*
- (iii) *A post-electoral coalition of parties, with all the partners in the coalition joining the Government.*
- (iv) *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 Governor's primary responsibility is to indemnify a committed and stable Government in order to fulfil his constitutional mandate of preventing the preventing failure of constitutional machinery. Therefore, while exercising his discretion he must be willing to choose the CM who, above all, is and in order to fulfil The Governor, while going through the process of selection described above, is the best prospective when it comes to commanding a majority support in the legislative Assembly.

The position has been clarified further in the case of *Chandrakant Kavlekar*³⁸ where it was held that once the CM is appointed by the Governor in the upshot of a hung Assembly, he

³⁵*Supra* note 22.

³⁶ Report of the Sarkaria Commission, 1983, <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/> last visited on Oct 11, 2019.

³⁷*Supra* note 35.

³⁸*Chandrakant Kavlekar v. Union of India*, A.I.R. 2017 S.C. 1435 (India).

must attain confidence of majority within 30 days of his appointment. The court also stated that the practice of floor test must be austere observed in order to preserve the democratic values. This progression not only absolves the governor of qualms about his biased preferences but also inculcates objectivity in the appointment of the Chief Minister in the aftermath of a hung Assembly.

VI. THE KARNATAKA FIASCO AND THE PATH AHEAD

The results of State elections in 2017 and 2018 in many States including Goa³⁹, Manipur⁴⁰, Karnataka⁴¹ and their consequent impacts revived pertinent constitutional and political questions concerning, amongst others, discretionary powers of Governor in choosing Chief Minister in case of a “hung assembly”.

The emergence of regional parties make it even more pertinent to have set of guidelines to prevent any violation of rules and powers to preserve the democracy in the country and avoid discretion to act in favour of a party instead of the constitution. The defection part of the menace was tackled to an extent by the Anti-Defection Act, 1985 which sanctions disqualification of the deflected member of the party the conditions for which are specified in the Schedule.⁴²

The Act left certain loopholes which can be exploited by the members such as permitting valid “mergers” that allowed defection of two thirds of the members of the party.⁴³ The earlier position was that the speaker’s decision on the disqualification would be final as per the act.⁴⁴ This provision was struck down as being unconstitutional by the apex court.⁴⁵ The court held that the speaker’s verdict was subject to constitutional review subject to judicial review because while deciding on such matters the speaker acts as a tribunal which can be subjected to judicial review.⁴⁶ However, when the rival parties are willing to allow back door entries, while resorting to illegal practices such as Horse trading, the law hardly remains in a

³⁹ Krishnadas Rajagopal, *SC allows Goa swearing-in, orders Thursday floor test*, THE HINDU, March 15, 2017, <https://www.thehindu.com/elections/goa-2017/sc-allows-go-swearing-in-orders-thursday-floor-test/article17463467.ece>.

⁴⁰ *Meghalaya election result 2018: Hung Assembly in state, Congress single largest party*, FINANCIAL EXPRESS, March 8, 2018, <https://www.financialexpress.com/elections/meghalaya-election-result-2018-hung-assembly-in-state-congress-single-largest-party/1086529/>.

⁴¹ Srinivasan Ramani, *Karnataka Assembly Elections 2018: How far is Congress from retaining power?*, THE HINDU, May 10, 2018, <https://www.thehindu.com/elections/karnataka-2018/karnataka-assembly-elections-2018-how-far-is-congress-from-retaining-power/article23841476.ece>.

⁴² The Constitution (Fifty Second Amendment) Act, February 15, 1985, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-fifty-second-amendment-act-1985>.

⁴³ The constitution (Ninety First Amendment) Act, Jan 7, 2004, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-ninety-first-amendment-act-2003>.

⁴⁴ *Id.*

⁴⁵ *Kihoto hollohan v. Zachillhu and Ors.*, 1992 S.C.C. Supl. (2) 651 (India).

