

GUBERNATORIAL DISCRETION IN INDIA

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ABSTRACT

One of the most contentious positions in the Indian democratic apparatus is that of Governorship. Constitutional scholars have even gone so far as to call the office a “hangover from the colonial past”.¹ Though this post was set up to function as a “liaison” between the center and the states, it has a slew of complications, one of the most prominent ones being the tangible mistrust between the Chief Minister and the State Governor. The issues may be broadly classified into three categories of appointment, tenure, and removal. There have been several accusations that the governor simply accomplishes the will of the center, which raises the question of how the governor’s discretionary powers are used. The author has attempted to demonstrate in this paper how the three-pronged challenges mentioned above obscure the governor’s discretion, resulting in the possibility of bias and prejudices that may impair the state’s constitutional machinery. The purpose of this paper is to delve deeper into the aforementioned issues in order to identify the root cause of distrust in the governor’s office and to demonstrate that the discretion vested in it may not be as transparent as desired in a constitutional democracy.

Journal of Legal Research and Juridical Sciences

INTRODUCTION

Ever since its inception in the Constituent Assembly debates, the topic of gubernatorial discretion, and the heated debate around it, has only intensified over time.² While this position was created “to monitor the working of the states”, the wide discretionary powers granted to the Governor, and the misuse thereof, were among the chief reasons for the establishment of the “Sarkaria Commission³ on Centre-State Relations” in the 1980s. The dismissal of several “belligerent’ state governments” through the Governor’s report, and the consequent imposition of the President’s rule in the states, led to huge public outcry in the past, with allegations being raised about the Governor acting as the “agent of the Central Government” in destabilizing democratically elected governments in these states, which were mostly ruled by an opposition

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¹ Singh Daljit, *The Position of a State Governor in India*, 22(3), THE INDIAN JOURNAL OF POLITICAL SCIENCE 232 (1961).

² MP JAIN, INDIAN CONSTITUTIONAL LAW 420 (8th ed. 2018).

³ SARKARIA COMMISSION REPORT, INTER-STATE COUNCIL (1983) <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/>

party.⁴ The Supreme Court has time and again iterated the need for greater restraint on part of the Governor in exercising the power to report “the breakdown of constitutional machinery”.⁵ It is of utmost importance that the politics of the government be defined by the process of “rational discussion and moral persuasion on the floor of the house and not by violent demonstrations in the streets.”⁶ Despite the multitudinous aspects of this debate, we can narrow down the issue to three main prongs viz., appointment, removal, and discretionary powers of the governor, and try to peruse them in isolation along with threading a link through them as we go along.

APPOINTMENT OF THE GOVERNOR

Per Art. 155 of the constitution, the Governor of each state is to be “appointed by the President by warrant under his hand and seal.”⁷ The President makes this appointment upon the “aid and advice of the Council of Ministers headed by the Prime Minister”, with whom the effective power thus lies in this regard.⁸

The constituent assembly⁹ furnished the following reasons for a nominated governor instead of an elected governor:

1. “A nominated governor would encourage centripetal tendencies and, thus, promote all-India unity. An elected governor would, it was apprehended, to some extent encourage separatist provincial tendencies more than otherwise. The links with the Centre would thus be fewer in number.”¹⁰
2. A governor elected by the direct vote of the people would be a party-man instead of an impartial head, as required in a parliamentary system.¹¹ A governor, it was opined, should be a detached figure acceptable to the province, otherwise, he could not function, and yet may not be a part of the party machine of the province. It would be desirable to have people from outside, cooperating fully with the govt. in carrying out the policies and yet represent before the public ‘*something above politics*.’

⁴ MP JAIN, INDIAN CONSTITUTIONAL LAW 421 (8th ed. 2018).

⁵ B. P. Singhal v. Union of India, Writ Petition (Civil) No. 296 of 2004

⁶ J. P. Suda, The Role of the Governor, 29(1), The Indian Journal of Political Science 62, 63 (1968).

⁷ INDIA CONST. art. 155.

⁸ INDIA CONST. art. 74.

⁹ CONSTITUENT ASSEMBLY DEBATES, https://www.constitutionofindia.net/constitution_assembly_debates (last visited June 21, 2022).

¹⁰ MP JAIN, INDIAN CONSTITUTIONAL LAW 425 (8th ed. 2018).

¹¹ *Id.*

3. If both the CM and the Governor are elected, there will arise conflict between the two indispensable office-bearers, since it would amount to running two parallel administrations in the same state.¹² When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him, at his discretion he can intervene in the governance of the province.”

