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Discretionary Power of Governor in Appointment of Chief Minister in Case of Hung Assembly: A Constitutional Silence Turned into Constitutional Gap

NISHCHYA[1] AND NEHA[2]

ABSTRACT

The post of governor is a constitutional one, he is not reckoned as part of the legislative organ rather, he is considered to be the fountainhead of state executive machinery. The central object of the governor is to balance the interests of the union and the states and to ensure a smooth flow of powers without any overlap. The governor holds the office during the pleasure of the president, and, therefore, owes his appointment to the president.

To fathom a smooth balance of powers between union and state the constitution has explicitly vested certain powers to the governor. Be that as it may, there have been instances wherein the governor has misused his constitutional powers, one such instance being during the appointment of the chief minister of a state in case of a hung assembly. Ergo, the authors through this paper intend to analyse the extent of discretionary powers of a governor vis-à-vis hung assembly. The authors have also traced the history of hung assemblies and brought out the recommendations and observations made by the various committees. Finally, the authors conclude by providing rational solutions to overcome the state-governor conundrum.

I. INTRODUCTION

Human The Constitution of India is the lengthiest constitution in the world. It is because the founding fathers of the Constitution paid attention to the minutest detail while framing the basic law of the land. Yet there have emerged grey areas in this otherwise aspirational document which were not anticipated by even our founding fathers but later became a point of contention. Some of them took the form of complex issues in which sometimes the citizens were up against the State or two or more organs of State were involved. Many-a-times the system remained resolute to effectively address the issue and succeeded in resolving it as well, while sometimes despite massive efforts, it only added to the complexity of the issue.

[1] Author is a student at Gujarat National Law University, Gujarat, India.
[2] Author is a student at National Law University, Ranchi, Jharkhand, India

 [ISSN 2581-5369]

One such instance has been the way discretionary powers have been exercised by the Governors under Article 164 in various States in case of a hung assembly. Such grey areas are called Constitutional silences, a term first coined by Lawrence H. Tribe in his celebrated work 'Invisible Constitution'.[3] As per Tribe, "the reach and influence of the written constitution are not as conclusive as we think." The maker will either leave some areas unaddressed so that they are dealt with in manner as they are required to be in future. Or it might happen that despite the best of the efforts, some areas might inadvertently remain left out.

Like other constitutions in the World, our Constitution is full of silences as well. And not in one but many parts. For instance, in Part II of the Constitution, the ambit of the term 'other authorities' in the definition of State under Article 12[4] has expanded leaps and bounds over the years. If you consider Part III, Article 21[5] only provided for Right to life but never provided an exhaustive definition. Over the decades, due to expansive interpretation of the provision by the Supreme Court, it became the genesis of environmental jurisprudence in the country and also includes aspects like passive euthanasia[6] and right to privacy.[7] Similarly, when it comes to the manner of appointment of judges, the judiciary was able to preserve and protect its independence by creating collegium system after Three Judges case. Constitutional Silence proved to be golden here.

But there is a silver lining to it as Constitutional silence is a double-edged sword which has not always resulted in strengthening of our democracy and in turn ended up as a Constitutional Gap. One such instance is discretionary power of the Governor while appointing a chief minister and conducting floor tests in case of hung assembly. It has taken the form of a "negative constitutional energy".

II. DISCRETIONARY POWERS OF THE GOVERNOR

A governor is a representative of the Union Government at State level. It is a constitutional position which can be compared to that of President of India as both are a nominal head while the real power of governance and administration lies with the chief ministers & their council of ministers in former's case[8] and the Prime Minister and Cabinet Ministers in latter's case.[9] This is done to uphold the spirit of federalism while the post of Governor is created to preserve,

[3] Laurence H. Tribe, *The Invisible Constitution* (OUP 2008)
[4] INDIA CONST. art. 12.
[5] INDIA CONST. art. 21.
[6] *Common Cause* v Union of India (2018) 5 SCC 1
[7] *Justice K.S. Puttaswamy vs Union of India* (2017) 10 SCC 1
[8] INDIA CONST. art. 163 cl. 1.
[9] INDIA CONST. art. 74 cl. 1.

