The Governor, The Constitution and the Courts.

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The Supreme Court of India, in a Division Bench consisting of Dr. Justice B.S. Chauhan and Mr. Justice Fakkir Mohammed Ibrahim Kalifulla, has disposed of a civil appeal filed by the State of Gujarat Vs. Hon'ble Justice R.A. Mehta on the question of appointment of the Lokayukta in the State of Gujarat. The sequence of events as narrated in the judgement is:-

1. Under the Gujarat Lokayukta Act 1986 the Governor appoints the Lokayukta as per the procedure given in the Act. As per the procedure, as stated by the Supreme Court, the Chief Minister, in consultation with the Chief Justice of the Gujarat High Court and the Leader of Opposition makes a recommendation to the Governor, on the basis of which the appointment is made.

2. The post fell vacant on 24.11.2003 and remained so for about three years. In August 2006 the Chief Minister wrote to the Chief Justice, suggesting the name of Justice K.R. Vyas. The Chief Justice concurred and the matter was sent to the Governor, who sat on it for the next three years.

3. In December 2009 the Secretary to the Governor requested the Registrar General of the High Court to obtain a panel of names from the Chief Justice for consideration of the Governor. About two months later the Chief Minister wrote a similar letter to the Chief Justice, who replied almost immediately suggesting the names of four retired judges.

4. The Chief Minister tried to consult the Leader of Opposition, who replied that the Chief Minister had no power to consult him, especially because the Governor had already initiated the process and the Chief Minister had no locus standi.

5. During this period the Gujarat Council of Ministers met and recommended the name of Justice J.R. Vora (retired) for appointment as Lokayukta. This suggestion was forwarded to the Governor, who again sat on it.

6. The Governor sought the opinion of the Attorney General about the process of consultation. He also wrote to the Chief Justice asking which of two retired judges, Justice R.P Dholakia and Justice J.R. Vora, the Chief Justice preferred.

7. The Attorney General opined that the Chief Justice need not suggest a panel but only one name. The Chief Justice communicated his preference for Justice R.P.Dholakia, but on the insistence of the Governor he recommended the name of Justice S.D.Dave (retired) because Justice J.R. Vora had been appointed elsewhere. Meanwhile the Chief Minister wrote to the Governor again stating that his recommendation about Justice JR Vora stood as the Hon'ble Judge had expressed willingness to be considered for the post of Lokayukta.

8. The Chief Justice now recommended the name of Justice R.A. Mehta (retired). The Chief Minister, on 16.6.2011, requested the Chief Justice to reconsider his recommendation because Justice Mehta was above seventy-five years of age and was also associated with NGOs and organisations known for antagonism against the State Government. The Chief Justice rejected this contention of the Chief Minister and again recommended the name of Justice R.A. Mehta. The Leader of Opposition said that he had been consulted by the Governor and approved the appointment of Justice R.A. Mehta. On 25.8.2011 the Governor issued the warrant of appointment.

I have narrated the sequence of events at length because this is a clear-cut case of all the players, but especially Governor of Gujarat, deliberately playing games according to their own set of rules and their own political agenda. For three years between 2003 and 2006 the State Government did not initiate the appointment of the successor of Justice S.M. Soni. Thereafter the Governor sat on the file for three whole years. The Governor then bypassed the Chief Minister and entered into direct correspondence with the Chief Justice and the Leader of Opposition. The Governor also chose to completely ignore the advice of the Council of Ministers and kept the Chief Minister out of the loop for appointment of the Lokayukta. The whole issue, therefore, boils down to whether the Constitution of India permits this and whether the Gujarat Lokayukta Act 1986 can permit the governor to act otherwise than on the aid and advice of his Council of Ministers mandated by Article 163 of the Constitution.

In paragraph 74 of the judgement, which gives the conclusions, the Hon'ble Supreme Court has very rightly pointed out that for nine years the post of Lokayukta lay vacant because only half-hearted attempts were made to fill the post. Regarding the Governor, the Hon'ble Court has said, "The present Governor misjudged her role and has insisted that, under the Act, 1986, the Council of Ministers has no role to play in the appointment of the Lokayukta and that she could, therefore, fill it up in consultation with the Chief Justice of the Gujarat High Court and the Leader of Opposition. Such an attitude is not in conformity or in consonance with the democratic set up of government envisaged in our Constitution. Under the scheme of our Constitution the Governor is synonymous with the State Government and can take independent decisions upon his or her discretion only when he or she acts as a statutory authority under a particular Act, or under the exceptions provided in the Constitution itself. Therefore, the appointment of Lokayukta can be made by the Governor, as Head of State, only with the aid and advice of the Council of Ministers and not independently as a statutory authority". This statement alone should have been enough for the Supreme Court to have accepted the appeal of the Government of Gujarat and set aside the appointment of Mr. Justice R.A. Mehta. However, the Supreme Court, in its wisdom, has chosen fit to rule that the Governor was wrongly advised that she could ignore the Council of Ministers, but because of the facts in this particular case, the Chief Minister was aware of the circumstances and, therefore, giving primacy to the opinion of the Chief Justice was perfectly in order. This meant that the process of consultation stood complete and the appointment of Justice R.A. Mehta could not be considered illegal.

