

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



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# **RATIONALISING DISCRETION OF THE CONSTITUTIONAL HEAD: THE GOVERNOR**

AUTHORED BY - YASH MINIYAR

## **INTRODUCTION**

To begin with, two Articles of the Constitution need critical analysis. The context is that Article 74 (1) and Article 163 (1), which, prima facie, have similar substance, insomuch so that they both state that “*there shall be a Council of Ministers*” to aid and advice the President and the Governors respectively, differ in one crucial aspect; that of discretion. A thorough reading of the Articles provide us with the fact that the President is bound by the aid and advice of his/her share of council of ministers, but the Governor is not. In one perspective considered as *non-obstante* to the exercise of functions of the Constitutional Heads, in the sense that they have overriding effect over the exercise of powers, Articles 74 and 163, for the President and the Governor respectively, form the basis of the flow of their powers to perform their respective functions. *In casu*, it is put forth that the ability of the Constitutional Heads to perform their functions are checked on the touchstone of these two Articles and they hence form the base of the further findings.

Following points are discussed to bring home the posited conclusions:

- The Constituent Assembly Debates that deliberated and deemed it correct to, through literal interpretations of the provisions, allow certain discretionary powers to both the Constitutional Heads.
- The 42<sup>nd</sup> Constitutional Amendment Act of 1976 which took away the discretionary powers of only the President, and its inaction with regards to the powers granted to the Governors under Article 163 (1). The problem that arises is that in all the legal issues that were brought up before the various Constitutional Courts, no challenge was ever made in this context; it was neither amended further nor deliberated upon in any subsequent amendments.

To thoroughly understand the reason for grant of discretion to both the heads, the article will primarily focus on the Constituent Assembly Debates pertaining to the grant of these powers to the Constitutional Heads. The next part will summarily lay down the features of the 42<sup>nd</sup>

Amendment Act of 1976, through its Statement of Objects and Reasons for enactment in this particular context and the final part will focus on the sustained existence of the discretionary powers granted to the Governors.

## UNDERSTANDING THE GRANT OF DISCRETION

Article 74 was deliberated by the Assembly on 30<sup>th</sup> December, 1948.<sup>1</sup> Article 74, as it was introduced in the Constitution of India in 1950, for the present context, stated that:

*“(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.”*<sup>2</sup>

The original Article entailed discretion to the President, generally. Its wordings did not mandate the President to act exactly in accordance to the advice tendered onto him by the Council of Ministers, and thus, at the inception, bestowed the ability in the President to use his/ her wisdom in the situations that was deemed fit and appropriate for the popular welfare, within the Constitutional Scheme. In the course of the debates though, the Father of the Indian Constitution, Dr. B. R. Ambedkar, stated that this lack of mandate was owing to the fact that *“all that the President will have under the new Constitution will be certain prerogatives but not functions and there is a vast deal of difference between prerogatives and functions as such.”*<sup>3</sup>

He stated that the only prerogatives that the Head of the Nation, in a parliamentary form of government has is the appointment of the Prime Minister and the dissolution of the Parliament. Of these two, only the first requires discretion and it is because *it is not possible to avoid vesting discretion in the President*<sup>4</sup> for there exists no other alternative. To further justify the exclusion of any kind of formal mandate in the provision, it was stated that these prerogatives in no way essentially amount to the administration of the nation. At that point, the will of the people and that, through their elected representatives, alone dictates the functioning of the nation. *In casu* the President has been bound by the advice of the Council of Ministers since the inception of the provision. The amendments proposed and arguments put forth by Mohammed Tahir, where he wished for the provision to read the same as that of Article 163 of the Constitution of 1950; by Professor K. T. Shah, who argued on the veracity of the provision and its potential to attract

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<sup>1</sup>30 Dec 1948 Archives - Constitution of India' < “<https://www.constitutionofindia.net/debates/30-dec-1948/#139598>” > accessed 6 February 2025

<sup>2</sup> Constitution of India, Article 74 (1)

<sup>3</sup>30 Dec 1948 Archives - Constitution of India' < “<https://www.constitutionofindia.net/debates/30-dec-1948/#139598>” > accessed 6 February 2025

<sup>4</sup> Ibid

interpretative obstacles; and by Tajamul Hussain, who wanted to do away with the discretionary powers of the both the Constitutional Heads, did not make it to the Article in the way they intended.

