

FESTSCHRIFT

Constitutional Jurisprudence and Environmental Justice

Essays in Honour of
Prof. A. Lakshmi Nath



Editor - Dr. D.S. Prakash Rao

29	Market driven economy : The constitutional drift and paradigm shift - <i>Dr. A. Raghunath Reddy</i>	319
30	Appointment and removal of judges of the supreme court and the high courts-need for constitutional amendments to ensure judicial independence - <i>Dr. Kameswarai</i>	329
31	Judicial Review - <i>Dr. Archana Sharma</i>	351
32	Independence of judiciary under indian constitution - <i>Dr. S.B.N. Prakash</i>	357
33	Parliamentary form vs. Presidential form-Need for review of the Indian constitution - <i>Dr. N.S.J. Rao</i>	377

SECTION -II

1	Centre State Relations	
2	Co-operative Federalism	
3	Governor	
4	Imposition of President Rule in the States	
34	Imposition of president's rule : A Critique of Judicial assessment of Governor's role - <i>By Prof. K. Guptaeswar</i>	383
35	President's Rule - A constitutional Damocle's sword - <i>Dr. D.S.N. Somayajulu</i>	397
36	The Role of the Governor-Constitutional or Controversial? - <i>Dr (Mrs.) Y. Lakshmi & G. Rao</i>	413
37	Appointment of Chief Minister - The Discretionary Powr of A Governor - <i>Dr. T.S.N. Sastry</i>	429
38	Governor - An Independent Constitutional Authority or otherwise - <i>Dr. D.S.Prakasa Rao</i>	437
39	Constitutional Parameters of Taxation - <i>Dr. Y. Satyanarayana</i>	445
40	Union and State relations a critique - <i>L.V.Krishna Prasad</i>	453

APPOINTMENT OF CHIEF MINISTER - THE DISCRETIONARY POWER OF A GOVERNOR

Dr. T.S.N. Sastry*

According to the provisions of the Constitution of India, the Governor of a State shall be Head of the State. The entire administration of the state functions only in the name of the Governor. In fact, the Governor is the 'Inchpin' of the Constitutional apparatus of a state.¹ Though a Governor of a state is appointed by the President of India and holds office at the pleasure of the President, it does not mean that a Governor becomes a sub-servant of the Government of India.² Being the head of a state holding a high constitutional office, he cannot be regarded as an employee of the Government of India. The Governor has to perform the functions and to discharge the duties in accordance with the Provisions as conferred on him/her. The office of the Governor is an independent one which is not subject to the control of the Government of India.³ In reality the Governor is the yoke between the Union and the State in maintaining the federal harmony and relations as enshrined by the Constitution.

Being a Constitutional head of a state, the Governor many a time has to take crucial decisions on important issues in his own discretion. Having enormous power to act in his own discretion, if the Governor exercises his authority pertinent to any aspect, he is alone responsible for such decision and shall not be subject to the scrutiny of the judiciary.⁴ Thus the Constitution empowering the Governor of a state with enormous power has left many vital questions unanswered, especially in the appointment of a Chief Minister in certain circumstances. How far is it possible for the Governor to appoint a person as a Chief Minister who is not a member of the State Legislature? Is the decision of a majority party of the legislature to appoint a non-legislator who is not possessing the qualifications to become a member of the house as Chief Minister binding upon the Governor? Whether a person who has been convicted of criminal offence and whose conviction has not been suspended pending appeal can be appointed as a Chief Minister? Does the constitution impose any limitations upon the powers of a Governor, in the appoint of a Chief Minister?

In the last fifty years, on a number of occasions the office of the Governor has been under constant criticism as an offshoot of the controversial use of the discretionary power of a Governor in the appointment of a Chief Minister. In the chronological order, the first one came in 1952 in the composite Madras province. After the general elections in 1952, the then Governor Sri Prakasa appointed C. Rajagopalachari as the Chief Minister, who had been neither the leader of a majority party in the legislature nor even been elected as a legislator.⁵ This event and those

* Reader & Co-ordinator, Centre for Human Rights, School of International Studies, Pondicherry University, Pondicherry-605014.

several others happened in various states since the adoption of the Constitution raised the questions asked above and produced lot of steam in generating conflicting views. According to one school of thought, any person can be appointed a Chief Minister for a period of six months provided he could command the majority of the legislature.⁴ According to another school of thought, the Governor in certain cases cannot appoint any person as a Chief Minister unless he is a member of the state legislature.⁵

According to a third view, in Parliamentary democracy the will of the people must prevail. Accordingly, the Governor has to appoint any person whose name has been recommended by the majority party of the legislature to be appointed as Chief Minister, who is even ineligible for membership of the legislature. Further, once the Governor exercises his discretionary power, being a constitutional head of a state such decision cannot be questionable in a court of law under article 361 of the Constitution.

