



URGENT NEED OF LAW TO REGULATE THE SITUATIONS OF HUNG LEGISLATIVE ASSEMBLIES

*Krishna Murari Yadav**

I. INTRODUCTION

The Constitution of India provides that the Governor of a state will be appointed by the President.¹ In practice only those person can be appointed as Governor whom the Council of Ministers in Centre thinks fit. The Governor shall hold office during the pleasure of the President.² In case of *Ram Jawaya Kapur v. State of Punjab*,³ Supreme Court said that after reading articles 53 and 74, it becomes clear that the President is a formal or Constitutional head while real head is Council of Ministers. We have witnessed that whenever Government in centre has changed, Governors appointed by previous Governments have also changed. It also happened in 2004 and 2014. The post of Governor has actually become a political post.

It is rule that Governor acts on the aid and advice of the Council of Ministers. In case of *Ram Jawaya Kapur v. State of Punjab*,⁴ the Supreme Court said that it becomes very clear that the Governor is a formal or constitutional head while real head is Council of Ministers. We have accepted Parliamentary form of Government as in England. In *Samsher Singh v. State of Punjab*,⁵ the Supreme Court said that “wherever the Constitution requires satisfaction of Governor under articles 213 and 356, it is not the personal satisfaction of the Governor. It is the satisfaction of the Council of Ministers in constitutional sense under the cabinet system of Government.” So, from these cases it becomes very clear that actual power is in the hand of the Council of Ministers rather than the Governor.

There are certain exceptional circumstances when Governor acts according to his own discretion.⁶ One of them is inviting a person to form the ‘Government’. Governor has more widely discretionary power than the discretionary power of the President of India. Governor may reserve any bill for consideration of President.⁷ He may also submit report for imposition of President’s rule in State.⁸ He may also grant sanction to prosecute a Minister, including Chief Minister under the Prevention of Corruption Act, 1988.⁹ Exercise of discretion by the Governor is subject to judicial review.¹⁰ Discretion must not be used in arbitrary and capricious manner.¹¹ Governor is not employee or servant of Government of India.¹²

* Assistant Professor, Law Centre I, Faculty of Law, University of Delhi. The author may be contacted at krishnamurari576@gmail.com.

¹ Art. 155 of the Constitution of India.

²*Id.*, art. 156.

³ AIR 1955 SC 549.

⁴*Ibid.*

⁵ AIR 1974 SC 2129.

⁶ *Supra* note 1 at art. 163. According to art. 163(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.

⁷*Id.* at art. 200.

⁸*Id.* at art. 356.

⁹*M.P. Special Police Establishment v. State of Madhya Pradesh*, AIR 2005 SC 325.

¹⁰*B.P. Singhal v. Union of India* (2010) 6 SCC 331.

¹¹*Ibid.*

¹²*Hargovind Pant v. Dr. Raghukul Tilak*, 1979 AIR 1109.

Since 1951, there is no uniformity on what the Governor should do in case of hung Assembly. Sometimes leader of largest party and sometime leader of pre /post- election coalition as convenient to Central Government is called to form the Government. This is against the federal features of the Constitution of India. Sarkaria Commission,¹³ Justice M.N. Venkatachaliah Commission¹⁴ and Punchhi Commission¹⁵ have recommended guidelines for Governor to use discretion in case of hung Assembly and manner of appointment and removal of Governor. Floor test is mandatory to decide majority in Assembly.¹⁶ But in absence of certain enacted laws, these guidelines and decisions have been violated.

II. APPOINTMENT AND REMOVAL OF GOVERNOR

The Governor of a State shall be appointed by the President by warrant under his hand and seal.¹⁷ The Governor shall hold office during the pleasure of the President.¹⁸ However, the Governor is not an agent of the President of India.¹⁹ In India, there is Parliamentary form of Government. In this form of Government, there are two heads. One is the formal or Constitutional head and other is real head. President and Governors are formal or Constitutional heads. Real executive powers are vested in Ministers or Cabinet.²⁰ After observing articles 52, 53, 74 and *Ram Jawaya Kapur v. State of Punjab*,²¹ *Shamsher Singh v. State of Punjab*²² and *S. P. Gupta v. Union of India*,²³ it can be said that real powers of the President are vested in the Council of Ministers. So indirectly power of President is used by Council of Ministers.