⁴⁶ *Id.*

position to prevent defection. The sanctions of law become completely ineffective as the members hardly have anything to lose even after losing their membership of the party.⁴⁷

It is not merely the deflection that becomes detrimental to ethical politics but also what follows as a consequence. For instance the politics of post poll alliances. Where pre poll alliances allow the citizens a chance to know who their prospective representatives represent, post poll alliances offer no such clarity. This does not remain merely an ethical question in case of a hung assembly where the Governor needs to decide which suitable alliance is most likely to form a stable Government.

A brief outline of facts about what happened in Karnataka that raised these legal and ethical questions on party politics and gubernatorial discretion are important. The pre-elections state of affairs encompassed rigorous steeplechase between the two political giants in the State, the Congress and the JD(S). A partnership between the same political parties in the aftermath of an election, which resulted in no clear and absolute majority, cannot be perceived as anything more than an unethical, unscrupulous and unprincipled collaboration.⁴⁸ Many argue that the Governor's actions, which are discussed in detail in the later parts of this paper, make the victory of such alliances illegal as well. However, eyebrows can be raised on similar post-poll alliances formed Government in other states including Goa, Manipur and Meghalaya where BJP was the pivotal force behind such collaborations.⁴⁹

The major issue that highlighted through the abovementioned State elections. In case of a hung assembly it is the Governor who invites the leader of that party who has the capability of commanding majority in the Assembly. The Governor acts completely on his individual discretion to select such a leader.⁵⁰ The abovementioned instances appear to reveal that such a selection has become jaded by centre's influence on the gubernatorial discretion. There is no specific convention that has been followed in the elections in States in the recent cases. The outcome however tends to favour the party in power in the centre. This is not to say that such a possibility may not be there at all. It's merely a nudge in the direction of questioning the long standing institution of Governor, its powers and most importantly the discretionary powers. It's about asking whether such wide discretionary powers are needed at all in the current scenario where the States are willing to assert their authority in more and more dimensions of governance. Is it merely our fear of decentralisation that tends to vest such

⁴⁷*Hung Assembly Brings Role of Governor into Focus*, DECCAN HERALD, May 17, 2018, <https://www.deccanherald.com/state/hung-assembly-brings-role-governor-vajubhai-focus-670142.html>.

⁴⁸*Supra* note 3.

⁴⁹*Id.*

⁵⁰*Supra* note 38.

wide powers in the hands of one individual despite understanding the absolute power leads to absolute corruption?

The *Goa Assembly Case*⁵¹, with a similar factual matrix, dealt with the role of Governor in appointment of the CM after the 2017 Goa State elections. Congress recorded highest number of votes with BJP following right behind it. Nevertheless, BJP was the one that proceeded and reached out to the Governor. With the assistance of other parties and independent members through post-poll collaborations it succeeded in forming the Government. The Congress knocked at the doors of the Supreme Court and the subject matter of the order of preference that the Governor ought to stick to was brought up. The court however refrained from laying down any clear guidelines on the matter while resolving the pending issue with an order of conducting a floor test.

Something that differentiates the two situations is the stake of claim by the single largest party. Whereas in Karnataka the BJP approached the Governor with an intention of forming the Government, the Congress failed to do so in Goa assembly case. However, the technicality is legally irrelevant as it is still the duty of Governor to appoint the most suitable candidate who can command the majority in the house and not the one who knocks at his door first with a claim to the said office.

VII. 'BY OR UNDER THIS CONSTITUTION': A MIRAGE OF ABSOLUTE DISCRETION

The term "by of under this constitution" regarding the discretionary powers of the Governor has surrounded the institution with innumerable invectives most of them pertaining to apparent tinge of bias in his actions favouring the party in power in the centre. An instance of the same is presented by both Goa and Karnataka State assembly elections along with many others. In Karnataka Mr. Yeddyurappa of BJP was sworn in as CM at first instance. However, after the Supreme Court's interference and the floor test led to the post poll alliance of Congress-JD(S) commanding the majority support.⁵² Such an instable form of Government can never be called to be a mandate of constitution and one of Governor's functions is to preserve this stability for the smooth functioning of the Government which he failed to do, not merely in Karnataka but in many other States.

Since the previous decision of Goa Assembly Case resulted in no set guidelines in determining

⁵¹ Chandrakant Kavlekar *supra* note 37.

