
LEGAL ANALYSIS OF DISCRETIONARY POWERS OF THE GOVERNOR IN APPOINTING A CHIEF MINISTER DURING A HUNG ASSEMBLY

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ABSTRACT

In State Assembly elections, it has been observed that occasionally no party secures a clear majority to establish a government, leaving the governor with the discretion to invite any party to form the administration. This discretionary authority can sometimes lead to issues in the state's governance, resulting in delays in decision-making, decreased stability in coalition governments, heightened probabilities of defections, risks of horse trading and corruption, stagnation within the administrative system, and growing discontent among the public and voters. Article 163 of the Indian Constitution addresses the circumstances in which the governor must exercise their discretion. Article 164(1) talks about the power of governor to appoint the CM and in case of hung assembly to appoint the leader most suitable to have the majority in the assembly.

Keywords: discretion, coalition government, defections.

Introduction

India's Constitution is one of the most comprehensive constitution, as its framers meticulously addressed even the smallest details while shaping the nation's fundamental law. However, despite its ambitious nature, certain ambiguities have surfaced over time—issues that even the drafters did not anticipate but eventually became significant concerns. Some of these challenges evolved into complex disputes, often involving conflicts between citizens and the State or among different State institutions.¹ While the constitutional framework has, in many instances, successfully resolved such matters and upheld its integrity, there have also been cases where, despite persistent efforts, the intricacy of the issue only deepened.

One such instance is the way Governors have exercised their discretionary powers under Article 163, particularly in cases of a hung assembly in various states. These ambiguities are often referred to as "Constitutional silences," a term introduced by H. Tribe in his seminal book *Invisible Constitution*². Tribe argues that the influence and interpretation of the written Constitution are not always as definitive as they may seem. At times, the framers deliberately leave certain aspects open-ended to allow for future interpretation based on evolving needs. In other cases, despite their best efforts, some elements may be inadvertently overlooked. In his book *Cornerstone of a Nation*, Granville Austin³ suggests that the omission of a definition for a hung assembly may be due to the Constitution's framers not foreseeing a scenario where no single party would achieve a majority in the House.

According to the constitution, governor is in charge of the state's executive branch and is not regarded as a member of the legislative branch. The governor's main responsibility is to act as a liaison between the Union and the State, guaranteeing a smooth and conflict-free division of powers. The Governor's appointment is closely related to the President's power because they are appointed and continue in office at the President's discretion. The Indian Constitution has deliberately granted the Governor certain powers in order to preserve a correct balance of power between the Centre and the States. But these powers have been abused on several occasions, especially when it speaks of the nomination of a CM in the hung assembly.

¹ Archie Garg, 'A Conundrum of Mandate and Discretionary Powers of a Governor in a Hung Assembly' [2023] Int'l JL Mgmt & Human 785

² Lawrence H. Tribe, *The Invisible Constitution* (OUP 2008) 47

³ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1st edn, OUP 1966)

It is anticipated, the Governor will serve as a liaison between the State and the Centre, facilitating coordination between the two. However, over time, the Governor's role has increasingly been seen as a tool for central influence over state governments. Disputes often arise over appointments, transfers, investigations, and discretionary powers, making the Governor's position one of the most politically sensitive in the constitutional framework.

Provisions Regarding The Governor's Discretionary Powers In The Constitution.

Notably, Article 163 expressly names the Governor as the exclusive authority in situations where discretion is needed, even though Article 74 does not give the President any discretionary powers. This is made quite explicit in Article 163(1), which states that, unless the Constitution requires him to act independently, a team of Ministers, led by the CM, would assist the Governor in carrying out his responsibilities. Additionally, the Governor's decision will be final if there is any doubt as to whether a certain issue is within his personal discretion. Furthermore, it is not possible to legally contest any action taken by the Governor in the exercise of his discretion on the grounds that it was improper.

Articles 163(1) and 163(2) of the Indian Constitution provide further details on the Governor's discretionary powers in a hung assembly, saying:

1. The Governor of a state will be assisted and advised in performing his duties by a team of Ministers headed by the CM, unless the Constitution expressly calls for him to act alone⁴.
2. The Governor's decision is final if there is any doubt as to whether a certain issue is within his discretionary power. Moreover, no action made by Governor exercising his discretion may be disputed on the grounds that it was improper or improper⁵.