To ensure smooth and unhindered functioning of the state government machinery, scholars have advised having a “non-political, non-partisan, a man of eminence in some walk of life” as the governor.¹³ The Sarkaria Commission has suggested that Art. 155 should be amended so as to ensure effective consultation with the Chief Minister of the State in the matter of appointment of the governor.¹⁴

Another issue with regards to this appointment is that there are “no set criteria for eligibility” to become a governor.¹⁵ A “citizen of India who has completed 35 years of age” is eligible as per Art. 157 and “should not hold any office of profit.”¹⁶ The governor cannot be a member of a House of Parliament or the State Legislature, and if he is a member of a House, at the time of his appointment, he has to vacate his seat on the date of entering office.¹⁷

TENURE AND REMOVAL FROM OFFICE

Another topic of controversy is that the governor holds his office “during the pleasure of the President” i.e., as long as the Central Executive wants him in that office.¹⁸ Therefore, it has been argued that the “Central Executive has complete control over this office” and thus the governor cannot act in a manner prejudicial to their interests.¹⁹ Subject to all of the above, a governor holds office for a term of 5 years.²⁰ However, he “continues to remain in office even after the lapse of his term till his successor enters upon his office”.²¹ Additionally, the governor may “resign at any time by writing to the President”.²² In the event of an unforeseen contingency, such as the death of the governor, the President may take whatever decision he

¹² *Id.*

¹³ MP JAIN, INDIAN CONSTITUTIONAL LAW 434 (8th ed. 2018).

¹⁴ *Supra* note 2.

¹⁵ INDIA CONST. art. 155.

¹⁶ INDIA CONST. art. 158 cl. 2.

¹⁷ INDIA CONST. art. 158.

¹⁸ INDIA CONST. art. 156 cl. 1.

¹⁹ MP JAIN, INDIAN CONSTITUTIONAL LAW 436 (8th ed. 2018).

²⁰ MP JAIN, INDIAN CONSTITUTIONAL LAW 426 (8th ed. 2018).

²¹ INDIA CONST. art. 156 cl. 2.

²² INDIA CONST. art. 156 cl. 3.

deems appropriate to discharge the functions of the governor of the state.²³ In *Arun Kumar v. UoI*, it had been held that “the Chief Justice of the High Court can be temporarily appointed to discharge the functions of the governor.”²⁴

The constitution provides “no procedure for the impeachment of the governor”, the primary reason behind this being that since the governor holds the position during the “pleasure of the President”, he can always be recalled by the Centre if they so wish.²⁵ A glaring example of the Centre’s control over the office of the governor came to the front in 1989, when the President, on the advice of the National Front PM V.P. Singh, asked for the resignation of all the governors simply because they had been appointed by the previous regime.²⁶

When the Rajasthan High Court upheld the dismissal of the Governor by the President in “*Surya Narain v. UoI*”, it had been observed that the “Governor has no security of tenure and no fixed term in office”, and that “Art. 156(3) is subject to Art. 156(1).”²⁷ The governor may be removed by an expression of “presidential displeasure” before the normal term of 5 years and the presidential displeasure under Art. 156(1) is “unjustifiable”.²⁸ Recently, the Patna High Court in “*Indian Union Muslim League v. UoI*”, held that the “president is not bound to give reasons for the dismissal of the governor”, and that “the maxim of *audi alteram partem* doesn’t apply to the governor, since he is not an employee under the Government of India.”²⁹

The question of the status of the governor was again brought into the limelight by the summary dismissal of the Governor of Nagaland in 1992.³⁰ The governor had dissolved the state assembly on the advice of the then Chief Minister and retained him as the caretaker Chief Minister till fresh elections could be organized.³¹ It had been apparently done in exercise of his power under Art. 174(2)(b) without consulting the Centre.³² The latter did not approve of this step and instead imposed President’s rule in the state under Art. 356, and dismissed the

²³ MP JAIN, *INDIAN CONSTITUTIONAL LAW* 430 (8th ed. 2018).

²⁴ *Arun Kumar v. Union of India*, Appeal (Civil) 3270 of 2003.

²⁵ *Supra* note 13.

²⁶ V. Venkatesan, *The First ‘Mass Dismissal’*, *Frontline* (June 24, 2022, 8:24 PM)

<https://frontline.thehindu.com/the-nation/article30223775.ece>

²⁷ *Surya Narain Choudhary v. Union of India*, AIR 1982 Raj 1.

²⁸ *Id.*

²⁹ *Indian Union Muslim League v. Union of India* AIR 1998 Pat. 156.

³⁰ Ramesh Menon, *President’s Rule Imposed in Nagaland under Questionable Circumstances*, *INDIA TODAY* (June 23, 2022 6:24 PM), <https://www.indiatoday.in/magazine/indiascope/story/19880831-presidents-rule-imposed-in-nagaland-under-questionable-circumstances-797609-1988-08-31>

³¹ *Id.*

³² *Id.*

governor.³³ This instance brought forth two crucial issues regarding this office: is the governor bound to seek the consent of the center before exercising the powers vested in him by the constitution? And how is Art. 356 to be utilized in a constitutional manner?