Under Article 141 of the Constitution every judgement of the Supreme Court is a law declared by it and, therefore, is binding and must be respected by all. I accept this proposition and respect the decision of the Supreme Court in the instant case. The question remains whether this is the final say in the matter of the powers of the Governor and his constitutional position vis-à-vis the Council of Ministers. With utmost respect to the learned Hon'ble Judges who constituted the Bench, perhaps this matter should have gone to a larger Bench, preferably a Full Bench, not on facts but because a very important question of constitutional law was involved. In this behalf I would like to point out that the Gujarat Lokayukta Act 1986 is one of the worst drafted pieces of legislation it has been my misfortune to come across. Under section 3 the Governor is the appointing authority for appointment of the Lokayukta. Such appointment is to be made after consultation with the Chief Justice of the Gujarat High Court and the Leader of Opposition in the State Vidhan Sabha. In the entire Act the Chief Minister and the Council of Ministers and the Gujarat Government are not mentioned. Under these circumstances could it be interpreted that the Governor has to consult only the Chief Justice and the Leader of Opposition and that the Chief Minister has no role to play? For this purpose we shall have to go to the

Constitution itself. Article 124 (2) reads, "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice the Chief Justice of India shall always be consulted". Under Article 217 these provisions apply mutatis mutandis to the appointment of Judges of a High Court. Can the President, in view of the wording of Article 124, ignore the Prime Minister and the Council of Ministers in the matter of appointment of Judges? Under Article 217 in the matter of appointment of a Judge of a High Court the President is required to consult the Governor of the State also. Can the Governor make a recommendation to the President without the aid and advice of his Council of Ministers?

In order to answer the above question recourse must be had to Articles 74 and 163 of the Constitution. Under Article 74 the President shall, in exercise of his functions, act in accordance with the advice of the Council of Ministers. The provisions of Article 163 are similar. Except only where the Constitution requires the Governor to perform his functions at his discretion he, too, is required to perform his functions on the aid and advice of the Council of Ministers. An Act of the Legislature, such as the Gujarat Lokayukta Act, cannot negate these provisions of the Constitution. Despite the fact that the Gujarat Lokayukta Act does not mention the government, the Chief Minister, or the Council of Ministers, the Governor cannot act otherwise than on the advice of the Council of Ministers unless the Constitution itself requires him to act independently.

In what cases can the Governor act at his own discretion? Under Article 75, whereas the Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister, he has discretion in the matter of appointment of the Prime Minister. Article 164 has similar provisions regarding the Governor and the Chief Minister. However, because under Article 75 (3) and 163 (2) the Council of Ministers is collectively responsible to the House of the People and the Legislative Assembly respectively, the President or Governor would obviously invite only that person to be Prime Minister or Chief Minister who enjoys the confidence of the House. The only discretion that the President and Governor enjoy is in how best to determine who enjoys the confidence of the House. The President and the Governor having sworn an oath to preserve, protect and defend the Constitution, would obviously reject any advice from the Council of Ministers which calls upon them to act in an unconstitutional manner. I have not come across any instance of such advice having been given by any Council of Ministers in this country. It has been stated that Mr. Fakhruddin Ali Ahmed, the then President should not have approved the proclamation of Emergency under Article 352 because under Article 352 (3) unless the decision of the Union Cabinet, that is, the Council of Ministers consisting of the Prime Minster and other ministers of cabinet rank, has been communicated to him in writing he cannot issue the Proclamation. However, once the Cabinet gives its advice in writing the President has no discretion in this behalf.

Another set of circumstances under which perhaps the President and the Governor can return a matter to the Council of Ministers is if the Council is in violation of the Rules of Business framed under Articles 77 and 166. Of course the Council of Ministers can advise amendment of these Rules and the President or the Governor has to agree.

