



GOVERNING THE MANY FACES OF THE GOVERNOR

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The three important roles of the Governor arising out of the Constitutional provisions, are:-

- (a) as the constitutional head of the State operating normally under a system of Parliamentary democracy;
- (b) as a vital link between the Union Government and the State Government; and
- (c) as an agent of the Union Government in a few specific areas during normal times [e.g. Article 239(2)] and in a number of areas during abnormal situations [e.g. Article 356(1)].

DISCRETIONARY POWER OF THE GOVERNOR IN TESTING MAJORITY

Governors have, in the past, employed various ways to determine which party or group is likely to command a majority in the Legislative Assembly. Some have relied only on lists of supporters of rival claimants produced before them, as in Bihar (June 1968) when the Congress Party was called upon to form a government. In some cases, physical verification by counting heads was carried out as in the case of Gujarat (1971), when the leader of the newly formed Congress (C) Party was called upon to form the government. Similarly, in Uttar Pradesh (1967), the leader of the Congress Party was appointed Chief Minister after the Governor had physically counted his supporters. In the case of Rajasthan (1967), physical verification was resorted to and the leader of the Congress Party was called upon to form the Government; but, in determining the relative strengths of the Congress Party and Samyukta Dal, the Independents were ignored. If they had been taken into account, the result might well have been different. Further, when the leader of the Congress Party did not form the government, the leader of the opposition group was not called upon to do so; instead, President's rule was imposed. A majority of the State Governments do not find anything wrong with the institution of the Governor. However, a few of them have time and again demanded abolition of the post of the Governor. The Parliamentary system of the Cabinet type, which the Constitution has adopted at the State level, is not on all fours with that of the United Kingdom. It is a case *sui generis*. The Governor in our system does not function as constitutional head for the whole gamut of his responsibilities. There is an important area, though limited and subject to Constitutional constraints, within which he acts in the exercise of his discretion. It will bear reiteration that there are more than one facet of his role. As a 'bridge' between the union and the State, he can foster better understanding between them and remove such misapprehensions as may be souring their relations. He is sentinel of the Constitution. He is a live link of channel between the Union and the State. As such link, it is his duty to keep the Union informed of the affairs of the State Administration, whenever he feels that matters are not going in accordance with the Constitution, or there are developments endangering the security or integrity of the country. The Governor thus assists the Union in discharging its responsibilities towards the States. The part which the Governor plays to help maintain the democratic form of Government in accordance with the Constitution is of vital importance. In the ultimate analysis, due observance of the Constitutional provisions is the soundest guarantee of enduring unity and integrity of the nation. The Governor whether acting with or without the advice of the Council of Ministers, plays a pivotal role in our constitutional system and in its working. He is

the linchpin of the constitutional apparatus of the State. All executive action of the State Government is expressed to be taken in his name. He chooses and appoints the Chief Minister in his discretion, on the criterion that the latter should be able to form a Ministry commanding majority support in the Assembly without his assent, no Bill can become law. A large number of other important functions have also been entrusted by the Constitution to the Governor. It is not necessary to recapitulate all of them here.

DISCRETION IN CHOOSING CHIEF MINISTER

The leader of the party which has an absolute majority in the Legislative Assembly should invariably be called upon the Governor to form a government. This is a time-honoured convention of a cabinet form of government. There is no controversy in this regard. However, where no party has a clear majority, there are two views as to the procedure to be adopted for identifying the person who can form a government. According to some others, the Governor, acting on his own, should summon the Assembly for electing a person to be the Chief Minister. Certain other State Governments have suggested that the person to be appointed as Chief Minister should be chosen or elected by the Legislative Assembly, even if he is the leader of a party which has secured absolute majority. Some of the State Governments consider that the Governor should try to ensure that the government to be formed will be stable. It is important to note that, in appointing the Chief Minister, the Governor is required to ensure that the Council of Ministers is collectively responsible to the Legislative Assembly vide Article 164(2). Accordingly, in order to continue in office, the Council of Ministers, and not the Chief Minister alone, should continue to have majority support in the Assembly. Also, it is only against the Council of Ministers that a no-confidence motion may be moved. We are, therefore unable to agree with any suggestion which would require a Chief Minister to be elected or chosen by the Legislative Assembly. To ensure strict adherence to the principle laid down by Article 164(2), and fair-play to all the parties in the Legislative Assembly, in choosing a Chief Minister, the Governor should be guided by the following principles,¹ viz.—

- (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.