In the case of *Hargovind Pant v. Dr. Raghukul Tilak*²⁴, a Constitutional Bench of the Supreme Court held that Governors hold an independent constitutional office which is not subject to the control of the Government of India. They are not employee or servant of anyone. He occupies a high constitutional office with important constitutional functions and duties.

Although the Supreme Court has held that Governor is not employee or servant of anyone, but in practice his position is worst in comparison to another authority. Government Servant cannot be dismissed without being given a right of hearing, the Governor can be

¹³ In June 9, 1983 the Union Government constituted a Commission under the Chairmanship of Justice R.S. Sarkaria with Shri B. Sivaraman and Dr. S.R. Sen as its members, to review the question of Centre - State relations. The Commission submitted its report in January 1988. Total pages are 1600. This report is divided into 19 Chapters. Report of Sarkaria Commission, Available at: <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/> (Visited on May 22, 2018).

¹⁴ The National Commission to Review the Working of the Constitution was set up by Government Resolution dated February 22, 2000 under the Chairmanship of Justice M.N. Venkatachaliah. Main function of this Commission was to suggest best methods after observing the experience of the Constitution for past 50 years. The Commission submitted its report in two volumes to the Government on March 31, 2002.

¹⁵ The Commission on Centre-State Relations was constituted by Government under the Chairmanship of Hon'ble former Chief Justice of India Madan Mohan Punchhi on April 27, 2007 to strengthen Centre- State Relationship after Sarkaria Commission.

¹⁶ *S. R. Bommai v. UOI*, AIR 1994 SC 1918.

¹⁷ *Supra* note 1 at art. 155.

¹⁸ *Id.* at art. 156.

¹⁹ H. M. Seervai, *Constitutional Law of India* 2065 (Universal Law Publishing Co. Pvt. Ltd, 1993).

²⁰ *Supra* note 3.

²¹ *Ibid.*

²² *Infra* note 45.

²³ AIR 1982 SC 149

²⁴ *Supra* note 12.

removed from office under article 156(1) without assigning any reason. Government Servants are entitled for *audi alteram partem*²⁵ but Governors are not entitled for this.²⁶

A. Sarkaria Commission (Commission on Centre-State Relation), 1988

The Sarkaria Commission²⁷ has mentioned in its Report that frequent removal and transfer of Governors have lowered the dignity of Governor. Many Governors looking forward for further office under the Union or active role in politics after their tenure regard themselves as an agent of the Union.²⁸ The Commission had recommended that Governor should be appointed through consultation process. Only that person should be appointed as a Governor who had not participated in active politics recently.²⁹ Chief Minister of the State, Speaker of Lok Sabha and Vice President of India must be consulted before appointing any person as Governor. It was also recommended to amend article 155 for inserting procedure of consultation.³⁰ It was recommended that 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. He should be given an opportunity of hearing. He should be removed on the recommendation of an 'Advisory Group' consisting of the Vice-President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India.

B. Justice M.N. Venkatachaliah Commission, 2002

This Commission is also known as National Commission to Review the Working of the Constitution.³¹ This Commission suggested for constitution of a Committee comprising of the Prime Minister of India, and the Home Minister of India. It was the discretionary power of the Committee either to include Vice-President or not.

In the case of *Rameshwar Prasad v. Union of India*,³² the Supreme Court left at the wisdom of political parties and their leaders to formulate national policy with some common minimum parameters applicable and acceptable to all major political parties for appointment and removable of Governor.