One point of contention, fundamental to the provision was brought by a question posed by Mohammed Tahir. He asked as to why governors then have discretionary powers and what reason for the grant of these discretionary powers would be given to the Ministers of the State, in reply to which, Dr. Ambedkar simply deflected it to be discussed while discussing Article 163 (then Article 143 of the Draft Constitution) of the Indian Constitution. Likewise, we move towards the discussions that happened around the Article in question.

Article 163 was discussed on the 1<sup>st</sup> of June, 1949.<sup>5</sup> This article convolutes things to a great extent but an effort is made to theorize and thus rationalize the arguments that took place in the Constituent Assembly.

Essentially, the argument lay in the comparison of the powers granted to the Governors to that of the President, in so much so that the provision had express mention of the same. For the sake of convenience, Article 163, to this context, reads as:

*“(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.”<sup>6</sup>*

It is pertinent to note that no Constitutional Amendment has affected the provision and its functions as it were in its original form. Heading towards the convolution, while the members of the Assembly were very well aware of the need for having a nominated Governor, they were skeptical of the powers vested onto him/ her. Unlike the President, the Governor was to have discretionary powers, regardless of the advice tendered onto him/ her by the respective Council of Ministers for the State.

It was stated that vesting of discretionary powers onto the governors does not, in function, interrupt the process or negate the sustenance of a responsible government. Examples of the Canadian and the Australian Dominion were quoted by Dr. Ambedkar, where he reasoned that:

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<sup>5</sup>‘01 Jun 1949 Archives’ (Constitution of India) < <https://www.constitutionofindia.net/debates/01-jun-1949/> > accessed 10 February 2025

<sup>6</sup> Constitution of India, Article 163 (1)

*“The Canadians and the Australians have not found it necessary to delete this provision even at this stage. They are quite satisfied that the retention of this provision ... [and it] is fully compatible with responsible government, If they had felt that this provision was not compatible with responsible government, they have even today, as Dominions, the fullest right to abrogate this provision. They have not done so. Therefore, ....I can very well say that the Canadians and the Australians do not think such a provision is an infringement of responsible government.”<sup>7</sup>*

To this extent, the debate can be followed and rationalized. The convolution begins when Dr. Ambedkar tries to answer the question put forth by H. V. Kamath, where he asked:

*“Is there no material difference between Article 61(1) relating to the President vis-a-vis his ministers and this Article?”<sup>8</sup>*

*Dr. Ambedkar states that the since the provincial governments are required to work in subordination to the Centre, the Governor will have to have the discretion to reserve things in order for the President to check whether the functioning of that particular state is as per the Constitutional Scheme.<sup>9</sup> In this context as well, the President is not vested with any discretionary power. This means that technically the Governor is bound by the aid and advice of the Council of Ministers who, along with the Prime Minister, aid and advice the President.<sup>10</sup> It is essential to note that this was also posited by the Courts in the case of **Shamsher Singh v. State of Punjab**,<sup>11</sup> where it was held that essentially the discretionary powers of the Governor are powers exercised on the aid and advice tendered onto him by the Council of Ministers at the Union Government. The court stated that:*

*“These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions.”*

*Two fundamental interpretations are thus drawn out from this rationalization.*

*One, that the political structure of the nation is centripetal; and Two, that the exercise of the discretionary powers of the Governor is limited to the extent of making sure that the provincial government works and that it works in subordination to the Central Government. Beyond this, the discretionary powers vested with the Governor are specifically laid out in the Constitution*

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<sup>7</sup>‘01 Jun 1949 Archives’ (Constitution of India) < “<https://www.constitutionofindia.net/debates/01-jun-1949/>” > accessed 10 February 2025

<sup>8</sup> Ibid

<sup>9</sup>‘01 Jun 1949 Archives’ (Constitution of India) < “<https://www.constitutionofindia.net/debates/01-jun-1949/>” > accessed 10 February 2025

<sup>10</sup>*Shamsher Singh v. State of Punjab* [1974] AIR 2192

<sup>11</sup>Ibid

*itself and it becomes a redundancy to term the power as 'discretionary'. These powers that the Governors exercise in the present day and age are only 'judicial recognitions' and neither constitutionally prohibited nor permissible.<sup>12</sup>*