In this paper a modest attempt is made to answer the questions and the different perceptions specified above with respect to the use of discretionary power of a Governor in appointing a Chief Minister in the light of recent Supreme Court's judgement in *B.R. Kapur Vs. State of Tamil Nadu*.⁶

II

The writ petition arose out of a public interest litigation filed by B.R. Kapur followed by several others.⁷ In the case the second respondent, Ms. Jayalalitha was the Chief Minister of the state of Tamil Nadu between 1991 and 1996. In respect of that tenure in office, she was later convicted by a special criminal court in two separate cases for offences punishable under I.P.C. and the Prevention of Corruption Act 1988. In one case she was sentenced to undergo three years rigorous imprisonment and pay a fine of Rs. 10,000/- and to undergo 2 years rigorous imprisonment and pay a fine of Rs. 5,000/- in another case. Challenging the orders of the Special Court, the second respondent preferred an appeal to the High Court of Madras. The High Court had suspended the sentence of imprisonment and directed her release on bail. However, her applications for stay of operation of the judgements in the said to cases were rejected and pending before the High Court at the time of the decisions of the Supreme Court. (However, subsequently she was acquitted in both the cases by the High Court.)

In the meanwhile in April 2001, she filed nomination papers for four constituencies in respect of the general elections to the Legislative Assembly. Three of them were rejected on the ground that she was not qualified to contest the elections, the AIADMK Party which won by a large majority elected the second respondent as its leader and she had sworn in as Chief Minister of the State. It was contended by the appellants and writ petitioners that the second respondent could not be sworn in as Chief Minister and could not function as Chief Minister of a state. They sought

directions in the nature of a writ of a *quo warranto* against her. The questions and the views stated above naturally became the contention of the respondents and prayed for the quashing of the writ petitions.

The Supreme Court after a thorough overhauling of the Constituent Assembly debates, various provisions of the constitution unanimously upheld the contention of the petitioners and quashed the appointment of Jayalalitha as Chief Minister. The pertinent questions stated above in detail will be examined in brief in the light of the judgement of the Court.

III

In answering the first issue, the Court held in the affirmative that under Art. 164 of the Constitution, it is purely the discretion of the Governor to appoint any person as the Chief Minister of a state, even if such person is to a member of the legislature and can continue in office until a period of six months without being its member. However in answering the subsequent issues, the court held in the negative and laid at rest for any further controversies in future in exercise of the discretionary powers of a Governor.

The Court rejecting the contention of the respondents similar to that of the issues raised already held that though Art. 164 of the constitution has not prescribed any qualifications for the appointment of a Chief Minister and the unfettered discretionary power of the Governor, the article should not be read alone leaving various other provisions which are ought to be taken into consideration. In other words, a person must possess the qualifications to become a member of the legislature that are prescribed under Art. 173. Further such person should not be disqualified from seeking the membership by reason of any of the provisions of article 191 on the date of his appointment as a Chief Minister. Hence a person convicted for a criminal offence and sentenced to imprisonment for a period of two years cannot be appointed as a Chief Minister.

In answering the most important aspect on the limitations of the discretionary powers of a Governor, the court held that he is bound by the constitution and as such he cannot act contrary to the provisions of the Constitution, Patnaik, J., in his separate opinion dealt the issue in detail.

In answering the contention of the respondents that in a Parliamentary democracy the will of the People will prevail and the discretionary power exercised by a Governor is not amenable to judicial jurisdiction since the Governor enjoys immunity under Art. 361,⁸ hence the appointment of Jayalalitha as Chief Minister cannot be questionable in a court of law, the learned Judge held in the negative. In negating the first issue, the judge opined that if the majority party of a legislature elects a person as their leader, who has been forbidden by the Constitution and any other law of the land for being eligible to be a member of the legislature, then such action would constitute as an act violative of the Constitution and be a betrayal to

the electorate. In such case, the so called theory of will of the people also constitutes as unconstitutional. In written constitution where the supremacy of the people, legislature, executive and judiciary are limited by constitution and all are bound by the constitution. Further, though Art. 164(1) confers the discretionary power on the Governor to appoint a Chief Minister at his pleasure, he cannot do so, since the Governor has a duty to preserve, protect, defend the Constitution and the law of the land in accordance with the oath undertaken by him under art. 159, at the time of assuming the office. Hence, the Governor cannot use his discretionary power subservient to the provisions of the Constitution and to the theory of good governance advocated by it.

