ROLE OF GOVERNOR IN THE CONSTITUTION OF INDIA AND EXERCISE OF DISCRETIONARY POWER WITH SPECIFIC REFERENCE TO APPOINTMENT OF THE CHIEF MINISTER

Dissertation submitted to National Law University, Assam

in partial fulfillment for award of the degree of

MASTER OF LAWS

ONE YEAR DEGREE PROGRAMME

Submitted by

Nikita Goel

SF0219017

LL.M. & Semester II

Supervised by

Dr. Diptimoni Boruah

Associate Professor of Law

National Law University, Assam

(August 2020)

Declaration

I, Nikita Goel, do hereby declare that the dissertation titled "ROLE OF GOVERNOR IN THE CONSTITUTION OF INDIA AND EXERCISE OF DISCRETIONARY POWER WITH SPECIFIC REFERENCE TO APPOINTMENT OF THE CHIEF MINISTER" submitted by me for the partial fulfilment of the requirement of the degree of MASTER OF LAWS – ONE YEAR DEGREE PROGRAMME is a bonafide work conducted under the supervision of Dr. Diptimoni Boruah, Associate Professor of Law, National Law University, Assam and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

Nikita Goel

Signature & Name of Student

Date: August, 2020

Certificate

This is to certify that the research work titled **"**ROLE OF GOVERNOR IN THE CONSTITUTION OF INDIA AND EXERCISE OF DISCRETIONARY POWER WITH SPECIFIC REFERENCE TO APPOINTMENT OF THE CHIEF MINISTER**"** is the work done by Nikita Goel under my guidance and supervision for the partial fulfillment of the requirement of the degree of L.L.M. from NATIONAL LAW UNIVERSITY & JUDICIAL ACADEMY, ASSAM, Guwahati.

Date: August, 2020

Name of Supervisor: Dr. Diptimoni Boruah
Designation: Associate Prof. of Law
NLUJAA

Acknowledgement

First, I would like to express my sincere gratitude to Dr. Diptimoni Boruah, Associate Professor of Law, National Law University, Assam for her consent, support and encouragement as well as her invaluable suggestions and inputs throughout the course of this research. Her guidance and direction have been significant in the completion of this seminar paper for which I am thankful to her.

Secondly, I would like to specially thank Prof. (Dr.) J.S. Patil, the Vice Chancellor of National Law University, Assam for sharing with us his vast knowledge in the field of legal research through his vigorous lecture. His teachings on research methodology have greatly helped me in approach to his research.

Thirdly, I would like to thank my fellow batch mates have helped me in different stages in preparation of his study

Finally, I am grateful to my parents and friends for their unending support and providing all the necessities in the preparing this paper.

Yours Sincerely

Nikita Goel LL.M. 2nd Semester

Table of Abbreviations

Abbreviation	Explanation
Art.	Article
AIR	All India Reporter
ed.	Edition
etc.	Etcetera
Ibid.	Ibidem
p.	Page
Sec.	Section
V.	Versus
first amendment	Constitution (First Amendment act, 1951)
HC	High Court
SC	Supreme Court
SCC	Supreme Court Cases
cl.	Clause
CJ	Chief Justice
CJI	Chief Justice of India
J.	Justice
U.O.I.	Union of India
Hon'ble	Honorable

PM	Prime Minister
CM	Chief Minister
COM	Council of Ministers
EIC	East India Company
Prof.	Professor
Vol.	Volume
NCRWC	The National Commission to Review the Working Of The Constitution
VC	Vice Chancellor

Table of Cases

S.NO	CASE TITLE
1	Arun Kumar v. Union of India
2	B.R. Kapur v. State of Tamil Nadu
3	Bishambar Chandra Mohan v. State of Uttar Pradesh
4	Chandrika Jha v. State of Bihar
5	Epuru Sudhakar v. Government of Andhra Pradesh
6	Ganamani v. Governor of Andhra Pradesh
7	G.D. Zalani v. Union of India
8	Hargovind Pant v. Dr. Raghukul Tilak
9	Harsharan Verma v. Tribhuvan Narain Singh
10.	H.T. Venkata Reddy v. State of Andhra Pradesh
11	Jayakar Motilal CR Dass v. Union of India
12	Jogendra Nath Hazarika v. State of Assam
13	K. Nagaraj v. State of Andhra Pradesh
14	K.M. Nanavati v. State of Bombay
15	Karpoori Thakur v. Abdul Ghafoor
16	Kehar Singh v. Union of India
17	Kesavananda Bharti V. State of Kerala

18	Mahabir Sharma v. State of West Bengal
19	Mahabir Prasad Sharma v. Prafulla Chandra Ghose
20	Maru Ram v. UOI
21	Nabam Rebia v. Deputy Speaker and ors
22	Pratapsingh Raojirao Rane v. Governor of Goa
23.	Rameshwar Prasad V. Union of India
24	R. v. Reay
25	Satpal v. State of Haryana
26	S. Dharmalingam v. His Excellency Governor of Tamil Nadu
27	S.R. Chaudhari v. State of Punjab
28	S.R. Bommai v. Union of India
29	Surya Narain Singh v. Union of India
30	T. Venkata Reddy v. State of Andhra Pradesh

Table of Contents

Preface

The Indian Constitution popularly known as the 'elephantine constitution', is the largest written constitution on the world. It is currently divided into XXII parts, 395 articles and twelve schedules. The existence of such copious provisions makes the constitution an exhaustive document. All the provisions, from time to time, have proved to be sufficient to cater the need of this ever-changing nation. But at times, the complex nature of the geo-polity creates challenges to which a simple answer is not provided in the letters of the constitution. In order to seek an acceptable solution, the constitution then seeks guidance from conventions (which it has adopted from different nations). One such area with limited constitutional provisions is the 'office of Governor' and is therefore guided by convention.

The office of Governor remained dormant till the fourth general election (1967). But in the year 1952 a remarkable change was witnessed by the political setup of the nation. The federal structure of the world's largest democracy was put to test, for the first time. Parties with different political ideologies and complexions came into power at the state level during the 1960's. The period ensuing it marked a new era of political administration in the country. The nation witnessed an unprecedented split in the Indian National Congress which was followed by mid-term election. The nation saw frequent rise and fall of coalition governments. New trends emerged in the centre- state relationship and a unparallelly fierce constitutional controversy erupted over the role played by the Governor in the states. Ruthless criticism was made regarding the decisions made by the Governor relating to appointment of Chief Minister and use of discretionary power. Allegations of foul play, favoritism and being an agent of the centre were also casted regarding the role played by him. This paper thus, attempts to study the constitutional and other provisions (including conventions) governing the office of governor, along with the shift in the role of the governor. This paper also aims at analysing the scope and nature of powers which are vested in the governor and whether the governor has used or abused discretionary power given to him in the appointment of chief minister of the state. Lastly, this paper will analyse the recommendations made by various commissions and there implementation thereof.

CHAPTER-1

INTRODUCTION

1.1 RESEARCH BACKGROUND

The institution of governorship is not new to the Indian subcontinent and has existed since ages. It has been an integral part of the Indian polity and traces its roots in the ancient society. The ancient and medieval society practiced monarchy as the dominant form of government in which centralization of power was observed. The monarchs gradually found it difficult to govern such large kingdoms single-handedly and divided their kingdom into small provinces. These provinces were, in turn, governed by officers appointed by the kings under their hand and seal and thereby a of post of governor was created at the province level. Records of huge empires like Maurya's, Gupta's the Mughal's have confirmed the existence of the office. However, a more formal and documented establishment of the office can be traced in the records of the East India Company. It is in their (British) reign that the office finds mention at numerous places including charters and legislations drafted by the colonial lords[1] and the post of governor gained recognition in its true sense.

Post-independence also, the Governor was declared as an important Constitutional functionary in the Indian governmental setup. Prominent political personalities like the ex-Prime Minister Pt. J.L. Nehru, drafting committee's chairperson Dr. Ambedkar and eminent members of constituent assembly T.T. Krishnamachari and K.M. Munshi attaches great importance to the office of the Governor and vouched for its active inclusion in the political system. Dr. Alladi Krishnaswami Iyer also supported the view and asserted that, "*the governor should be a sagacious counselor, adviser to the Ministry, one who can throw oil on troubled waters*."[2]

The Constituent Assembly, eventually, opted for a cabinet form of government with a federal structure. This federal structure thus, brings into existence a two- tier government;

[1] The Government of India Acts of 1919 & 1935

[2] CONSTITUENT ASSEMBLY DEBATE. Vol. VIII, 431.
https://www.constitutionofindia.net/constitution_making_process/constituent_assembly (July 31, 2020)

the Union and the regional (state). Both these governments operate independently in the respective allotted areas and a *de jure* head of the state is appointed at both these levels, president at central and the governor at the province.

The constitution of India established the glorious office of the governor[3] and made him an intrinsic part of the state legislature. The constitution provides for a Legislature consisting of two Houses (or one House as the case may be) and a Governor,[4] in every state. Multifaceted responsibility of protecting, defending, preserving the Constitution[5] and devoting himself to the service and well-being of the people of the State, were casted upon him. Scrutinising the role of the Governor, Babasaheb Ambedkar observed that "*He is the representative of the people as a whole of the State. It is in the name of the people that he carries on the administration. He must see that the administration is carried on a level which may be regarded as good, efficient and honest administration*[6]*".* Thus, he is made the executive head and all the executive actions in the State are taken in his name[7]. Apart from the being the executive head he also performs additional functions of Financial, Legislative and Adjudicatory nature.

The constitution also inscribed varied role which are to be performed by the Governor.

- The first role is of the head of the executive wing or constitutional head at the state level. In this role he is made part (and not a member) of the state legislature and perform important functions like appointment, dissolution, being chancellor of the State University, passing ordinances etc.
- The second role is of the representative of the centre. In this capacity his main work is to build a bridge between the centre and the state.
- In its third role he acts as an agent of the centre.

Under normal circumstances the governor performs the first two roles, that is, either he is discharging the role of constitutional head of the state or acting as link between the two

---

[3] INDIA CONST. art. 153, "There shall be a Governor for each State: Provided that nothing in this Article shall prevent the appointment of the same person as Governor for two or more states."

[4] INDIA CONST. art. 168

[5] INDIA CONST. art. 355

[6] CONSTITUENT ASSEMBLY DEBATE. Vol. VII.
https://www.constitutionofindia.net/constitution_making_process/constituent_assembly (July 31, 2020)

[7] INDIA CONST. art. 166, Conduct of business of the Government of a State, (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor

levels of government. But under exceptional circumstances he observes the role of representatives of the centre, whereby he tries to maintain the democratic form of government, as prescribed by the constitution, in the state territory. While discharging the said function he is obligated to inform the centre about the affairs of the state. Cumulatively, these functions are discharged by the governor by following one of the three ways–

(i) directions of the centre

(ii) advice of Council of Ministers

(iii) exercising his discretion

Constitution of India provides that, "there shall be a Council of Ministers headed by the Chief Minister to aid and advise the Governor in the exercise of his functions, except when he is required by the Constitution to act in his discretion" [8].

Under the cabinet form, the governor is made the nominal head and the real authority is exercised by the Chief Minister. The Governor is thus, compelled to perform functions according to the aid and advice rendered to him by the Council of Ministers. But under circumstances mentioned in the constitution or under extra ordinary circumstances the Governor is allowed to exercise its discretionary power. The Supreme Court has also have also recognized this power in the leading case of *S.R. Bommai* v. *Union of India*[9] the court observed, "that there may exist certain circumstances when the Governor may be required to act according to his discretion". The matters on which Governor can exercise his discretion are very limited. Some of them are expressly demarcated in the constitution namely; Art. 371, schedule 6, effective fulfillment of the responsibilities and smooth functioning of the democracy etc.

While the matters which are not mentioned but on which discretion can be exercised are as follows–

a. Appointment of C.M. of state where there is no clear majority
b. Dismissal of Ministry of state.
c. Dissolution of state Legislature.
d. Summoning of houses etc.

[8] INDIA CONST. art. 163, § 1.
[9] AIR 1994 SC 1918

e. Appointing VC of state universities.

Thus, the office of governor has with the passage of time evolved as a key issue in the Centre- state relationship and a lot of controversies have come in picture with regard to exercise of discretionary powers. The exercise of discretion by governor while appointing of Chief Minister, in case of no clear majority, has been the key areas of discord in the centre- state relationship, creating stress, problem and irritation.

In light of the above stated problem this paper intends to review, in its entirety, the discretionary power vested with the governor with specific reference to appointment of the chief minister. The scope and exercise of discretionary power of the governor will also be discussed in the paper, along with instances where the same has been exercise with ulterior motives leading to resentment and discord.

The paper will further examine the working of constitutional machinery of Centre and state along with the complex nature of relationship between them with specific reference to the office of governor, along with constitutional provision, prevailing circumstances and existing arrangement between them.

This paper is an attempt to identify the change in the role at working of the Governor due to change in political and legislative condition of the nation.

Also this paper will analyze the recommendation given by various commission, committees such as Administrative Reforms Commission (1966-70), Sarkaria Commission (June 1983), M. M. Punchhi commission (2010) and judicial decisions regarding the ambit and exercise of power of governor at the actual implementation and outcome of the same on Indian economy and politics.

1.2. AIMS AND OBJECTIVES

The paper aims at studying (in its entirety) the nature, role and scope of discretionary power used by the governor in the present era along with instances of abuse of discretionary power and the consequences attached to it. This paper also seeks to discuss the provisions governing the office of the governor and the requisite reforms that are required to ensure smooth functioning of this prestigious office.

- To trace the evolution if institution of governorship in India.

- To understand the provisions governing the office of the governor.
- To examine the role played by conventions in this process.
- To comprehend the use of discretionary power of the governor in the process of appointment of chief minister.
- To examine the instances of abuse of power and discretion in the process of appointment process and the consequences attached to it, if any.
- To study the recommendations made by various committees regarding governor. and whether they were aptly implementation or not.
- To draw conclusion and suggestions.

1.3. SCOPE AND LIMITATION

The scope of this paper is to determine the quantum and consequence of abuse of discretionary power vested in the governor of the state with specific reference to appointment of chief minister. The research paper limits its study to the various provisions of the Constitution of India as well as conventions, judicial decisions and other institutions outside the Constitution relating to office of governor.

1.4. HYPOTHESIS

The discretion exercised by the governor, in appointment of the chief minister, is often abused and is politically motivated.

1.5. RESEARCH PROBLEM

Indian constitution has registered in its name the record of being the longest written constitution, in the entire world. The makers inked all the major issues and decided not to leave too much to the discretion of the future legislatures whose political sagacity could not be taken for granted. Despite this many important issues such as appointment of chief minister, in case of no clear majority, were left undecided. In other words, these provisions are left to be governed by convention and in its (convention's) absence by discretion. Now, since there is a room to exercise discretion there is always an inherent risk of arbitration,

erratic or capricious decisions and biasness, which has with the passage of time proved fatal. Instances of abuse of power and favoritism came in light creation havoc and turmoil in the society. Thus, the critical questions about the nature and extent of power of the governor, that is the discretion exercising authority, were raised by the subjects. When can this power be exercised, what are the parameters to be considered and to what extent can this power be exercised is what this research attempts to analyze and answer.

1.6. LITERATURE REVIEW

There are quite a few studies that deal with the position and role of the Governor. Of these, the study done by Rajni Goyal[10] and Sibranjan Chatterjee[11] elaborate upon the current position and role played by the Governor in our polity. These studies depict the change that had taken place in the functioning of this gubernatorial office.

Another notable study was that is used by the researcher was by Purushottam Singh[12] and by Prof. Dilip Singh[13]. The study showcases the position of governor as under Indian Constitution and its working in the era of coalition government. These researches vividly elaborate the constitutional provisions regarding the office of the Governor and Council of Ministers. The relationship subsisting between the executive and the legislative wings is

---

[10] Rajni Goyal, *The Governor: Constitutional Position and Political Reality*, 53 THE INDIAN J. OF POL. SCIENCE (October-December 1992).
https://www.jstor.org/stable/41855632?Search=yes&resultItemClick=true&searchText=rajni+goyal&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Drajni%2Bgoyal%26acc%3Don%26wc%3Don%26fc%3Doff(July 30, 2020)

[11] Sibranjan Chatterjee, *Role of Governor in Indian Politics Since 1967*, 32 THE INDIAN J. OF POL. SCIENCE (October- December 1971).
https://www.jstor.org/stable/41854471?Search=yes&resultItemClick=true&searchText=Role+of+Governor+in+Indian+Politics&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DRole%2Bof%default%3A1d9c0e47b5cb5a224be7ab47215d532f&seq=1#metadata_info_tab_contents(July 27, 2020)

[12] DR. PURUSHOTTAM SINGH, GOVERNOR'S OFFICE IN INDEPENDENT INDIA (3rd ed. Navayug Sahitya Mandir 1968). . https://economictimes.indiatimes.com/topic/Purushottam-Kumar (Aug 2, 2020)

[13] Dilip Singh, *The Role of The Governor Under the Constitution and the Working of Coalition Governments*, 29 THE INDIAN J. OF POL. SCIENCE (January-March 1968) https://www.jstor.org/stable/41854247?Search=yes&resultItemClick=true&searchText=The+Role+of+The+Governor+Under+the+Constitution+and+the+Working&searchUri=%2Faction%2FdoBasicSearch% (July 31, 2020)

also clearly established and the functioning of governor along with the constitutional provisions regarding the office were vividly stated.

Numerous charters, regulations and acts passed by the British were referred by the researcher. These act, charter and regulations clearly established the timeline that shaped and re-shaped this office, so that it can cater the needs and demands of the changing society. The analysis of the Indian system and the centre state relationship and its functioning of various stakeholders thereof was done by Sarkaria Commission under the chairmanship of retired justice R. S. Sarkaria. The report provides an exhaustive view on topics of Centre-state relationship ranging from legislative, executive to financial relationship, the role of governor, water dispute etc. This report is a primary as well as reliable source and there is no scope of error or concoction in the data of analysis of the situation. All first-hand information is collected and provided by the document. The report very efficiently provided an all-round analysis about the office of the governor. Historical aspect, constitutional provisions and scope, initial position of governor (that existed during the British era) and how it influenced the present office of the Governor and other contemporary issues like emergence of the institution of governor, need of governor, selection, use of discretion etc. was aptly discussed in the report. All the other important aspects connected with the office were also brought into picture and the document overall help in providing a wide view of the topic to the researcher. Not only the report highlights the issues concern but also provide feasible solutions to the problems by recommending guidelines to be followed. In order to provide a clear and unambiguous conclusion the analysis of this documents a must.

The report of Rajamannar Committee[14] (May 1971) and NCRWC[15] (The National Commission to review the working of the Constitution, published in the year 1971 and 2002 respectively) outlined the existing arrangements between the Union and the constituting units, as per the Constitution of India. The arrangement is made with regard to the powers, functions and responsibilities undertaken by the two. The documents highlight

[14] Rajamannar Committee on Centre-State Relations, 1971, http://legalaffairs.gov.in/sites/default/files/chapter%208.pdf (Aug 12, 2020)
[15] The National Commission to review the working of the Constitution, 2002, http://legalaffairs.gov.in/ncrwc-report(Aug 14, 2020)

the issues existing between the levels of the government, keeping the social and economic development in mind. The report simultaneously touched upon the issues of politicization and criminalization. The report further helped understanding the mindset of the makers of the constitution while drafting the provisions by showcasing the mindset of both, supporters as well as those who stood against .

Punchhi Commission Report came, in the year 2010, with the broad mandate to review the existing condition of affairs between the centre and regions. It was chaired by Shri Justice Madan Mohan Punchhi (Former Chief Justice of India). As mentioned above, the report came in the year 2010 and was more recent and subscribe well to the changing needs of the Indian society and polity. The report provides appraisal of the existing framework of Centre-State Relations. It provided clarity on basic topics like federal, quasi-federal or unitary with federal features of the constitution. The report more or less provided the same solutions as provided by the Sarkaria Commission Report on matters of governor and also dealt in the same matters. However, the uniqueness of the work lies building the bridge. In other words, it provided certain change in approach that is to be made due to change in time and position of law.

