A CONSTITUTIONAL CONFLICT - NOMINATION OF MEMBERS TO THE MAHARASHTRA LEGISLATIVE COUNCIL

By Mr. S. C. Naidu, Advocate, High Court, Bombay

(With assistance and inputs from Mr. Manoj M. Gujar and Mr. Aniketh Poojary, Advocates)

1. The State of Maharashtra appears to be heading towards a conflict between the Legislature headed by the Chief Minister and his Council of Ministers on one hand and the Governor of the State on the other hand in respect of nomination of members to the Maharashtra Vidhan Parishad (*Maharashtra Legislative Council***)**.

2. The developing constitutional crisis has all the ingredients of a battle royale between the two combatants. The issue at hand is whether the Governor ought to give primacy to the aid and advise given by the Chief Minister or exercise his Constitutional discretion for nominating members to the Vidhan Parishad.

3. The State of Maharashtra has a bicameral Legislature. The Maharashtra Vidhan Parishad is the Upper House and the Maharashtra Vidhan Sabha **(***Maharashtra Legislative Assembly***)** is the Lower House legislature of the State.

4. Article 170 of the Constitution of India (***Constitution***) provides that Legislative Assembly of each State shall be composed of members directly elected from single-seat constituencies on basis of adult suffrage. Sections 7 and the Second Schedule to the The Representation of the People Act, 1950 (***RP Act 1950***) specifies 288 seats for Maharashtra Legislative Assembly (***MLA***).

5. Article 171 provides for composition of Legislative Councils. Members to Legislative Councils (***MLC***) are indirectly elected through an electoral college. Under clause 3 of Article 171 of the Constitution, as close as possible, one-third members of the Council are to be elected by electorates consisting of members of local bodies like municipalities, district boards etc., another one-third to be elected by MLAs., one-twelfth to be elected by an electorate consisting solely of graduates and another one-twelfth by an electorate consisting of teachers. 1/6th of the members are nominated by the Governor from among those with special knowledge or practical experience in the field of Literature, Science, Art, Co-operative Movement and Social Service.

6. Section 10 and the Third Schedule read with Section 27 and the Fourth Schedule to the ***RP Act 1950*** specifies 78 seats for the Maharashtra Vidhan Parishad. The Allocation of seats in Maharashtra Vidhan Sabha is as under:

   i. 30 members elected by the MLAs;
   ii. 7 members elected from amongst Graduates Constituency;
   iii. 7 members elected from amongst Teachers Constituency;
   iv. 22 members are elected from amongst the specified local bodies of Maharashtra;
   v. 12 members having special knowledge or practical experience the specified fields to be nominated by the Governor in exercise of powers vested in him under Article 171(3)(e) read with Article 171(5) of the Constitution.

7. The Vidhan Sabha is a continuous House and not subject to dissolution. However, one-third of its members retire every second year and are replaced by new members. As such a member enjoys tenure of six years.

8. The nomination of members of Legislative Council, as per Article 171(5) by the Governor is final and cannot be a subject matter of review before any Court as per Article 163(3). However, Article 163(1) of the Constitution requires the Governor to exercise his functions, as per aid and advise of the Council of Ministers with the chief Minister at the head, except in so far as where he is, by or under the constitution, required to exercise his functions or any of them in his discretion.

9. The discretionary power, vested in the Governor, in our Constitution was subject matter of considerable debate before the Constituent Assembly. As the Constitution does not give any exhaustive list of such functions, the matter is generally left to convention and practice.

10. The first case of exercise of discretion in regard to such nomination arose as early as in 1952, in Madras, when C. Rajagopalachari was nominated to the Legislative Council and was then appointed Chief Minister. Since then, the Governor's function, to nominate Members to the Upper House of the Legislature have been subjects of scholastic legal debates and articles, which have made conscious attempts to interpret and clarity the constitutional powers of the Governor.

11. The Indian Constitution has not recognized the Doctrine of Separation of Power in its rigid sense as the British Parliament. The provisions relating to Executive of a State is contained in Part VI of the Constitution. (Article 152 to Article 237).