Regarding matters within his exclusive discretion, the Governor enjoys absolute immunity, even outside the High Court's writ jurisdiction. The Governor has complete discretion over the Chief Minister's appointment, hence it is outside the purview of judicial review or legal challenge.

⁴ CONSTITUTION OF INDIA, ARTICLE 163(1)

⁵ CONSTITUTION OF INDIA, ARTICLE 163(2)

When Is the Assembly Said To Be Hung.

The India's Constitution do not define the word "hung assembly." Generally, a hung assembly refers to a situation where no political party or pre-election alliance secures majority in the either the state legislature or the national parliament. The Oxford Dictionary defines a hung assembly as one in which no party secures a definite majority. Either holding new elections or asking a party whether before election, after election, or one-party, the Governor thinks can demonstrate its numbers in the Assembly and win a vote of confidence are the alternatives available in such a situation. The head of the political party is invited to administer the oath of office as Chief Minister if these requirements are satisfied. Forming a coalition after an election is a difficult task in a huge country such as India where it's frequently unfeasible to have new elections. To address this, the Governor exercises his discretionary powers to facilitate government formation.

Problems Faced During A Hung Assembly.

A hung assembly presents several challenges that can impact governance and political stability. Some key problems include:

1. **Political Instability** – With no clear majority, forming a stable government becomes difficult, leading to uncertainty in administration.
2. **Delay in Government Formation** – Negotiations for alliances and coalition-building can take time, delaying the formation of a functional government.
3. **Horse-Trading and Unethical Practices** – In the absence of a majority, parties may resort to unethical means, such as bribing or poaching legislators, to gain support.
4. **Frequent Elections** – If no viable government is formed, fresh elections may be required, leading to increased costs and election fatigue among voters.
5. **Governor's Discretionary Power Misuse** – The Governor's role becomes crucial, and there is a risk of biased decision-making, favouring certain parties or coalitions.
6. **Policy Paralysis** – Without a strong government, decision-making may be stalled, affecting governance, economic policies, and public welfare initiatives.

7. **Weak Coalition Governments** – Even if a coalition is formed, internal conflicts among allies may lead to an unstable government, increasing the chances of mid-term breakdowns.
8. **Public Distrust in Democracy** – Repeated political deadlocks and power struggles can erode public faith in the democratic process.

How Did Such Problem (Gap) Arose.

While "in his discretion" is mentioned in the Constitution, the clauses pertaining to the use of these powers are vague and general. Political scientist K. V. Rao relates this ambiguity to the flawed composition of the Constituent Assembly and the limited time available for drafting. He points out that nearly 20 articles concerning state governments were hastily approved in a single day and argues that the Constitution was framed with the assumption that the Congress and its leadership would remain in power for an extended period⁶.

However, the Governor's discretionary authority is not without limits. If misused—whether due to personal ambitions or political bias—the President has the power to intervene and, if necessary, remove the Governor. Discretion must be exercised responsibly to ensure it does not undermine the functioning of parliamentary democracy.

The articles being referred to in the discussion primarily pertain to the governance of states and the discretionary powers of the Governor.

These include:

1. **Article 153:** Mandates that each state must have a Governor, either separately or in common with another state⁷.
2. **Article 154:** explains that the governor has the authority to use the state's executive branch either directly or through officers who report to him⁸.

⁶ Vershika Sharma, 'Governor and Constitutional Conundrum: A Relook at the Discretionary Powers of the Governor in Case of a Hung Assembly' [2020] 3 Int'l JLMgmt & Human 388

⁷ CONSTITUTION OF INDIA, ARTICLE 153

⁸ CONSTITUTION OF INDIA, ARTICLE 154

3. **Article 163:** declares that, unless expressly permitted, the Governor must follow the CoM advice⁹.
4. **Article 164(1):** gives the governor the authority to name other ministries and the chief minister. The governor appoints ministers to their positions¹⁰.
5. **Article 174:** grants the governor the authority to call a meeting of the legislature, prorogue it, and dissolve it¹¹.
6. **Article 200:** enables the Governor to reserve laws for the President's consideration, withhold assent, or grant assent¹².
7. **Article 213:** empowers the governor to issue ordinances during times when the legislature is not in session¹³.
8. **Article 356:** permits the governor to suggest President's Rule in the event that he feels that the state's governance cannot continue in accordance with the constitution¹⁴.