Ashutosh Salil and Amar by their article[16] explains the topic of constitutional convention in great detail. This article specifically deals with two conventions that operates in India. The former deals with the appointment of Prime Minister and Chief Minister and latter concerns the dissolution of houses. The article is very crisp and precise on the topic and is coupled with numerable instances and illustrations. It enhanced the vision and understanding by providing a comprehensive view about the meaning of convention, its development, practice, characteristics, their operation in Britain and India. he situation in case of coalition government or when chief minister resigns order solution was very clearly given and again is well explained with ample of examples cited from Indian context. What should and should not be done to improve the situation, however, was not provided but overall, the document provides a clear vision about the position earlier and now and the difference thereof.

[16] Ashutosh Salil and Tanmay Amar, *Constitutional convention: The Unwritten Maxims of the Constitution,* PL WebJour 3 (2005). https://www.ebc-india.com/lawyer/articles/2005_plw_3.htm (June 27, 2020)

The article of N.B. Rakshit[17] throws light on the unfortunate occasions of dismissal of state governors without any sound reasons. The article illustrates instances whereby the president has not used but abused its power by throwing out the Governor of his office on flimsy grounds and in an inglorious way. The article highlights the need to secure the tenure of the Governor so as to ensure smooth function of the democracy. The article very briefly and aptly describes the development that took place in the Indian polity and thereby in the office of governor by highlighting the chronology of case laws along with the amendments in a diligent manner and providing a complete picture of the problem. Plethora of case laws are mentioned in the article by the author to displays all the aspects attached with the issue of ninth schedule in a crisp and precise manner. Also, the article includes the opinion of jurists, dissenting opinion in landmark cases and the strength of bench delivering the verdict thereby providing a full picture of the events that have taken place.

The debates of the constituent assembly of India discusses at length the desirability, need, significance of the office of governor. The debates drew a full-fledged jurisprudential picture of the office. The proceedings of the constituent assembly were published in 12 volume set thereby providing comprehensive view of the topic. These discussions threw light on the federal structure adopted by India. The debates acted as a mirror to the minds of the intellectual elites that is the makers of the constitution. It helped culling out the intention behind the establishment of the provision. It is the first authoritative account of the constitution making.

The book, M.P. Jain, excessively deals with the historical perspective of the office of governor, the establishment, and the constitutional provisions along with various judicial decisions of Supreme Court and high court. The book aptly describes the series judicial pronouncements that has taken place in the in the appointment of chief minister. [18]

S.R. Bommai v. *U.O.I*[19] case was decided on 11-03-1994 by a constitutional bench of the Supreme Court and is considered as a landmark judgment. This judgment not only clarified

[17] Nirmalendu Bikash Rakshit , Governor: Serving at the President's pleasure, The Statesman (Kolkata) May 30, 2019. https://www.thestatesman.com/supplements/law/governor-serving-presidents-pleasure-1502760310.html (July 27, 2020)

[18] M.P. JAIN, INDIAN CONSTITUTIONAL LAW (7th ed. Lexis Nexis, 2014)

[19] (1994) 3 SCC 1

the operation, definition and scope of Indian federalism but also simultaneously placed federalism under the protection of basic structure, thereby confirming the original position in the *Kesavananda Bharti* v. *State of Kerala*.[20] Controversial issue such as declaration of president's rule in the state was addressed at length. Another issue which was elaborated in the judgment was that of the 'dissolution of the house' by the governor after exercising his discretion. Essentiality of floor test was ordered by the court and scope of discretion was curtailed. Exercise of Art. 356, the principle of subjective satisfaction, what cases will fall under failure of constitutional machinery and what not are also dealt by the verdict. This verdict on one hand clarifies the grey areas under Art. 356 on the other hand help in curbing the issues which created hindrance in the working of the system. Since the formation of the constitution, president's rule has been declared over 100 times, sometimes even at random instances, but after pronouncement of this case there was a decline in the number. Apart from this, this case establishes an assertive role of judiciary. The court defined the scope and area of judicial review and widened its arms covering all the essential questions.

1.7. RESEARCH QUESTIONS

1. Whether the appointment of Chief Minister is made impartially and in according with the provisions of the constitution and with the intent of the makers of constitution.
2. Whether the Governors uses its powers for in an arbitrary fashion and for political considerations.
3. To ascertain the role and response of court in the cases of abuse of discretionary power and nature of remedy granted.
4. Whether the provisions governing the governor are sufficient and the role played by convention in the working of the office.
5. whether the recommendations made by various committees were aptly implementation or not.

[20]AIR 1971 SC 1461

1.8. RESEARCH METHODOLOGY

The researcher adopted doctrinal study including case analysis method where case laws from domestic jurisdiction have been referred to and critically evaluated to find the answers of the above listed research questions. The methodology the researcher has adopted in this study is the historical, descriptive and logical positivism method. The study will make use of primary resources such as Reports of commissions, committees, Constitution of India, Government of India Act, 1935, Judicial decisions, Constituent Assembly Debates, Acts, Charters and Regulations passed by British government, Constitution Conventions, Adoption Order, 1950 etc.

The study also closely examines and analyses secondary data like opinion of eminent jurists and experts from different books. Along with that editorials, articles, different texts, literature and online J.s have been referred and analysed. Optimum use was made of all the available resources and internet which were found relevant. A major portion of the research shall be done on the internet as most of theological data is available only in that form.

CHAPTER NO. 2

GOVERNOR AS AN ELEMENT OF INDIAN FEDERALISM

Muhammad Ali Jinnah in a speech stated "India is not a nation, nor a country. It is a subcontinent of nationalities". Its boundaries are guarded by mountains, seas and desert makes it *sui generis* and earned India an entitlement of a subcontinent. The existence of these distinct features not only affected India's geography but also casted an impact on its polity. The impact it casted is varied, as it helped as well as hampered the cause of establishing of a stable polity. The presence of these inherent characteristics exposed India's political history to extreme upheavals such as political unity and the consequential fragmentation.

Indian history is replete with instances of political stability and unity which (lasted for a short period of time and) eventually concluded by disruption. In other words, huge kingdoms, after conquering the entire Indian subcontinent, were seen falling prey to dissension. The reason behind the fragmentation of all the big empires was 'the operation of policy of centralization'. The historians contended and emphasized that 'over or undue centralization' acted as catalyst for the division forces to function and eventually leads to disintegration of the empire. Application of centralization policy has proved to be counterproductive considering the geopolitical nature of India. It acted as a breeding ground for the divisive forces to take effect. The moment Centre became weak or unstable, fissiparous forces become strong leading to annihilation of the empire.

2.1. FROM CENTRALISATION TO DECENTRALIZATION

A. **Policy adopted during ancient and mediaeval India -** In order to avoid division and disintegration, big empires like Maurya's and Mughal's resorted towards adoption of policy of 'local and province government' as against the policy of centralization. Delegation and division of power to competent persons, acquainted with local culture, custom, language and way of living was adopted. In other words, agents were appointed at the province levels by the king to ensure smooth

functioning in the province and thereby in the empire. Ergo, an altogether unique concept of governance was propounded, and a distinct approach was taken to cater the need of this vast and heterogeneous sub-continent.

B. **Policy adopted during Modern India -** After the downfall of the Mughal empire, the next great power that established their sway over the Indian subcontinent were 'the British'. They examined the clangers of the past empires and decided to implement the policy of decentralization. Paradoxically they also, at first, attempted to practice centralization but after witnessing the failure of Dalhousie policy (or the Doctrine of Lapse) and the traumatic consequence that came along, they understood that it was not possible to administer such vastly diverse nation without decentralization of powers to the provinces and local bodies. Thus, steps for progressive devolution of power were taken, provisions relating to decentralization were strengthened (in 1882). With the coming up of Government of India Act, in the year, 1909 and 1919 further necessary steps were ensured. The major codification that was enacted by the British was the Government of India Act, 1935. The act indeed is a milestone in the history of constitutional development because of the reason that the act, for the first time, devolved power constitutionally. It not only patently pronounced the kind of relationship which should be shared between the Centre and the provinces but also divided Governmental subjects into three Lists namely; Concurrent, Provincial and Federal, making the demarcation clearer.

C. **Policy adopted by constitution makers-** On the verge of independence the leadership of the nation decided to constitute a Constituent-Assembly and vested the assembly with the complex task of devising the constitution and thereby nature of Indian union. The addressed task was immensely complicated and difficult as they had to constitute a Union by assembling the following; British Indian provinces, tribal areas and princely states.

The architects of the Constitution observed the history and the event of partition of the nation realized that in a colossal nation like India only that political- system can endure and protect unity, integrity and sovereignty (against external aggression and internal

disruption) which is led by a strong Centre with paramount powers.[21] The idea of a unitary government, thus, did not prove to be compelling was rejected on the ground of being retrograde both administratively and politically and a proposal to draft a Constitution with a Federal State appeared prudent. The makers also desired to constitute a structure with a strong union, envisaging the emergence of an indivisible.[22]Thus, a two- tier government (one at central and other at state level) was ideated by the constitution and India, resultantly, emerged as an amalgamation of the two ideas that is a 'federal nation with a strong Centre'.

2.2. UNDERSTANDING FEDERALISM

The term 'federalism' is used today, in its most general sense, to denote the relationship between the federation at central level and its constituting units at local, state and regional level. Etymological derivation of the word is from a Latin word 'foedus' which means an 'agreement' or 'treaty'.

In a political system federalism marks the division of power amongst the centre and the regions. In some spheres the units remain completely independent of each other while on the others their power and authority are overlapping and is often shared by both. Both, the constituting units and the centre, are made sovereign in their marked spheres. They can exercise political power in a manner which is best suited to their interests so as to enable them to work independently and efficiently. Also, there is no iota of doubt in the contention that the system today is more complex and diverse. Such a system demands a clear demarcation of territory of the centre and the constituting units. Thus, the core object of federalism is to decentralize authority and power so as to ensure inter- government co-operation and thereby unity in diversity.

The functioning of concept is federalism is not uniform amongst the nations. It is rather, very dynamic. It varies according to the political condition and position of the practicing nation. The presence of aspect of dynamism in federalism makes it an important element of constitutionalism.

---

[21] SARKARIA COMMISSION REPORT. 1.2.21 (1983) http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/ (Aug 18, 2020)
[22] Id., at 1.2.23

2.2.1 Opinion of political scientists on federalism:-

This concept is very intricate and therefore, complicated to define. Various political writers and thinkers have defined this concept in their own novel ways. According to classical observation of Dicey- "*Federalism means distribution of the forces of the State among the coordinate bodies each originating in and controlled by the Constitution."* Prof. K.C. Wheare further elaborated the concept and said that "*the federal principle is the method of dividing the powers between general and regional governments. Each government within a sphere coordinate and independent. Existence of coordinate authorities independent of each other is the gist of the federal principle*."[23]

Prof. K.C. Wheare in his subsequent works considered the American Constitution as an ideal federal constitution as it establishes an association of States so organized that the Governments are at par and are not subordinate to one another. They coordinate with each other and the Union and State Governments divides powers amongst themselves. It showcases some of the most modern ideologies regarding federalism to the world at large.

2.2.2. Elements of federalism

A federal constitution has following elements-

- Written Constitution - In a federation it is necessary to avoid encroachment in the spheres of one another. Therefore, to ensure smooth functioning of the system a clear demarcation of power and function is necessary. This is done by series of covenants usually embodied in a written constitution[24]. On the need of written constitution Prof. A.V. Dicey opined that, "a Constitution based upon understandings or conventions would be certain to generate misunderstandings and disagreements."[25]
- Power Distribution - This is one of the foundational features of federalism and is constituted by two broad elements namely; non- centralisation and territorial

[23] Irfan Nabi, "Cooperative Federalism: A Comparative Study", p. 4, http://www.academia.edu/9267593/cooperative_Federalism_A_comparative_Study(June 17, 2020)

[24] BRITANNICA. FEDERALISM. https://www.britannica.com/topic/federalism (July 17, 2020)

[25] R.K. CHAUBEY, FEDERALISM, AUTONOMY AND CENTRE-STATE RELATIONS 18 (1st ed. Satyam Books 2007).

neutrality. The presence of both these elements ensure that, the power to deal with the internal affairs is not taken away from the state government. Also, division of power ensure representation of diverse groups and local autonomy within a civil society. In the words of Prof. Dicey, "*Federalism means the distribution of powers of the State among a number of co-ordinate bodies each originating in and controlled by the Constitution*[26]*".*

- Supremacy of Constitution - In a federal set up the constitution is the law of the land and thus, is required to possess two features; (a) it has to be written; (b) should be made supreme. All the three organs of the government (executive, legislative, or judiciary) have to submit themselves to the constitution. Prof. Wheare rightly said, "*supremacy of the Constitution and the written Constitution constitute the essential characteristics of a federal government. Supremacy of the Constitution is essential for the government to be federal, while the written Constitution is essential, if the federal government is to work well".*[27]
- Rigid Constitution - A natural outcome of a written constitution is rigidity.[28] By rigid constitution, it does not mean that an absolute bar is imposed on the amendment of the constitution, rather it makes pertinent matters of national interest open to amendment albeit by extraordinary procedure. The amendment procedure, however, could be simple or complex or could even include approval of majority of the stakeholders.

  According to A.V. Dicey, "*the law of the Constitution must either be immutable or, else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures existing under the constitution*".[29] In a federation all these functions operate in a loop, that is, a written constitution in order to establish its supremacy has to be rigid.
- Independence of Judicial Authority- Independence of adjudicating authorities is a pertinent feature of a federal set-up. An impartial adjudicating authority is needed

[26] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 87 (http://files.libertyfund.org/files/1714/0125_Bk.pdf(July 27, 2020)
[27] CHAUBEY, *supra* note 23, 18.
[28] Dr. J.N. PANDEY, CONSTITUTION LAW OF INDIA 18 (52nd ed. Central Law Agency 2015).
[29] DICEY, *supra* note 79. http://files.libertyfund.org/files/1714/0125_Bk.pdf(July 27, 2020)

to interpret the grundnorm. As mentioned earlier, the federal setup incorporates two level of Government and divide the political power amongst them. Therefore, a strong and independent judiciary is needed to decide the areas of dispute that arise among the federal units.

Despite of all these features, a federal government has its own inherent drawbacks. This form of government, is more, in the nature of compromise and is often dependent on the sweet will of the constituting states, for its existence. Thus, making it a week type of government.

Every nation including India has formulated its own unique ways to tackle the situation and mitigate the effects of these flaws.

2.3. **FEDERALISM IN INDIAN CONSTITUTION**

The framers of the Indian constitution did not expressly mention the term federalism in the constitution but have included the principle in its spirit. Indian polity is designated as a federal or quasi- federal polity by different political stalwarts. This could also be gathered by analyzing the following provisions of the Indian constitution.

1. It is a Union of States
2. There exists of dual polity
3. Constitution is written, rigid and supreme
4. Division of powers between Union and States
5. Independent adjudicating authority.

Indian constitution patently showcases existence of federal feature in its spirit as well as provisions. The adjudicatory authority has also, from time to time, validated and glorified this federal feature and placed it under the doctrine of 'basic structure'.[30]

The Constitution despite having such important federal features cannot be called 'federal' in the classical sense. Neither can it be called 'unitary' constitution. It envisages a special type of diversified political system. In the words of, Babasaheb Ambedkar, "*it is unitary in*

[30] Kesavananda Bharti v. State of Kerala, AIR 1971 SC 1461

extraordinary situations, such as, war (or emergency) and federal in normal times". He also, pointed out that "*the basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. This is what the Constitution does. The States in our Constitution are in no way depending upon the Centre for their legislative authority. The Centre and the States are co-equal in this matter"*. Other authorities have preferred to call it a "quasi-federal" Constitution.

Thus, after all the intellectual brainstorming on the nature and position of Indian society and features of federalism and unitary government, the makers choose to settle for a Cabinet form of Government for the Union and the states. In fashioning the form of Parliamentary system with a duel-government (Union Government at the Centre and the State Governments in the regions) the Assembly drew largely from the British model. Both the governments, Central or State were made supreme in its demarcated sphere and made to operate independently. The functions of the government are divided into three broad heads; executive, legislative and judicial.

2.3.1 Governor as an Element of Federal Structure

The executive functions are vested in the President and the Governors at central and regional levels respectively. They were also envisaged as *de jure* heads of the respective governments, acting on the aid and advice of the Council of Ministers. The Office of President and Governor are only the constitutional heads of the respective arenas, unlike their counterparts in the United States. The states executive actions are performed in their name. But the functions are, in fact, distributed between their Council of Ministers as provided in the Constitution[31]. However, "The decision of any Minister or officer under the Rules of Business [made under Art. 77(3)] is considered to be the decision of the President and Governor".[32] Also it is the legislators and not the executives that are made responsible for their actions. Describing this feature of the constitution, the court observed;

[31] INDIA CONST. art. 73 (3), 74, 75, 77, 153, 154, 163 & 164
[32] G.D. Zalani v. Union of India, AIR 1995 SC 1178

> "It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government."[33]

The position acquired the Governor /president in Indian polity is similar to that of a sovereign in Britain. However, the status and position of president and governor *inter se*, is both alike and yet different. There exists a corollary in the nature of the office, but these authorities do not parallel to each other and cannot be termed as counterparts at their respective levels. The Constituent Assembly thoroughly discussed on this contention on July 15 and 16, 1947 and after long deliberation Sardar Vallabh Bhai Patel wound up the discussion by saying—

" In the Union-Centre we have a President and, if in the Provinces also, there are Presidents, there will be confusion. Therefore, we must not have the wrong idea that anything appearing in the new Constitution connotes the old ideas connected with the Constitution under which we are now functioning. This is a simple proposition in which there should be no misunderstanding or further discussion."[34] Following a, *sui generis* office of governor was designed to suit the requirements of this diverse nation.

Thus, the Indian system emerged as a unique amalgamation of distinct systems around the globe. It accumulated the best features of all the societies and formulated for itself a novel form of government. The architects of this eccentric system after analysing the Indian polity decided to retain the esteemed office of the governor. The makers not only acknowledged the symbolic importance attached with the office but also the crucial and

[33] (1974) 2 SCC 831

[34] CONSTITUENT ASSEMBLY DEBATE. Vol. IV, 591-593 & 606-607.
https://www.constitutionofindia.net/constitution_making_process/constituent_assembly (Aug 18, 2020)

arduous role played by the statemen. Therefore, enormous provisions were incorporated in the newly drafted constitution. Governor, as mentioned above, was made the executive head of the State and his role became particularly important because of the duel responsibility bestowed on him. Around 45 articles along with 2 schedules (fifth and sixth) were incorporated in the constitution defining and outlaying the roles, responsibilities, functions of the governor along with power vested in him which will be dealt in the next following chapter. In this regard the Hon'ble President, Ram Nath Kovind in his address on Law Day stated, "*the governor had a very important role in the country's constitutional system, particularly in context of cooperative and healthy competitive federalism. The role become even more important when the emphasis on cooperative federalism*"[35]

[35] Editorial, "*Governors, Lieutenant Governors have important role to play in constitutional system of country: President Ram Nath Kovind*" The Hindu (July 23,2020). https://www.thehindu.com/news/national/governors-lt-guvs-have-important-role-to-play-in-constitutional-system-of-country-president/article30059450.ece (July 27, 2020)

CHAPTER 3

HISTORICAL PERSPECTIVE OF GOVERNORSHIP IN INDIA

Indian civilisation is one of the civilizations known to the world. The society at that time was extremely simple and unorganized. With the passage of time complexities increased in the governance leading to establishment of kingdoms. King became the sole authority and monarchy operated as the prominent form of government. As the empires expand its ambit it became difficult for the ruler to rule the entire empire alone. Thus, to ensure proper and effective administration of the empire a parallel authority was created, and the office of governor came into existence. Huge empires were divided into manageable provinces which in turn were headed by a governor. The governor was known by different names in different dynasties and performs function and duties similar to that of a king in his own province but remains subordinated to the king. Also, in British India the existence of this prestigious office can be traced and the same was retained, with necessary modifications by the independent India. Thus, to gain a vivid understanding about the office of governor it is important to trace the history of the same. Ergo the historical perspective of office of Governor in India is as follows;

3.1. PRE-BRITISH ERA

3.1.1 Position under the Mauryan Empire:

The Maurya dynasty was the very first dynasty that encompassed the entire Indian territory. It ruled the Indian subcontinent from about 326 BC to 184 BC .The Indian continent during their era, for the first-time, witnessed consolidation of power under the sway of a single empire. It was founded by Chandragupta Maurya and was governed according to principles elaborated in the celebrated book Arthshastra authored by Kautilya (the teacher of Chandergupta Maurya). After Chandragupta Maurya, emperors like Bindusara and Ashoka The Great succeeded to the throne of the glorious empire.