12. There are several constitutional functions, powers and duties of the Governor. Under Article 154 the executive power of the State vests in the Governor. These are conferred on him *eo nomine* (i.e., on the Governor in his name). The executive power includes acts necessary

for carrying on or supervision of general administration of the State (***Chandrika Jha vs. State of Bihar – AIR 1984 SC 327*** and ***State of MP vs. Dr. Yeshwant Trimbak – AIR 1990 SC 765***). The aforesaid principle has been reiterated by the Supreme Court in ***Satya Narayan Shukla vs. Union of India – (2006) 9 SCC 69.***

13. The Governor is, by and under the Constitution, required to act in his discretion in several matters. These constitutional functions and powers of the Governor *eo nomine* as well as those in the discretion of the Governor are not executive powers of the State within the meaning of Article 154 read with Article 162.

14. Article 162 of the Constitution sets out extent of executive power of a State. This Article is analogous to Article 73. Proviso to Article 162 provides that the executive power is co-extensive with legislative power subject to other provisions of the Constitution and the limitations set out in the said Article. As a general Rule, the executive power of a State cannot be exercised where the field is already occupied by laws made by the Legislature. Article 162 is only concerned with distribution of executive powers of the State and not with the validity of its exercise. However, any exercise of Executive power not in accordance with the constitution will be liable to be set aside. (Per ***U.N.R. Rao v Indira Gandhi (1971) 2 SCC 63***).

15. Article 163 of the Constitution controls, in general, the relation between the Governor and his Ministers. The said Article reads as follows:

"*163. Council of Ministers to aid and advise Governor*

(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

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court"

16. Historically, Article 163, for the most part, has been bodily lifted from Sections 50 and 51(4) of the Government of India Act, 1935 (***GoI Act***). However, the Governor of a Province had varied functions and to discharge the said functions, was vested with vast discretionary powers under Section 50 of the GoI Act. The said powers are, however, absent under our Constitution.

17. During the Constituent Assembly debates on Draft Article 143 (which is finally numbered as Article 163 in the Constitution), an objection was raised to the language conferring discretion on the Governor under Clause (1) of Article 143 by Shri HV Kamath and others.

18. Dr. B.R. Ambedkar, however, opposed any dilution in Draft Article 143(1) by stating as follows:

"*Now, speaking for myself, I have no doubt in my mind that the retention in or the vesting the Governor with certain discretionary*

powers is in no sense contrary to or in so sense a negation of responsible Government. I do not wish to rake up the point because on this point I can very well satisfy the House by reference to the provisions in the Constitution of Canada and the Constitution of Australia.

I do not think anybody in this House would dispute that the Canadian system of Government is not a fully responsible system of Government, nor will anybody in this House challenge that the Australian Government is not a responsible form of Government. Having said that, I would like to read Section 55 of the Canadian Constitution."

19. Section 55 of the Canadian Constitution reads as follows:

> "55. *Where a Bill passed by the Houses of Parliament is presented to the Governor- General for the Queen's assent, he shall, according to his discretion, and subject to provisions of this Act, either assent thereto in the Queen's name, or withhold the Queen's assent or reserve the Bill for the signification of the Queen's pleasure*."

20. Dr. B.R. Ambedkar further went on to say that: "*The clause is a very limited clause, it says 'except insofar as he is by or under this Constitution'. Therefore, Article 163 will have to be read in conjunction with such other articles which specifically reserve the power to the Governor. It is not a general clause giving the Governor power to disregard the advice of his Ministers, in any matter in which he finds he ought to disregard...*"

21. Article 163 is analogous to Article 74. The former deals with the Governor and Chief Minister while the later deals with the

President and Prime Minister. Though Article 74(1) and Article 163(1) are substantially the same, the President has no discretion at all under Article 74 while the Governor has some element of discretion under Article 163.

22. Articles 239(2), 371-A(1)(b), 371-A(2)(b), 371-A(2)(f) and Paras 9(2) & 18(3) of the VI Schedule are some of the Constitutional provisions where the Governor can exercise his discretion. Similarly, the Governor will be justified in exercising discretion in making a Report under Article 356 even if the Report is against the aid and advice of his Council of Ministers. Reserving bills for consideration of the President under Article 200, has been held to be a discretiary function of the Governor.

23. Leaving aside the above exceptions, in matters where the Constitution is silent or does not specify that the Governor has to act on the aid and advice of the Council of Ministers, the Supreme Court interpreting some of the Articles held that the powers conferred by the Constitution upon the Governor require him to act on the aid and advice of the Council of Ministers.

