

GOVERNOR'S DISCRETIONARY POWERS IN CASE OF HUNG ASSEMBLY

by

Aishwarya Agarwal

ABSTRACT

Being the head of the state comes with certain responsibilities. Fair elections have always been considered an important feature of democracy and a way to express one's idea of how a nation should work. It is the right of the people to choose their own leader. While considering this preposition there are situations when no party/leader gains majority in the house. To guide a state through this situation there are certain responsibilities of the governor at state level which he has to fulfill. The paper investigates into the role of governor in this situation, his powers, responsibilities and the controversies rooted into it. It further discusses the judgements and statutory provisions giving a clear picture of how such situations must be tackled with and the limitations to governor's discretionary powers. And finally, the paper concludes with the present situation in this regard.

Keywords: Governor, discretionary powers, election, hung assembly

Introduction

Times are not static. Times change and so does the life of a nation in many aspects such as political, social or economic. These changes create new problems. Hence to cope with these problems new methods are required. Same is the problem with old laws. It is quite possible that a constitution drafted in one era and in a particular context may be found inadequate in another era and another context. Hence it is necessary to have some machinery, some process, by which the constitution may be adapted from time to time in accordance with contemporary national needs. While the constitution provides power for its amendment, there are certain things that should be kept in mind during amending process. In the case of *Kesavananda Bharti v. State of Kerala*¹, the court held that amendment should not affect the basic structure of the constitution. Some features of the basic structure of the constitution were listed in the judgement while the list mentioned was not exhaustive. One of the basic features of the constitution is democratic form of government.² A democratic form of government is one where people elect their government. According to Abraham Lincoln “Democracy is a government of the people, by the people and for the people.” It must be noted that majority rule is an innate part of democracy. It is important to prove majority in the house before the formation of the government be it at state level or at center. While it is clear whom to invite when there is a clear majority but what if no party claims majority? In situations like this, questions arise on the legality of post poll alliances and the discretionary power of the governor to invite a party not claiming majority in the house. Answering these questions, the courts of the nation have clarified the position several times.

How are the parties elected to form government?

The constitution of India defines the nation as a democratic republic³ with a parliamentary system⁴. India is a Sovereign Socialist Secular Democratic Republic with a parliamentary system of government.⁵ In such a system the party which commands the majority/ succeeds to

¹ *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

² *Id.*

³ INDIA CONST. pmb, amended by The Constitution (One Hundred and Second Amendment) Act, 2018.

⁴ See *Id.* art. 79.

⁵ National Portal of India, <https://www.india.gov.in/my-government/constitution-india> (last visited Dec. 13, 2021).

gain more than 50% seats in the parliament or state legislature, forms the government at centre/state respectively. There are certain conditions to be fulfilled before a person can be enrolled as a candidate to stand in elections which are prescribed in the Representation of People's Act, 1951⁶ and the constitution of India.⁷ The elections are based on adult suffrage i.e., the citizens of India who are not below the age of 18 years and not disqualified to be enlisted as voters shall vote to elect the government at centre/state. Article 326 of the constitution lays down the rules for who can vote in elections and says that: "Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage. — The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 2 [eighteen years] of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election." After the election process the leader of the party which commands majority in the house is invited by the governor at the state level to form the government and take the oath as the chief minister of the state.⁸

Hung Assembly – Meaning

The constitution of India does not define the words "hung assembly". The general meaning of a hung assembly is that, it is a situation when no political party or pre poll alliance gains majority in the house of parliament (centre) or house of legislature (state). As defined by oxford dictionary a hung assembly/parliament is a 'parliament in which no party has clear majority.' In such a situation the alternative is either to conduct fresh elections, or inviting any political party (single party, pre poll alliance or post poll alliance) which a governor thinks could prove its majority on the floor of the house and get the vote of confidence.⁹ And if the said conditions are fulfilled then the leader of that party is invited to take an oath as the chief minister of the state. In a country like India while it is not feasible¹⁰ to conduct fresh elections due to the

⁶ Representation of People's Act, 1951, § 36, No. 43, Acts of Parliament, 1951 (India).

⁷ INDIA CONST. art. 84 & 173, amended by The Constitution (One Hundred and Second Amendment) Act, 2018.

⁸ See *Id.* art. 164.

⁹ Chapter IV Role of the Governor, <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf>.