Constituent Assembly Debate.

The discussions on this provision took place on June 1, 1949. Interestingly, the members of the Constituent Assembly primarily concentrated on two specific aspects, seemingly neglecting the broader and more significant issue at hand¹⁵.

Pandit Thakur Das Bhargava stated:

"Sir, I strongly oppose Mr. Kamath's proposed amendment. Article 143 explicitly mentions that the Governor shall be assisted by a Council of Ministers in executing his responsibilities, making this point clear.

⁹ CONSTITUTION OF INDIA, ARTICLE 163

¹⁰ CONSTITUTION OF INDIA, ARTICLE 164(1)

¹¹ CONSTITUTION OF INDIA, ARTICLE 174

¹² CONSTITUTION OF INDIA, ARTICLE 200

¹³ CONSTITUTION OF INDIA, ARTICLE 213

¹⁴ CONSTITUTION OF INDIA, ARTICLE 356

¹⁵ '01 Jun 1949 Archives' (Constitution of India) < <https://www.constitutionofindia.net/debates/01-jun-1949/#105736> > accessed 30 Jan, 2025

I had also proposed Amendment 142-A, which is listed in the order paper, although I have not formally presented it. My amendment suggests that the Governor must act according to the advice of his ministers in all matters, except where the Constitution expressly grants him discretionary authority.¹⁶

I firmly believe it is incorrect to consider the Governor as merely a symbolic figure or a rubber stamp. In reality, he holds significant and extensive powers. For example, Article 144 grants the Governor the authority to appoint ministers, who serve at his discretion."

How Is The Chief Minister Appointed.

The governor has no discretion when a political party wins a resounding majority in the state legislature; all he needs to do is ask the party's leader to become chief minister. The Congress party continuously maintained a sizable majority at the federal and state levels, therefore this process remained unopposed until 1967.

After the 1967 General Elections, however, the situation shifted, posing a problem as the Congress lost its majority in eight states. A number of important problems surfaced, such as whether the governor should invite the leader of the biggest party to make the government if no party had an absolute majority. This would still entail inviting the Congress in some states, but it might go against the wishes of the electorate. The electorate's choice to vote against the Congress was clear, even though it was unclear if they specifically backed the opposition.

Methods Used By Governor While Appointing The Chief Minister.

During a hung assembly, the Governor may use different methods to verify claims of majority support before appointing a Chief Minister. These methods are used to assess the majority claim in case of disputes or unclear mandates in a hung assembly situation¹⁷.

1. List System

- The Governor asks political parties or alliances to submit a list of supporting

¹⁶ '01 Jun 1949 Archives' (Constitution of India) < <https://www.constitutionofindia.net/debates/01-jun-1949/#105744> > accessed 2 Feb , 2025

¹⁷ Rajini Goyal, 'THE GOVERNOR: CONSTITUTIONAL POSITION AND POLITICAL REALITY' (1992) 53 The Indian Journal of Political Science 505 < <https://www.jstor.org/stable/41855632> > accessed 2 Feb 2025

MLAs with their signatures.

- This helps verify the claimed majority on paper.
- However, it may not always reflect the true intent of MLAs, as there is a possibility of coercion or post-signature withdrawals.

2. Parade System or Physical Verification

- To ensure legitimacy, the Governor may ask MLAs to physically appear before him and confirm their support.
- This helps prevent false claims or cases of party switching under pressure.
- It is a direct and transparent method but is sometimes seen as controversial and unconventional.

3. List-cum-Parade System

- A combination of both methods where MLAs first submit a signed list, followed by a physical verification or parade before the Governor.
- This method reduces chances of forgery and ensures that MLAs personally confirm their support.

Suggestions And Recommendations of Sarkaria and Punchhi Commissions.