24. Illustratively,

- *Article 161 (power of Governor to grant pardon) in* ***Maru Ram vs. Union of India – AIR 1980 SC 2147****:*

- *Article 174 (power to summon, prorogue House) in* ***Nabam Rebia & Anr. Vs Deputy Speaker and others - 2016 8 SCC 1***

- *Article 175 (Right of Governor to address and send messages to the House) in Nabam Rebia (Supra);*

- *Article 213 (power of Governor to promulgate Ordinances) in* ***Samsher Singh vs. State of Punjab - AIR 1974 SC 2192****.*

- *Article 309-Proviso (power of the President to make service rules of persons appointed, to public services and posts in connection with the affairs of the Union and for the Governor of a State) in* ***State Of U.P. and ors. vs Z.U. Ansari*** *– (2016) 16 SCC 768*

25. There are, however, some areas where the Governor may act independently or contrary to the aid and advice of the Council of Ministers, such areas are few. For instance, where the advice tendered by the Council of Ministers is contrary to constitutional principles; in cases where there is an apparent bias/ conflict of interest or where the legislative intent patently requires the Governor to exercise his discretion.

26. Normally, the Governor has to act on aid and advice of the Council of Ministers, but there can be cases where the Governor is, by or under the Constitution, required to exercise his functions or any of them in his discretion. The expression "required" in Article 163 signifies that Governor can exercise his discretionary powers under the Constitution only if there is a compelling necessity to do so.

27. The expression "in his discretion" in Clause (2) of Article 163 was considered by the Supreme Court in *Samsher Singh (Supra).* After adverting to the draft articles as discussed in the Constituent Assembly it was observed that this expression was used when the Constitution referred to certain special responsibilities of the Government.

28. The Sarkaria Commission, in its report to the Central Government in 1988, set out the matters where the Governor has to act in his discretion. They are:

- In choosing the Chief Minister
- In testing the majority of the government in office
- In the dismissal of a Chief Minister
- In dissolving the Legislative Assembly
- In recommending President's rule
- In reserving bills for the consideration of the President

29. The commission clearly concluded that the Governor has no discretionary power in the matter of nominations to the Legislative Council or the Legislative Assembly. If at the time of making a nomination, a ministry has either not been formed or has resigned or lost majority in the assembly, the Governor should await the formation of a new ministry, the commission had recommended. (Para-graph 4.16.18).

30. The Sarkaria Commission was clear that Article 171 of the Constitution does not provide for the exercise of discretion by the Governor. Similarly, it said, no discretion is available to him to make a nomination to the Legislative Council under Article 333, which deals with representation of the Anglo-Indian community in the Legislative Councils of the States.

31. The Sarkaria Commission, however, was of the view that the discretionary power of the Governor as provided in Article 163 should be left untouched. When a Governor finds that it will be constitutionally improper for him to accept the advice of his Council of Ministers, he should make every effort to persuade his ministers to adopt the correct course. He should exercise his discretionary power only as a last resort, the commission had recommended.

32. Decision rendered by Courts to ascertain the Scope of Gubernatorial discretion has not conclusively settled the issue.

33. The Lucknow Bench of the Allahabad High Court, while disposing a PIL (*Ranjana Agnihotri vs State of Uttar Pradesh*) seeking issue of Mandamus to the Governor to use his discretion while nominating members to the State's Legislative Council held that in the matter of nomination under Article 171(2)(e), the advise of the Council of the ministers is not binding upon the Governor. He is to act on his own discretion. This is an obiter and not a binding ratio.

34. In ***Har Sharan v. Chandra Bhan, A.I.R. 1962 All. 301*** the Allahabad High Court held that provision of nomination has not been made to provide a backdoor entry to ministers who fail to gather public support; nevertheless, if there is no illegality to the procedure, the Court cannot interfere in the decision of the Governor. The Court observed that the intentions of 164(4) and 171(5) are not reconcilable, and were meant for very different purposes. However, after this Judgment has been delivered there have been a vast change in the constitutional jurisdiction.