¹⁰ *Mithlesh Kumar Pandey v. Election Commission of India*, 2014 SCC Online Del 4771.

population, making a post poll alliance attracts certain controversies in this regard. To address this problem the governor exercises his function and uses his discretionary powers in this regard.

Role & Importance of Governor

The governor is the head of the state. The governor of a state has many responsibilities. He serves as an important link between the centre and the state. It is his responsibility to keep the centre up to date on state affairs. This assists the centre in carrying out its constitutional functions and responsibilities to the state. The governor is the state's constitutional head. He appoints the chief minister and other ministers, as well as performs a number of important functions in relation to the state legislature. The governor assures continuity in the state administration, as having a fixed tenure, he stays in office while the chief minister may come and go from time to time. When a proclamation of breakdown of constitutional machinery in the state is issued under article 365, the governor acts as the centre's agent. As a result, the state governor is an important functionary in the system envisaged by the constitution. The governor serves in two capacities: he is the head of the state as well as the centre's representative in the state, and he serves as a channel of communication and contact between the state and the centre. To ensure the smooth operation of the Indian federal structure, the person appointed as governor must inspire confidence from both the centre and the state concerned. The governor's office has now become the centre-state relationship's balance wheel.

Provisions relating to the appointment, duties and powers of the governor are contained in articles 153 to 167 of the constitution of India. Article 153¹¹ says that each state shall have a governor, but two or more states may have a common governor. The constitution of India gives a carte blanche to the center in the matter of appointment of a state governor. Under article 155, the ultimate responsibility to appoint the governor rests with the central government. The governor of a state is formally appointed by the president.¹² There are certain qualifications that need to be fulfilled before a person can be appointed as the governor of a state and certain conditions imposed on the governor while holding the said office. These are as follows: -

¹¹ INDIA CONST. art. 153, amended by The Constitution (One Hundred and Second Amendment) Act, 2018.

¹²See *Id.* art. 155.

- a) The person should be a citizen of India.¹³
- b) The person must have completed the age of 35 years,¹⁴
- c) The person shall not be a member of either house of parliament or house of legislature and if so, he should vacate the seat before entering upon his office of governor, and¹⁵
- d) After being the governor, he shall not hold any other office of profit.¹⁶

Governor's powers with more emphasis on discretionary powers

It is a general rule that the governor works on the aid and advice of the council of ministers and not contrary to it. But there are several exceptions to it where the governor can act on his own discretion. The conferring of discretionary power on the governor is not alien to the constitution of India.¹⁷ Some of the exceptions to the said rule have been laid down in the judgements by the courts of the nation but it must be noted that the list given is not exhaustive.¹⁸

1. Whether a function falls within his "discretion" or not, it is the governor who decides the matter in his "discretion".
2. The governor is sole and final judge whether any function is to be exercised in his discretion or on aid and advice of his council of ministers.
3. The validity of anything done by the governor is not to be called in question on the ground that "he ought or ought not to have acted in his discretion".

While the governor, like the president, usually acts on ministerial advice, the governor is not bound to seek such advice in his discretionary area, and he discharges such functions to the best of his judgement.¹⁹ The necessity of conferring discretionary power on the governor by the constitution makers is twofold i.e., (i) the governor has to serve as an agent of the central government in the state, (ii) he is an important link between the centre and the state to maintain the unity and integrity of the country.²⁰ Moreover, the constituent assembly justified vesting the governor with discretionary power on the grounds that "the provincial government are

¹³ See *Id.* art. 157.

¹⁴ *Id.*

¹⁵ INDIA CONST. art. 158, amended by The Constitution (One Hundred and Second Amendment) Act, 2018.

¹⁶ *Id.*

¹⁷ See *Id.* art. 163.

¹⁸ *MP Special Police Establishment v State of MP*, (2004) 8 SCC 788.

¹⁹ *Samsher Singh v State of Punjab*, AIR 1974 SC 2192.