Much was known about the kingdom from the documents, books, narratives, inscriptions, edicts, stone pillars and other writings . All the recordings of that era depict division of the empire into number of smaller provinces. These provinces came into existence by two ways namely;

1. By division of the imperial territories which were under the direct rule of the Maurya's into smaller units.
2. By making rulers to accept the lordship of the Maurya's.

Records shows that the number of provinces during the reign of Ashoka ranged from four to six, however, the number remained uncertain during the time of Chandergupta . In each province a governor was appointed directly by the king. Members of the royal blood, Prince's usually, were appointed to this position and were designated as were designated as Kumar- Mahamatras. People from the non-blue blood seldom holds this prestigious office and were simply called Mahamatras.

3.1.2 Position under the Gupta Dynasty:

The Gupta Empire ruled the Indian territory from 4th to late 6th century CE[36]. It conquered much of the Indian subcontinent comprising the whole of the southern and northern India. Historians usually refer this period as the 'Golden- Era' of India. Records of Fa-hien (a Chinese pilgrim, visited India during the reign of Chandra Gupta II) exhibits that the empire was prosperous and was divided into provinces. These provinces were further were divided into smaller units called *pradesha*s or *vishaya*s[37] for administrative purposes. The governance of these provinces was dealt by high imperial officers or by members of the royal family.

As mentioned above the post was open to both members of the royal lineage as well as common man but was allotted to non- bluebloods only if they possess the requisite qualities. Junagarh Rock inscription also prescribes the qualities of a good governor.

[36] BRITANNICA, *supra* note. 22 https://www.britannica.com/topic/Gupta-dynasty (last visited 21.17.2020)
[37] Id., https://www.britannica.com/topic/Gupta-dynasty (21.17.2020).

According to the inscriptions he should possess qualities like truthfulness, nobility[38], wisdom, intellect and fast forwardness. He also ought to be a competent and truthful person possessing a sound temper. The Guptas choose people with the above-mentioned qualities and with high moral values as the head of the provinces or governors.

The governors were popularly called the 'Uparikas' and were appointed by the ruler. These governors ruled freely and are independent in their practices. Their main work was to protect the empire and to establish law and order and was made collateral with the king but in their own province. However, they were to work under the guidance of the king and were bound by the directions and policies of the central government.

3.1.3 Position under the Mughal Empire

The Mughal (or Mogul) Empire[39] ruled the south- eastern part of Asia mainly territory of today's India, Afghanistan, Pakistan and Bangladesh for almost three centuries (early 16th to mid18th century). They centralised the governance of the nation and brought together many smaller kingdoms. During the reign Akbar, the empire prospered a lot and new administrative experiments were undertaken. The Mughal empire was divided in two levels; Central and provincial. The organization of central government was in lines with the sultanate and drew heavily from it whereas the organization of provincial administration was devised by Akbar and was newfangled.

The system of division of empire into provinces was widely practiced during the Mughal Era. The kingdom was divided into provinces popularly known as 'Subas'. The provincial units were more or less fixed and the administrative patterns were uniform for the entire empire. This system, however, was not rigid and was open to changes and modifications considering the need and local conditions.

---

[38] O.P. SINGH BHATIA, THE IMPERIAL GUPTAS 355 (Surjeet Book Depot) 1962. https://www.google.co.in/books/edition/The_Imperial_Guptas/AUg_AAAAMAAJ?hl=en&gbpv=0&bsq=o.P.%20SINGH%20BHATIA,%20THE%20IMPERIAL%20GUPTAS(July 7, 2020)

[39] BBC, The Mughals, https://www.bbc.co.uk/religion/religions/islam/history/mughalempire_1.shtml(July 12, 2020)

Each suba were governed by governors known as 'sipah- salar' under the reign of Akbar and 'Nazim'[40] under his successors. Apart from their official designation, they were popularly referred to as 'Subahdars' and later only as 'Subah'[41]. These Subahdars were entrusted with the work of executions and administration excluding the revenue collection. The main function of the governor was to enforce and maintain law in the province, administer criminal justice and execute decrees passed by the centre. They often assist their counterparts in their work and make sure that the agriculture system operates well in their administered province. He often performs the task of being a channel between the province and the centre by informing the Wazir about the difficulties and challenges chased by the Governor. He admits people to various posts in its autonomy and punishes the wrongdoers for their mistakes. Also, he announces his resignation to the Wazir and advises him to take charge of his autonomy. He was entrusted with the task of general welfare of its province. This further include the task of development and construction of various channels, dams, roads, wells, etc.

With the passage of time and with the success of the system Akbar found it necessary to employ two persons as governor and two co-terminus posts, namely Assistant governor and Chief Governor, were created. The former was made subordinate to the latter and was bound to follow the orders of the chief. The entire system worked really well for the Mughal. The number of provinces accounted to range between from 15 to 22 during the reign of Shahjahan. Shahjahan vested all the three powers of executive, legislator and adjudicator in the governors. These powers were further widened under the reign of Aurangzeb.

3.2 POSITION UNDER THE BRITISH EMPIRE

The Britishers set their foot in India (Surat, Gujarat) around 1600's for the purpose of trade and commerce. They started their journey as a monopolistic trading company[42]; the English East India Company (hereinafter referred to as the EIC). The EIC primarily dealt in spices, tea, cotton, silk, indigo and opium. Although the EIC never intended to colonize India or

[40] MUGHAL ADMINISTRATION, http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/ikram/part2_16.html(July 12, 2020)
[41] PARMATMA SARAN, THE PROVINCIAL GOVERNMENTS OF THE MUGHALS 343, 1990 (July 17, 2020)
[42] https://www.bbc.com/news/world-asia-india-37094519(July 27, 2020)

establish their administration but they gradually, with the course of time, involved itself into administrative politics of the nation and started acting as agent of the British imperialism in India. Their conquest in search or power somehow started around 18th century and lasted till mid-21st century.

To ensure smooth functioning and maintenance of the system various offices and positions were established, office of governor being one. The progress of office of Governor been divided into following parts for our purpose ;-

- 1600 to 1700
- 1700 to1800
- 1800 to 1900
- 1900 to 1947

3.2.1 1600- 1700

The first charter was signed in the year 1600 by the Queen of England, Elizabeth I. It was by virtue of this royal charter that the management and control of trade and commerce in south-east Asia was entrusted upon the East India Company. Following the royal order, around two- hundred British bureaucrats and officials (headed by George Earl of Cumberland and consisting of knights, alderman and burgesses) travelled to India. The charter extended the management rights of the EIC for a period of 15 years[43] subject to a power of determination on 2 years noticed if tread was found unprofitable.

This charter also established a formal office of the Governor and bestowed upon him several managerial powers and functions. Although the queen appointed the first governor (Thomas Smith, the alderman of London) provisions were made for the election of the subsequent governors. It was decided that the office of governor will be an elected one. The entire process was to be carried out annually by the Court of Directors (comprising of merchants of England and popularly known as company courts) at London. The Governor though was subjected to supervision of the company courts but in practice exercised all the power and was the real head of the company with respect to matter concerning trade. In

[43] K. VENKETA RAO, THE INDIAN CONSTITUTION 18 (1945).

other words, no extra- ordinary or special power was given to him but with regard to general power he was made a central figure with apparent authority.

A Governor General and Council was also created and was vested with the legislative executive and judicial powers[44].

As the company grow, the powers of the Governor also witnessed a substantial change by the Charter act of 1612, 1615, 1623 and 1657. These charters amongst other things enhanced the power of the governor by granting him additional jurisdiction in civil and criminal matters such as power to punish its servant etc.

The charter of 1661 & 1694

By the end of 17th century the company entered into a period of unprecedented prosperity. Two new charters were granted in favour of the company by Charles II. The first charter of 1661 extended new privileges to the company. The company was now allowed possession of fortresses along with trading factories. Now the EIC can also appoint governor and other officers to ensure effective administration. The charter of 1694 played a vital role and ensured affirmative changes by incorporating the 'principle of rotation' in the office of Governor and limited the tenure of the governor and deputy governor to two years. Few more charters were assigned in the last decade of the 17th century and vested the authority to maintain troops.

By the end of 17th century the overall position and powers of governor magnified. He was given a free hand in military matters. Also, he was given authorities to maintain a standing army and was made in-charge of the navy. He was given power adjudicate matters relating to office of the company with limited interference. This was done to smoothen the functioning of the EIC so that wealth can be accumulated without any friction.

Thus, the end of 17th century the beginning of the era of the EIC and the British.

3.2.2 1700 - 1800

Major changes in the administration and functionality of the EIC and the governor occurred in the backdrop of two major instances which are as follows;

[44] DR. PURUSHOTTAM. S*upra* note. 12. 2. https://economictimes.indiatimes.com/topic/Purushottam-Kumar(July 31, 2020)

1. Rivalry with the other commercial trading companies - Environment of hostility operated between the French, Portuguese and British in order to establish their supremacy over the Indian economy. All the three companies wanted to maximize their profit and tried to rule out the others by minimize their profits. In order to protect the sovereignty and interest of the EIC a leadership role was given to the Governor so that appropriate step could be taken without any delay.
2. Downfall of the Mughals- During this period the last emperor of the Mughal realm, Aurangzeb, died. After death the entire empire disintegrated. Fissiparous forces operated and the empire became week giving British and opportunity to conquer territories. All the small powers started their mission of territorial aggrandizement and British were one of them. Battle of Plassey[45] provided a feeding ground for the company and the company found itself at a strengthened position after they conquered.

The administrative structure of the two (EIC and the governor) more or less remained the same except the fact that now the company found itself to be master of one of the richest and most populous provinces of India namely; Bengal, Madras and Calcutta. In this process the Governor of the three Presidencies were given significant powers. They were now maintaining a standing army, navy, a militia, judges and a mint[46]. The system of election had given way to system of appointment of governor. The EIC was more than a trading company and had become a territorial and military power.

The affairs of the company were regulated by the Charter Act of 1698 and no new charter or regulation was drafted. The Governor of the three presidential town operated jointly and singly. They mutually co-operated and handled situation jointly in times of emergency and urgency and independently at other times.

A noteworthy change however, occurred in the power of Governor and the Council consists of the senior civil servants of the Company and was vested with authority which could be

[45] The Battle of Plassey was a decisive victory of the British East India Company over the Nawab of Bengal and his French allies on 23 June 1757

[46] WOODRUFF, PHILIP, THE MEN WHO RULED INDIA, Vol. I 146 (The University of Michigan 1971) (July 3, 2020)

exercised jointly through voting, by simple majority. Although the Governor was heading the presidency, but his position was not more than that of 'Primus-inter-pares[47]'. Governor who was supposed to act on his own authority was not able to do so even in case of emergency. The operating factor behind it was the Governor and the Council. The Council was supposed to cater the Governor was in-fact curtailing his way. This difficulty was brought into light by Warren Hasting, the Governor of Bengal. He wrote letter to the Court of Directors complaining about the powers of the Governor. These powers according to Hasting, "seems to be great but are in reality little more than those of any individual in his Council"[48].

The Regulating Act, 1773

During this period the overall position of the company witnessed our downfall. The relationship between the board of directors and the Governor and the Council worsened. The board of directors considered itself as the master of the council and treated it like wise. The directors later on suspended the members of the Council who voiced against their unscrupulous behaviour. The position of the company suffered an enormous downfall by the year 1772. The financials of the company were not pleasing and there was widespread corruption in the affairs of the company. The court of directors ordered independent enquiry into the affairs of the EIC. Enquiry showcased ramified result. In the meantime, all the three presidential towns operated independently and not in consonance with each other. They made their own rules and declared war with anyone they desired. All these factors when coupled with lack of co-ordination paved way to enactment of a Regulation Act in the year 1773.

With the coming of this act a supreme residency was created at Bengal, Fort William and following Changes were made in the company's constitution;

- Centralization policy was adopted, and the business of the company was brought under the supervision of the parliament and Crown.

---

[47] DR. PURUSHOTTAM, *supra* note 12, 5-6.

[48] A.C. BANERJEE, INDIAN CONSTITUTIONAL DOCUMENTS 16 (Abhinav Publications 1983) https://www.google.co.in/books/edition/English_Law_in_India/7MXExXXb9usC?hl=en&gbpv=0(July 21, 2020)

- A new office of Governor- General of India was established and Warren Hasting was appointed as the first governor general. Also, four other Councilors were also appointed. Together they called Governor General- in- Council.
- The Bengal Presidency was made superior, and the other two presidencies were placed under its supervision and control.
- Prior approval of Warren hasting was made necessary for the governors of the other two presidential towns on matters of wars and peace. Also, the governors were obliged to inform the governor- general regularly on matters of business and importance.

The act of 1773 very accurately summarized the position of governor general and with reference to other governors. They were obligated to follow the command of the sovereign and were subjected to sanctions in case of disobedience. However, large number of exceptions were provided to the governor of the other two presidential towns which somehow limited the authority of governor general. Philip Wooruff in his book "The Man Who Ruled India" very accurately summarised the position of governor general of India by writing that, "place of governor general was established but gave him so shadowy control over the governor of Madras and Bombay there was little more than first among the equals"[49]. Also, the position of governor- general and his council was somewhat weird and controversial. It was believed that Hasting's relations with his Council, in which he was in minority were always strained. "His administrative reforms were carried through like a battle at sea, in a continuous running fight, until the death of a member of the Council put him in a majority of one."[50] The Montford Committee after examining the position of the Governor-General commented that the Act of 1773 "created a Governor-General who was powerless before his own Council, and an executive that was powerless before a Supreme Court, itself immune from all responsibility for the peace and welfare of the country - a system that was made workable only by the genius and fortitude of one great man"[51].

[49] WOODRUFF, *supra* note 44, 146 .
[50] EDWARDS MICHAEL, BRITISH INDIA 1772-1947, 24 (1967).
[51] REPORT ON INDIAN CONSTITUTIONAL REFORMS 30 (1928).

Thus, the act more or less has far-reaching consequences and was drafted with the intention of it being "a milestone in the Constitutional History of India"[52] proved to be an unsuccessful experiment.

Pitt's India Act of 1784

Another significant act that came almost a decade after the act of 1773 was the Pitt's India Act, 1784. This act was drafted to correct the flaws of the former act, that is, act of 1773. It brought changes in the position of possession of India. it established a *joint government or dual control* in India by EIC and the Crown in Great Britain with the crown having ultimate authority. British government was now made incharge and the crown was given direct control over the of the administration of the nation, unlike the former act where the government was only 'regulating' the matters. a differentiation was carved out in the political functions and the commercial activities of the EIC. The crown was also made incharge of the governors of the presidential town of Madras and Bombay. It subjected the governors to the direct authority off the crown thereby making it responsible for the removal or recalling of the governors.

Other important features of the act are as follows-

A Board of Control was created for the purpose of Joint Government and was empowered to exercise its full control on matters concerning revenues, civil or military governance and was given full access to the company's records.

- The Governor General's council was made a *3 members* body, by reducing the number of memberships. Out of these three, one member was required to be the commander-in-chief of the King's army in India. This process of reducing number of members was done to *strengthen the position of the Governor General.*

[52] SAHARAY, H.K., A LEGAL-STUDY OF CONSTITUTIONAL DEVELOPMENT OF INDIA 51 (Nababharat Publishers 1970). (Aug 1, 2020) https://www.google.co.in/books/edition/A_Legal_Study_of_Constitutional_Developm/W1aJrA3MYLcC?hl=en&gbpv=0&bsq=SAHARAY,%20H.K.,%20A%20LEGALSTUDY%20OF%20CONSTITUTIONAL%20DEVELOPMENT%20OF(July 25, 2020)

Despite of all the provisions the act was considered a failure as it lacked clarity. The boundaries between the company and the government was vague and indistinctive. The Governor-General was to serve two masters i.e. EIC and the Crown.

Act of 1786

Two more acts were passed in the year 1786 & 1793. Both these acts strengthened the position of governor.

In 1786, after lord Hastings, Lord Cornwallis succeeded to the office. He insisted on the enlargement of powers of the Governor-General and that of the subordinate presidencies they should be authorised to over-ride the majority decision of their Council[53]. Consequently, the Act was drafted and empowered them with the desired authority to over-rule the decision. This authority, however, was only made exercisable in exceptional circumstances and in normal course of work the governors could not act without the authority of the council. Also, the act vested two power of the Governor General and Commander in Chief on Lord Cornwallis. Thus, via act of 1786, Cornwallis gained the status of a ruler of India under the authority of Board of Directors.

The charter act, 1793

The charter act, 1793 or as officially called "The *East India Company Act, 1793"* renewed the charter of the EIC and authorized the company to carry on trade for next 20 years with India. The power to control Governor-General over the subordinate presidencies of Madras and Bombay was made absolute. The subordinate presidencies were bound to obey the orders of the Governor-General in Council until it contravenes the instructions from London. Powers to exercise discretionary was vested in the Governor- general and the assent of his Council was not a pre-requisite to pass any resolution or order . The governor was however made responsible for his actions and the consequence that follows. Also, the Governor-General was allowed to appoint a Vice President from among the civilian members of his Council to take care of the administration of Bengal in his absence.

[53] REPORT OF INDIAN STATUTORY COMMISSION 128 (1993).

3.2.3 1800-1900

The Parliament Act, 1807

The Parliament Act, 1807, clothed the Governors of Bombay and Madras with legislative powers but the legislative acts that were made the Governors of these presidencies were required to be approved as well as registered by the Recorder's Court and the Supreme Court.[54]

The Charter Act, 1813

The United Kingdom faced great changes, for almost two decades, before the coming up of charter act of 1813. The impact of the changes, that took place in their polity, could patently be traced on the charter act. The act came as a final step towards centralization in the British India. It validated the British colonization of India and the territories of EIC were to be carried "in trust for his majesty, his heirs and successors". In toto, the direct activity of the Company ended after this act, and its functions were only limited to administration. The Indian government, for the very first time, was given authority over the British controlled Indian territory. The Charter interestingly, attempted to introduce a system for the selection of civil servants by open competition and stated that, "the Indians should not be debarred from holding any office and employment under the company and that merit should be the basis of employment to government service and not birth, colour, religion or race." However, these provisions were disapproved by the court of directors and thus, were never affected.

The Governor-General, of Fort William, was elevated to the position of Governor-General of India. Lord William Henry Cavendish-Bentinck was made the first Governor-General of India and served the office from 1833 to 1835. The governor general was given varied powers by virtue of his office and was made to exercise all the civil and military powers. He was authorised to repeal, amend or alter laws and regulations. The Governors of the subordinate presidencies on the other hand, were deprived of their law-making powers and were prohibited to either suspend or frame any laws, except in the matters of urgency and that to with the prior permission of the Governor-General. However, the Governors were

[54] DR. PURUSHOTTAM, *supra* note 12, 10-11.

given the power to convey and provide their inputs and opinions regarding any law and regulation required for their respective presidency. They were compelled to obey the instruction of the Governor-General. The Governor-General could also suspend the Provincial Government after the consent of his Council, if they disobey the instructions of the Centre Government.

Along with these provisions many other aspects were introduced and incorporated like the number of the members of the council, which were reduced by the Pitt's India act, were again fixed to four (with necessary limitations on the functioning of the 4th member)**.** Slight modification was made in the nomenclatures, as the statutes were post this act were to be referred as 'Acts' as against the previous enactments where they were referred as 'Regulations'.