Thus, if there is a single party having an absolute majority in the Assembly, the leader of the party should automatically be asked to become the Chief Minister.

If there is no such party, the Governor should select a Chief Minister from among the following parties or group of parties by sounding them, in turn, in the order of preference indicated below:

1. An alliance of parties that was formed prior to the Elections.
2. The largest single party staking a claim to form the government with the support of others, including "independents."
3. A post-electoral coalition of parties, with all the partners in the coalition joining the Government.²
4. 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, while going through the process of selection described above, should select a leader who, in his (Governor's) judgement, is most likely to command a majority in the Assembly. The Governor's subjective judgement will play an important role. A Chief Minister, unless he is the leader of a party which

¹ Justice Sarkaria Commission, 1988 (established to examine Centre-State relations, set up by the Central Government) in its report Chapter IV - Role of Governor, page no. 22

² *Chandrakant Kavlekar v. Union of India*; (2017) 3 SCC 758

has absolute majority in the Assembly, should seek a vote of confidence in the Assembly within 30 days of taking over. This practice should be strictly adhered to with the sanctity of a rule of law. We are firmly of the view that when a number of Members of the Legislative Assembly approach the Governor and contest the claim of the incumbent Chief Minister to continued majority support in the Assembly, the Governor should not risk a determination of this issue, on his own outside the Assembly. The prudent course for him will be to cause the rival claims to be tested on the floor of the House. Such a procedure will be not only fair but also seen to be fair. It will also save the Governor from embarrassment consequent upon any error of judgement on his part.

NEED FOR DISCRETIONARY POWER OF THE GOVERNOR

It has been suggested to us that the discretionary power of the governor under Article 163 should be removed. The Governor may be assigned only some symbolic functions to perform but must act only according to the advice of the State Council of Ministers. Two State Governments are of the view that the expression "except in so far as he is, by or under this Constitution required to exercise his functions or any of them in his discretion" in Article 163(1) should be retained. However, the Governor should exercise his discretion, in public interest, not arbitrarily, and so as to subserve the purpose for which discretionary power has been conferred. One of these State Governments has further suggested that the discretionary power needs to be curtailed, as the present interpretation of the scope of this power is a potential threat to the autonomy of the States and to the right of the people of the State to be governed by a responsible government. It has accordingly suggested that, if exercise of discretion by the Governor under a particular Article of the Constitution cannot be regarded as justified, the Article should be amended so as to remove that function the purview of the Governor's discretionary power. As it is humanly impossible to visualise and provide for all contingencies in which the Governor may be required to act in the exercise of his discretion for discharging his constitutional responsibilities, the Constitution-makers advisedly refrained from putting it within the strait jacket of a rigid definition. The ways in which the Constitution can be tampered with cannot be foreseen. Political pressures and human ingenuity may try many methods of circumventing the Constitution and creating chaos. Which way the Governor may have to react under any such situation cannot be pre-determined. For all these reasons, we are of the opinion that the discretionary power of the Governor as provided in Article 163 should be left untouched. It is neither feasible nor advisable to regulate its exercise or restrict its scope by an amendment of the Constitution. In the earlier paragraphs we have indicated broadly the principles and conventions to be followed by the Governor in exercising discretion in relation to some specified functions. On all such occasions when a Governor finds that it will be constitutionally improper for him to accept the advice of his Council of Minister, he should make every effort to persuade his Ministers to adopt the correct course. He should exercise his discretionary power only in the last resort. It is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President.³ It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides.⁴ It is possible that on some rare occasional the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court

³ Harish Chandra Singh Rawat v. Uol; March, 2016

⁴ Pema Khandu & Ors v. Nabam Rebia; January, 2016

was, therefore, wrong in holding that the floor-test was neither compulsory nor obligatory or that it was not a prerequisite to sending the report to the President recommending action.⁵

GUIDELINES FOR GOVERNORS

A number of views have been expressed earlier as to whether guidelines are necessary for Governors in regard to the exercise of their discretionary powers. According to some, it will be difficult to frame a set of guidelines because the characteristics of the situations in which they have to be exercised will be so diverse as to defy even broad categorisation. Another view is that guidelines may lead to litigation. In any case, they are unnecessary and it should be assumed that a Governor will use his discretion properly in accordance with the spirit of the Constitution.