C. Punchhi Commission³³, 2010

Report of the Commission on Centre-State Relations is also known as Punchhi Commission.³⁴ This Commission recommended for amendment of article 156 and article 157 of the Constitution of India. Regarding article 156, it recommended that the phrase "during the pleasure of the President" must be substituted by an appropriate procedure so that before

²⁵*Supra* note 1 at art. 311.

²⁶ M.P. Jain, *Indian Constitutional Law* 359 (Lexis Nexis, 2018).

²⁷ Report of Sarkaria Commission, available at: <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/#> (last visited on May 22, 2018).

²⁸ Report of Sarkaria Commission, Ch. IV, Role of the Governor, Para 4.1.02.

²⁹ This view was reiterated in case of *Rameshwar Prasad v. Union of India* (2006) 2 SCC 1: AIR 2006 SC 980

³⁰*Supra* note 29 at para 4.16.03

³¹ The National Commission to Review the Working of the Constitution was set up by Government Resolution dated 22 February, 2000 under the Chairmanship of Justice M.N. Venkatachaliah. Main function of this Commission was to suggest best methods after observing the experience of the Constitution past 50 years. The Commission submitted its report in two volumes to the Government on 31st March, 2002.

³² AIR 2006 SC 980.

³³ The Commission on Centre-State Relations was constituted by Government under the Chairmanship of Hon'ble former Chief Justice of India Madan Mohan Punchhi on April 27, 2007 to strengthen Centre- State Relationship after Sarkaria Commission. Punchhi Commission submitted its Report in seven volumes on March 30, 2010.

³⁴ Report of the Commission on Centre-State Relations.

removal of Governor, he must be provided an opportunity to represent himself before President of India. The Commission was against “Doctrine of Pleasure’ in case of removal of Governor.³⁵ This Commission was in favour of inserting some more qualifications for Governors.

The Commission recommended that the following amendments in article 157 of the Constitution are required to ensure the independence and dignity of the Governor’s office:

- (i) “The Governor should, in the opinion of the President, be an eminent person;
- (ii) The Governor must be a person from outside the concerned State; and
- (iii) The Governor should be a detached person and not too intimately connected with the local politics of the State. Accordingly, the Governor must not have participated in active politics at the Centre or State or local level for at least a couple of years before his appointment.”³⁶

United Progressive Alliance’s Government came into power after defeating National Democratic Alliance’s Government in 2004. Governors of Uttar Pradesh, Haryana, Gujarat and Goa were removed on July 2, 2004. It was challenged through writ petition under article 32 by former BJP Member of Parliament, B.P. Singhal and name of the case was *B.P. Singhal v. Union of India*.³⁷ A Constitution Bench of Supreme Court of India headed by Chief Justice of India K.G. Balakrishnan stated that the Doctrine of pleasure is applicable in case of office of Governor. So, no need to assign any reasons or providing an opportunity for hearing. But such removal must not be “arbitrary, whimsical, capricious or unreasonable”. This power must be exercised in exceptional circumstances on the basis of compelling reasons. If the aggrieved is able to show prima facie arbitrary or mala fide use of power, then the Court has the power of judicial review. A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. It follows therefore that change in government at Centre is not a ground for removal of Governors holding office to make way for others favoured by the new government.

III. HUNG ASSEMBLY AND APPOINTMENT OF CHIEF MINISTER

Governor shall act on the aid and advice of the Council of Ministers except where Constitution requires to act according to his own discretion.³⁸ Chief Minister shall be appointed by the Governor.³⁹ Any person may be appointed as a Chief Minister although he is neither member of the Legislative Assembly nor the member of Legislative Council.⁴⁰ The reason of this is the absence of the expression “from amongst members of the legislature” in article 164(1).⁴¹ The only condition is that he must be member of either House within six months.⁴² A person disqualified to be member of either House cannot be appointed as a Chief Minister.⁴³

³⁵*Id.* at para 4.4.06.

³⁶*Id.* at Para 4.4.11.