⁵² SC Orders Karnataka Floor Test for May 19; Dispute Now Over Pro Tem Speaker, THE WIRE, May 18, 2018, <https://thewire.in/politics/karnataka-floor-test-to-be-held-tomorrow-supreme-court-says>.

the extent of discretionary powers of the Governor in the selection of CM of a State, another petition has been filed.⁵³ The primary issues for concern are:

- a) Regardless of the immunity bestowed upon the Governor by the Constitution under Article 163(2) and 361, whether the court can review his actions under the aforementioned Articles.
- b) Whether the actions taken under exercise of discretionary powers under Article 164(1), particularly in the appointment of a CM in case of a hung assembly, can be judicially reviewed.

In order to ascertain the outcomes of the abovementioned questions of law it is important to analyse previous decisions of judiciary on gubernatorial discretion.

THE SCOPE OF GUBERNATORIAL DISCRETION

In contrast to his counterpart at the centre, the President, the Governor is conferred with some discretionary powers.⁵⁴

The judgement of Supreme Court in *Samsher Singh v. State of Punjab*⁵⁵, brought forth a suggestive and inexhaustive list of circumstances where the Governor may exercise his discretionary powers. These included, amongst other things, a reminder that in appointment of a CM the primary contemplation should remain his ability to gain popular support in the Assembly. The court however let the issue of judicial review of gubernatorial discretionary actions hang and did not venture into laying any legal guidelines on the same. The courts however dealt with the question in the later judgements discussed in the next part of the paper.

JUDICIAL REVIEW AND THE GUBERNATORIAL DISCRETION: HOW FAR IS TOO FAR?

The most ingenious explanation for judicial review is the authority bestowed upon the judicial courts of any nation by the Constitution or similar document to appraise the exercise of powers by the other organs in the governance of that nation.⁵⁶ However, in a parliamentary democracy like India, Judicial review exhibits particularly diverse predicament atypical to any presidential form of Government like the United States. This is owed to the continuous tussle for supremacy between the primary organs of governance, the Legislature and the

⁵³ G. Parameshwara v. Union of India, Writ Petition (civil) No. 536/2018, on May 17, 2018 (India).

⁵⁴ INDIA CONST. art. 163.

⁵⁵ Samsher Singh, *supra* note 11 para 153.

⁵⁶ I D BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 160 (3rd ed. 1955)

Judiciary.⁵⁷

In fact, in *In Re., Keshav Singh*⁵⁸, the Supreme Court clearly observed that the dominant feature of the British Constitution, ie., parliamentary sovereignty, has no place in a federal constitution as in India.

In view of this, it can be inferred that the Court can also look into questions pertaining to formation of government. Yet, if one were to go by the bare text of the Constitution, there is no scope to challenge a decision taken by the Governor in their discretion, one of the many such decisions being the appointment of a Chief Minister. In fact, there is an explicit bar against this, expressed in the constitution.⁵⁹

The evolution of judicial deliberation on the role and extent of judicial review on the exercise of gubernatorial discretion began in the judicial pronouncement in *B.R. Kapur v. State of Tamil Nadu*⁶⁰. The court did not categorically uphold the legality of judicial review of gubernatorial discretion and neither did it delve into the question of absolute immunity granted to his discretionary actions under Article 321. However, the court stated that the validity of the appointment made under such discretionary exercise of power still remains within the purview of constitutional review and the selected person is under a constitutional obligation to prove the validity of his/her appointment.

The pivotal pronouncements made in *S.R. Bommai v. Union of India*⁶¹ widened the overall horizon of application of Judicial Review while declaring it as an unamendable basic feature of the Indian Constitution. In this landmark decision, the Supreme Court categorically stated that the court may judicially scrutinise discretionary actions of Governor, while prescribing imposition of State emergency, on the ground of “mala fides, arbitrariness or where it is based wholly or irrelevant grounds”.⁶²

Then monumental judgement on the issue of absolute immunity to Governor under Article 361 however came in 2006 in *Rameshwar Prasad v. Union of India*⁶³. In this landmark decision, the Supreme Court dropped any previous hesitation and categorically stated that the immunity granted to the Governor under Article 361 is not absolute and the court may

⁵⁷*Id.*

⁵⁸ A.I.R. 1965 All 349, para 38 (India).