Also, The Charter Act suggested division of Bengal Presidency into two; (a) Presidency of Fort William; (b) and Presidency of Agra, the provision was however rejected and never saw the light of the day. An affirmative step was taken by establishing a Law Commission to codify the segregated laws. To achieve this objective the Governor-General-in-Council was directed to constitute an Indian Law Commission with the objective to inquire into the existing laws, judicial procedure and other areas of like nature specially laws relating to marriage, rights and authorities of the heads of the families, state of slavery etc.

The British Parliament Act, 1853

The act of 1853 made a significant change by separating the executive and legislative functions of the Governor- General's council. It further strengthened the central government by discharging the Governor-General from his duties (by creating a separate post of Governor was created at Fort William[55]) as the governor of Bengal. For temporal management of affairs, a post of Lieutenant Governor was created by the Board of Directors, for the said Presidency.

[55] THE CHARTER ACT, 1853, § 16.

A functional separation (legislative and executive) was unprecedented and was never witnessed by the council[56]. A separate Governor-General's legislative council [which was popularly known as the Indian (Central) Legislative Council] was established. This legislative wing adopted the same procedures as of the British Parliament and functioned as a mini-Parliament. The membership of the council was increased from 6 to 12 members[57] and the assent of the Governor-General's was made mandatory for all legislative proposals.

The Charter Act, 1858

The next act in line was The Charter Act of 1858. This act can be termed as 'The Crown Rule'. This was a notable act as it was drafted as a consequence of the 'First War of Independence' or popularly known as the 'Revolt of 1857'. India directly came under the control of the British throne and was governed by Her Majesty, in her name. The seat of Governor General of India was renamed as 'the Viceroy of India' and the he was made the direct representative of the British Crown in India.

The Charter act also brought the office Governor of presidency under the surveillance of the crown and provided for its direct appointment by her Majesty by a warrant under her royal sign manual (earlier made by the Court of Directors). Appointment of two executive councilors, for the help of the Governor, was made by the crown.

This act ended the 'dual form of government' which was introduced by the Pitt's India Act. It also terminated the operation of policy of 'Doctrine of Lapse'. Subject to the rule made by the British, limited liberties and leverages were bestowed onto the Indian rulers and doors were opened for Indians in Government services. The act created a new and powerful office of Secretary of State for India (with Lord Stanley as the first Secretary). He was made the political head of the India and was given absolute control and authority over Indian administration. Cumulatively, the act did not alter the way of governance in India

[56] JAGRANJOSH, Charter Act, 1858, https://www.jagranjosh.com/general-knowledge/charter-act-of-1853-main-features-1443010549-1(Aug 11, 2020)

[57] The 12 members were: 1 Governor-General, 1 Commander-in-Chief, 4 members of the Governor-General's Council, 1 Chief Justice of the Supreme Court at Calcutta, 1 regular judge of the Supreme Court at Calcutta, and 4 representative members drawn from among the company's servants with at least 10 years tenure, appointed by the local governments of Bengal, Bombay, Madras and North Western Provinces.

but confined itself towards bringing improvements in the administrative machinery of the state and thus, in the governing, supervising and controlling patters of India.

The Indian Councils Act, 1861

The Indian Councils Act, 1861 brought important changes in the Governor-General in council and the presidencies. The act brought the separate presidencies of Bombay, Madras and Calcutta into a common system. Both the wings of the Governor-General in council (legislative and executive) were expanded.

It provided for provincial autonomy and enhanced the powers and functions of the Governor. The Governor- general was given new power to formulate ordinances without the concurrence of the council. The act also restored the Presidencies with the legislative power, but they were required to seek the assent from the Governor -General in Council on every bill passed by them; the bill will take shape of act only upon their assent. A bill passed by the Governor, however, could be refused by the Governor-General, but in case of Provincial legislations the Crown was made the final authority[58]. The governors were also debarred from altering the Acts passed by the Centre.

Thus, the act very expeditiously provided a framework of government for India which is practices till today, for eg. the governor was empowered to preside over the meeting of the council. He was given authority to cast a deciding vote, in case of a tie, while enacting regulations. He can even withhold his assent to a particular bill. M V. Pylee described it as "the Act was the primary Charter of Indian Legislature of the 20th Century."[59]

The Indian Councils Act, 1871

The Act of 1871 authorises to the Governor-in Council to prepare and propose draft regulations for the good government of the Province to the Governor- General in Council. This Act due to the decision of the Bombay High Court in the landmark case of R. v. Reay empowered the Provincial Government to amend and repeal certain laws.[60]

---

[58] INDIAN COUNCILS ACT, 1861 § 41.
[59] PYLEE, M.V., CONSTITUTIONAL GOVERNMENT IN INDIA, 67 (S. Chand & Company 2004). https://www.google.co.in/books/edition/Constitutional_Government_in_India/Jy4rDAAAQBAJ?hl=en&gbpv=0(July 31, 2020)
[60] THE INDIAN COUNCILS ACT, 1871 § 3.

3.2.4 1900- 1947

The Indian Council Act, 1909 (Morley Minto Reforms)

After first few decades of first war of independence (revolt of 1857) two major aspects emerged in the Indian national movement of independence; (a) the nationalists became more vocal about their demands, like proper representation of Indians in government; (b) the extremists, who aimed to impede the foundations of the British rule, emerged. The persisting political situation appeared to be a major threat to the British and they termed the situation as 'Unrest'. It was believed that a dramatic step was needed to curb this unrest and need was felt to partition the state of Bengal into two. The partition, however, did not produce the desired result and proved to be insufficient. It did not restore the desired stability to the British raj.

Humongous uprisings and protests followed the partition and a result a need for reforms in the governmental system was felt. In order to pacify the situation, the Britishers provided political concessions in the form of 'The Morley-Minto reforms.' The reforms were named after the Secretary of State for India, John Morley and the Viceroy of India, the 4th Earl of Minto[61]and formed the basis of the Indian Councils Act, 1909. The act was carved out by the British parliament to introduce reforms in legislative councils and to pacify the upheaval in the Indian society. It provided concessions to the native population and assured them involvement in the governance of the nation.

The act increased the size and functions of the legislative councils at both levels. The members could discuss budget, move resolutions, raise supplementary questions and matters of public interest etc. The interaction of Indian population with the executive council of the Viceroy and Governors was fostered. But *in toto*, the association and involvement of Indians in the system was limited and bounded. The British also, introduced 'separate electorates' for Muslims and Hindus. Constituencies were reserved for Muslims and only a candidate following Islam was allowed to cast a vote in that constituency. This

[61] BYJUS, Morley Minto Reforms, https://byjus.com/free-ias-prep/ncert-notes-morley-minto-reforms/ (21.07.2020)

was done after the formation of Muslim league (in 1906) and in response to the growing communal activities. The formation of separate electorate for a class of population casted a devastating impact on the nation.

The Government of India Act, 1919

The British parliament, after sensing the mood of the nation, patently spelled out the policy of British Government on August 20, 1917. In the historical declaration the Crown succumbed to some demands of the people and announced that, "the association of Indians in every branch of the administration will be increased and of gradual development of self-government institutions with a view to progressive realization of responsible Government in British India as an integral part of the British empire"[62] and resultantly the act of 1919 was drafted with the sole intention to deliver what is said and to further increase the participation of population in administration.

In order to carry out the provisions of the august declaration the then viceroy, Lord-Chelmsford and the Secretary of State for India, Edwin Samuel Montague were ordered to carry out the task of formulating policy and the act of 1919 was carved. The act came out in the form of recommendations and is therefore known as the *Montague-Chelmsford Reforms* or *Mont-Ford Reforms.*

Features of the Act:-

There were two classes of administrators - executive councilor and minister. It created and strengthened provincial autonomy by loosening the control of the centre on provincial matters. 'Diarchy' was introduced and matters of administration were divided into two categories- reserved and transferred[63]. The former category includes subjects like-irrigation, law and order, finance, land revenue and was administered by Governor and his Executive Council. In the matters of reserved subjects, the executive Council and Governor were not responsible to the Legislative council.

[62] DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA, 5 (22ND ed.) 2015https://www.google.co.in/books/edition/Introduction_to_the_Constitution_of_Indi/8kRSPwAACAAJ?hl=en(Aug 18, 2020)

[63] The transferred subjects were to be administered by the Governor with the aid and advice of the Ministers accountable to the Legislative Council wherein 70% members were to be elected.

Whereas the transferred list includes subjects like education etc. here administrative action is taken by the Governor in consonance with the legislative Council. The legislative Council consists of ministers whose aid and advice should be considered before making laws. 70% The members of the Council were elected by limited franchise[64]. The governor was given responsibility for appointment of the other 30% of the ministers who holds office at his pleasure.

Governor became the executive head of the province and were appointed in their office for a period of five years. Few changes were brought regarding in the appointment process. Only the governors of the presidential towns were appointed by the British crown while the others at provincial levels were appointed after the consultation with the Governor-General.

He was also vested with some legislative power. Although he was not a member of the Legislature but was given an additional rights and duties that made him an active part of the legislature. He was given the task to preside over the Council meeting and to nominate members having special knowledge for the purpose of introducing or considering the bills in the Legislature. His assent was made mandatory for bills to become laws and he can even reserve certain bills for the Governor-General's consideration who can further reserve them for the signification of the crown[65]. A significant addition was made in the decision-making process of the governor. His decisions could even over-rule the decisions of the Councils in matters of safety, tranquility or interest of the provinces. Thus, the act in toto gave the Viceroy and the Governor enough power to undermine the legislature at the centre and the provinces.

The Government of India Act, 1935

In order to pacify the uprising that was caused by The Government of India Act, 1919 the British government appointed a statutory commission known as the Simon commission. The commission being an all "white commission" was boycotted by the nationalists and a

[64] The franchise was not allowed to the common man and was very limited. Only a few women were allowed to vote.
[65] THE GOVERNMENT OF INDIA ACT, 1919 § 10, 12 & 89-A

situation of unrest was created. Amidst of all the chaos the commission prepared its report in 1930, based on which the British parliament passed the historical act of, 1935. The Government of India Act, 1935 has following key features;

One, that the act divided power between union and the constituent units and refashioned the structure of the government. This was the first Act that was created by colonial lord and which, in technical sense, contains a tinge of parliamentarianism. The federal government was to consist of the Provinces (in which the British India was divided) and the States under the rule of the native princes. This scheme was never fully implemented as the rulers refrained from joining the Federation; the federal scheme thus, was implemented partially and only between the centre and the province.

In relation to the executives, the situation remained substantially similar and the governor continued to enjoy his position as the executive head. However, provisions regarding his appointment were reshaped and now his appointment was made under the royal sign manual[66] by the crown on the advice of Secretary of State after consultation with Governor-General. This change seems to have been made in view of introduction of Provincial government under the Act of 1935. The Act expanded the powers of the provincial Governor manifolds and made this post, a prize post. The authority in the provincial was consisted of the Governor, who was to act on the advice of the Council who were in turn responsible to the provincial legislature. The Governor could exercise some functions according to his 'individual judgement' subject to the control of the governor general. While exercising the individual judgement or discretion he is not bound by the ministerial aid. Thus, the general rule is that it is bound by the advice of the ministers but in certain authorized areas he can use his own decision and discretion. Similarly, the authority at central level vested with the governor- general with similar rights and duties. Except for the fact that the governor- general was subjected to scrutiny of the Secretary of State for India, a member of the British cabinet. The discretionary powers of the Governor were, however, vague. The lack of demarcation made these powers uncontrolled and wide. Interestingly, the Governor was given the task to determine the scope of his interference and discretionary power. The decision of governor on matters pertaining to exercise his

[66] GOVERNMENT OF INDIA ACT, 1935 § 48.

individual judgment was made final. Thus, the Governor was found interfering in the day to day administration of government.

Other peculiar features of the act are; the power and control of administration was vested with the Governor-General, Governors and the Secretary of State. The validity of Governors actions could not be called in question on the ground that he ought not to have acted in his discretion or exercised in his individual judgement. He can override the advice rendered by the Ministry regarding matters involving responsibility of the Governor. He was also given abundant power and responsibilities to ensure efficiency in exercise of functions, some of which are as follows:

i) Responsibility to prevent grave menace to peace and tranquility of the Province;
ii) to protect the right of Indian States;
iii) to secure right of members of public service;
iv) to secure the execution of orders of directions lawfully issued to him
v) to safeguard the legitimate interests of minorities;
vi) to secure peace for good government of areas;

He was empowered to attend the meetings of the Provincial legislature in his discretion and was empowered to issued ordinances if it appears to him that the peace and tranquility of Province is in danger. He can even issue emergency and was authorised to suspend the working of the Constitution at that time. he has to appoint members of the Public Service Commission. With reference to the legislative powers vested in him, the Governor could retain Bills for reconsideration and could also reserve a Bill for Governor-General's (and the King) consideration or could withhold his assent.

Thus, the Government of India Act, 1935 was the last step which traced the evolution of the office of governor under the colonial era. the position of India changed from a colony of British to an independent state in the year 1947. This development also changed the situation of a Governor. All the governors holding office under the British rule tendered their resignation to the governor general, on the eve of independence.

In the newly independent India, the office of governor was revamped to suit the needs of the blooming nations. The tenure, appointment, removal, powers, functions, role etc. of the

governor were discussed by the constituent assembly (which will be discussed in the latter chapters). *In toto,* the office was retained but with very limited powers and functions and governor, according to Sarojni Naidu, “was nothing more than a bird trapped in a golden case”

Chapter 4

POSITION OF GOVERNOR UNDER INDIAN CONSTITUTION

The Constitution making process was organised around the deliberations of the Constituent Assembly. The assembly was chaired by Dr Rajendra Prasad and had a total membership of 299 members. On 9th December 1946 the proceedings of the Assembly were initiated. The assembly sat for 166 days in 11 sessions and within the span of two years and 11 months, it accomplished its major task of preparation of a draft constitution. The draft constitution was prepared by an 8-member body was (called the drafting committee) under the chairmanship of Dr. Bhimrao Ambedkar. The draft was tabled before the assembly on in February 1948 upon which discussions and deliberations took place.

In the course of the deliberations about the position of the Governor, the assembly was one voice on the point that the, "governor should be a person of undoubted ability and position in public life, possessing wisdom and sagacity, a sort of eldest statesman free from any partisanship". Other provisions concerning his tenure, removal was also discussed and are elaborated as follows.

4.1 APPOINTMENT AND TENURE OF GOVERNOR

Article 153 of the Constitution provides; (a) for the office of the Governor; (b) and that the same person can be appointed as Governor for two or more States [67]. The constitution also proclaims, that the executive actions of the State shall be carried out in the name of the governor thereby making him the head of the executive of the state. Ironically the governor (who is the executive head of the state and part of the state legislature) is appointed by the president which really means, by the Union Council of Ministers. In other words, the people of the state have no role to play in his appointment. Neither the people directly choose their governor, nor the democratically elected leaders have a say in this matter.

4.1.1Dilemma regarding Appointment of governor

The Constituent Assembly, while examining the provisions related to the Governor, discussed and deliberated on many facts and circumstances and an important issue stood in front of them for consideration; Whether the Governor should be appointed or elected.

[67] INDIAN CONST. art. 153

The committee initially proposed two alternative proposals for the appointment of the Governor. In both the methods the office of governor was an elected one.

- the first proposal was suggested by Sir B.N. Rau according to which the legislature of the state would be electing the Governor by secret ballot[68]. All this will be conducted according to the proportional representation system by means of a single transferable vote. Sir Rau stated that in both, in unitary constitution and federal constitution having unitary features (like that of Canada), the Governors at Province level were appointed by the Central Government and since it was accepted[69] that India should be a federation then this appointment criteria should not be made applicable.
- The second alternate also proposed for an elected governor by an Electoral College. A committee was constituted on 9 June 1947 to discuss the question of formation and framework of the electoral college. The Committee in its report suggested for an elected electoral college to be constituted which will in turn appoint the governor. The election of the college should be made according to the territorial constituencies by the residents of the state during the time of general elections. One elector over 1,000 people should be elected, and the college should continue till the next general elections. This suggestion of the committee was however rejected.

  The committee then modified the report and proposed for an elected governor by adult suffrage. This proposal of the Committee was approved by the Assemblies and was even incorporated in the Draft Constitution. The Draft also had a schedule Vth, consisting an instrument of instructions for the Governor.

The Constituent Assembly while preparing the final draft rejected this proposal. After thorough discussion, deliberation and thinking, amendments were made in the draft

---

[68] Yogesh Pratap Singh, *Governance begins with Governor*, THE STATESMAN (KOLKATA) AUGUST 31, 2016 https://www.thestatesman.com/supplements/governance-begins-with-governors-162756.html(Aug 18, 2020)

[69] PROVINCIAL AND THE UNION CONSTITUTION COMMITTEE 32 (7 JUNE 1947)

constitution and the idea of an elected governor succumbed to appointed governor because of the following reasons;

- "An elected governor would encourage the separatist provincial tendency more than otherwise and there will be fewer links with the centre."[70] whereas a nominated Governor would foster and promote unity.
- The office of governor is symbolic, and it is pointless to incur expenditure on his elections.[71]
- Stress, tension and irritation in the relations of Governor and the Chief Minister could arise if both the offices were to be elected.[72]
- The head in a parliamentary system should be neutral and an elected governor will not serve the purpose as then he has to be party man.

This, according to the makers, meet the requirements of: - cabinet government, federalism, and a parliamentary system involving inter-party rivalries, which sought to meet by providing for a Governor appointed by the President. Also, is done "in the interest of All India Unity and with a view to encourage centripetal tendencies" and to make it "necessary that the authority of the Government of India should be maintained intact over the Provinces"[73].

The focal reason cited by them was the existence of two simultaneous elected bodies, namely, the Governor and Chief Minister, both being responsible to the house. It was felt that this would inevitably result in friction and will eventually lead to weakness in administration. Pandit Nehru also stood in favor of a nominated governor and observed that "an elected Governor would encourage the separatist provincial tendency, to some extent, more than otherwise."[74] Babasaheb Ambedkar also viewed that there is no need for

---

[70] CONSTITUENT ASSEMBLY DEBATE, VOL. VIII, 455.
https://www.constitutionofindia.net/constitution_making_process/constituent_assembly(Aug 20, 2020

[71] Id., VOL. VIII, 424-556.

[72] Id., VOL. VIII, 455. 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 and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy

[73] Id., VOL. VIII, 426.

[74] Rameshwar Prasad v. Union of India, AIR 2006 SC 980

an elected Governor. According to him "If we have an elected Governor and an elected Chief Minister, then the elected Governor would not be the constitutional head. It would be different from the position obtaining at the Centre" and finally Constituent Assembly approved the system of presidential nomination of the Governor in the State.

4.1.2 Provision under the Constitution

Article 153 of the Indian Constitution establishes the office of the Governor and the president of India is entrusted with the task of appointment of the Governor. While making an appointment the central government can make recommendation to the president[75]. Similar to the act of 1858, Governor of the state is appointed by a 'warrant under the hand and seal' of the central executive. To qualify for the post of governor the only qualification that is needed is that of age and nationality. [76]Another prescribe qualification is that one should not be a member of the state legislature (as well as parliament) and if the person appointed is an active member of the house, then in that case he is deemed to have vacated his office the moment he enters into the office of the Governor.[77]

After its appointment but before entering into the office as the Governor, the candidate is administered oath by the hon'ble Chief Justice of the respective high court of the state, in which the governor is appointed and in his absence by the senior most judge. Article 159 prescribes the form of oath, which is administered to the governor:

swear in the name of God

"I, A.B., do ---------- that I will faithfully

Solemnly affirm

execute the Office of Governor (or discharge the functions of the Governor) of …. (name of the State) and will to the best of my ability preserve, protect and defend the Constitution

[75] INDIAN CONST. art. 74. Council of Ministers to aid and advise President, (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:

[76] Id., art. 137.
[77] Id., art. 158.

and the law and that I will devote myself to the service and wellbeing of the people of …. (name of the State)."