By stretching the interpretation of the Constitution a bit, which has been done both in the case of Parliament and the State Legislatures more than once, the President or the Governor need

not dissolve the House of the People or the Legislative Assembly under Articles 85 and 172 respectively on the advice of the Prime Minister or Chief Minister who has been defeated in a no confidence motion or has otherwise lost the majority in the House. In Britain, however, the convention is that the monarch must accept the advice of the outgoing Prime Minister who may have lost his majority in the House if he asks for dissolution of the House and holding of elections. However, one has to accept that there is a difference of perception about this issue in Britain and India.

The Constitution itself provides for those matters in which the Governor may exercise discretion under Article 163. Under Article 371 in the matter of the Special Development Boards in Maharashtra and Gujarat the Constitution gives special responsibility to the Governor and here he may reject the advice of his Council of Ministers. Under Article 371 A the Governor of Nagaland has special responsibility with respect to law and order. Under Article 371 C the President may give special responsibility to the Governor of Manipur in order to procure the proper functioning of a committee of the Legislative Assembly consisting of Members of the Assembly elected from the hill areas of that State. Under Article 371 F the Governor of Sikkim has special responsibility for peace and for equitable arrangement for ensuring the social, economical advancement of different sections of people of Sikkim. Under Article 371 H the Governor of Arunachal Pradesh has special responsibility with respect to law and order in the State. He is required to consult his Council of Ministers, but he can exercise his individual judgement, differing from the advice given to him by the Council of Ministers. In all matters other than those specified by the Constitution, the Governor has no discretion to act otherwise than on the aid and advice of his Council of Ministers. With utmost respect to the Hon'ble Supreme Court I would submit that this is a true representation of the powers of the Governor, including in the case of appointment of the Lokayukta.

There are certain other issues in which we need an authoritative judgement from the Supreme Court sitting in a Constitutional Bench. I refer specifically to the provisions of Articles 111, 200 and 201 of the Constitution. Under Article 111 or 200 when a Bill is presented to the President or the Governor for signature after being passed by the Legislature, the President or Governor is required to give his assent or return the Bill for reconsideration or amendment. In Parliament both the Houses, as also in a bicameral State Legislature and the Legislative Assembly in an unicameral Legislature, will reconsider the Bill and if it is passed by the Houses or House with or without amendment neither the President nor the Governor may withhold assent. Under Article 1, section 7 of the Constitution of the United States of America the President has ten days time in which to either assent to a Bill or return it to the Congress. In case he does not return the Bill it is deemed as assented to and if he does return the Bill and the Congress once again approves it, then the Bill is deemed to have received the presidential assent. The difference between the United States and the Indian position is that in India no limitation of time is prescribed by the Constitution within which the President or the Governor is required to either assent to the Bill or to return it for reconsideration. When Giani Zail Singh was the President of India and Rajiv Gandhi was the Prime Minister, a Bill was sent to him for assent which would have virtually brought in postal censorship. Giani Zail Singh considered this as undemocratic, but he also knew that if he returned the Bill Rajiv Gandhi had a massive majority in Parliament and would have been able to get the Bill passed a second time. Using the provisions of the Constitution which laid down no time limit in consideration of the Bill he argued that he was examining it, he neither assented nor returned the Bill and he sat on it till the term of the House of the People was over. It was dissolved and the Bill lapsed.

Governors have also played the same game, for example, in Gujarat to frustrate a BJP led government and in the case of Madhya Pradesh to frustrate first a Congress led government and a then BJP led government. The scheme of the Constitution is that the Legislature has competence to legislate. If a piece of legislation is unconstitutional, then the High Court or the Supreme Court has the power to strike it down. The President or the Governor may, in his or her wisdom, delay a Bill by sending it back to the Legislature but neither functionary can abort a Bill through delaying tactics. That flies in the face of the mandate given to the Legislature by the people to legislate on their behalf. I would most respectfully submit to the Hon'ble Supreme Court that at some stage it will have to define the words "as soon as possible after presentation to him of a Bill for assent" given in Articles 111 and 200. Even though the Constitution does not provide for a time limit should not the Supreme Court, in exercise of its powers under Article 141, define what "as soon as possible" means? The President or the Governor who sits unduly on a Bill is acting in violation of his oath to protect the Constitution and, therefore, either by a suitable amendment of the Constitution or an interpretation by the Constitutional Bench of the Supreme Court a time limit must be prescribed for giving of assent or denial of assent and return of the Bill to the Legislature for reconsideration.

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