The Indian government created the Sarkaria Commission in 1983 with the intention of assessing the Union-State power dynamics and proposing changes to fortify the federal system. In order to guarantee more impartiality and efficacy, the Commission suggested keeping the Governor's job, albeit with some changes.¹⁸

The Commission recommended that before choosing a candidate for governor, the Chief Minister of the state in question should be properly consulted. According to the guidelines, the governor should be appointed from a state different than the one in which they will serve and

¹⁸ *Commission on Centre-State Relations* (Government of India, 1988) vol 1, ch 4

should be a person of great stature with a remarkable background in any profession. In order to preserve impartiality, the Commission also underlined that the Governor must neither be a member of the Center's ruling party or have any recent political links.

In terms of tenure, the Sarkaria Commission¹⁹ recommended that Governors ideally serve a five-year term to provide stability. For their removal, it was suggested that objective criteria such as violations of constitutional propriety, morality, or dignity should be the basis, rather than political considerations.

The Punchhi Commission²⁰, chaired by former CJI M.M. Punchhi, expanded on these suggestions and suggested additional improvements to the Governor's function. It supported the 1988 Commission's opinion that governor should be appointed from outside the state, must not be a member of the governing party, and not be politically engaged before to appointment.

The Punchhi Commission also recommended a fixed five-year tenure for Governors to prevent frequent removals due to political reasons. A key proposal was that the removal of Governors should follow an impeachment process by the State Legislature, similar to the impeachment process for the President of India. This was aimed at preventing the misuse of the Governor's position for political interests and ensuring greater accountability in state governance.

Judicial Decisions on Governor's Discretionary Power In A Hung Assembly.

Rameshwar Prasad v. Union of India (2006)²¹

In this instance, the SC looked at the 2005 dissolution of Bihar Assembly, which was suggested by the governor without any invitation to form a government.

The Court ruled that:

- The governor's discretionary authority is limited and must to be used in line with constitutional requirements.
- Rather than suggesting dissolution, the governor ought to have asked the largest party or

¹⁹ *Commission on Centre-State Relations* (Government of India, 1988) vol 1, ch 4

²⁰ *Report of the Commission on Centre-State Relations* (Government of India, 2010) vol 2, ch 3

²¹ *Rameshwar Prasad & Ors v. Union of India*, AIR [2005]

alliance to demonstrate its majority.

-It was unlawful to dissolve the Assembly without first testing a majority on the House floor.

Pratap Singh Rane v. Governor of Goa (1998)²²

This case revolved around the governor's judgment while choosing which party to call to form the government. The Court emphasized that:

-The Governor must follow constitutional conventions and invite the largest party or coalition to prove its majority.

-The Governor cannot act arbitrarily and must base decisions on objective criteria.

Chandrakant Kavlekar v. Union of India (2017)²³

Even though the Congress was the single-largest party, the governor asked the BJP-led coalition to form the government in the 2017 Goa Assembly elections. According to a Supreme Court decision,

-The Governor has the discretion to invite a coalition if it appears more stable, even if the single-largest party stakes a claim.

-The Governor's decision must be based on demonstrable support, and such support ought to be examined on the House floor at the earliest opportunity.

G. Parmeshwara v. Union of India (2018)²⁴

This case started when governor of Karnataka invited BJP to form a government despite the fact that they lacked a clear majority following the 2018 elections. According to a Supreme Court decision,

-The Governor must ensure that the appointed Chief Minister faces a floor test within a

²² *Shri Pratapsing Raojirao Rane & Others vs The Governor Of Goa & Others*, AIR [1999]

²³ *Chandrakant Kavlekar v. Union of India*, AIR [2017]

²⁴ *G. Parmeshwara v. Union of India*, [2018]

short period to establish legitimacy.

-The governor can only choose the alliance or party that has the best chance of winning a majority.

Samsher Singh v. State of Punjab (1974)²⁵

The Court decided that the Governor may use discretion in certain situations, such as choosing a Chief Minister, but the main factor should be whether the chosen person can lead the country successfully. However, the Court did not discuss judicial review of discretionary acts or the absolute immunity granted by Article 361 for such activities in *Samsher Singh* and *B.R. Kapur v. State of Tamil Nadu* (2001).

Chintalingam v. Government of India (1971)²⁶ and Shiv Sagar Tiwari v. Union of India (1997)²⁷

In these decisions, the Court stressed that no official is immune from accountability, acknowledging the possibility of government officials abusing their discretionary power.