³⁷*Supra* note 10.

³⁸*Supra* note 1 at art. 163 (1).

³⁹*Id.* at art. 164 (1).

⁴⁰Durga Das Basu, *Shorter Constitution of India* 1098 (Lexis Nexis, 2009).

⁴¹ P M Bakshi, *Commentary on the Constitution of India* 532 (Lexis Nexis, 2016).

⁴²The Constitution of India, art. 164 (4); see also, *S. R. Chaudhari v. State of Punjab*, AIR 2001 SC 2707.

⁴³*B.R. Kapoor v. State of Tamil Nadu*, AIR 2001 SC 3435.

Hon'ble Justice Krishna Iyer observed that "Governor has discretionary power in the choice of Chief Minister, this choice is restricted by the paramount consideration that he should command a majority in the House".⁴⁴ The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.⁴⁵

In the Constitution of India, it has not been written that only that person can be appointed as a Chief Minister who has majority in Legislative Assembly. It has also not been written that the Governor has power to call the Chief Minister to prove majority in the Assembly. These questions were raised before the Patna High Court when Governor after appointing Smt. Rabri Devi as the Chief Minister directed her to prove majority in the Legislative Assembly within 10 days.⁴⁶ This direction was given on March 9, 1999 and at that time the National Democratic Alliance was in power in the Centre. In the Case of *Sapru Jayakar Motilal C.R. Das v. Union of India*⁴⁷, Patna High Court with the help of *Shamsher Singh case*⁴⁸ and *U. N. R. Rao case*⁴⁹ decided these questions. In *Shamsher Singh Case* it has been held that India has accepted Parliamentary form of Government. In the case of *U. N. R. Rao*, it was contended that convention prevailing in United Kingdom must be ignored. Supreme Court rejected this argument and held that in absence of clear provisions 'conventions' before the commencement of the Constitution may be adopted. In this case Hon'ble Chief Justice of India S. M. Sikri stated:

"If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."⁵⁰

The Patna High Court had invoked two constitutional features to support that Governor has power to call for floor test, viz., (1) Collective Responsibility of the Council of Ministers to the Legislative Assembly of the State, and (2) Discretionary nature of the Governor to appoint the Chief Minister. In this case Hon'ble Justice B P Singh said:

"To us it appears that even if the Constitution does not refer in express words to a vote of confidence, or to a vote of no confidence, the principle of collective responsibility of the Council of Ministers to the legislative Assembly includes within its ambit the rule that the Council of Ministers must enjoy the support of the majority of members of the Legislative Assembly."

The Supreme Court in several cases has said that floor test is best methods to judge the majority in Assembly.⁵¹

From the above discussion it has become very clear that only that person may be appointed as a Chief Minister who is able to prove majority in Legislative Assembly of the

⁴⁴*Shamsher Singh v. State Of Punjab*, AIR 1974 SC 2129

⁴⁵*Supra* note 1 at art. 164 (2).

⁴⁶*Sapru Jayakar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.

⁴⁷AIR 1999 Pat 221.

⁴⁸*Supra* n. 45.

⁴⁹*U. N. R. Rao v. Smt. Indira Gandhi*, AIR 1971 SC 1002.

⁵⁰*Ibid.*

⁵¹*S. R. Bommai v. Union of India*, AIR 1994 SC 1918, *Rameshwar Prasad v. UOI*, AIR 2006 SC 980 and *Nabam Rebia, & Bamang Felix v. Deputy Speaker* (2016) 8 SCC 1.

State and relevant conventions before the commencement of the Constitution may be adopted for interpreting relevant provisions of the Constitution of India.