*It is pertinent to note that the above drawn rationalisations are only what could be logically concluded from the brief understanding of the Constituent Assembly Debates. The above conclusion will be dealt with in the further part. The following part will briefly summarise the statement of objects and reasons of The Constitution 42<sup>nd</sup> Amendment Act of 1976.*

### **THE 42<sup>ND</sup> AMENDMENT**

*The 'Mini- Constitution' or the Constitution (Forty- Second) Amendment Act of 1976<sup>13</sup> was a very detailed and controversial piece of legislation which tried to reduce the powers of the Constitutional Courts, limiting them, and was a particularly politically motivated action. It was enacted during the Emergency and was the brainchild of the then National Government. Without going into depth of this political motivation, to our relevance, are three things. One, the statement of objects and reasons of the legislation; Two, the formal curtailing of discretionary 'prerogatives' of the President, which still holds true; and Three, the inaction with regards to the discretion vested with the Governor.*

*The Statement of Objects and Reasons of the 42<sup>nd</sup> Amendment Act, for our relevance, stated the follows:*

*"A Constitution to be living must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy.... The democratic institutions provided in the Constitution are basically sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good.... Parliament and the State Legislatures embody the will of the people and the essence of democracy is that the will of the people should prevail."<sup>14</sup>*

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<sup>12</sup>AK Tiwari, "A Chequered History of Governors' Discretionary Powers under Article 163" (2017) 63 Indian Journal of Public Administration 384

<sup>13</sup> The Constitution (Forty-Second Amendment) Act, 1976

<sup>14</sup>The Constitution (Forty-Second Amendment) Act, 1976| National Portal of India' < "https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-second-amendment-act-1976" > accessed 12 February 2025

*The relevant excerpt of the Statement of Objects and Reasons of the amendment is a little vague. The reason for this vagueness is the inability to point towards a particular causation and reason for need to amend. To this extent, this is speculative, for the actuality of the happenings are of little relevance to the present research. The focus is on the fact that in order for the will of the people to prevail, it was thought correct to require some Constitutional institutions to function in a certain way. In essence, per the Constituent Assembly Debates, the President did not have any discretionary powers to begin with but was tasked with certain 'prerogatives'. The 42<sup>nd</sup> Amendment merely formalised this lack of discretion.*

*A crucial point is put forth, that in all the challenges made against the Amendment, questioning its validity, its ability, its purported interpretations, no challenge was ever made, nor any amendment proposed to reverse the formal curtailment of discretionary powers of the President, for it was not necessary. In the Constitutional Scheme, the President never was supposed to have any discretionary powers and to that extent, the Amendment was just a formality. The amendment to Article 74 read as:*

*"In Article 74 of the Constitution, for clause (1), the following clause shall be substituted, namely:- '(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.'"<sup>15</sup>*

*We now head towards the problem statement of the entire research, the inaction of the amendment towards the discretionary powers of the Governor. To understand this inaction, it is imperative to primarily understand the discretionary powers that have been vested onto the Governor.*

### **DISCRETION AND THE GOVERNOR**

*When Dr. B. R. Ambedkar was asked as to why the Governor of a State should have discretionary powers, part of the answer stated that it was because the Canadian and Australian Dominions have had it and have had no occasion to remove it. They functioned as a necessity to the responsible government that the dominions sought to maintain and thus were found requisite for the same. In casu, responsible government for the abovementioned dominions should hint towards the answer as to why discretion is a necessity.*

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<sup>15</sup> Supra Note 13

*Responsible government, in the colloquial sense means a government that is responsible to the Parliament. There exists some difference in this context of responsible government when it comes to the United Kingdom, US, Canada and Australia. There are empirically 40 odd forms of democratic government<sup>16</sup> that exist and more or less they share the same basic premise of what the responsibility should be like. Essentially, it entails a democratic setup with certain body/ bodies or institution/s supposed to be responsible to the people. Responsibility entails accountability, liability and subsequent reformation regardless of the opportunity to act upon the newfound responsibility. Procedural differences of the United Kingdom, the USA, Canada and Australia aside, the substance of all remain consistent. Fundamentally, it means having accountability towards the will of the people. A facet of responsible government entails that the responsibility is not limited in the context of accountability. It envisages positive developments for all and through proper involvement. This necessitates knowledge of the condition of the people and their needs that need addressing. It is impractical for a single head of the nation to be able to cater/ address to all the needs and delegation of power becomes inevitable. Delegation is done through the means of a Constitutional Head of the State and Governors need, in furtherance of the constitutional duties, discretion. This though did not find substance in the wordings of the 42<sup>nd</sup> Amendment and thus, the inaction, to this extent, was prima facie incidental.*