35. In ***Ram Gopal Sisodia v. Union of India- 196 (2013) DLT 675***, the Delhi High Court while considering a challenge to the nomination of Shri Sachin Tendulkar, a cricketer (sportsperson) in the category of 'Art' to the Rajya Sabha stated that the nominated members are expected to take a broader view of the issues at hand, sometimes different to elected members, so as to provide them with an opportunity to identify different circumstances. The judgment upholds the nomination made by the President.

36. In the case of ***S.R Chaudhari v. State of Punjab,*** **(2001) 7 SCC 126** the Supreme Court reiterated the principle that the scheme of Article 164 compels a minister to return to the legislature through direct or indirect elections within a short period. India has seen instances of ministers being elected in the (Rajya Sabha) State Legislative Council through indirect elections after not being able to emerge victorious in their constituency. This form of election, though deflection still follows the representative democracy since the elections are held indirectly. The Judgment holds that <u>Nominations under Article 80 to the Council of States or Article 171 to the State Legislative Council do not fall into the category of either direct or indirect elections.</u>

37. The Allahabad High Court in ***Writ Petition No.4529 (MB) of 2003 (K. K. Tripathi Vs. State of UP - decided on 22nd March 2010)*** challenging nomination of certain member and urging transparency, guidelines and criteria for selecting persons to be nominated, considered the relevant constitutional provisions but did not decide the plea that nomination made without enquiry being initiated as required under Article 191 of the constitution except for observing that it may be advisable to take report of the proposed

candidates before consideration of his nomination. This observation is an obiter.

38. The Andhra Pradesh High Court in the Writ Petition No.32542 of 2011 - ***V. Venkateshwar Rao (V.V. Rao) vs. Government of Andhra Pradesh*** considered the challenge to the validity of notification issued by the State Government members to the Andhra Pradesh Legislative Council. After taking note of the constitutional provisions and judgments **pertaining to the challenge, the Andhra Pradesh High** Court observed that the main contention of the Petitioner inter-alia is that the persons nominated by the said notification did not possess special knowledge or practical experience in the fields mentioned in clause (5) of Article 171 cannot be accepted in light of the statements in the counter-affidavit filed in the matter stating that the persons nominated had special knowledge and/or practical experience in the fields enumerated in Clause (5) of Article 171. The decision is mainly based on the facts of the case and does not lay down a ratio.

39. The Patna High Court in the case of ***Vidya Sagar vs. Krishna Ballabh – AIR 1965 Patna 321*** and ***Katra Gadda Gangaram vs. State of Andhra Pradesh – 1982 An.WR 258*** held that the Courts cannot be called upon to enter into the question of determining whether members nominated have or do not have the required qualification under the Constitution. The Court further held that in review of the advise tendered by the Council of Ministers to the Governor or the material considered by the Governor for accepting the nomination cannot be reviewed by a Court as the decision of the Governor is not justiciable.

40. It is apparent that the High Courts chose not to undertake an in-depth analysis of the relevant constitutional provisions to answer scope of discretion vested in the Governor within the frame work of the Constitution.

41. In this regard it would be relevant to note the observation of the Hon'ble Supreme Court in the case of *Nabam Rebia (Supra)* extracted below:

The Chief Minister and his Council of Ministers lose their right to aid and advise the Governor, to summon or prorogue or dissolve the House, when the issue of the Government's support by a majority of the Members of the House, has been rendered debatable. ... And in such a situation, if there is a non-confidence motion against the Chief Minister, who instead of facing the Assembly, advises the Governor to prorogue or dissolve the Assembly, ***the Governor need not accept such advice****.*

42. In the case of ***Shivraj Singh Chouhan vs Speaker, Legislative Assembly of Madhya Pradesh and Ors. reported in (2020) 4 MLJ-207,*** the prime question before the Supreme Court was whether the Governor is empowered to issue a direction to the Chief Minister to hold a floor test and prove trust in his government. After examining speeches of the Constituent Assembly Debates – and the final wording of the Article – the Court concluded that 'Constituent Assembly thus decided to vest the office of the Governor with certain discretionary powers under the Constitution'. The Supreme Court responded to the question in affirmative and found the discretionary powers under Article 163 of the Constitution to be the source.