On the first question, proverbially speaking, scholars have advised that the governor should be “entitled to his own judgment to decide whether the powers constitutionally vested in him should be exercised or not”, thus this discretionary power should not, on paper, come under the influence or even be subject to the prior consent of the Centre.³⁴ But in practice, the governors rarely act on their own judgment independent of the Centre’s opinions. This practice though is not in conformity with the constitutional rectitude, and neither is it politically sound since the ruling parties at the Centre and the State may differ and in that case, the decision of the Centre may have adverse political overtones.³⁵

GUBERNATORIAL DISCRETION

In “Nabam Rebia v. Deputy Speaker, Arunachal Pradesh”, the SC had held that “the exercise of executive power by the Governor, is by and large notional.”³⁶ The governor thus has “limited authority” in his own discretion, i.e., without the aid and advice of the Council of Ministers headed by the Chief Minister.³⁷ Scholars have debated intensely on the opinion that the Centre’s appointment and removal of the governor compromise the latter’s independent discretion.³⁸ The function of the Council of Ministers in the state is per Art. 163(1), 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.”³⁹ The phrase “by or under” means that the need to exercise discretionary power may arise from “any express provision of the constitution or by necessary implication.”⁴⁰

This discretion has been vested in the governor by the constitution because the governor has to serve as an agent between the center and the state and he is an important link to maintaining the unity and integrity of the nation.

³³ *Id.*

³⁴ MP JAIN, INDIAN CONSTITUTIONAL LAW 428 (8th ed. 2018).

³⁵ MP JAIN, INDIAN CONSTITUTIONAL LAW 424 (8th ed. 2018).

³⁶ Nabam Rebia v. Deputy Speaker, Arunachal Pradesh, Civil Appeal No. 6203-6203 of 2016.

³⁷ *Id.*

³⁸ MP JAIN, INDIAN CONSTITUTIONAL LAW 433 (8th ed. 2018).

³⁹ INDIA CONST. art. 163 cl. 1.

⁴⁰ MP JAIN, INDIAN CONSTITUTIONAL LAW 434 (8th ed. 2018).

The matters of discretion include:

1. Art. 200 requires him to reserve any bill which, in his opinion, “derogates from the powers of the High Court”, for the consideration of the President.⁴¹
2. He is also empowered to reserve “any other bill” that he perceives would “affect the powers of the Union” or “contravene any provision of the constitution”.⁴²
3. The governor also has the duty to appoint the Chief Minister of the state.⁴³
4. He is tasked with preparing the Governor’s report under Art. 356 in the event of a breakdown in the state’s constitutional machinery.⁴⁴
5. He also has responsibilities with respect to certain regions such as the “Tribal Areas” in Assam and other duties under Art. 371A, 371C, 371E & 371H.⁴⁵

The exercise of this power will stand vitiated if there is a “manifest error on record or if the exercise of power is arbitrary”.⁴⁶ If any question arises about whether a matter falls within the governor’s discretion or not, the governor’s decision in that regard is final.⁴⁷ The vesting of this discretion on the governor was justified in the Constituent Assembly on the ground that “the provincial governments are required to work in subordination to the central govt.”, “the governor will reserve certain things in order to give the president the opportunity to see that the rules under which the provincial governments are supposed to function are duly observed.”⁴⁸

An instance of the governor reserving a bill in his discretion occurred in 1982 when the governor of Jammu and Kashmir refused to give assent to the controversial “Resettlement Bill” passed by the Legislature and returned it to the House for reconsideration.⁴⁹ Another important area of exercise of discretionary power is the governor’s report under Art. 356 for invoking President’s rule in the state. The ministry concerned cannot be consulted while making the said

⁴¹ INDIA CONST. art. 200.

⁴² *Id.*

⁴³ INDIA CONST. art. 164.

⁴⁴ INDIA CONST. art. 356

⁴⁵ INDIA CONST. art. 371A, 371C, 371E, 371H.

⁴⁶ MP JAIN, INDIAN CONSTITUTIONAL LAW 435 (8th ed. 2018).

⁴⁷ MP JAIN, INDIAN CONSTITUTIONAL LAW 437 (8th ed. 2018).

⁴⁸ MP JAIN, INDIAN CONSTITUTIONAL LAW 440 (8th ed. 2018).