I. Conditions for appointment and recommendation of committees

The Indian constitution very briefly summarizes the qualification for appointment as Governor,[78] which are nationality and age. And it can be validly contended that the constitution fails to prescribe the mechanism to evaluate as to who is the fit for the appointment as the Governor.

The void that was created was somewhat filled by the operation of conventions and recommendations and guidelines of various commissions. Constitutional conventions which operate alongside the constitution of India provide that a Governor should not be appointed at a place of his birth. Similarly, Sarkaria Commission and Punchhi Commission report recommends additional qualifications which a person seeking appointment should possess.

The Rajamannar Committee

The Rajamannar Committee was constituted in 1969 by the Tamil Nadu, DMK government. It was a three-member body with Dr. P.V. Rajamannar (former Chief Justice of Madras) as its Chairperson. It was set up to ponder upon the relationship that should subsist in a federal set up between the Centre and the States. The committee in its report May 27, 1971 amongst other things recommends for appointment of governor by the President after consultation with the body specially constituted for this purpose or with the State Cabinet or alternatively in consultation."

- Sarkaria Commission recommends

Sarkaria Commission was constituted in the year 1983 March 24, by the central government to examine the loopholes in the centre state relationship and various portfolios that run along with it. It was also given the task to suggest changes that are to be incorporated in the system in order to reduce friction and ensure smooth functioning.

[78] INDIAN CONST. art. 157. Qualifications for appointment as Governor No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty- five years

It was a three-member body chaired by retired Supreme Court Judge R.S. Sarkaria and derived its name from there. The commission exhaustively examined the office of the Governor and provisions and aspects related thereto. They concluded their study by recommending changing in the appointment process of the Governor. They urged that the appointment should be made by the President after taking into consideration the advice, opinion and consultation of the Chief Minister of the respective state. In order to ensure efficiency and transparency in the entire process of consultation and selection of a person to be appointed as Governor, the commission suggests that the procedure should be inscribed in the grundnorm itself by requisite amendment in Art. 155[79]. The commission also recommends qualities that a person should possess to be fit for the appointment as Governor. The Governor should observe the following:[80]

a. The individual should be from outside the State.
b. He should be eminent in some walk of life.
c. He should be a person with no active participation in politics in the recent past.
d. Fair chance should be given to individual belonging to minority groups.
e. He should not be connected with the local State politics and should be a detached figure.[81]
f. He should not be a ruling party politician from the Union in a state governed by other party or combination of such other parties.[82]
g. a body consisting of; (a) Vice President of India, (b) Speaker of the Lok Sabha, (c) Prime Minister should constituted for selecting Governor. The constitution of such body and consultation (confidential and informal) thereof will enhance the credibility of the selection process.[83]

---

[79] SARKARIA COMMISSION REPORT. Centre-State Relations, para 4.16.03 http://interstatecouncil.nic.in/sarkaria-commission/(Aug 18, 2020)
[80] Id., para 4.16.01
[81] Id., para 4.6.09
[82] Id., para 4.16.02.
[83] Id., para 4.16.04.

- Punchhi Commission recommends

  Punchhi Commission was headed by Justice M. M. Punchhi in April 2007. The commission reiterated all the suggestions of the Sarkaria Commission regarding the office of the Governor and suggested that the recommendations that the Sarkaria commission gave should be followed verbatim and in its true spirit. They also vouched that the governor should not take part in active politics at even local level at least for a couple of years before his appointment. It also went ahead and endorsed NCRWC recommendations saying that necessary amendments should be brought in Art. 155 & 156[84] and the appointment of Governor should be entrusted to a committee comprising the eminent personalities namely; (a) Prime Minister, (b) Speaker of the Lok Sabha, (c) Vice President of India; (d) Chief Minister of concerned State; (e) and home minister. The committee urged for incorporation of these steps in order to bring transparency in the system.

NCRWC

The National Commission to Review the Working of the Constitution (NCRWC) agreed with or rather went beyond the recommendations of the Sarkaria Commission with respect to the appointment of Governor and suggested amendments in the constitution itself. NCRWC in its Consultation Paper made two important additions namely:

1. The tenure of ,five years of, office should be fixed;

2. The Governor holds office "during the pleasure of the President" be deleted[85].

But in its final report, the NCRWC mellowed down its tone and suggested no dilution in the power of the President to appoint the Governor, rather they argue for inclusion of the Chief Minister of the State before the appointment.

[84] PUNNCHI COMMITTEE REPORT. para 4.4.09. http://interstatecouncil.nic.in/punchhi-commission/

[85] NATIONAL COMMISSION TO REVIEW THE WORKING OF CONSTITUTION. para-26 (b & c). http://interstatecouncil.nic.in/punchhi-commission/(Aug 8, 2020)

4.1.3. Position of Courts

In Rameshwar Prasad v. Union of India[86] the hon'ble Supreme Court observed that, "there is a need to formulate a national policy with some common minimum parameters for appointment of Governor, which are applicable and acceptable to all political parties. The court also held that the unfortunate situation of allegations of mala fide at the time of appointment of Governors could be avoided if the recommendations of the Sarkaria Commission and the National Commission to Review the Working of the Constitution are implemented."

'The Office of the Governor is not subordinate or subservient to the Government of India', this was opined by the court in Hargovind Pant v. Dr. Raghukul Tilak.[87] The court also held that, "it is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee and servant of the Government of India. He is the head of the State and holds a high constitutional office which carries with its important constitutional functions and duties. He holds office during the pleasure of the President. It is a constitutional provision for determination of the term of office of the Governor and it does not make the Government of India an employer of the Governor. He is not amenable to the direction of the Government of India nor is he accountable to them for the manner in which he carries out his functions and duties. He is an independent constitutional office, which is not subject to the control of the Government of India. Actually, the Governor is more than a constitutional head. He is an important functionary designed to play a vital role in the administration of the affairs of the State. Or in other words he is a link between the Centre and the States under the Indian".

4.2 REMOVAL OF GOVERNOR

The post of governor is often considered as exalted and prestigious and hence it is expected that the incumbent should be appointed and removed in a glorious and prudent manner.

[86] (2006) 2 SCC 1
[87] (1979) 3 SCC 458.

Ironically, both these elements (of glory and prudence) are found missing in the exoneration process of the governor.

4.2.1 Dilemma regarding removal of governor

The Architects of the Constitution were divided on the issue of the tenure of Office of the Governor (as mentioned in Art. 132 of the Draft Constitution). The House stands divided on the issue. While some members argued strongly against leaving the tenure of office of the Governor on the mercy of the President, others adamantly supported the same. The Former Sect of people work concern about the uncertainty of tenure that would result if the office was left at the pleasure of the President. It was assumed that a Governor will not be able to work freely and would be under the constant threat and assumption of removal. Prof. K.T. Shah therefore proposed amendment " in the Draft Article 132 and insisted for insertion of words "and shall during the term be irremovable from his office", after the word "office". Post the insertion of words, the Article would read as;

"The Governor shall hold office for a term of five years from the date on which he enters upon his office and shall during that term be irremovable from his office"

but his amendment was rejected by the members of the Assembly. The amendment was brought with the intention of providing a secure and stable tenure to the Governor. He argued that, if the Governor, being head of the province, is acting according to the constitution and with the advice of council of minister, then the assembly should make sure that "he should not be at the mercy of the President who is away from the Province and who is a national and not a local authority".

Prof. Shibban Lal Saksena, added to the logic of Prof. Shah and opined that, "*if the Governor will be at the pleasure of the President then such Governor will have no independence and my point in that the Centre might try to do some mischief through that man. Even if he is nominated, he can at least be independent, if after he is appointed, he is irremovable."*

Babasaheb Ambedkar argued in favour of the powers of the president in matters of removal and justified his stand in the Constituent Assembly in the following words that "*this power of removal is given to the President in general terms… it seems to me that when you have*

given the general power, you also give the power to President to remove a Governor for corruption, for bribery, for violation of the Constitution or any other reason which the President no doubt feels is legitimate ground for the removal of the Governor. It seems, therefore, quite unnecessary to burden the Constitution with all these limitations stated in express term when it is perfectly possible for the President to act upon the very same ground under the formula that the Governor shall hold office during his pleasure. I, therefore, think that it is unnecessary to categorize the conditions under which the President may undertake the removal of the Governor[88] *".*

4.2.2. Provisions Under the Constitution

Art. 156 (3) provides that, irrespective of other things the governor serves for a term of five years. The span of five years will be deemed to be counted from the day of entry in the office as the Governor or put differently the day on which the oath is administered. Thus, the prescribed term of tenure under normal circumstances is of five years.

However, in exceptional circumstances, he may vacate the post before completion of his tenure. Under Art. 156 (1) the Governor holds office during the pleasure of the President and under clause (2) he may by writing under his hand address his resignation to the President.[89]

An analyzing the above- mentioned articles clarifies two things-

- the President holds the authority to terminate the Governor from his office, at any time without any sound reason

Art. 156 mentions that the Governor holds office "during the pleasure of the President". This article interestingly fails to attach a meaning to the term " pleasure of the President" thereby making it vague and problematic. The dismissal can be made at any time and on

[88] CONSTITUENT ASSEMBLY DEBATE. Vol. III, 470-474. https://www.constitutionofindia.net/constitution_making_process/constituent_assembly(Aug 18, 2020)

[89] INDIAN CONST. art. 156. Term of office of Governor, (1) The Governor shall hold office during the pleasure of the President, (2) The Governor may, by writing under his hand addressed to the President, resign his office, (3) Subject to the foregoing provisions of this article, a Governor shall hold for a term of five years from the date on which he enters upon his office, (4) Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office

any flimsy grounds, all the President needs is to withdraws his pleasure. Indeed, 'pleasure' is made a subjective phenomenon and can be withdrawn at any time without showing any reason.

Thus, the exonerated of governor is made easier than that of a government peon and all is made possible by vesting unparallelly extreme and unguided power in the President.

- Role of Union Cabinet in Removal

Our cabinet system is crafted in such a way that it makes President (under normal circumstances) bound by the advice of the prime minister and his cabinet. Consequently, the provision means, that the Governor holds office during the pleasure of the Council of Ministers. And because is appointment and removal depend upon sweet will of the centre, the Governor is seen dancing on the tunes acting in favour of the centre- in other words the party in power at union level.

However, the intention of the forefathers was abraded by the actions of the future politicians. Unguided exercise of power has given way to arbitrariness and party politics and numerous instances of removal of governors from various states like Gujarat, Odisha, Haryana Uttar Pradesh came into light. In most of cases, the governors were removed by the centre because they were appointed by the opposition party during their regime, some of the examples of which are as follows-

Instances of Abuse

During the 1980's the union government was seen practicing an unethical policy of removing the Governor or shifting it from one state to another maliciously. Since then, the government has time and again abused its power by reducing the tenure, without any valid reason and solely for political consideration. A much criticised practice, which should not have been followed, became a norm and governor appointed by the previous ruling party were exonerated. Instances portraying the same have been discussed below;

The services of Mr. A. P. Sharma terminated at Chandigarh without any reason. Post that in the year 1980 and 1981 governors of Tamil Nadu Sh. Prabhudayal Patwari and of Rajasthan Sh. Raghukul Tilak were removed without any reasonable ground.

Subsequently, in 1982 the Rajasthan HC in Surya Narain singh v. Union of India[90] has gone far and validated the dismissal of the Governor (by ex- PM Indira Gandhi) only because he had been appointed by the Janata party Government. The court observed that the five years term provided under Art. 156 (3) is not mandatory. Art. 156 (3) is made subjected to clause (1) which inserts that the term, of five years, is subject to pleasure of the President. Thus, the President has the authority to terminate the term of Governor office at his pleasure. Court also held that "it was not necessary to specifically mention in the order that it was issued in exercise of the power at the pleasure of the President". The President must be deemed to have exercised this power under Article 156, when the order of removal is duly signed by him.

Another example which showcases abuse of power occurred in 1987 when the National Front Prime Minister V.P. Singh advised the President for removal of all Governors appointed by the previous Government and the president in fact asked them to resign only for that reason. Following the sequence, in April 1992 the Governor of Nagaland Mr. MS Thomas was dismissed because he dissolved the legislature following the advice of the CM without consulting the union, which again was not a plausible explanation.

In 2004, four Governors, Haryana, Goa, Gujarat and Uttar Pradesh appointed by the previous NDA government were dismissed by the newly elected UPA Government under the Prime Minister- ship of Dr. Manmohan Singh (who assumed office in March- April 2004). No reason except that of "ideological difference from the centre" was given. Lately also, as many as eight governors resigned after Narendra Modi government came to power for reasons best known to them.

All these instances point out that the gubernatorial office of governor of state is inseparable linked with the rise and fall off the ruling party at the Centre and has no security of service. The suddenness with which some Governors in the yesteryears have been dismissed have made this position simply humiliating.

[90] A.I.R. 1982 Raj. 1

4.2.3. Position of courts

The matter finally reached the court by a Public Interest Litigation (PIL) filed by VHP leader. A Constitutional Bench headed by the then Chief Justice, K.G. Balakrishnan, opined that-

"Governors cannot be removed with the change of power at the Centre or for refusing to act as government's agent or for being out of sync with its ideology. Change in government is not a ground for removal of Governors to make way for others favored by new regime. He should not be ousted without deplorable misconduct on any other gross offence.[91] Governors could only be removed under rare and exceptional circumstances for valid and compelling reasons and not in an arbitrary, capricious or unreasonable manner for being, out of sync with the party in power at the Centre."

Recommendation of commissions

Sarkaria Commission

Sarkaria Commission has given some recommendation regarding removal of the Governor, which are as follows:

i) The five years tenure of the Governor should not be disturbed except for extremely compelling reasons.[92]

ii) The governor should be notified of the grounds of removal if the proposal of terminating his tenure is in motion. The president should personally notify the grounds to him and should afford him a reasonable opportunity for showing cause against it. The explanation offered by him then should be submitted to an advisory group consisting of the vice president, speaker of Lok Sabha and retired CJI. Upon receiving the advice of the group, the president then can pass any order as he may deem fit.[93]

---

[91]Nirmalendu Bikash Rakshit , "*Governor: Serving at the President's pleasure*", The Statesman (Kolkata) May 30, 2019. https://www.thestatesman.com/supplements/law/governor-serving-presidents-pleasure-1502760310.html(Aug 18, 2020)

[92] SARKARIA Commission REPORT. para 4.16.05. http://interstatecouncil.nic.in/sarkaria-commission/

[93] Id., para 4.16.06. (Aug 18, 2020)

iii) When the Governor is appointed in another State or resigns or has his tenure terminated before expiry of five years then both Houses of Parliament may be presented with a statement, explaining the circumstances leading to the ending of the tenure. The statement may also include his explanation and reply against the premature termination of his tenure[94]. This procedure would strengthen the control of Parliament and the Union Executive's accountability to it.

Punchhi Commission

Committee in its report prescribes that critical changes in the role of the Governor should be brought. It suggested that the tenure of five year should be fixed and removal should be made by the State Assembly only through the process of impeachment. It also criticizes arbitrary dismissal of Governors, saying, "the practice of treating Governors as political football must stop".

Thus, from the above discussion it can be concluded that the Union Government by virtue of Art. 156 has whimsical discretion on the matters of reappointment and transfer of governor (in same and different state respectively) and in the matters of dismissal and retainment of office.

Unlike the other dignitaries for the removal of the Governor there exists neither a sound provision, nor a sound system. The President of India can be sacked under Art. 61 for 'violation of the Constitution' But the procedure prescribed for impeachment is so difficult that the provision is likely to remain as a 'rusted blunderbuss'. Similarly, the Vice president can be impeached by following the Procedure prescribed in of Art. 67(b) But again it is made to a difficult affair that it was never resorted as it requires the consent of both Houses of Parliament.

The hon'ble Judges of the SC and HC can be dismissed from service[95]. But the procedure and the grounds for dismissal were so cumbersome that they are ordinarily irremovable.

[94] Id.,para 4.16.07.

[95] INDIAN CONST. art. 124, (4) and 217, (b),

The Speakers of the Lok Sabha also by virtue of and the state legislatures Art. 94 and Art. 181 enjoys a service-security .

Unfortunately, the office of Governor is made subjected to and dependent on the pleasure of the President and it means, in realistic politics, that he must woo the Central cabinet for his survival.

About the removal of the Governor, H.M Seervai[96] stated in his book that Governors holding office during President's pleasure has weakened the position of the Office. And he is increasingly being subject to the whims and fancies of the Central Government. Also, the practice of removal or shifting governors with the change of government in the Centre has become a normal practice today and demands to be changed.

4.3. PRIVILEGES AND IMMUNITIES:

Our grundnorm ascribes many powers and immunities on the august office of the Governor. The ambit of the privilege and immunity is extensive and is contained in art. 361 of the constitution[97]. According to the law, no authority (not even the courts) can either compel or refrain the Governor to exercise his power or perform duty. nor can a writ be issued against him, in respect to the acts and omissions committed by him in his official capacity. In other words, He is not answerable to the Court of law for "any act done or purporting to be done by him" while exercising his official powers and duties. The term "purporting to be done" have wide ranging scope and even unconstitutional acts, if done in pursuance of the Constitution, are protected.

The immunity granted to the dignitaries by this article is a personal immunity, that is, the Governor is not amenable to Court process personally, but appropriate proceedings can be

[96] H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 2022 (4th ed. Tripathi 1983).

97 . INDIAN CONST. art. 361. Protection of President and Governors and Rajpramukhs, (1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties: Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Governor of India or the Government of a State

initiated against the Government of the State. Thus, the act in question is not placed outside the courts scrutiny and the court can still delve into the cause of action. It is axiomatic that lack of *bona fide* unravels every transaction and yet when a question arises as to whether the Governor has acted rightly or not, in a given situation, it may be decided only against the Government of the State without questioning the Governor's conduct.

The immunity also extends against the criminal liability and proceeding against the Governor. During his tenure no proceedings can be instituted or continued against him and no order of arrest can be made by any court, even against acts done in his personal capacity.[98]

The extent of liability operates differently in civil cases. A distinction is drawn between the Governor's official or personal acts. An absolute bar against court's action has been created with respect of his official acts. However, a partial bar is created with respect of his personal acts and a proceeding can be initiated with a prior written notice of two months. The notice should state the name, description nature of the proceedings, cause of action, relief claimed and other requisite details.[99]

4.4. SALARY, EMOLUMENTS AND ALLOWANCES:

The Governor is entitled to many allowances and emoluments. These emoluments are specified in various articles of the constitution and also finds mention in the Second Schedule. One of the privileges enjoyed by the governor is to use the official residence, Raj Bhavan, without payment of rent.[100]

These allowances and emoluments were earlier determined by the state legislature but owing to the heterogeneity in the provisions of salaries and allowances in different states. An amendment was brought and Parliament is given the responsibility of determination. However, where the same person is appointed as Governor of two or more

---

[98] INDIAN CONST. art. 361, (2). No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office. (3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office

[99] Id., art. 361 (3)

100 Id., art. 158

States, the emoluments and allowances shall be allocated among the States as per the order of the President.[101]

Moreover, no custom duties are levied on imported articles for personal use, wear or consumption by the Governor or any member of his family. No duties are levied on the articles meant for furnishing the Governor's residences and motor cars provided for his use or on items such as food, drink and tobacco (either consumed by the members of the Governor's Household or by his guests whether official or otherwise).

The state government makes a huge expenditure to maintain the institution of the Governorship. Apart from salary which is paid to the Governor, the state spends large amount on maintenance of huge residencies, staff, gardens, official railway, saloons, river craft and air-craft, traveling and leave allowances and renewals and furnishings thereby making the institution of the Governor an expensive one. The cost further increases when a Governor goes on a long-leave and when somebody else is appointed as an interim Governor to fulfill the void during that period. The state had to pay the salary to two Governors. the same one's happened in West Bengal when Mr. Dharam Vira went on leave, Ms. S.S. Dhawan was appointed as Governor. Numerous other examples can be added in the list. In all, crores of rupees are being spent every year on this office thereby earning a lot of criticism.