*How then the governors, in the exercise of their discretionary functions, are a part of this responsible government? Let's study the discretionary powers summarily.*

*In the case of **M. Gnanamani v. His Excellency, The Governor of Andhra**,<sup>17</sup> the court stated that discretionary powers meant those which find express mention in the Constitution, or can be drawn from necessary implication. These powers are those which the governor can exercise in the individual discretion.<sup>18</sup> Articles 239 and 371 in their respective provisions, and others which find written existence in the Constitution, substantiate the individual discretion, and since these are Constitutional in nature, not much controversy arises in this regard. The governors are bound by the Constitution and the exercise of discretion through these provisions are technically beyond the scope of judicial review, but practically, the courts can take a*

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<sup>16</sup>Chapter 1: The Origins of Responsible Government – Parliament of Australia' < [https://www.apf.gov.au/About\\_Parliament/Senate/Practice\\_and\\_Procedure/hamer/chap01](https://www.apf.gov.au/About_Parliament/Senate/Practice_and_Procedure/hamer/chap01) > accessed 14 February 2025

<sup>17</sup>*M. Gnanamani v. His Excellency, The Governor of Andhra* [1954] W.P. 510/1954

<sup>18</sup> *Ibid*

*different view.*

*The implied discretion that is vested onto the governor is of greater significance to understand not only the viewpoint of the Constitutional Makers, but also get an idea of what responsible government is, and how judicial pronouncements grant the supposed discretionary power.*

*In the case of **State of Gujarat v. R. A. Mehta**,<sup>19</sup> the Apex court illustrated examples when the governor can exercise functions without the aid and advice of the Ministers under Article 163, even though the circumstances that have presented find no mention in the Constitution. The court stated that the provision allowed for the Governors to use their prudence in cases where the situations so require and demand. The court specifically laid out exemplary situations where this prudential discretion ought to be exercised but also stated that*

*“Article 163(2) of the Constitution provides that it would be permissible for the Governor to act without ministerial advice in certain other situations, depending upon the circumstances therein, even though they may not specifically be mentioned in the Constitution as discretionary functions, ... clause (2) of Article 163 provides that the Governor himself is the final authority to decide upon the issue of whether he is required by or under the Constitution, to act in his discretion, .... and such a decision taken by the Governor would not be justiciable in any court. There may also be circumstances where there are matters with respect to which the Constitution does not specifically require the Governor to act in his discretion but the Governor, despite this, may be fully justified to act so, ... [in cases] which may be detrimental to the interests of the nation. In such circumstances, the Governor would be justified in refusing to accept the advice rendered to him and act in his discretion.”<sup>20</sup>*

*The Justice M. M. Punchhi Commission’s Report and the Justice R. S. Sarkaria Commission’s Report pragmatically laid down the scope of discretionary powers vested in the governor but the list was not exhaustive. There still exists scope whereunder the governor might act according to his/ her discretion and such discretion will be novel. In such cases, even though the action itself remains beyond the scope of judiciary, the power of judicial review has wide enough ambit to deliberate, if not direct, upon the decision of the governor.*

*The case of **Nabam Rebia v. Deputy Speaker**,<sup>21</sup> stated that “the language of Article 163(2) shows that the governor has the scope to choose matters beyond ‘judicially recognised*

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<sup>19</sup>State of Gujarat v. R. A. Mehta [2013] AIR SCW 1742

<sup>20</sup>Ibid

<sup>21</sup>Nabam Rebia v. Deputy Speaker [2016] AIR SC 3209

*situations’.*”<sup>22</sup>

*Does this hint in any manner as to what responsible government is, for which the discretion is of importance? To some extent, yes, whereunder following points are highlighted; One, that the role of the governor is to maintain the constitutional structure of the state: to this extent, the powers are more or less recognised if not formally defined, Two, the discretion extends to such an extent so as to curb any action that may be detrimental to the interests of the nation, Three, the discretion is ‘paper discretion’ and the Governor works on the aid and advice of the Council of Ministers at the Centre.*

### **CONCLUSION**

*The following quote of Brajeshwar Prasad, a member of the Constituent Assembly Debates, states that:*