⁴⁹ Muzamil Jaleel, *J&K Resettlement Law, who is it for and why has it been challenged in the Supreme Court*, THE INDIAN EXPRESS (June 25, 2022, 6:50 PM) <https://indianexpress.com/article/explained/jk-resettlement-law-who-it-is-for-why-it-has-been-challenged-in-supreme-court-5487273/>

report because the “failure of the constitutional machinery may be because of the conduct of the ministry itself.”⁵⁰

In “S.R. Bommai v. UoI”, it had been held that “the imposition of President’s Rule in a state would be improper where a ministry resigns or is dismissed on losing majority support in the assembly and the governor recommends imposition of President’s Rule without probing the possibility of forming an alternative ministry or where the governor makes his own assessment of the support of a ministry in the assembly and recommends imposition of President’s Rule without allowing the ministry to prove its majority on the floor of the Assembly.”⁵¹ It was also observed that if the governor believed that the government has failed to hold the majority, he can ask for a “floor test” and in case the results are not affirmative, he can further recommend the imposition of President’s rule.⁵² The Supreme Court has also held in “Shivraj Singh Chauhan v. Speaker, Madhya Pradesh Legislative Assembly”, that if the governor is satisfied that the Council of Ministers has lost the confidence of the House, he can use his “discretionary powers under Art. 163 to call for a trust vote in the Assembly.”⁵³ This decision of the Supreme Court has played a major role in expanding the ambit of the governor’s supposed discretion. While the governors must aim to utilize their powers to uphold the core foundational principles of the constitution, by expanding the discretionary powers of the governor, the Apex Court has created a loophole through which the governor can interfere in the purely legislative function of holding the executive accountable. In “Mahabir Prasad Sharma v. Prafulla Chandra Ghose”, the Calcutta HC held that in appointing the Chief Minister under Art. 164(1), the Governor “acts in his sole discretion”, and that the exercise of his discretion “*cannot be called in question in writ proceedings in High Court*”.⁵⁴

However, the limitation on this discretion is that he is to appoint the CM who will “enjoy a majority support in the party which has a clear majority in the assembly.”⁵⁵ If the Ministry is not able to command a majority in the House, it will fall. Thus, in 1971, an effort was made in this respect when the Committee of Governors suggested the following guidelines for the guidance of the Governors in the manner of appointing the CM⁵⁶:

⁵⁰ MP JAIN, INDIAN CONSTITUTIONAL LAW 445 (8th ed. 2018).

⁵¹ S. R. Bommai v. Union of India 1994 AIR 1918.

⁵² *Id.*

⁵³ Shivraj Singh Chauhan v. Speaker, Madhya Pradesh Legislative Assembly, Writ Petition (c) No. 439 of 2020.

⁵⁴ Mahabir Prasad Sharma v. Prafulla Chandra Ghose AIR 1969 Cal 198.

⁵⁵ MP JAIN, INDIAN CONSTITUTIONAL LAW 446 (8th ed. 2018).

⁵⁶ SAHAY BHAGWAN, ROLE OF GOVERNORS: REPORT OF THE COMMITTEE OF GOVERNORS (1971), <https://dspace.gipe.ac.in/xmlui/handle/10973/51655>

1. “Where a single party commands a majority, the leader of the party is called upon to form the govt.
2. If before elections, some parties combine and produce an agreed program and the combination gets a majority after the election, the commonly chosen leader should be invited to form the govt.
3. If no party has returned in a majority at the election and thereafter two or more parties come together to form the govt., then the leader of the combination may be invited to form the govt.
4. The leader of the minority party may be invited to form the govt. if the governor is satisfied that the leader will be able to muster majority support in the House.”

OPINION & CONCLUSION

The discretion of the governor is an area that has been deliberately left vague and unspecified in the constitution. As the head of the state, he has the right to be “consulted, to encourage and to warn”.⁵⁷ Despite the emphasis put on this by the judgments of various courts in India, the fact remains that the governor would not want to take any step which would engender his removal from office, meaning, even in his discretion, practically speaking, the governor would not want to prejudice the ruling party at the Centre, in whose hands ultimately, his tenure lies. Scholars have argued that this three-pronged problem is a threat to the spirit of federalism in India, which is agreeable to a large extent, especially because this discretionary power of the governor and its limits are shrouded in obscurity. Through the hands of the governor, the Centre can tacitly control the state’s machinery, thereby suffocating its autonomy. The reckless and unbound powers vested in this nominal office have the potential to degrade the federal system of the nation. All things considered; the major emphasis should be on his role as an advisor. Therefore, the need of the hour is to mark the necessary boundaries and set limits on the center’s unsolicited influence in the affairs of the states.

⁵⁷ M.V. Pylee, *The Governor and the Constitution*, 2(31), ECONOMIC AND POLITICAL WEEKLY 1367, 1369 (1967).