 [ISSN 2581-5369]

protect and defend the Constitution in case there is a breakdown in functioning of a State Government.

What separates the Governor from President is that the Governor can use his discretion during the exercise of his functions if the Constitution requires him to do so.[10] This discretion is so wide that a particular matter is one where the Governor is required to act in his discretion is also up to the Governor to decide and validity of such action cannot be challenged on the ground that if he should have acted in his discretion.[11] Unless a particular Article *expressly* so provides, an obligation of the Governor to act in his discretion cannot be inferred by implication.[12]

Accordingly, appointment of a chief minister is done on Governor's discretion in a situation where after Assembly elections, no party or pre-poll alliance gets a clear majority.[13] He also has to oversee the process of majority being proved by the CM elect in the Assembly. It is a circumstantial power not expressly provided in the Constitution. The problem emerged from the fact the manner to exercise this discretion has been provided in either the Constitution or even Representation of Peoples' Act 1951. While it is not laid anywhere, but the Governors have to try to identify a party or an alliance which can form a stable government. There can be different scenarios emerging after the elections and there is no concrete order of inviting parties to form a government.

Such a use of this discretionary power was not even anticipated by even Dr B.R. Ambedkar who in response to the concern of Pandit Thakur Das Bhargava during the Constitutional Assembly debates regarding the ambit of discretion said that similar provisions were there in the Constitution of Canada and Australia and they have left in the manner as they were a century ago. This essentially means that Constitutional silence could have been given a voice in the beginning itself but it could not be anticipated on the basis of the nature of politics in future.

III. HISTORY OF HUNG ASSEMBLIES AND VARIOUS COMMISSIONS ESTABLISHED IN INDIA

This issue is as old as our Constitution as it was in the year 1952 when in Madras Assembly elections, Congress won 155 out of 321 seats and was the single largest party in the Assembly and the Communist bloc (United Democratic Front) got 166 seats. It was C Rajagopalachari from Congress who was invited by the Governor Sri Prakasa to form the government. Although it was Pandit Thakur Das Bhargava who gave the suggestion to keep a provision to call the

[10] INDIA CONST. art. 163 cl. 1.
[11] INDIA CONST. art. 163 cl. 2.
[12] *Ram Jawaya v State of Punjab* AIR 1955 SC 549
[13] INDIA CONST. art. 164 cl. 1.

 [ISSN 2581-5369]

leader of the biggest party in the Assembly to form a government, it was Sri Prakasa whose name is attributed to this doctrine. Then over the years, India mostly saw a majority government with a few exceptions in between. In 1967, after Rajasthan elections, it was Congress which emerged as the single largest party with 88 seats and was invited to form the government as the United Front which claimed majority support of 93 members in the House of 183 members.

Afterwards, a Report of Committees of Governors published in 1971 affirmed this approach by suggesting that "the leader of the single largest party had an absolute right of Chief Ministership irrespective of the fact whether such party commanded a stable majority or not." But soon elections in the country started becoming more complicated than ever. Coalition governments and hung assemblies started becoming a norm rather than exception but what changed the doctrine were a series of hysterical decisions made by Governors in the process. For instance, in 1982, there was a hung assembly after Haryana elections and the Governor ended up inviting both the pre-poll alliance of INLD & BJP as well as their opponent Congress one after the other to form the government.

(A) Sarkaria Commission (1983-1988)

In wake of this and other issues affecting Centre-State relations, a commission was formed under the chairmanship of Justice R S Sarkaria was formed in 1983 which submitted its report in 1988. It provided following guidelines laying down the principles and order to be kept in mind by the Governor while exercising his discretionary power:

> *(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."*

In case when no party or alliance can claim of having absolute majority, there order in which blocs are to be called is:

> *(i) "An alliance of parties that was formed prior to the Elections.*
>
> *(ii) The largest single party making 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.*

 [ISSN 2581-5369]

> *(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."*

This order has been reiterated in the report of two commissions.

(B) National Commission to Review the Working of Constitution (2000-2002)

The commission established under the chairmanship of Justice M N R Venkatachaliah while reiterating the order, also suggested that a vote of confidence should be conducted in the Assembly within 30 days of oath taking if the Chief Minister does not command absolute majority in the Assembly. "This practice should be rigorously adhered to with the sanctity of Rule of Law."