⁵⁹ INDIA CONST. art. 163 cl. 2 & art. 361.

⁶⁰ A.I.R. 2001 S.C. 3435, Para 51 (India).

⁶¹ A.I.R. 1994 S.C. 1918, Para 118 (India).

⁶²*Id.*

⁶³*Supra* note 19, Para 173.

judicially scrutinise such actions on the ground of mala fides and ultra vires.⁶⁴

Recently, the extent of gubernatorial discretion and the immunity ensuing therefrom has been concretised in the judgement in *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*⁶⁵. The court concluded that if the Governor were to be vested with absolute discretionary powers, the resulting authority would be in the nature of imperial institution in a position to act *ultra vires* the constitution even.⁶⁶ Hence, the court while confirming its earlier decision upheld the validity of judicial review in the exercise of his discretionary powers by the Governor.⁶⁷

Therefore the most likely outcome of the recent petition regarding the judicial review of Governor's discretionary powers while appointing the Chief Minister of any State in case of a hung assembly would be acquiesced to.⁶⁸

POTENTIAL OUTCOMES AND THE ENSUING REVERBERATIONS

What has been denied till date has finally come to light and needs clear and unambiguous guidelines regarding the Gubernatorial discretion regarding the appointment of Chief Minister in case of a Hung Assembly. The possible outcomes to the petition⁶⁹ concerning the above issues could be conceding to any of the following scenarios:

Governor is Conceded Absolute Discretion

The ensuing outcome that follows as a result of bestowing absolute discretion upon the Governor is inapplicability of judicial review of such an action. The inevitable flaw with such manifestation is the defeat of constitutional supremacy that Indian Governance scheme swears by. The governor would be placed at a pedestal higher than the Constitution itself. Many High Court judgments however decided such absolute discretion is constitutional.⁷⁰ The approach that the courts adopted to reach the said conclusion was to decide based on literal interpretation of Articles 164 and 361 which seem to offer little scope for placing limitation on the absolute exercise of power by the Governor.⁷¹ The Supreme Court rejected this particular line of reasoning in the recent case of *Nabam Rebia*⁷².

⁶⁴*Id.*

⁶⁵ 2016 S.C.C. Online S.C. 694, Para 148 (India).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸ G. Parameshwara, *supra* note 35.

⁶⁹*Id.*

⁷⁰ S. Dharmalingam v. Governor of Tamil Nadu, A.I.R. 1989 Mad 48 (India) & Sapru Jayakar Motilal C.R. Das v. Union of India, 1966 (2) S.C.C. 1246 (India).

⁷¹ M.P. Sharma v. P.C. Ghose, A.I.R. 1969 Cal 198 (India) & Pratapsingh Raojirao Rane v. State of Goa, A.I.R. 1999 Bom 53 (India).

⁷² *Nabam Rebia*, *supra* note 64, Para 155.

Therefore, to concede absolute discretion upon the Governor would not only be highly incongruent with the settled precedent but also denigrate the spirit of Constitutional Democracy.

Discretionary Powers of Governor Are Delineated

In case there is a deadlock in the formation of Government, the Governor may be granted discretion to act suitably in accordance with predetermined legal boundaries. The Governor, in such a scenario, may discharge his constitutional obligations without acceding to his personal inclinations to decide the outcome and course of governance in the State.

In *B.R. Kapur v. State of Madras*⁷³, the court stated that the will of the people as represented by the majority party may prevail only when it is in accordance with the constitution and in any other circumstance it is the Constitution itself which will prevail no matter what. Hence, the Governor is not to be held obligated by the will of the people rather by the Constitution. Hence, the Governor's primary concern remains the preservations of constitutional democracy in the State. It was also held to be infeasible to completely do away with the discretionary powers as that may be necessitated in certain circumstances.