M.P. Special Police Establishment v. State of M.P. (2005)²⁸

Taking an extraordinary stand, the Court ruled that the Governor must use his own discretion in some situations in order to enforce the rule of law, especially when it comes to concerns of appropriateness.

Recommendations To Make The Role of Governor More Transparent and Non-Arbitrary.

1. Define the Governor's Powers and Responsibilities Clearly without ambiguities.

The role and authority of the Governor should be explicitly outlined to prevent ambiguity and misuse of power. This will ensure that the Governor's constitutional

²⁵ *Samsher Singh v. State of Punjab*, AIR [1974]

²⁶ *Chintalingam v. Government of India*, [1971]

²⁷ *Shiv Sagar Tiwari v. Union of India*, AIR [1997]

²⁸ *M.P. Special Police Establishment v. State of MP*, [2005]

responsibilities are well-defined, preventing conflicts with the state government.

2. **Ensure Transparency in the Appointment Process of the Governors of each state.**

The selection of the Governor should be conducted through a transparent and consultative mechanism, rather than being solely a political decision. Involving the Chief Minister and other constitutional authorities in the appointment process can help maintain impartiality and fairness.

3. **Establish Accountability for the Governor's Actions by setting up a mechanism.**

There should be mechanisms to review the Governor's decisions and actions to ensure they align with constitutional principles. Provisions such as judicial review or parliamentary scrutiny can help prevent arbitrary decision-making.

4. **Promote Regular Communication Between the Governor and State Government.**

A cooperative relationship between Governor and state government is essential for smooth governance. Regular consultations can help resolve differences and ensure that state policies are implemented without unnecessary interference.

5. **Prevent Political Bias in Governor Appointments by keeping a check on their profile.**

The Governor should be selected based on merit, experience, and neutrality, rather than political affiliation. This will help maintain objectivity and prevent undue interference in the functioning of elected governments.

6. **Conduct Periodic Review of the Governor's Role and Authority in making decisions.**

To make sure they remain relevant in the changing political environment, a thorough assessment of the governor's duties and authority should be carried out. This will assist in resolving any new problems pertaining to the abuse of discretionary authority.

BIBLIOGRAPHY

ARTICLES

1. Garg Archie, 'A Conundrum of Constitutional Mandate and Discretionary Powers of a Governor in the Event of a Hung Assembly' [2023] *Int'l JL Mgmt & Human* 785
2. Sharma Vershika, 'Governor and Constitutional Conundrum: A Relook at the Discretionary Powers of the Governor in Case of a Hung Assembly' [2020] 3 *Int'l JLMgmt & Human* 388
3. Goyal Rajini, 'THE GOVERNOR: CONSTITUTIONAL POSITION AND POLITICAL REALITY' (1992) 53 *The Indian Journal of Political Science* 505 <<https://www.jstor.org/stable/41855632>> accessed 2 Feb 2025

BOOK

1. Austin Granville, *The Indian Constitution: Cornerstone of a Nation* (1st edn, OUP 1966)
2. Tribe Lawrence H., *The Invisible Constitution* (OUP 2008) 47

REPORTS

1. *Commission on Centre-State Relations* (Government of India, 1988) vol 1, ch 4
2. *Report of the Commission on Centre-State Relations* (Government of India, 2010) vol 2, ch 3

CONSTITUTION ARTICLES

1. CONSTITUTION OF INDIA, ARTICLE 153
2. CONSTITUTION OF INDIA, ARTICLE 154
3. CONSTITUTION OF INDIA, ARTICLE 163
4. CONSTITUTION OF INDIA, ARTICLE 164(1)

5. CONSTITUTION OF INDIA, ARTICLE 174
6. CONSTITUTION OF INDIA, ARTICLE 200
7. CONSTITUTION OF INDIA, ARTICLE 213
8. CONSTITUTION OF INDIA, ARTICLE 356

CONSTITUENT ASSEMBLY DEBATES

1. '01 Jun 1949 Archives' (Constitution of India) <
<https://www.constitutionofindia.net/debates/01-jun-1949/#105744> > accessed 2 Feb ,
2025