However, it stated that decision of appointment or removal of a Chief Minister has to be taken by Governor on his sole discretion and the same is not amenable to judicial review. It is because of absolute immunity provided under Article 361 in such matters. But this does not mean that a party or a coalition claiming a stake to form a government can be prevented from doing so and if that is done, it will be unconstitutional and would be described as *mala fide.*

(C) Punchhi Commission (2010)

Formed under the chairmanship of former CJI MM Punchhi, the Commission recommended that that clear guideline in the form of constitutional convention should be framed while keeping the judicial opinions and recommendation of expert commissions in mind. The report kept the order provided in Sarkaria commission intact with one exception which became a genesis of more ambiguity and a potential source of future bias. The order as provided by the Commission gave precedence to "t*he party or combination of parties which commands the widest support in the Legislative Assembly"* but did not define what "combination of parties" stood for. It can also include a post-election combination which, in essence, will make the rest of alternatives following this arrangement ineffective.

All the Commission have not been successful in ending or reducing the silence because the guidelines provided by them are merely suggestive and not binding in nature. It is not an uncommon phenomenon in India to find that many recommendations made by the Committees never made it to the legislations. This ultimately requires the intervention of Constitutional courts in the country to correct the course or at least stop further digression.

Why has the Supreme Court been unable to fix the issue?

Various High Courts of the country passed a catena of judgments holding that powers given to

the Governor under Article 163 has to be exercised in his sole discretion and immunity for such actions is absolute.[14] The Governor cannot be called upon in any court of law even when alleged with charges of malafide. This also includes appointment of Chief Minister under Article 164(1) and there is no warrant in the Constitution putting any condition or restriction on exercising this discretion solely by himself.[15] A Chief Minister is appointed or dismissed on the discretion and at the pleasure of Governor which can be withdrawn in his sole authority.[16] High Courts cannot question it as the immunity is provided under Article 361 of the Constitution.[17]

With this background, it was quite clear that this silence was not golden. The Supreme Court had a major role to play as the final interpreter of the Constitution to end this silence which has taken the form of a gap. Discretionary power without a prescribed method and order of exercising in case of hung assembly resulted in an omission and the Court has restricted itself from deriving words from the sounds of silence because it would result in entering deep into the territory of legislature to write a law governing the executive. However, the Apex Court has been firm in its stance to preserve the ethos of the Constitution by not allowing gross abuse of rule of law.

Initially, the Court took a restrictive approach when in Samsher Singh v. State of Punjab,[18] it was held that appointment of a CM is one of the situations in which Governor has a power to exercise his discretionary powers but it should be kept in consideration that the aim of the exercise is that the appointee should be able to gain. The Apex Court in same the verdict as well as in *B.R. Kapur v. State of Tamil Nadu*[19] did not touch upon the aspect of judicial review of discretionary actions as well as absolute immunity granted for such actions under Article 361. Accordingly, the prospect of laying legal guidelines did not materialize.

Later, in the landmark judgment of *S.R. Bommai v. Union of India,*[20] the Court held that Judicial Review was an inseparable feature of the Constitution and hence part of the basic structure of the Indian Constitution. For the first time, the Apex Court touched upon the aspect of judicial review of discretionary actions in case of mala fides, arbitrariness or irrelevant grounds though it was not for the purpose of appointment of Chief Minister but for imposition of State emergency. Presumption of abuse of discretionary power by public authorities has also been

[14] *S. Dharmalingam v Governor of Tamil Nadu* AIR 1989 Mad 48
[15] *Pratap Singh Raojirao Rane v Governor of Goa* AIR 1999 Bom 53
[16] *Mahabir Prasad v Prafulla Chandra* AIR 1969 Cal 198
[17] *Jogendra Nath v State of Assam* AIR 1982 Gau 25
[18] *Samsher Singh v State of Punjab* (1974) 2 SCC 831
[19] *B.R. Kapur v State of Tamil Nadu* AIR 2001 SC 3435
[20] *S.R. Bommai v Union of India* (1994) 3 SCC 296

 [ISSN 2581-5369]

acknowledged in *Shiv Sagar Tiwari v. Union of India*[21] and *Chintalingam v. Govt, of India*[22] and it was held that no exception can be made in favour of any officer.