There have been multiple attempts by various commissions to postulate clear guiding principles regarding exercise of gubernatorial discretion in case of a hung assembly. The recommendations of Sarkaria Commission were reiterated by the Punchhi Commission in 2010.⁷⁴ The primary adherence stipulated by the said reports includes inviting that faction having largest backing in the Assembly. However, absence of such faction allows the Governor to choose in the order prescribed by the commission mentioned earlier.

The author believes that this might be the most feasible conclusion to the Karnataka like conundrum. In this manner, the Constitutional mandate of gubernatorial discretion is not entirely dilapidated and can be brought into effect when necessitated by any future contingencies. Additionally, when governor's actions are performed within set parameters and predisposed to being judicially reviewed, constitutional authority is preserved over institutional supremacy which is antithesis to constitutional democracy.

Lastly, condensing executive meddling in the formation of government to absolutely necessary preordained circumstances goes a long way in procuring rule of law and preserving the pillar of parliamentary democracy where only the Judiciary can be the "acceptable

⁷³ Kapur, *supra* note 59, Para 72.

⁷⁴*Supra* note 3.

repository of absolute discretion".⁷⁵

Governor is Conferred No Discretion

Lastly, specific guidelines can be formulated to take away the discretion of the Governor in the appointment of Chief Minister. The Constitution solely asserts the appointment of Chief Ministers to be made by the Governor but remains silent on the manner of such appointment be it in the case of a hung assembly or otherwise.⁷⁶

The guidelines may indorse a mandatory prompt floor test to be completed within 24 hours (as was done in Karnataka⁷⁷ after the intervention of Supreme Court) after the poll results are announced. This would ensure that the Government's stability and strength is tested on the floor of the house rather than the skewed judgement of a single entity which is the proper and final test to prove if the party in question is in a position to command majority support in the Assembly.⁷⁸

This negates the requirement of exercise of discretion by the Governor and he would simply be required to appoint the Chief Minister as is the case in normal circumstances, a plausible outcome given acknowledgement in a High Court Decision in early 1970s.⁷⁹

VIII. CONCLUSION

Despite the fact that the gubernatorial discretion regarding appointment of Chief Minister in case of a hung Assembly are very wide for the lack of explicit constitutional restraints. Even, when guiding principles exist they are not binding and thus apprehensions regarding misuse of powers are well placed.

One extremity is to unequivocally do away with gubernatorial discretion which does not seem to be feasible option considering the purpose with which such a provision finds place in the constitution. What remains is a limited discretion of Governor whereby he must be allowed to invite the party capable of commanding majority support but not at the cost of degrading constitutional democracy. He must be bound by the set guidelines while inviting the leaders to form majority. The only other option is re-election which poses a huge threat of wastage of public funds while leading to a possibility of similar outcome resulting in a hung assembly.

The set guidelines must be three pronged.

⁷⁵ S. R. Chaudhuri v. State of Punjab, A.I.R. 2001 S.C. 17, Para 21 (India).

⁷⁶ *Supra* note 21.

⁷⁷ *Supra* note 51.

⁷⁸ Nabam Rebia, *supra* note 64.

⁷⁹ K. A. Mathialagan v. Governor of Tamil Nadu, A.I.R. 1973 Mad 198, Para 11 (India).

- A. Stricter defection laws which must entail disqualification from conducting election for at least 10 years.
- B. The governor's discretion must follow the constitutional convention of inviting parties in the order of preference postulated in the Sarkaria and Punchhi Commission guidelines.
- C. Mandating a floor test promptly after the election results are out preferably within 24 hours of inviting the first sect.
- D. In case the Governor needs to shift from the said convention his actions must pass through the litmus of judicial review.

Constitutional supremacy along with democratic principles of the nation are of utmost importance and must remain safe from the encroachment of any institution.

The rationale that Governor is the sole institution sustaining the brunt of State Secessionist tendencies do not suffice in today's political coagulation. However, calculated and prejudiced political meddling on Governor's part, particularly in the formation of government of States, has been witnessed in the recent past more frequently than ever. The solution remains in asking direct questions about the relevance of the institution particularly the wide discretionary powers bequeathed thereupon rather than trying the scratch the surface and providing pacifying answers to irrelevant part of the relevant issue.