*“I feel that we have not taken into account the present facts of the situation. We have tried to copy and imitate the Constitutions of the different countries of the world. The necessity of the hour requires that the Governor should be vested not only with the power to act in his discretion but also with the power to act in his individual judgment. I feel that the Governor should be vested with the power of special responsibilities which the Governor under the British regime were vested in this country. I feel that there is a dearth of leadership in the provinces. Competent men are not available and there are all kinds of things going on in the various provinces. Unless the Governor is vested with large powers it will be difficult to effect any improvement in the Provincial administration. Such a procedure may be undemocratic but such a procedure will be perfectly right in the interest of the country.”*<sup>23</sup>

*The above argument hints towards the practicality of the situation when the nation was newly independent and it was the need of the hour to primarily unify the princely states. At that point of time the responsible government was thought to be such that would sustain the nation as a whole and this required discretion to act in good faith and per the constitutional standards. It can thus very well be summarised that the discretion of the governor theoretically extends to anything done to maintain the status quo, in the interest of the nation. Simply, discretion should be practised in good faith, for the betterment of the people at large, and within the*

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<sup>22</sup>AK Tiwari, “A Chequered History of Governors’ Discretionary Powers under Article 163” (2017) 63 Indian Journal of Public Administration 384

<sup>23</sup>‘01 Jun 1949 Archives’ (Constitution of India) < “<https://www.constitutionofindia.net/debates/01-jun-1949/>” > accessed 10 February 2025

*Constitutional Scheme.*

*It still doesn't satisfactorily answer as to why the president was not supposed to have discretionary powers since the inception, barring the fact that the derivation from the Westminster system of governance, and the prime example of the United Kingdom so dictated it, but clarifies one thing that discretion is a necessity for the nation to work in such a manner that the contributing states would be able to grow in the direction and the manner that best suited their demography and potential.*

*In casu, the role of the head of state as is conventional per the Westminster system of responsible government, which India has adopted, is 'curiously ill-defined.'*<sup>24</sup>

*It is a general view that the head of state has to have some discretionary 'reserve' powers, but what these powers are, and when they should be exercised, 'is a fertile field for academic debate.'*<sup>25</sup> One authority has stated that *"amongst the text-writers on the subject of constitutional conventions those interested will usually be able to find support for (or against) almost any proposition."*<sup>26</sup>

*Where discretion arises, convention dictates. The action of the constitutional head is supposed to be dictated by the precedents. These precedents arise out of experiences of other dominions, where essentially the judiciary interpret the correctness of the exercise of discretion in the case of first instance. In the case, where no convention exists, rationality dictates. It is assumed that the constitutional head is a prudent and reasonable person. The judiciary verifies this action as correct or incorrect and we thus have a precedent to derive substance from.*

*Responsible government requires the constitutional head to be vested with certain discretionary powers.*<sup>27</sup> *Essentially, owing to the fact that the will of the people dictates the constitution, it is the will of the people that requires the constitutional head to contribute towards it and the consequent constitutional post that is bestowed onto them. The discretion so vested should be thus exercised in such cases where it is apparent or seems to be making headway towards some other functionary not performing their share of contributions towards*

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<sup>24</sup>Chapter 5: Curiously Ill-Defined-the Role of the Head of State' < "https://www.aph.gov.au/About\_Parliament/Senate/Practice\_and\_Procedure/hamer/chap05" > accessed 15 February 2025

<sup>25</sup> H.V. Evatt, *The King and His Dominion Governors*, 2nd edn, Melbourne, Cheshire, 1967, p. 268

<sup>26</sup>Ibid

<sup>27</sup>'01 Jun 1949 Archives' (Constitution of India) < "https://www.constitutionofindia.net/debates/01-jun-1949/" > accessed 10 February 2025

*this Will. The theory here makes a greater sense, and can be put forth as a viable perspective of understanding the convolution in discretion so granted.*

*The discretion that is vested with the governor is only so as to aid aligning of the State's policy with that of the Centre. In the broader scheme of things, this is a necessity for the Union to remain a Union, for if not, it becomes significantly easier in such a diverse nation as that of India to essentially go separate ways owing to its cultural, social, economical, linguistic, religious, regional, environmental or geographical diversity. This duty on the Governor allows the States functioning and growth and to maintain its federalism Constitutionally.*

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