However, the Court has also made an exceptional digression in the case of M.P. Special Police Establishment v. State of M.P.[23] when it held that there are a few circumstances where in order to protect the rule of law, it is pertinent for the Governor to apply his mind independently and such circumstances included matter of propriety in which he can act in his own discretion. But things changed for better in Rameshwar Prasad v Union of India,[24] the Court finally gave words to Constitutional Silence when it categorically held that Article 361 does not give absolute immunity to the Governor and the same can be scrutinize in a Court of law if the ground of mala fides and ultra vires are found. The verdict was again upheld in *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*.[25] The court was of the opinion that the principle of Constitutionalism has to reign supreme over imperialistic tendencies.

While the Court has shown extreme pragmatism by taking the approach of judicial inaction in terms of not framing any guidelines regarding the manner in which discretionary power has to be exercised but a common feature in its judgments is to direct the contending parties to have a composite floor test even if it requires convening a special session of the Assembly as done in *Jagdambika Pal v. State of U.P.*[26] Recent years has seen heavy political turmoil if there is a hung assembly after assembly elections or the Chief Minister loses absolute majority during his tenure. The Court has displayed an objective sense while dealing with such cases to not fill the legislative vacuum. The same step was taken after the recent Goa elections[27] when BJP succeeded in forming the government through a post-poll alliance despite Congress emerging as the party with the highest seats. Karnataka Assembly elections were another addition to this gap, perhaps widening it the most, and again the Supreme Court had to come for the rescue by direct to conduct the floor test in 24 hours.[28]

IV. CONCLUSION AND SUGGESTION

The Union Government should understand that no Chief Minister will be able to run a government if he/she does not command a majority in the Assembly because ultimately a floor

[21] *Shiv Sagar Tiwari v Union of India* AIR 1997 SC 2725
[22] *Chintalingam v Govt of India* 1971 SCR (2) 871
[23] *M.P. Special Police Establishment v. State of MP & Ors* 2005 SCC (Cri) 1
[24] *Rameshwar Prasad and Ors v Union of India* AIR 2005 SC 4301
[25] *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly* 2016 SCCOnline SC 694
[26] *Jagdambika Pal v State of UP* AIR 1998 SC 998
[27] *Chandrakant Kavlekar v Union of India* AIR 2017 SC 1435
[28] *G. Parmeshwara v. Union of India* (2018) 16 SCC 46

 [ISSN 2581-5369]

test has to be conducted either in the beginning of tenure or at any point of time during the tenure. A Constitutional amendment is the only concrete solution which can put the issue to rest. It will spare the parties and the Governor from eroding the sanctity of Constitution principles and reduce the chances of horse trading, strengthening the anti-defection law in the process. India is an indirect democracy with the first past-the-post election system. We have to keep the mandate of the people at paramount because voting is the only hard power a citizen has got to get their voices heard. Criticism and protests are softer powers. A stable government which not only holds the confidence of the Assembly but also of the people should always remain in power. Confidence of people takes a backseat once the results are declared. Constitution silence also gives the scope of creativity to the judiciary to interpret the Constitution

In recent times, elections in Goa, Manipur, Karnataka and Maharashtra have shown that the mandate of the people can be defeated by bandaged arrangements after elections. Post poll alliances among parties with difference in ideologies or the ones which contest elections against each other head-on is unethical, unscrupulous and unprincipled collaboration. One reason behind the absence of constitutional convention is lack of will on the part of a party ruling at the Centre as it will lose the upper hand in case it is contending for power in a certain State with hung assembly.

Constitutional Silence regarding the discretionary power provided the scope of arbitrariness and violation of principle of natural justice. It has weakened the principles of Constitutionalism as well by sabotaging the rule of law. Such silences are an opportunity for the legislature to gauge the progress made by the society & democratic institutions and ensure that the law facilitates forward movement towards making the aspirations of the people a reality. It is also the need to be kept in mind that the Constitution is there to give power to the institutions and at the same time limit it to avoid abuse. That's how the system of checks and balances work.

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 [ISSN 2581-5369]