There is the opposing view that guidelines are necessary. They should be directory and embody accepted conventions. While some would prefer the guidelines to be kept outside the Constitution, others would like them to be issued in the form of an Instrument of Instructions under the Constitution. According to one view, an Instrument of Instructions may be formulated by the Union in consultation with the States. Another view is that this should be done by the Inter-Governmental Council.

The Draft Constitution provided that, in choosing his Ministers and in his relations with them, the Governor would be guided by the Instructions set out in a Schedule.⁶ The Schedule was subsequently deleted by the Constituent Assembly. While doing so, it was explained that the Governor had to act on the advice of his Ministers. His discretion being very meagre, his relations with his Ministers should be left entirely to convention. The SC has held that, when a political party with the support of other political party or other MLAs stakes 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.⁷

The ARC Study Team on Centre-State Relationships⁸ emphasised the need for the evolution of a national policy to which the Union and the States subscribe, which gives recognition to the role of the Governor and guides the responses of the Union, the States and the Opposition parties to any actions taken in discharge of it. The national policy, according to it, should spell out the implications of the Governor's role in the form of conventions and practices, keeping in view the national objective of defending the Constitution and the protection of democracy.

Again in 1969, the Administrative Reforms Commission⁹ recommended that guidelines on the manner in which discretionary powers should be exercised by the Governors should be formulated by the Inter-State Council and, on acceptance by the Union, issued in the name of the President. The Government of India, however, did not accept this recommendation on the ground that these matters should be left to the growth of appropriate conventions and that the formulation of rigid guidelines would be neither feasible nor appropriate.

Considering the multi-faceted role of the Governor and the nature of his functions and duties, we are of the view that it would be neither feasible nor desirable to formulate a comprehensive set of guidelines for the exercise by him of his discretionary powers. No two situations which may require a Governor to use his discretion, are likely to be identical. Their political nuances too are bound to be different, making it virtually impossible to foresee and provide for all such situations. Consequently, guidelines will be too broad to be of practical use to a Governor and yet may force him to search for

⁵ u/art 356(1)

⁶ IV Schedule, Constitution of India

⁷ *Rameshwar Prasad (VI) v. Union of India*; (2006) 2 SCC 1

⁸ In 1967

⁹ Committee appointed by the Government of India which is responsible for giving recommendations for reviewing the public administration system of India

precedents every time. It is important that no such handicaps should be placed on him. He should be free to deal with a situation, as it arises, according to his best judgement, keeping in view the Constitution and the law and the conventions of the parliamentary system outlined in the preceding paragraphs as well as in the Chapters on “Reservation of Bills by Governors for President's consideration”, and “Emergency Provisions”.

RECOMMENDATIONS

01. It is desirable that a politician from the ruling party at the Union is not appointed as Governor of a State which is being run by some other party or a combination of other parties.
02. In order to ensure effective consultation with the State Chief Minister in the selection of a person to be appointed as Governor the procedure of consultation should be prescribed in the Constitution itself by suitably amending Article 155.
03. The Vice-President of India and the Speaker of the Lok Sabha may be consulted by the Prime Minister in selecting a Governor. The Consultation should be confidential and informal and should not be a matter of constitutional obligation.
04. The Governor's tenure of office of five years in a State should not be disturbed except very rarely and that too, for some extremely compelling reason.
05. Save where the President is satisfied that, in the interest of the security of the State. It is not expedient to do so, the Governor whose tenure is proposed to be terminated before the expiry of the normal term of five years, should be informally apprised of the grounds of the proposed action and afforded a reasonable opportunity for showing cause against it. It is desirable that the President (in effect, the Union Council of Ministers) should get the explanation, if any, submitted by the Governor against his proposed removal from office examined by an Advisory Group consisting of the Vice-President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India. After receiving the recommendation of this Group, the President may pass such orders in the case as he may deem fit.
06. The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the government.
07. 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.
08. If there is a single party having an absolute majority in the Assembly, the leader of the party should automatically be asked to become the Chief Minister. If there is no such party, the Governor should select a Chief Minister from among the following parties or groups of parties by sounding them, in turn, in the order of preference indicated below:
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 - (iii) A post-electoral coalition of parties, with all the partners in the coalition joining 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.
09. The Governor while going through the process described above should select a leader who in his (Governor's) judgement is most likely to command a majority in the Assembly.
10. The Governor should not risk determining the issue of majority support, on his own, outside the Assembly. The prudent course for him would be to cause the rival claims to be tested on the floor of the House



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