4.5. WARRANT OF PRECEDENCE:

During the initial stages of our independence, our polity followed the policies of the British and by virtue of that the Governor enjoyed a higher position in warrant of precedence, as compared to the Central Ministers. But the then Prime Minister (Pt. Jawaharlal Nehru) revised the system and decreed that "the Governors except in their own States, were lower than the Central Cabinet Ministers."

Sri Prakasa in this article wrote, "As usually Governors are and will continue to be recruited from Central Ministers, as they were in the old days from the Central Executive Council, their position should be higher in the warrant of precedence. Governorship for a Central Minister should not mean demotion in the social scale. They felt that if not higher, they

[101] Id., art. 158 (4) of the Constitution of India.

should be given at least the same position as the Central Ministers, each taking his place according to seniority"

The current position however, is concretely determined as per the table of precedence published by the Government of India on 26 July, 1979 (which hold good till date) is that the Governors of State except within their respective States, and are lower than the Cabinet Ministers of the Union.

4.6. STATE MOURNING ON DEATH:

According to the instructions issued by the Home Ministry, there will be no State mourning and funeral except on the death of few dignitaries like the President, former President, Prime Minister and Governor. The mourning period varies for different positions ranging from 13 days to 7 days. In the case of a Governor it is recommended that the period should not exceed 7 days. Also, a State-wide half-masting is suggested for the death of Governors, Chief Ministers and Lt. Governors[102].

4.7. VACANCY IN OFFICE:

A Governor serves a normal tenure for the term of 5 years except for resignation or removal. He may at any time tender his written resignation to the President. Thus, in both the cases when the governor has observed his entire tenure or tender his resignation, he is allowed to retain the office till his successor enters upon his office.

In situations, such as the death of the Governor, the Constitution has not made any provision regarding the course of action that is to be taken. Here the President is expected to make provision as he thinks fit for discharge of functions of the Governor.[103] Generally, the C.J. of the respective HC is temporarily appointed to discharge the functions of the Governor.[104] The constitution also entitled the person discharging the functions of Governor to the same emoluments, allowances and privileges as the Governor.[105]

---

[102] MINISTRY OF INFORMATION AND BROADCASTING, BHARAT-2010. 896 (2010) https://mib.gov.in/(Aug 18, 2020)

[103] INDIAN CONST. art. 160

[104] Arun Kumar v. Union of India, AIR 1982 Raj. 67

[105] INDIAN CONST. sch. 4.A (4).

4.8. SYMBOLIC HEAD:

Unexpectedly, not only some non-congress leaders had urged for the abolition of the office of Governor, but also there have been many Governors who had given similar proposals. Vijaylaxmi Pandit, resigning as Governor of Maharashtra, expressed the view that the office of the Governor is useless and must be abolished. But it has been well pointed out by writers on British traditions that symbols are as important for Constitutionalism as for other forms of government and the Governor stands as the symbol of the State. He is the ceremonial head of the government who represents his state before visiting dignitaries of other nations. He is the one who receives foreign diplomats, serves as the state's chief executive officer and oversees the functions of the executive branch of government and has many more duties and responsibilities . An ultra-democrat may well question the purpose served by such pompous ceremonies.

CHAPTER 5

POWERS AND FUNCTIONS

Post-independence India declares the office of governor as a crucial one and attaches substantial value to it. He was given the responsibility to protect, preserve and defend the constitution and to ensure the well-being of the subjects of the state. The constituent assembly unanimously agreed that the Governor should be made the constitutional head. But ironically, when the question about the role and extent of power emerged, the opinion of the assembly was varied and divided. Some members of the assembly wanted to ascribe a figurehead role to the Governor precluding his interference in the actual administration of the system. Other members, on the contrary, suggested for a sagacious and politically active governor. The varied opinion ignited a full-fledged debate on the floor of the assembly.

The first article that was discussed in the constituent assembly regarding the power of the Governor was Art. 130 of the draft constitution. The article vests the executive power of the state in the Governor. Mr. Krishnamachari moved an amendment for the inclusion of certain words. The amendment was accepted and final provision was incorporated in Art.154 of the constitution and reads as "The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution". The constitution makes him the chief executor who is part of the state legislature and has to exercise power in the best manner and for the well- being of the state.

The father of the Constitution, Babasaheb Ambedkar, described the role and function[106] in the following words:

"A distinction has been made between the duties and the functions of the Governor which he has to perform. I submit that although the Governor has no functions still, he has certain duties to perform. His duties may be classified in two parts. Former is, that he has to retain the Ministry in office. The reason behind this is that the ministry holds the office during the

[106] CONSTITUENT ASSEMBLY DEBATE. VOL VIII. 02.06.1949, http://164.100.47.194/Loksabha/Debates/cadebadvsearch.aspx(Aug 16, 2020)

pleasure of the governor; he has to see whether and when he should exercise his pleasure against the Ministry. The latter duty, is to advise, warn, to suggest to the ministry an alternative and to ask for a reconsideration."[107]

Thus, after few rounds of dialog, deliberation and debate the assembly reached at a consensus and invested anomalous powers and functions on the governors.

The relevant provisions of the Constitution; which operate in the field of the powers and functions of the Governors may be discussed under the following heads-

5.1. JUDICIAL POWER

The Constitution confers certain powers of 'judicial' nature on the State Executive. The Governor has power to appoint judges to the subordinate Courts in the State [Art. 233-237].

Under Art. 233 (1) of the constitution, the appointment, posting and promotion of district judges[108] is done by the Governor in consultation with the State's High Court.

Also, according to Art. 192 the issue of disqualification of members of the State Legislature is to be decided, after obtaining the opinion from the Election Commission, by the Governor whose decision in this regard will be deemed final.

5.1.1. Power to Grant Pardon

Pardoning power or the 'power of mercy' was bestowed upon the executive head with the view that the executives will establish a balance between the organs and will improve the errors committed by the decisive adjudicator of the state. Art. 161 confers Governor with the powers to grant reprieves, remissions, respites or pardons of punishment or to commute, remit or suspend the sentence of any person. A parallel power is also vested in the president of India under Art. 72. There is, however, a difference in the pardon granted by the Governor and by President. The latter has exclusive power of pardon in cases of death sentence. Secondly, President can pardon punishments inflicted by court-martial. The

[107] Nabam Rebia v. Deputy Speaker and Ors, 2016 SC 694

[108] INDIAN CONST. art. 236(a).The expression 'district judge' includes judge of a city civil Court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause Court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge

Governor has no such power[109]. However, the nature of power is similar, that is, the power under both the articles is absolute and cannot be fettered by exercise of statutory provision.[110]

The architect of the constitution knowingly inserted this provision to check and fix the judicial biases or errors (if there are any). *Mala fide* order with irrelevant considerations can be fixed by granting the executive the power of scrutiny. The other operating philosophy behind the power is that, "every civilized country recognizes and has, therefore, provided for the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgements are always tempered with mercy."[111]

Article 161 comes into play when a person commits an offence against the state (included in List II and III) and is punished for the same. The governor of the state upon application can grant

- Pardon - It is an act of grace which completely absolves or exempt the offender from all the punishment and sentences which the law has inflicted upon him and places him in a position as if she had never committed the crime.
- Reprieve - Reprieve means temporary suspension or postponement of a sentence for definite time or date or period.
- Respite - giving lesser sentence or punishment on some special grounds for example pregnancy, illness etc.
- Remit - remission applies to reduction of amount of without changing the character of the punishment or sentence
- Commute - Commutation means exchanging the punishment for a different and less severe punishment. Eg, computation of rigorous imprisonment into simple imprisonment

[109] PANDEY, *supra* note 26, 438.
[110] M.P JAIN, *supra* note 16, 507
[111] Epuru Sudhakar v. Government of A.P., AIR 2006 SC 3385

- Suspend

The pardoning power of the Governor is made subjected to the aid and advice of the Council of Ministers. He cannot exercise this power in his individual discretion or *suo moto*. Sec. 433 and 432 of Criminal Procedure Code, 1974 authorises the state government to suspend execution of a sentence or remit it. The Government under the latter article is authorised to commute a sentence, including death, into a less rigorous sentence. Thus, the amplitude of pardoning power exercised by the governor is wider than that of the state government

Supreme court approved the same principle in the landmark case of *Maru Ram* v. *UOI*[112] and *Kehar Singh* v. *UOI* held that the power under Article 72 and 161 of the Constitution can be exercised by the Central and the State Governments, not by the President or Governor on their own" and stated that " judicial review of the Governor's decision under Art. 161 is not exercisable on the merits except within strict limits"

Satpal v. *State of Haryana,*[113] the court observed that "if the Governor is found to have exercised himself without being advised by the Government, the power is amenable to judicial review"

Also, Governor is barred from exercising its power under article 142 when a special leave petition is filed before The Honorable Supreme Court as the matter will be deemed to be in the jurisdiction of the court under article 142. *K. M. Nanavati* v. *State of Bombay,*[114] Supreme Court elaborated some aspects of this power and held that "the power of the Governor to suspend a sentence is subject to the rules made by the Supreme Court regarding cases which are pending before it in appeal. The Governor may grant pardon at any time but the suspension of sentence for the period when the matter is sub-judice in the Supreme Court under special leave to appeal under Article 136 of the Constitution, could be granted only by the court itself and not by the Governor."

[112] AIR 1980 SC 2147
[113] AIR 2000 SC 1702
[114] AIR 1961 SC 112

Thus, the power of pardon is a grace and cannot be granted as a matter of right and the sole discretion of the governor

5.2. LEGISLATIVE POWER

Participation in the Legislative Process

The State Executive, just like the Central Executives, are allowed to participate in the legislative process of the councils. The executive can dissolve the house or prorogue it. The bills passed by the legislature can either be assented by the governor or can be reserved for Presidential assent.

5.2.1. Rule Making Power

The executives also engage in the legislative processes by performing their rule making power. Several provisions of the Constitution confer rule-making powers on the Governor, and he is authorised to make rules regarding;

I. recruitment of officers, etc., for a High Court,[115]
II. convenient transaction of Government business;[116]
III. service conditions of the members of the State Public Service Commission[117] as well as civil servants;[118]
IV. authentication of orders and other instruments [119]
V. recruitment of secretarial staff of the Legislature[120]
VI. procedure in respect of communications between the Houses of State Legislature;[121]

5.2.2. Ordinance Making Power

Art. 213 confirm the ordinance making power on the state executive. It is *pari materia* with the ordinance making power of the central executive under Art. 123. Governor can promulgate ordinance only under the following circumstances-

[115] INDIAN CONST. art. 166, (2)
[116] Id., art. 166(3)
[117] Id., art. 318
[118] Id., art. 309
[119] Id., art. 166(2)
[120] Id., art. 187(3)
[121] Id., art. 208

1. When the legislative council and legislative assembly are not in session.

2. When the Governor is satisfied that, under the existing circumstances, it was necessary to take immediate action.

The proviso to Art. 213 cast an embargo on this power and obligates governor to promulgate ordinance upon instruction of the president when:- a. A bill to that effect requires prior sanction of the president for its introduction in the Legislature; or (b) if the Governor deems the reservation of bill for presidential consent as necessary; or (c) the act of state legislature, without the president assent, it would be invalid.

After coming into existence, the ordinance carries same effect and force as acts passed by the legislature and has to be presented before the state assembly and Council and ceases to operate at the expiration of six weeks from the reassembly of the Legislature. The existence of Ordinance can also be terminated by passing a revolution of disapproval or by withdrawal by the Governor.[122]

Though the power of Ordinance making is vested in the executive but in practice is exercised by the council of Ministers and there by the legislature. The Governor while making ordinances is to act according to the aid and advice of the Council except on matters in which he has to seek instructions from the president.

Justiciability of ordinance power- The position of Governor's satisfaction to issue an ordinance is similar to that of President's. The question has been raised from time to time whether the 'satisfaction' of the Governor (i.e. of the Government) to issue an ordinance is justiciable or not.

In the state of Andhra Pradesh, the Governor reduced the retirement age of civil servants from 58 to 55, via an ordinance. The ordinance was challenged *inter alia* on the ground of non-application of mind. The apex court upholding the validity of the executive action asserted in *K. Nagaraj* v. *State of Andhra Pradesh*[123] that "The power to issue an ordinance is not an executive power but is the power of the executive to legislate and there are no limitations upon that power except those to which the legislative power of the State

[122] INDIAN CONST. art. 213(2)(b)
[123] AIR 1985 SC 551

Legislature is subject." The court reiterate that the power is co-terminus with that of legislative power and legislative actions cannot be struck down on the ground of non-application of mind.

The court further expanded the position of ordinance in *T. Venkata Reddy v. State of Andhra Pradesh*[124] and said that "an ordinance cannot be struck down on such grounds as non-application of mind, or mala fides, or that the prevailing circumstances did not warrant the issue of the ordinance."

The position that Ordinance cannot be challenged on ground of mala fide doesn't seem appropriate. As the action of Executive are placed on similar footing as that of a democratic elected legislature seems to blur the line of separation of power. thus, this proposition was revised by the S.C. after the Bommai case and it can be summed up as the Legislative Acts may not be challengeable on the ground of mala fides, the same ought not to be said of the Executive acts and the ordinance making power is subjected to some inherent limitations and scrutiny (because they are executive acts) and cannot be placed on the same footing as legislative acts.

5.3. EXECUTIVE POWER

The term executive power has no precise meaning associated with it. An attempt to define the term 'executive power' is done by Supreme Court. In *Chandrika Jha v. State of Bihar*, the court connotes that the executive power under Art. 154(1) is a residual function. It is something which remains after the judicial and legislative functions are taken away. it includes actions necessary for the supervision or carrying on of the general administration of the State and includes both- (a) a decision as to action and (b) carrying out of the decision.[125]

As a general rule, the executive power of the State Government is coextensive with the legislative power of the Legislature[126]. The State in the exercise of this power is responsible for carrying on the general administration of the State and its width and amplitude cannot

[124] AIR 1985 SC 724
[125] AIR 1984 SC 322
[126]Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh, AIR 1982 SC 33

be curtailed so long as the Government does not go against the express provisions of constitutional or statute.

In case of void, that is, where there is no law on a particular subject then the government can proceed with the administration of the state by issuing instructions or directions under the state legislature drafts law on the subject. The State Government can act within its competence and take executive action even if there is no legislation to support such executive action.

The conduct of government executive business is regulated by article 154 and 166 of the constitution. The state vests the executive power on the Governor which is to be exercised by him either directly or through a subordinate. These functions can also be conferred by law on other subordinate authorities . The Governor also make rules for convenient transaction of affairs of the state. These rules are commonly referred as rules of business, and they allot business amongst different Ministries. These provisions run *mutatis mutandis* to the provisions controlling central government that is article 53, 57 and 77.

5.3.1. Discretionary Powers of the Governor

According to the constitution Governor is required to discharge certain functions in his "discretion", "by or under the Constitution"; or discharge of functions does not require him to seek the "aid and advice" of his Council of Ministers; or it is the Governor who decides whether a function falls within his "discretion" or not and the validity of anything done by the Governor is not to be called in question on the ground that "he ought or ought not to have acted in his discretion".

All these terminologies vividly highlight the existence of discretionary power in the constitution. The makers of Indian constitution studied dozens constitution of various nations before formulating their own constitution. They were acquainted with the provisions of other constitutions which obliges the executive head to act 'only in accordance with the advice of the Ministry'. The members thus, very intellectually, refrained from adopting such provisions in the constitution considering the duel-responsibility served by the governor. They did not bind the head of a wing and made his action subordinate to the wimps and fancies of another wing of the government. A unique position of the Governor (which found no parallel in any Constitution) is created.

Under the constitution, the state's administration is undertaken in the name of the Governor, but his authority is not real. In practice, the elected ministry of the state exercises the real authority and the constitution thus, under normal circumstances bounds the Governor by the aid and advice of the Council of Ministers while exercising his executive functions. The discretionary power of governor comes into play in extraordinary circumstances and the governor is given authority to make decisions without the advice of the Council. In simple words, while discharging his responsibility, as the supreme executive of the state, the Governor could make decisions independently by exercising his own reason and judgement.

In all other matters like prosecution of ministers and chief minister etc. the Governor, like the President, acts on the advice of his Council of Ministers. But if the Governor is of the opinion that the ministry has not acted *bona-fide* or honestly or fairly or where the decision of the ministry showcases *prima facie* elements of irrationality, biasness and disentitlement then he has the authority to use his individual judgement and can exercise his own discretion. Thus, the legislature should exercise fairly, reasonably and within the four corners of the statute while making decisions and a parallel duty is enforced upon the Governor to exercise his discretionary power in a judicious way and in furtherance of the principle of collective responsibility.

5.3.2. Types of Discretionary Powers

Governor's discretionary powers can be divided into two parts; i) Circumstantial discretionary power; and (ii) Specific discretionary powers.

i. Specific discretionary powers,

The governor being the de jure head is given certain responsibilities to fulfill. These responsibilities require him to act stringently and without being influenced and in the best interest of the subjects. For exercise of these activities he is bestowed with the discretionary power, in exercise of this power he can either act without the advice or in contradiction to the advice.

circumstances are specifically mentioned under various articles of the constitution and therefore the discretion exercise under these provisions is called "specific discretionary powers".

In *Ganamani v. Governor of Andhra*[127] it was held that "All the powers exercisable by the Governor can be exercised on the advice of the Council of Ministers except insofar as the Constitution expressly or perhaps by necessary implication says that he can exercise those powers in his individual discretion"

The Articles of the constitution that provides for specific discretionary powers to the Governor are as follows :

a) Art. 239

Art. 239 provides for the administration of a Union Territory. The President is to Administrate the union territory by appointing an Administrator in this behalf[128].

The Governor can also be appointed as the Administrator of the adjoining Union Territory by the President. In such a case, he is made to exercise these administrative functions of without the aid and advice of his Council.

b) Para Nine of Sixth Schedule

Schedule 6 Para nine[129] talks about the 'licenses or leases for the purpose of prospecting for or extraction of minerals.'

Part-1 of paragraph provides for annual royalty from license and lease for extraction of minerals. Para nine part -2 of the schedule[130] provides for settlement of dispute as to the

[127] AIR 1954 A.P. 9.

[128] INDIAN CONST. art. 239 (1)

[130] INDIAN CONST. sch. 6. Licences or leases for the purpose of prospecting for, or extraction of, minerals. (1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of the State] in respect of any area within an autonomous district as may be agreed upon between the Government of the State] and the District Council of such district shall be made over to that District Council.

share of royalty that is to be made to the district Council. Part 2 provides that the dispute shall be examined and decided by the Governor. It is also provided that while deciding the amount you can use his discretion and the decisions made by him shall be final and binding.

c) Article 371

This article provides for special provision for the States of Maharashtra and Gujarat. The President can provide the Governor with special responsibilities with respect to both the states. The Governor is bestowed with the responsibilities of establishing separate Development Boards for the districts[131] of Gujarat.

The Governor of Nagaland possesses certain responsibilities under Article 371A of the Constitution

For meeting these obligatory responsibilities, the Governor shall undertake his judgement for the action to be taken after consulting the Council.

Under Article 371 C of the Constitution, the Governor of Manipur is conferred with the duty to ensure the effective functioning of a Committee of the MLA's representing the Hill Area.

Art. 371 F (g) provides to the Governor of Sikkim, special duties for maintaining peace and making righteous provisions for fostering the social and economic advancement of the population of Sikkim. Art. 371H (a) similarly confers responsibilities on the Arunachal Pradesh Governor.