²⁰ M P JAIN, INDIAN CONSTITUTIONAL LAW 371 (8th edition 2018).

required to work in subordination to the central government," and "the governor will reserve certain things in order to give the president opportunity to see that the rules under which the provincial government are supposed to act according to the constitution or in subordination to the central government are observed."²¹ The phrase "by or under" the constitution, as used in article 163(1), has a broad meaning. The constitution may not expressly state that a specific function is to be performed at the governor's discretion. Nonetheless, the tenor or context of the provision may indicate that the function is one that the governor may exercise at his discretion. If there is any doubt as to whether a matter is within the governor's discretion or not, the governor's decision in his discretion is final, and the validity of anything done by him in his discretion cannot be called into question on the grounds that he ought or ought not to have acted in his discretion [Article 163(2)].²² Clarifying the position on discretionary power of the governor, the Governors' committee has said: "... even though in normal conditions the exercise of the governor's powers should be on the advice of the Council of Ministers, occasions may arise when the governor may find that, in order to be faithful to the constitution and the law and his oath of office, he has to take a particular decision independently." It is to be noted that constitution expressly confers only a few functions on the governor which are to be exercised on his own discretion such as:²³

1. Under schedule VI, certain discretionary powers are conferred on the governors of some of the states,
2. Article 239 says that in certain specific situations concerning the administration of adjoining union territory, a governor does not have to act on aid and advice of his council of ministers in the state and so on.

What other functions fall under this category has been left vague and flexible; the constitution provides no guidelines for deciding this, and the governor is, in effect, the final judge of the matter.

²¹ Dr Ambedkar, VIII CAD, 502.

²² Supru Jayakar Motilal C.R. Das v UOI, AIR 1999 Pat 221.

²³ INDIA CONST.

Governor exercising his discretionary power in appointing the Chief Minister

As discussed above, the governor exercises certain discretionary powers as stated explicitly in the constitution while they are not the only areas in which he can exercise such power. The courts of the nation have time and again pronounced judgements giving a list of areas where a governor could enjoy his discretionary power although the list is not exhaustive. One of the main purposes for which this discretionary power is exercised by the governor is in the appointment of the chief minister of a state. The constitution of India entrusts the governor to appoint the chief minister of the state. Article 164 (1) of the constitution²⁴ says that:

“The Chief Minister shall be appointed by the governor and other ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the governor.”

While it is clear from the aforementioned article that governor is responsible for appointing the Chief Minister, the question of him acting in his discretionary power to fulfill the requirements of this role has been raised several times and the courts of the nation including the apex court have answered it clarifying the ambit of discretionary powers exercised by the governor. Before mentioning the cases, it is pertinent to look into the article which grants discretionary powers to the governor. Article 163(1) & (2) of the constitution of India²⁵ talks about the discretionary powers of the governor and says that:

(1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion,

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

The hon'ble Justices P.N. Bhagwati and Krishna Iyer while listening to a matter concerning the discretionary powers laid down that, it is the president and governor who are the custodian of executive and they should exercise their constitutional powers only on aid and advice of the

²⁴INDIA CONST. art. 164, cl. 1, amended by The Constitution (One Hundred and Second Amendment) Act, 2018.

²⁵See *Id.* art. 163, cl. 1 & 2.

council of ministers except in some exceptional situations.²⁶ Further the court observed that: *Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the house.*²⁷ The court stated certain other situations where discretionary powers may be exercised but the list mentioned was not exhaustive. Under article 163, the governor has certain powers that he may exercise at his discretion.²⁸ Regarding actions pertaining to his sole discretion, the governor's immunity is absolute and extends beyond even the high court's writ jurisdiction. The governor's power over the appointment of the chief minister is one that he has sole discretion over, and thus the court cannot call it into question.²⁹ In the case of *S. Dharmalingam v. His Excellency Governor of Tamil Nadu*,³⁰ where the appointment of chief minister was challenged, the Madras High Court ruled that the governor's power to appoint the chief minister was entirely within his discretion, and the court could not intervene in a matter relating to his discretion. The same preposition was supported in several other cases and it was laid down that, the governor's power in appointing a CM is absolute and he acts in his sole discretion for the said purpose.³¹ The governor is the "sole and exclusive authority" for appointing the Chief Minister and as the head of the state "is the sole judge to ascertain as to who commanded the support of the majority in the assembly".³² The Gauhati High Court observed that, the governor retains the power to appoint the chief minister and the council of ministers, as well as to withdraw the pleasure contemplated by article 164 (1) and/or dismiss the ministry.³³

Legality of post poll alliances

"Constitutional morality is different from political morality. In democracy we cannot curtail parties to form alliances."³⁴ These words of hon'ble Justice N.V. Ramana in one of the recent

²⁶ *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192.

²⁷ *Id.*

²⁸ M P JAIN, *INDIAN CONSTITUTIONAL LAW* 376 (8th edition 2018).

²⁹ *Madan Murari Verma v. Choudhari Charan Singh*, AIR 1980 Cal 95.

³⁰ *S. Dharmalingam v. His Excellency Governor of Tamil Nadu*, AIR 1989 Mad 48.