When a single largest party or pre-poll coalition of parties has not secured majority in Legislative Assembly that is called hung Assembly. Several committees and Commissions have made suggestions regarding appointment of Chief Minister in case of hung Assembly which are following:

A. The Governors' Committee (Bhagwan Sahay Committee) Report, 1971

This Committee suggested the following formula to appoint a person as a Chief Minister:

- (i) "Where a *single party commands a majority* in the Assembly, the Governor is to call upon its leader to form the government.
- (ii) *If before the election*, some parties combine and produce an agreed programme and the combination gets a majority after the election, the commonly chosen leader of the combination should be invited to form the government.
- (iii) If no party is returned in a majority at the election and, thereafter, two or more parties come together to form the government, the leader of the combination may be invited to form the government.
- (iv) The leader of a minority party may be invited to form the government if the Governor is satisfied that the leader will be able to muster majority support in the House."⁵²

B. Sarkaria Commission, 1988

In choosing a Chief Minister, the Governor should follow the following principles in accordance with preference:

- (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) An alliance of parties that was formed prior to the elections.
- (iii) The largest single party staking a claim to form the government with the support of others, including "independents".
- (iv) A post-electoral coalition of parties, with all the partners in the coalition joining the Government.
- (v) 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."⁵³

The basis of political convention in England in forming a ministry is that the King's Govt. must go on, and that the party which commands the widest support in the House of Commons must be called upon to form the government.⁵⁴In some States, the Governors had invited the leader of the single largest party to form a ministry and ignored the claim of the leader of a united front and vice-versa. The author has tried to show position of hung Assemblies and discretionary powers used by the Governors through Chart. This Chart clearly shows that behaviour of Governors is directly or indirectly influenced by the then Central Government.

⁵²*Supra* note 27 at 378.

⁵³ Report of Sarkaria Commission, Chapter IV, Role of the Governor, Para 4.11.04, Available at: <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf> (last visited on May 22, 2018).

⁵⁴*Supra* note 20 at 2063.

Chart

States/ Years	Single Largest Party	Coalition of Parties	Invitation by Governor	Central Government
Madras/ 1952	Congress 152 seats	UDF (Post-poll Coalition) (166 Seats)	Single Largest Party (Congress 152 seats) (This was the first case when there were severe allegations that majority was proved by horse-trading). ⁵⁵	Congress
Haryana/ 1982	Congress (I) 35 Seats	Lok Dal-BJP 36 Seats	Single Largest Party Congress (I) 35 Seats ⁵⁶	Congress
Bihar/ 2005	JD(U) and BJP formed coalition to form government (92 seats)	RJD 75 seats	When JD(U) and BJP tried to form the Government, Assembly was dissolved even without single sitting. ⁵⁷	UPA
Goa/ 2017	Congress 17	BJP 13 and Other Parties	Coalition (BJP 13 and Other Parties)	NDA
Manipur/ 2017	Congress 28	BJP 21 and Coalition	Coalition	NDA
Meghalaya/ 2018	Congress 21	BJP 2 and Coalition	Coalition	NDA
Karnataka/ 2018	Congress and JDS Coalition 117 seats	BJP 104	Largest Party BJP (104 seats) (15 Days time was given by Governor for floor test which was reduced up to 30 hours by the Supreme Court). ⁵⁸	NDA

IV. CONCLUSION AND RECOMMENDATIONS

Federal character is the basic structure of the Constitution of India.⁵⁹ To protect the federal features of the Constitution of India, an independent Governor is *sine qua non* who

⁵⁵Gautam Bhatia, "Do we need the office of the Governor?" *The Hindu*, May 24, 2018.

⁵⁶ Dr. J.N. Pandey, *Constitutional Law of India* 592 (Central Law Agency, 2015).

⁵⁷ In the case of *Rameshwar Prasad v. Union of India*, AIR 2006 SC 980, Supreme Court declared that dissolution of Assembly by Governor was unconstitutional. Coalition must be given an opportunity for floor test.

⁵⁸ Regarding Karnataka Dispute, three "Orders" were passed on 17, 18 and 19 May, 2018. All the three orders were passed in case of *Dr. G. Parmeshwara & Anr. v. Union of India*. These Orders were passed by three Judge Bench – Hon'ble JJ A. K. Sikri, S. A. Bobde and Ashok Bhushan. Case Diary No. of this case is 19482/2018.