So, in the course of discharging the duties discussed above, the Governor is not bound to seek the advice of the legislatives and will not be subjected to any questions in case of any discretion exercised to fulfill his obligations. However, the Sarkaria Commission recommended that "before taking a final decision in the exercise of his discretion, it is

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

[131] Vidarbha, Marathwada, Saurashtra, Kutch

advisable that the Governor should, if feasible consult his Ministers even in such matters, which relate essentially to the administration of a State". Such a practice will be conducive to the maintenance of healthy relations between the Governor and his Council of Ministers.

ii. Circumstantial Discretionary Powers:

"*Under the Constitution, the Governor has no functions which he can discharge by himself: no functions at all. But he has certain has some duties to perform. This article (art. 156) certainly, it should be borne in mind, does not confer upon the Governor the power to overrule the Ministry on any particular matter. The Governor is bound to accept the advice of the Ministry even under this article. This article, nowhere, either in clause (a) or (b) or (c), says that the Governor may overrule the ministry in any particular circumstances. Therefore, the criticism that this article somehow enables the Governor to upset or interfere with the decision of the Cabinet is completely beside the point".*

The Constitution doesn't define Circumstantial discretionary powers. These powers are implied powers, and they largely differ basis the premise within which they are exercised. Therefore, the position under these situations are critical and subject to discretion. This also poses contentions on how a Governor needs to act, if at all, in special situations not explicitly called out in the Constitution. In such situations of discretionary or conflicting nature where the constitution doesn't clearly call out the conduct and act of the Governor, the Governor's decision in all discretions is regarded final and shall not be subject to any question around the legitimacy of his governance on the subject matter.

According to Administrative Reforms Commission review on the Centre-State relation, the Governor has to be mindful of the essence of the constitution and law of the land that he is being subject in order to safeguard and defend the best interest of the state. For this to happen sufficiently, the Governor must ensure complete impartiality and display true sense of non-biasness to command the respect of all political affiliations in the state. In the following circumstances of discretion and governance, he may use his discretionary powers;

a. Appointment of the Vice - Chancellor;

Governor performs multifold functions some of which are mentioned in the constitution while the others are inscribed in the statute. these powers and functions are in the nature of inter-state or Centre-state relationship and are not essentially part of the state's function. One such non-state function performed by the Governor is Appointment of the Vice – Chancellor. the Governor bestowed with the power of appointment of the Vice-Chancellors of the Universities. The states by various State University Acts confer the Governor the position of the Chancellor of the Universities of the state. Based on the recommendations of the Search Committee, the Vice- Chancellor is appointed by the Governor with the assistance and consultation of the Council of Ministers. However, The Governor's power, as a Chancellor, is a statutory power, and not constitutional power, as he confers it from the Statute passed by the Legislature of the State.

According to the State University Acts, the VC can be removed by the Chancellor. However, the actions of the Governor as a Chancellor are not immune from prosecution under Art. 361 and he doesn't enjoy the immunity possessed by him in the capacity of the Governor.

Governor is vested with the task of appointing the VC and the same is to be done with the consultation of the State Government. However, the recommendations of the Government are not binding on him and he can exercise his individual judgement while making appointment. In the past, Governor has stood differently from the advice of the ministers, in making the appointment, and this has resulted in a lot of controversy. To recall this, there have been numerous instances:

In 1971, the appointment of C.N. Nanda as the VC of State Agriculture University by the Chancellor of Universities in Orissa, Mr. S.S. Ansari without consulting the Government of Orissa resulted in a controversy In 1981 also, A.V. Verghese appointed as the VC of Kerala University, by the Chancellor, Mrs. Jyoti Venkatachallam, without taking the advice of the Education Minister. In October 1977, the Chancellor of Universities in Haryana, appointed the Vice-Chancellor of MDU, Rohtak in confutation with the Government. In 1984, the Chancellor of Universities in Andhra Pradesh appointed Sh. G.N. Reddy as the VC of Venkateswara University, Tirupati disregarding the names recommended by the

Government. In 2010, a list containing names was submitted by the Search Committee to the Chancellor of the University of State was rejected and not considered for the appointment.

Precisely put forward, it is not a Governor's obligations to accept the recommendation of the state government in making appointment and the governor is reasonably free to exercise his discretion in the best interest of the education paradigm of the State.

b. appointment of other ministers

Article 164 (1) of the constitution provided that the ministers should be appointed by the Governor upon the advice of the Chief Minister. But, in reality, the Governor has no role in the appointment or selection process of other ministers.

He cannot exercise his discretionary or other powers and select candidates to be appointed as the cabinet and council members. The authority and choice lie with the Chief Minister or rather with the political party. He may, however, influence the chief minister that to only if the latter is weak. This is done because of two reasons-

- Executive in a democracy are not allowed to be part of electoral politics.
- Executive poking its nose can be detrimental the concept of collective responsibility.

c. Dismissal of the Chief Minister and the Council of Ministers

Article 164(1) postulates that the Ministers hold office during the pleasure of the Governor, the withdrawal of the pleasure by the Governor is a matter entirely in the discretion of the Governor.

Governor making a non-controversial use of can dismiss the ministry under two circumstances

- When no confidence motion against the chief minister has passed.
- When the ministry demonstrably has lost the support of the majority in the Assembly and is dismissed, but 8 refuses to vacate the office and respect the verdict.

The dismissal under the above-mentioned head is necessary as it promote constitutionalism and the Governor here does not exercise his judgement of discretion but rather seen implementing the verdict of the house. However, this situation is really witnessed as the ministry prefers to resign accept the case when they are defeated in the house on a snap vote.

The Calcutta High Court in *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*[132], has ruled that "if the Council of Ministers refuses to vacate the office of Ministers, even after a vote of no confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers holds office".

But when the Council of Ministers enjoy the majority support however infringes the provision of the constitution or make mockery of parliamentary democracy then also the Governor cannot exercise his discretion at first and dissolve the Assembly. He can recommend for president's rule to resort to other constitutional remedies before using his discretionary power.

The most dramatic exhibit of the use of discretionary power by the Governor, to dismiss the ministry, has been witnessed in the case of West Bengal. A conglomeration of 14 parties was formed under the banner of union front, the sole intention was to keep the INC out of power. in 1967 under the leadership of Ajoy Mukherjee the party took the office. Within 8 months post its formation, the members defected from the party and established a new party under the leadership of P. C Ghosh. The newly formed party informed the Governor about them withdrawing the support and doubts regarding the majority of the United front ministry started to appear. The Governor ask the CM only session, but the ministry delayed the section another six weeks. In response to this the Governor dismissed the ministry and appointed Ghosh as the new chief minister. The Governor based his action on the Ministry losing majority support in the Assembly.

Interesting, when the Governor called the newly formed ministry to test majority the speaker of the house adjourned the meeting. Consequently, leading to enforcement of

[132] AIR 1969 Cal. 198.

president rule. Interesting when the Governor called the newly formed ministry to test majority the speaker of the house adjourned the meeting. Consequently leading to enforcement of president rule. The actions of the Governor created hue and cry in the country. Discretionary actions were criticized by the central government.

However, the Calcutta High Court on February 6th ,1968 dismissed the against the new CM on the ground that under Art. 164(1), the Ministers hold office during Governor's pleasure and no restriction or condition has been imposed upon the exercise of the Governor's pleasure. The court in *Mahabir Prasad Sharma v. P.C. Ghosh*[133] also observed that Governor has "an absolute, exclusive, unrestricted and unquestionable discretionary power to dismiss a minister and appoint a new Council of Ministers". The Court asserted that the "withdrawal of the pleasure by the Governor is a matter entirely in the discretion of the Governor" and that "the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this (writ) proceeding". 82

The High Court clarified that the provision in Art. 164(2) that "the Ministers shall be collectively responsible to the Legislature does not fetter the Governor's pleasure during which the Ministers hold office. It only means that the Council of Ministers is answerable to the Assembly and a majority in the Assembly can at any time express its want of confidence in the Council of Ministers. But this is as far as the Assembly can go, it has no power to remove or dismiss a Ministry. If a Ministry does not vacate office, after the passage of a vote of no-confidence against it by the Assembly, it is then for the Governor to withdraw his pleasure during which the Ministry holds office and the discretion of the Governor is absolute and unrestricted".

Gauhati HC *Jogendra Nath Hazarika v. State of Assam*,[134]said that under Art. 164(1), Ministers hold office during Governor's pleasure. "The exercise of the pleasure has not been fettered by any condition or construction or restriction. The Governor as the appointing authority can withdraw his pleasure and dismiss a Chief Minister. The power to appoint or dismiss the Chief Minister or the Ministry are exclusive pleasure-cum-discretion of the Governor. The Constitution lays down no procedure or imposes no fetter

[133] AIR 1969 Cal. 198
[134] AIR 1982 Gau 25

as regards the dismissal of a Chief Minister by the Governor whose right to withdraw his pleasure, during which the Ministers hold office, is absolute, unrestricted and unfettered". "Withdrawal of pleasure is entirely in the discretion of the Governor and the Governor alone."

The legalistic position was confirmed by the Patna High Court in *Karpoori Thakur v. Abdul Ghafoor*[135]. The Bombay HC has also rejected the action of CM challenging the Governor's order through a writ petition alleging mala fides on his part in *Pratapsingh Raojirao Rane v. Governor of Goa* .[136]

The Governors' Committee has asserted that "where the Governor is satisfied, by whatever process or means, that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly prove his majority within the shortest possible time. If the Chief Minister shirks and this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying the confidence of the Legislature."[137]

With the passage of time it was realised that this approach is full of pitfalls and is hazardous. Sometimes the actions of the Governor were politically motivated while the other time they proved to be erroneous and the Governor was left with no other option but to resign. Like in the case of West Bengal when fresh elections were held, the U.F. won a majority and again formed the Ministry and this led to the Governor's resignation from office.

Another historical event to place in the year 1998. Uttar Pradesh governor dismissed the democratically elected government of Mr. Kalyan Singh on the ground that it the ministry has lost the support. A no confidence vote was not passed on the floor nor was the

[135] AIR 1975 Pat 1.
[136] AIR 1999 Bom 53
[137] SARKARIA COMMISSION REPORT. 45 (1983) http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/(Aug 16,2020)

government advised to seek vote and a new government headed by Jagdambika Pal was established. This action of governor was heavily criticised.

The Allahabad high Court following the principle laid down in S. R. Bommai case overturned the action of the Governor and we installed Kalyan Singh government.

thus, the entire position can be summarised as the discretionary power of the Governor can only be exercise when the party loses its majority and the loss has to be ascertained only on the floor of the house and not in the Gardens of the Raj Bhavan.The Sarkaria Commission recommended the same that the Governor should not dismiss the ministry until it loses the majority in the House. The Governor should advise the Chief Minister to summon the Assembly as early as possible.

D. Dissolution of the House

Another bone of contention regarding the use of individual discretion has been in the arena of dissolving the House. With the passage of time, some amount of discretion has been conceded in this area. Before taking decision on the dissolution of assembly the Governor must consider all the circumstances into totality. After inspecting the entire situation, the governor, depending upon the position of ministry in the house, can either accept the advice or can act differently. In other words, the decision of governor is dependent upon the position of ministry. If the ministry enjoys majority support in house and then tender the Governor the advice for dissolution then, in that case, Governor is bound by the advice. But on the other hand, if the Ministry has lost the majority support and, in his view, an alternative stable government can be formed then he may refuse to accept the advice.[138]

However, in the matters of dissolution the exercise of discretion can be reduced if the suggestions of The Governors Committee (1971) are incorporated in the working of the system.[139] According to the report, a convention should be adopted granting dissolution to a defeated CM if he enjoyed majority, earlier. There is however great reluctance in the public to hold frequent elections as holding of an election in India is a very costly

[138] GOVERNOR'S COMMISSION REPORT 60.
[139] ADMINISTRATIVE COMMITTEE REPORT, REPORT ON CENTRE-STATE RELATIONSHIP, 30 (1969).

proposition. Therefore, dissolution of the Assembly ought to be resorted to only as a last resort. This enhances the discretion of the Governor instead of reducing it.

E. Prorogation of house

The Governor is an integral part of state legislature and thus, exercises power to prorogue the house, by virtue of his position. The term prorogation is different from adjournment and dissolution in the sense that it terminates or ends the session of the assembly; unlike adjournment where the normal business of the house is interrupted in the course of same session. The general rule is that before prorogation the Governor must consult the CM and his Council. But this rule is subjected to the exception that, if the chief minister advices prorogation to save his government from defeat or to avoid the motion of no confidence then, in that case, governor can exercise discretion and refuse prorogation.

Thus, apart from these above-mentioned arenas, the Governor has power to send report under Art, 356 to the president or can reserve bills for his assent or can summon the houses. But the most controversial area of with reference to exercise of discretion is the appointment of chief minister in a state. Calling of candidates, imposing condition to prove majority are some aspects which have ignited a lot of arguments and discourse amongst the intellectual's and will be considered deeply in the next chapter.

CHAPTER 6

EXERCISE OF DISCRETION IN APPOINTMENT OF CHIEF MINISTER

The governor (as mentioned earlier) has two types of discretionary power; circumstantial and specific. The appointments of legislative head of the state is an inherent duty casted upon the Governor. The Governor is designated as the nominal head of the state and is charged with the duty of ensuring welfare of the subjects, which can only be ascertained by appointing a stable government. Therefore, it becomes an obligation on part of the Governor to provide the state assembly with a person who is best suited for the post and can ensure stability, by commanding a majority in the house.

The appointment of the head of the Legislature is not an easy task and requires affirmative action's according to the changing circumstances. These actions demand diligence, prudence and a vivid understanding of the intricacies of the system. Thus, the governor is vested with the discretionary powers so as to ensure efficiency in the decision-making process.

6.1. MEANING AND SCOPE OF DISCRETION

The term discretion finds no mention in the grundnorm and in its most literal sense denotes the 'freedom to act according to one's own mind and judgement'. The Oxford Dictionary describes discretion as, the freedom to decide on a course of action.[140]

The terminology is *prima facie* used in article 163[141] to refer to the decision-making power of the Governor. The term 'in his discretion' implies that the Governor need not seek

[140] Oxford Printing Press, 11th edition, 2006, p. 410

[141] INDIAN CONST. art. 166. 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

ministerial advice while exercising certain demarcated functions. In other words, the scope of his discretionary power lies outside the area of ministerial responsibilities.

The term 'by or under the Constitution' used in Art. 164 also possesses wide connotation and banishes the requirement of expressly mentioning the areas in which the discretionary power is to be exercised. It is submitted that the 'tenor of the provision' will highlight the functions in which the discretion can be exercised. However, in case of doubt, as to whether certain matter lies within the ambit of discretionary power of governor or not; the decision of the Governor (after exercising his discretion) shall be considered final. The validity of his discretionary action cannot be discussed in any Court of law on the ground that he ought or ought not to have acted in his discretion.

The Governors' Committee outlines the position and declares: "even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently".[142]

6.2. OFFICE OF CHIEF MINISTER: QUALIFICATIONS AND APPOINTMENT

In each State there shall be a Council of Ministers, headed by a Chief Minister. The term 'shall' denotes that the presence of Council of Ministers is mandatory in a state, and the Governor cannot dispense with this body at any time. The apex court has also reiterated this proposition and clarified that the Council does not immediately dissolve the dissolution of the Legislature, rather continues to hold office post dissolution of house. *Inter alia*, a mandatory requisition which has to be observed in the parliamentary system is that the 'minister ought to be a member the House'. Strict compliance of this rule is emphasised to ensure observation of the 'principle of accountability'. However, a candidate who is not a member of the house can also be appointed as minister on the condition of him becoming a member within the next six months.[143] Such member is allowed to attend the house meeting but does not possess the right to vote.[144] Interestingly, the above-mentioned rule

[142] M.P JAIN, *supra* note 16, 492
[143] INDIAN CONST. art. 164 (4)
[144] INDIAN CONST. art. 177

also applies on the post of CM and a non-member is thus, made eligible to hold the post of Chief Minister, but again he needs to become a member of any house within the next six months. There have been cases where a non-member established itself at the prestigious office of the state's chief minister. For instance, Mr. Kamraj Nadar was made the Chief Minister of Tamil Nadu in 1954 despite being a nonmember. Indian judiciary has also have verified as constitutional and rejected the petition challenging his appointment held that a non-member, in view of Art. 164(4).[145]

Few judicial pronouncements on the scope of Art. 164(4) may be taken note of here; A question of significance came before the SC[146] when Mr. Singh when awarded a seat in the ministry in the state of Punjab, lacked the membership of the state legislature. He did not obtain the membership within the next six months and resultantly, resigned from the office. The assembly choose a new chief minister for themselves (during the term of the same legislature). The new CM again awarded a ministry to Mr. Singh.

Challenging his appointment, a writ of *quo warranto* was filed leading to quashing of his appointment. The apex court in the case observed that "The privilege of continuing as a Minister for six months without being an elected member is only a one time slot for the individual concerned during the term of the concerned Legislative Assembly. It is not permissible for different Chief Ministers, to appoint the same individual as a Minister, without him getting elected, during the term of the same Assembly. The change of a Chief Minister, during the term of the same Assembly would, therefore, be of no consequence so far as the individual concerned."[147]

The Supreme Court, in relation to Art. 164(4), made an historic pronouncement in the case involving appointment of Miss. Jayalalitha as the CM of state of Tamil Nadu[148]

Facts and issue- The nomination paper for assembly election of miss. Jayalalitha was rejected on the ground of her convicted under the I.P.C. and the Prevention of Corruption Act. She was also sentenced imprisonment for three years and had made an appeal in the

[145] Harsharan Verma v. Tribhuvan Narain Singh AIR 1971 SC 1331
[146] S.R. Chaudhari v. State of Punjab AIR 2001 SC 2707
[147] Harsharan Verma v. Tribhuvan Narain Singh AIR 1971 SC at 2718.
[148] B.R. Kapur v. State of Tamil Nadu (2001) 7 SCC 231.

HC against her conviction. The HC, pending the decision, suspended the sentence and not conviction thereby disqualifying her from contesting election. Her party [AIDMK]emerged victorious in the election and elected her as their leader.

The Governor of the state also appointed her as the CM under Art. 164(4), as she was not a member of the Legislature at this time. Her appointment was thus, challenged in the court of law. The question the came before the court was; whether a disqualified person (to be member of the Legislature) could hold the office of Minister or the CM under Art. 164(4).

Verdict – the SC answered the question in negative and declared her appointment as null and void. The Court argued that, "it is implicit in Art. 164 that a non-member of the Legislature must seek election to the Legislature and secure a seat therein, within six months of his appointment. If he fails to do so, he ceases to be a Minister". The court further considered that, "if the Governor appoints a disqualified person to the office, the discretion of the Governor may not be challengeable because of Art. 361, but that does not confer any immunity on the appointee himself. The qualification of the appointee to hold the office can be challenged in proceedings for *quo warranto*. If the appointment is contrary to any constitutional provision, it can be quashed by the Court."

The Court patently negated her argument that she had the mandate of people to become the CM, as is evident from her victory in the election. The Court's denying this logic argues that "The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution." Ergo, to be appointed as the chief minister one has to fulfill the qualifications prescribes in the constitution on this behalf.

6.3. EXERCISE OF GOVERNOR'S DISCRETION POWER

Constitution of India is a comprehensive document it is written at length so that there is no grey area or discrepancy. However there still exist areas which are not adequately represented and are governed by constitutional convention. One such arena that lacks adequate representation is the 'Appointment of Chief Minister'.

According to Art. 164(1) the CM of the state is formally appointed by the Governor. The appointment is generally made, (a) after the assembly elections, (b) when the CM holding

the office dies, (c) resigns after a vote of no confidence, (d) on political or personal grounds and (e) lastly in cases when the ministry is dismissed due to any reason.

The Constitution mentions is completely silent as to the person who should be appointed as such. In such cases where the constitution observes silence pertinent matters 'constitutional conventions' come into play. Constitutional conventions in its liberal sense means, practices that are adopted by nations under unique circumstances. They are used as guiding principles and even carries precedential value. The convention that is being followed for this purpose is that the head of the party securing majority in the State would be invited by the Governor to form the Government.

This practice is followed in Britain at innumerable instances. The King or the Queen invites the majority leader who has a clear majority in the House of Commons to become Prime Minister.