³¹ *Bijayananda v. President of India*, AIR 1974 Orissa 52; In *Mahabir Prasad v. Prafulla Chandra*, AIR 1969 Cal 198.

³² *Jogender Nath v. State of Punjab*, AIR 1982 Gau 25.

³³ *Id.*

³⁴ *Pramod Pandit Joshi v. UOI*, Writ petition (civil)No. 1362/2019

judgements paves a way to understand the legality of alliances formed by different parties. The legality of post poll alliance has been upheld in several cases. In the case of Mithlesh Kumar Pandey v. Election Commission of India³⁵ it was observed that: “In view of the aforesaid legal position, post-poll alliances cannot be declared as illegal on the ground of being contrary to the manifesto of the political parties entering into the alliance and it is not within the domain of this Court to legislate or issue a direction therefore, making the manifesto a legally binding document on the political party issuing the same. We may record the contention of the learned ASG that if the post-poll alliances are so prohibited, in the event of a hung House/Parliament, with neither party having the required majority, the only option will be to conduct a re-election and which is not a feasible or a practical solution; elections are held at huge costs and the country can ill-afford such repeated elections. It was argued that such repeated elections would thus not be in public interest and this petition rather than being in public interest is against the public interest.” Further it has been observed by other courts that declaring the formation of post poll alliance as illegal would be unsustainable and incomprehensible.³⁶ There is no legal or constitutional prohibition regarding post poll alliances and it would be against the principle of parliamentary democracy if such a contention would be accepted and post poll alliances would be denied to form government.³⁷ In the case of Rameshwar Prasad v. Union of India³⁸ the Hon’ble Court observed that: “If a political party with the support of other political parties or other MLAs stakes a claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of the Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means.” The Court further held that, denying the formation of post-poll alliance will be against the democratic principle of majority rule. The formation of post poll alliances was also discussed in the Sakaria Commission and Punchhi commission³⁹ reports. The Sarkaria Commission⁴⁰ considered the issue relating to Hung Assembly and Suggested possible guidelines for overcoming the difficulty posed by the issue. It suggested a uniform method to be followed in order of preference by the governor while selecting chief minister i.e., when no party has an absolute majority in the legislative assembly

³⁵Mithlesh Kumar Pandey v. Election Commission of India, 2014 SCC Online Del 4771.

³⁶ Jagdish Prasad Saini v. State Election Commission Raj, (2019) SCC Online Raj 4758.

³⁷ *Id.*

³⁸Rameshwar Prasad & Ors. vs Union of India & Anr., 2006 2 SCC 1.

³⁹ Role of governor and centre-state relations, Volume II Constitutional governance and the management of centre-state relations, 71 (2010), <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume2.pdf>.

⁴⁰ Chapter IV Role of the Governor, <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf>.

as under : (i) An alliance of parties formed prior to the elections (ii) The largest single party staking a claim to form the government with the support of other, including the “independents”; (iii) A post-electoral coalition of parties, with all the parties in the coalition joining the government (iv.) A post-electoral alliance of parties, with some of the parties in the alliance forming the government and the others supporting the government from outside. Later, Punchhi Commission also broadly agreed with this recommendation. Thus, it must be noted that there is neither a statutory restriction nor a judicial prohibition on the formation of post poll alliances as long as such an alliance can assure the governor to form a stable government for the welfare of the people of the nation.

Conclusion

From the above discussion it can be inferred that a governor exercises certain discretionary powers. While the constitution of India does not include all the areas in which those powers can be exercised, it is left to the governor to decide whether a matter is within his discretionary powers or not. It is for the people to decide whom they want as their leader but the question of concern arises when no party claims majority. Should the elections be re-held or the governor exercising his discretionary powers may invite the strongest party including the post poll alliance which assures stability and gains the vote of confidence in the house. It has been stated that holding elections again would be a grave misuse of the resources and would not be a feasible solution in a country like India with a large population. But the alternative solution to that problem is to allow post poll alliances to form government and providing a stable and feasible way to carry on the state affairs. The legality of such alliances has been upheld and been supported by the courts of the nation saying that formation of alliances between the parties cannot be curtailed. But it should be kept in mind that while allowing the post poll alliances to form government, the governor should exercise his discretionary power with utmost care and precision that his decision is for the public welfare and the alliance which is going to form the government would prove its stability in the longer run while keeping in mind the greater good of the citizens.