Disapproving the second contention of the respondents, the Learned Judge held that under Art. 361, the immunity provided to the Governor cannot be extendable to an appointee by the Governor. Referring to an earlier judgement¹¹ of the Supreme Court, the learned judge opined that judicial review is the basic feature of the Indian Constitution which entrusted to the judiciary to protect the rule of law as a repository. Hence the exercise of power either by the legislature or executive or any authority should be within the constitutional limitations, and, if any practice is adopted by the executive which is in violation of its constitutional limitations, then such action is within in the purview of the judiciary to examine it; hence the immunity of the Governor cannot be extendable to the Chief Minister.

IV

No doubt, the judgement of the Apex Court has set at rest great constitutional and vital issues regarding the exercise of discretionary powers of Governor in appointing a Chief Minister.

In fact the judgement of the court also silences the different views that were aired by eminent people of the polity that the constitution has failed in prescribing any qualifications with respect to the appointment of a Chief Minister, hence there is an urgent need to amend article 163¹². As was rightly stated by the Court, Art. 163 and 164 need to be read together along with Arts. 173 and 191 which clearly prescribes the qualifications and disqualification's for becoming a member of the state legislature. Hence there is no need to amend the constitution once again. If fact we fail to interpret the constitution in its right perspective and attribute our misdeeds and wrong decisions to it and add amendments unnecessarily.

Though the court has answered great constitutional issues, it would have been pertinent if the court would have had examined one more aspect with respect to the appoint of a person as a Chief Minister who had already contained as a minister for a period of six months without becoming a member of legislature after he has vacated his office in accordance with Art. 164(4) even if it is not within the purview of the present case. Because after the disposal of the cases against Jayalalitha some of the leading lawyers and academicians expressed that she can become a Chief

Minister once again and can contest the elections within six months from the date of assuming office since the decks are cleared by the judiciary. Though such an incident has not been happened, there may be a possibility in future that a Governor may use his discretionary power and may appoint a person as Chief Minister of a state, who has already continued as a minister without becoming a member of the legislature.

But at the same time, the author is optimistic that in future the Governors shall use their discretionary powers in the letter and spirit of the constitution, even if such a situation arises in interpreting Art. 164(4) of the constitution, as expressed by eminent scholars like M.C. Setalvad that such an aspect is unethical and against the spirit of the constitution.

END NOTES

1. Sarkaria Commission Report, 1988, Vol. I, p.115.
2. Articles 155, 156.
3. Hargobind vs. Raghukul Tiak, AIR 1979 SC 1113.
4. Art. 361 which has provided the immunity to the Governor for his acts; also see R.K. Jan vs. Union of India, 1993, 4 SCC 119.
5. For the controversial use of the discretionary power of a Governor on various occasions in the appoint of a Chief Minister, see Granville Austin: Working a Democratic Constitution, The Indian Experience, 1999, pp.582-88; also see J.R. Siwach: Office of the Governor: A Critical Study, 1977, pp. 28-58; also see H.M. Seervai: Constitutional Law of India, (4th edn.) 2093, pp. 2062-65.
6. Hanman Sharan Verma vs. Tribhuvan Narain Singh, AIR 1971 SC 1331; S.P. Anand vs. H.D.Deve Gowda, 1996, SCC 734.
7. The then Governor of Bihar, Anantha Saynam Ayyangar refused to accept the request of B.P. Mandal in 1967 to appoint him as Chief Minister on the advise of the then Advocate-General. In this case the Governor refused to appoint B.P. Mandal as Chief Minister since he continued as a minister prior to his request for a period of six months without being a member of the State Legislature. For a detailed discussion on this aspect whether a person who had already been a Minister for six months without being a member of the state legislature can he be appointed as a Chief Minister without becoming a member of the state legislature after he has ceased to be a minister, different views of scholars see Siwach n.5, pp. 30-33.
8. 2001 7 SCC 231

9. Since the facts are well known to every body, they are stated very briefly.
10. R.K. Jain v. Union of India 1993 4 SCC 119.
11. S.R.Bommai v. Union of India 1994 3 SCC 1.
12. Satya Prakash Malaviya; A Minor Amendment to Undo the Wrong, The Hindu Supplement June 26, 2001 OB-1, He contends for an amendment of Article 74 relating to the appointment of Council of Ministers at the Union along with Art.163. Even for this there is no need, in view of the qualifications that are prescribed by articles 84 and 102 need to be satisfied by a member before becoming of either house of the Parliament.