(1) First Order -Midnight Order (2.00A.M, May17, 2018) - Order passed on 17 May is called midnight order by which Supreme Court passed an order to produce document but did not prohibit swearing ceremony of Mr. Yeddyurappa which was scheduled at 9.30 a.m. on 17th May, 2018 and fixed the date of next hearing on May 18, 2018.

(2) Second Order - Order passed on May 18, 2018- In this Order the Supreme Court passed guidelines for floor test at 04.00 p.m. on May 19, 2018. It also directed for appointment of pro-tem Speaker.

(3) Third Order - Order passed on May 19, 2018- Additional Solicitor General on behalf of Karnataka Government promised for live telecast and permission for media for coverage of floor test. The Supreme Court passed an order that that no further order for removing Mr. K.G. Boppaiah, pro-tem Speaker. It means appointment of pro-tem speaker was approved.

⁵⁹*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

can use his discretion according to the Constitutional ethos rather than political partisan. Since the commencement of the Constitution, behaviour of Governors is based on political partisanship. Such behaviour of Governors is heart wrenching for thinkers and catastrophe for the Constitution. Governor is neither an employee nor an agent of the President of India. Governor is appointed by President on the advice of the Council of Ministers. Crucial role of Government in appointment and removal of Governor makes the Governor political agent. Since Madras (1952) to Karnataka (2018), Governors have acted like political agents of ruling party/ parties and role of Governors has always been controversial since inception. Several Committees and Commissions have suggested several formulae for appointment and removal of Governors and use of discretionary power by them. The Supreme Court of India has also suggested for floor test and use of discretionary power. “*Miseraest servitus, ubi jus est vagum aut incertum*” which means “it is a miserable slavery where the law is vague or uncertain”. So it is urgent need of law to enact particular law so that an eminent and independent person may be appointed as a Governor to protect federal character of the Constitution of India. Role of fair media and unbiased social media which create political awareness cannot be denied. Some of the recommendations in this context are:

(1) Tenure of Governor must be certain like other Constitutional bodies namely, President, Comptroller of Auditor General, Judges. His tenure totally depends upon pleasure of the President who removes him/her without assigning any reason. Indirectly tenure of Governor depends upon the sweet will of ruling party in the Centre. He should not be removed without assigning any reason and giving an opportunity for hearing.

(2) Wider and arbitrary discretionary powers of Governor are against representative form of Government. Such discretionary powers must be curtailed by amending article 163 in the line of article 74.

(3) There is need to amend article 164 and insert guidelines to decide which party or person should be invited to form Government and manner for proving majority in the Assembly. There are following rules that must be followed in preference at the time of appointing a person as Chief Minister-

Rule 1- Only that party or pre-poll combination of parties must be invited which has secured absolute majority in the Assembly.

Rule 2- In case of non-fulfillment of first rule, largest single party in Assembly election must be invited to form Government.

Rule 3- In absence of first and second rule, post-poll combination of parties which are claiming majority in the House must be invited to form Government.

Rule 4- Floor test must be followed to prove majority in the House.

(4) Article 156 (1) must be amended and phrase ‘pleasure of President’ must be omitted.

(5) Article 155 and article 156 must be amended and ‘National Governors Appointment and Removal Commission’ (NGARC) consisting of Prime Minister of India, Home Minister of India, Speaker of Lok Sabha, Chairperson of Rajya Sabha, Leader of Opposition and Chief Minister of the State in which Governor is to be appointed must be inserted. For appointment of any person, at least four members of the Committee must agree.

(6) Article 157 must also be amended and the following qualifications must be inserted –

(i) he must be an eminent person, (ii) he has not actively participated on behalf of any party during last five years. (iii) his previous record must be beyond political partisanship.