43. In the above background the conclusion that Governor is the only link which needs to act as a checkpoint here. The phrase "*by or under this Constitution"* in Article 163 *is of* wide import. If the discretion of a Governor is not expressly provided, the tenor or the context of the provision in question may show that the Governor has to apply his discretion. The legislative Intent of the provision in 171(5) is to bring in people from different specified fields to provide help and expertise to the functioning of the Council, which stands in distinction to that of the Assembly. The nominated member act like an objective lens, not tilted towards the ruling or the opposition members in the Assembly. The nominated members who adorn the benches of the Legislative Council are expected to contribute a distinctive and especially valuable kind of wisdom to the deliberations of the council.

44. The Supreme Court in *Samsher Singh (supra)* explained the limitations Article 163(1) poses on Governors, by providing the reasoning that it specifies a relationship of accountability of Council of Ministers through the Governor. However, nomination of members to Legislative Council is not a question of relationship between Governor and the Chief Minister, but a question of constitutional scheme.

45. The Constitution makers, aimed at providing an impartial set of individuals i.e. those who are not burdened with political or party loyalty to the Council, who can provide invaluable insight to the House, which elected members might not be able to garner. The main intention of incorporating this provision was to provide a balanced, third party view to the Council equipped with expertise in their fields. It is not impossible, though hard to expect a party

member serving as a minister or Chief Minister of any State to fulfil the legislative intent of this provision.

46. Under Section 6 of the RP Act, 1950, the person to be nominated shall be a citizen of India and shall not be less than 30 years of age. In addition to these qualifications, the prohibition prescribed in Article 191 of the Constitution will apply. However, except for the above qualifications and prohibitions, which are similar to nominated members and elected members (directly or indirectly), the nominated members do not possess equal capacities and obligations as elected members. For example, nominated members are not allowed to vote in the election of a president. A nominated member is also exempted from filing of assets and liabilities under the Representation of People's Act, 1951, which all elected members are compelled to file within 90 days of oath. A minister has its own sets of duties and obligations that stand contrary to those expected from nominated members. The caution sounded by the Supreme Court in the case of *S. R. Choudhary (supra)* will have to be taken note of more particularly if a member is nominated and such a member is given the task of being a Minister, then it shall defeat representative democracy as envisaged by the Constitution.

47. Thus, if such gateway entry is allowed to career politicians in it will lead to dilution of the importance of such nomination to the point where they might be completely hijacked as a backdoor entry for politicians to the Council, in the garb of having "practical experience" in the realms of social service, leaving no scope for achieving the true intent of Article 171(3) i.e. to nominate members having "practical experience" in the field of literature, science, art, co-operative movement and social service to be realized.

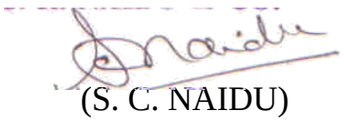
48. Since this form of nomination is unintended by the makers, and destroys the idea of representative democracy, it must not be looked upon as a legislative action to be controlled by the Council of Ministers, but as a discretionary executive action on which Governor has some control. Therefore, the Governor should consider the constitutionality of such actions, and allow them only if they do not alter the state of democracy. Nomination is not and cannot be permitted to be used as a back door for politicians to enter the Legislature.

49. The present impasse in Maharashtra present two situations, in respect of advise under Article 163 (1) received by the Governor from the Chief Minister and his Council of Ministers proposing names of persons to by nominated to the Legislative Council.

50. The first situation is when the Governor on being satisfied that the person/s proposed to be nominated by the Chief Minister, fulfill the predicates of Article 171(3)(e) and is not disqualified under Article 191 of the Constitution proceeds to nominate the person to the Legislative Council. This would be a harmonious working of Article 163(1), Article 171(3)(e) and Article 171(5).

51. The second situation may arise when person/s proposed to be nominated by the Chief Minister and his Council of Ministers, under Article 163(1), does / do not possess “special knowledge” or “practical experience” in the field stipulated in Article 171 (5) of the Constitution or is disqualified from being a member of the Legislative Council. In such a situation the Governor would be justified in not accepting such advise of the Chief Minister and proceed to nominate persons who, in his opinion, satisfy the constitutional requirements. This would be an exercise of

constitutional discretion vested the Governor exercised within the frame work of the Constitution.



Dated: 15th December 2020 (S. C. NAIDU)

Mumbai Advocate, High Court Bombay

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