But there exist cases where parties are unable to secure a clear majority, or the CM dies in office or resigns etc. The situation in these cases is not aptly described thereby making the appointment of CM problematic. The constitution, as well as the convention, maintains silent on the point. Britain (being a bipolar system) has never faced any such situation. In India such situation arose later in time when the congress, despite being largest party, was not able to command the majority at province level and the governor in these circumstances was left to exercises his personal judgment while selecting a candidate. Similarly, in cases when political party lacks a recognized face or two parties are not able to command support of the house, the governor was then obliged to explore different possibility in order to find a person who could command the support of the house.

6.3.1. Exercise of Governor's Discretion

In order to find a suitable solution, the then Home Minister Y.V. Chavan in ,1967 expressed his (below mentioned) view to the Justices and eminent constitutional experts; Justice Mahajan. J, Sarkar. J, Gajendragadkar J., M.C. Setalvad and H. M. Seervai seeking their legal opinion. In his letter he mentions his varied principles that could be adopted by the respective Governor's before making appointment of the CM.[149]

[149] A.G. Noorani, CONSTITUTION QUESTIONS IN INDIA, (ed.3rd 2005) https://www.google.co.in/books/edition/Constitutional_Questions_and_Citizens_Ri/BIAyDwAAQBAJ?hl=en&gbpv=0a9(July 23, 2020)

- the leader of the largest part should be called to lay his claim of forming the government irrespective of whether or not such party commands a stable majority.
- if the ruling party, upon a vote of confidence, fails to secure a sound majority. Then upon election, the leader of the that party should not be invited to lay his claim.
- the Governor should make endeavor to appoint a person who in his opinion, can most likely command majority of members.[150]

The legal stalwarts were *ad idem* regarding the third proposition and emphasised that the governor should be given the task to exercise his power and make prudent choice.

The Sarkaria Commission dissented this view in its report and suggested otherwise. This proposition was also referred in the report of the "Committee is of Governors"(1971). The committee rejected the idea of 'arithmetic test' or calling of candidate according to strength.[151]

Prominent political personalities like S.A. Smith after observing the situation of India emphases that a leader with reasonable prospect of maintaining itself in the office should be chosen as the leader of the house. Wade and Bradley also supported the idea and opted for "the person who is in the best position to receive the support of the majority"[152]. Hood Phillips also speaks for appointment of 'a ministry that can hold majority in the house'.

The above authorities suggested a common answer to the problem and exposes the absurdity in the decision-making process of the governor.

The governor, in practice, uses his discretion by choosing a metric which appears sound to him. A general metric that is being followed by the governors while appointing the chief minister in case of no clear majority is the metric of 'objective test'. The Governor is often observed summoning the party in order of their numeric strength. Thus, considering the position today it can be asserted that in case of no majority prefers to call the party in order of numeric strength, irrespective of their ability to command majority. Also, an example of this can be that in case of Bihar, where the Governor called Sh. Nitish Kumar to lay his claim despite having information that he was in no position to command majority. He was

[150] Noorani. *supra* note. 148, 70-71
[151] *I*d., 16
[152] Ashutosh Salil, *supra* note 14, 5

appointed but eventually had to resign. Such decision from the Governor goes against the spirit of democracy and sully the image of the office.

As against the practice mentioned above, the governor is usually seen appointing the chief minister after imposes the condition to seek a vote of confidence within a stipulated period. Neither there exists a specific convention nor any provision in the Constitution empowering the Governor to compel the CM to prove majority on the floor of the House. Thus, a pertinent issue regarding the justiciability of discretion of Governor on the CM, on imposition of such condition, was raised?

The Patna HC answering the question ruled that the Governor possesses the authority to exercise his discretion and impose such condition. The court further said that "The Constitution specifically provides neither for a vote of confidence nor for a vote of no-confidence for or against the government in the House. But it would be preposterous to suggest that there can be no such vote because the Constitution is silent on the point. The entire constitutional scheme would collapse if Art. 164 is interpreted in such a manner" [153]

The underlying idea behind this is, to ensure that the leader of the house commands confidence of the majority in the House. The principle of 'collective responsibility' comes into play and envisages that the Council of Ministers with CM as their head commands the majority support in the House. Thus, in order to make sure that the Chief Minister commands the support of the majority in the House, the Governor can ask him to prove his majority by seeking a vote of confidence and if he does this by using his discretionary power, then the use of such power is justified.

Thus, this power is something which is to be used by him in his sole discretion. This position is asserted and reasserted by courts in plethora of case laws; *S. Dharmalingam* v. *His Excellency Governor of Tamil Nadu*[154] "With regard to the action pertaining to his sole discretion, the immunity of the Governor is absolute and beyond even the writ jurisdiction of the High Court".

[153] Jayakar Motilal CR Dass v. Union of India AIR 1999 Pat. 221
[154] AIR 1989 Mad 48.

The Gauhati HC has also ruled that the Governor is the "sole and exclusive authority" to appoint CM. Governor as the Head of the State, "is the sole judge to ascertain as to who commanded the support of the majority in the Assembly"[155]

6.4. INSTANCES OF ABUSE OF DISCRETIONARY AUTHORITY

1952 Madras: This was the first instance post-independence when the actions of governor were scrutinized for partisanship. The hon'ble Governor of Tamil Nadu, Sri Prakasa called Mr. C. Rajgopalachari from Congress party to form government. The invitee had not participated in the election process and was not a member of the assembly. His actions attracted great criticism and were termed injudicious.

1959 Kerala: Kerala undertook elections and CPI emerged victorious under the leadership of E M S Namboodiripad and a government was formed. The government introduces two bills in the house and on education and zamindari which caused agitation in the state and it was taken to be a reasonable ground for dismissal of a democratically elected government, by the then governor Burgula Ramakrishna Rao.

1967 Bengal: (As elaborated in the previous chapter) The United Front government led by Ajoy Mukherjee was dismissed and Congress government headed by P C Ghosh was appointed.

1982 Haryana: Ganapatrao Devji Tapase, Governor of Haryana overlooked Devi Lal the prospective CM candidate from BJP and Lok Dal's coalition and invited Bhajan Lal, congress candidate, to prove majority. This reckless behaviour earned him lot of condemnation.

1984 Andhra Pradesh: That year for the first time in Andhra non-congress government was formed. The CM underwent a heart transplant, in the meantime a former congressman

[155] Jogendra Nath v. State of Assam, AIR 1982 Gau. 25

Nadendla Bhaskara Rao split the party and proposed a claim for CM which was seconded by the governor.

1988 Karnataka: S.R. Bommai v. UOI[156]

Till 1970- 80 the system of government worked flawlessly because of existence of single party at both, centre at province level. But post that period, with the addition of regionalism complications in the system were witnessed. Instances of abuse of dominance and proclamation of president's rule (without sound bases) emerged. One such major instance was the- S.R. Bommai case. A 9-judge bench was constituted to decide the issue.

In 1985, the Janata Party government under the command of Sh. Ramakrishna Hegde emerged victorious in the Karnataka assemble elections. Post that in 1988, Sh. S.R. Bommai came in power replacing the chief minister and a coalition government (in the name of Janta Dal) was formed. Subsequently, in the same year members of Janta Dal, under the leadership of K.R. Molakery, withdrawing their support and defected from the party. Shadows of doubts began to appear regarded the majority status of the ruling party, countering which the CM proposed for a 'vote of confidence' to test the strength of the government. The governor of the state simply resorted to the president rule without calling the assembly or attempting to explore the alternative possibility and consequently in 1989, the state government was dismissed, and President's Rule was imposed without giving Bommai a chance to prove his majority. The issue concerning governor's action was raised in a writ petition before the High Court of Karnataka by Bommai.The court dismissed the writ petition on the ground that claiming that the actions of the governor could not be held to be irrelevant. Also, his bonafide intention could not be questioned in any court of law as it is assumed that his satisfaction was based on reasonable assessment of all facts. Regarding the recourse to the floor test, court observed that "conducting a floor test is neither compulsory nor obligatory". It cannot be held as a prerequisite before sending of the report to the President.

This issue was challenged before the apex court along with other similar and contemporaneous issues of imposition of President's rule in state of Meghalaya and

[156]AIR 1994 SC 1918

Nagaland and in the states of MP, Rajasthan and Himachal on different grounds namely; unconstitutional governance and demolition of Babri structure.

The court negated the decision of the HC and emphasised on checking and curbing the authority of centre in dismissal of a democratically established government at state. It was asserted that 'floor test' should be the only criteria to determine if a party enjoys support in a particular state or not and the president to dissolve only extends to the ground of "complete breakdown of constitutional machinery". Dissolution of house on governor's subjective assessment that the ministry is not longer to command the confidence without taking suitable measures to assure the same does not tantamount to constitute breakdown of constitutional machinery and does not attract such harsh actions. The court pronounced that "the strength of the Ministry can only be ascertained in the House and is not a matter of private opinion of the Governor or the President or any individual. When the demonstration is possible, it is to be taken into consideration instead of depending upon the subjective satisfaction of the Governor or the President."

2005 Bihar: Here the governor acted *prima facie* acted arbitrarily and did his best by not letting NDA to formulate and establish majority despite of them fulfilling the criteria prescribed to form the government.

2017 Goa: After the assembly election no, single party got absolute majority and government could not be formed. The largest party however was congress party. The governor Mridula Sinha ignored them and invited BJP to test majority.

2017 Manipur: The governor again exercised its discretion by not calling the majority party that emerged after the election and invited the other party to form government, ironically this other party was the same party ruling the centre.

2017 Bihar: JD(U) government shook hands with former enemy BJP and broke its alliance with the RJD and Congress. Keshari Nath Tripathi, the governor (appointed by BJP) called Nitish Kumar to test majority as against the largest party RJD

Maharashtra election case, 2019- The results for the Maharashtra Assembly Elections, 2019 ended with a stalemate with no party gaining absolute majority to form a government. What ensued later was regarded by some as a big blow to federalism in India. It was the

role played by the Governor which came in for sharp criticism. Post decision, the pre poll alliance of BJP and Shiv Sena managed to secure a stable majority (the former party with 105 and latter with 56 seats, forming a total of 161 seats out of 288). This pre-poll alliance, however, did not last long and was eventually terminated. A rat race started between the parties to associate themselves in new political alliance. In between this process the role played by the Governor, Sh. Bhagat Singh Koshyari, in not giving reasonable time to the different parties to prove their majority and the subsequent imposition of President's Rule in the State and the subsequent sudden revocation of the same at dawn 5:47 am came under sharp criticism as being violative of the established Constitutional Provisions as well as the well settled decisions of the Supreme Court.

After the revocation of the President's Rule, the Governor allegedly immediately sworn in the erstwhile Chief Minister as the new Chief Minister (Devendra Fadnavis) allegedly without even reasonably satisfying himself as to whether the Chief Minister had the requisite support or not. The result was that the new Chief Minister resigned just before the floor test was to be conducted based upon the direction of the Supreme Court. This raised concerns as to whether the Governor was right in swearing in the former Chief Minister as the new Chief Minister even in the absence of a majority.

This development brought in light the role of Governor in such circumstances. Issue was the hasty action taken by the Governor in administering the oath which was a shift away from the regular practice adopted for the purpose. This approach was deprecated by the court and floor test at the assembly was adopted, with consensus, as a way out.

6.5.RECOMMENDATION OF COMMISSIONS

The report of Sarkaria, NCRWC and Puncchi commissions in clear and unambiguous terms provides for the following recommendations for appointment of chief minister:

1. Conditions for calling a candidate: The governor is vested with the responsibility to provide the state with a stable government and thus, is bestowed with the task of appointment of legislative head of the state. While making appointment he must respect the election verdict and should summon party by virtue of their numeric strength. He ought not attempt to establish government which subscribe to his

policies but rather should decide judiciously. While deciding as to who should be called and the order thereof, the governor can adopt the following metric;

- Clear Majority- When a single party secures majority in the election then its leader shall be appointed as the CM.
- NO Clear Majority- Where no single party secures a clear majority then the governor should summon the groups/parties, as per the preference indicated below:
    i. A pre-poll alliance
    ii. The single largest party staking claim to form the government with the support of others (including "independent" candidate)
    iii. Post- poll coalitions with all stakeholders of the coalition who desire to form government.
    iv. Post- poll alliance constituting parties (in alliance) to form government while others supporting the government from outside.

2. Another important consideration to be kept in mind by the governor, while undertaking the selection process (as portrayed above), is to select a leader who is most likely to command support of the majority in the house. The subjective judgment exercised by the governor here, will play an important role.
3. After its selection the party (but not majority party) must, within 30 days of taking over, seek a 'vote of confidence' in the house. This practice should be conducted on the floor of the house and not in the gardens of the Raj Bhavan and must be followed in word and spirit.
4. NCRWC further recommended that a pre-poll coalitions were to be treated as 'one political group' (for the purpose of Tenth Schedule of the Constitution of India, law relating to defections) and upon obtaining majority, the leader of such group shall be called to form the ministry.

CHAPTER- 7

CONCLUSION AND SUGGESTIONS

Constitutional head, linchpin in the Centre-State relationship, agent of the centre, spare wheel at state-level, bird in a golden cage and what not. The governor of India has been associated with all these connotations due to the multifarious roles undertaken by him. The position can be said to have experienced a substantial downturn from the highs during the British to lows in independent India. The British created the office with a distinct intent in place. They bestowed the office to establish a bridge between the colony and the crown and at the same time perform administrative, legislative, judicial and supervisory functions. However, with the advent of Independent Union of India and doctrine of separation of power, the office has undergone major shift in the role play and constitutional entrust. The architects of the constitution opted for a heterogeneous polity envisaging distinct features from different nations with a Westminster model and molded the contours to serve the need of the Indian counterpart thereby making it British English transplant with a federalist savor.

The office was created by the Constitution and the lawmakers to enshrine the ideals of federalism with a harmonious centre-state relationship and a watchdog of constitutional fundamentals prevailing over provinces. It was believed that the federal dream with a strong union could only perpetuate under the patronage of a constitutional head upholding the ideals of the constitutional principles within the state machinery. Prior to 1967, the office of the governor remained slumbering and irrelevant from the context of the essence that the position held; given the stronghold that INC had over Indian politics both at centre and state level. However, with the growth of regional political powers, the role of the Governor grew and so did the controversies entailing it. With the growing complexities in the polity of the nation, the limited provisions governing the role and function of the Governor created a void for unfettered power to creep in. Excessive politicization, lack of right will and transparency in the appointment and functioning of the Governor, resulted in conflicts between state legislature and Governor and the office seized to uphold the values of federalism and further inflicted on the dream of centre-state harmony. In order to cater the political interest of its own, the centre ruling party tries to establish a person of

active confidence in the office of Governor specially in opposition party ruled state. The person thus appointed, especially in the absence of any preventive safeguards or deterrence mechanisms against political evil, owes its allegiance to the political party first and the constitution next. The researcher basis the various case findings and past and recent instances has observed that there is grave dearth of effective means for ensuring a fair degree of transparency in the appointment process; and due competency and integrity in the appointed Governor. There is a lack of reasonable actions, directed either by the constitution or by the judiciary to ensure the office of Governor is free of all political affiliations and motivation needed to maintain high levels of integrity and run a balance between the constitutional and political will.

Instances observing Governors holding onto clutches of political ideology or agenda of the political party to which he subscribes/ed have been witnessed more often than not, to quote some, before the general election of 2019, Kalayan Singh, The Governor of Rajasthan viewed that as a worker of the party, he wants the Bhartiya Janata Party (BJP) to win in the Lok Sabha elections. He added that it is vital for society and nation that PM Modi should become the prime minister of India again. Such statements and political endorsement from a person holding a neutral office is detrimental to the sanctity of Governor's office and binds him back to his political affiliation questioning the neutrality and independence of the constitutional post. Innumerable instances of abuse have been witnessed in recent past, to cite a few -

The Maharashtra assembly election 2019 was one such event of controversy on government formation and CM appointment. In absence of any information or public notice, the emergency was revoked at night at the Governor's will and oath was administered to the new CM belonging to centre ruling party early next morning in spite of it not being the single largest party and in absence of any signs of its possible coalition. And all this triggered the very night the single largest party announced its coalition. This later raised political turmoil and ruckus in the state and the matter was challenged in the Supreme Court and the Governor's stance was later reversed by the Court. This case not only highlights grave political bias inducted upon the legislative head of the state but also

displays sheer abuse of discretionary authority over the appointment of chief minister thereby, substantiating back to the hypothesis and proving it .

The office is disregarded further from its competency due to an absence of proper safety nets established to immune the office from strong political vengeance. This further weakens the ability of office to work independently of any political influence. To cite an instance:

In 2004 the UPA government without any sufficient cause replaced, B.P. Singhal, NDA's appointed governor who later file a suit in the court of law. It was held that though this could be done without providing a justification by the president, but this power could not be exercised, unreasonably of capriciously.

Need was thus created for structural reforms in the matters pertaining to Governor's appointment, powers vested & exercised and removal from office. At first, attempts have been made to address the same by adopting conventions to operate in parallel to the constitution in areas pertaining to the rationale course of functioning of the office and laying general guidelines upon Governor's conduct. For instances, matters of significance like effective state administrative decisions should be made in consultation with the Chief of the state and/ or relevant council stakeholders.

The reform committees also realized a greater want for the Governor's subscription to constitutionalism, integrity, soundness and reasonability in decision. This meant a need for establishing commissions to provide recommendations on means to enable and ensure high levels of integrity, impartiality and competence are instilled in the office by means of reformed appointment, governance and removal procedures.

However, in the wake of political reluctance in bringing these recommendations to effect and checks to ensure stricter adherence to these recommendations, the current redresses proved to be insufficient and there is a demand for greater governance through codification of necessary conventions and bringing judicial guidelines to resolve the problem of arbitrary exercise of discretion by the executive.

Edmund Burke one's said that, "*among people generally corrupt, liberty cannot long exist*". Thus, to bring back the sanctity in the working of the system it is necessary that the recommendation of the Commission (Sarkaria and Punchhi) should be followed as

'verbatim' especially with regard to Governor and its discretionary powers . The researcher not only used but meant the term 'verbatim' because it is necessary to heals the spirit of the institution and this could only be done by following the guidelines such as appointment of person of sound character free from political influence and career; that is an independent candidate outside the state politics. Also, the researcher believes that, only formulation and implementation of policy and principles would not suffice until there is a deterrence of being persecuted in case of breach. Therefore, it is suggested that courts should be given a free hand to take cognizance of the matter *suo moto.* They should be given authority to delve and inquire the reason behind actions. All this will ensure transparency, which is the only cure to the problem of corruption. Decisions are taken behind closed doors and it is high time the court should be given a window to peep in.

Lastly, the researcher suggests that government of law and not of man must be formed and good days will definitely follow.

SUGGESTIONS

- A panel of the retied civil servants, military officials and other eminent personalities should be constituted, and the appointment of the Governor should be made from amongst them. There should be strict adherence to the rule that the person named to be appointed as governor is not associated with politics in any manner or form.
- The procedure of the removal of governor should be remodeled. Like other dignitaries namely Judges, Vice President, President, Speaker of Lok Sabha, the removal of the Governors should be made after observing a strict and defined criterion.
- To ensure governor that his office won't be jeopardized by his choices against the centre and to provide him a free and fair working environment, the researcher suggest fixing of tenure of governor should be fixed.
- A uniform criterion and aptly defined should be adopted for appointment of chief minister of state and the same should be documented and Governor should strive to adhere to the same unless the circumstances prove otherwise.

- Although the exercise of discretion is a subjective concept and varies from person to person still, the courts should be given a power to review. Justiciability in governor's actions will act as a deterrent towards politically motivated actions.
- Lastly, reforms suggested by various commissions should be vividly implemented in the system in right manner and form and their stringent fidelity should be ensured.

BIBLIOGRAPHY

Primary Sources

1.Statutes

- Charter Act, 1600
- Charter Act, 1661
- Charter Act, 1694
- The Regulating Act, 1773
- Pitt's India Act, 1784
- Act of 1786, 1786
- The Charter Act, 1793
- The Parliament Act, 1807
- The Charter Act, 1813
- The British Parliament Act, 1853
- The Charter Act, 1858
- The Indian Councils Act, 1861
- The Indian Councils Act, 1871
- The Indian Council Act, 1909
- The Government of India Act, 1919
- The Government of India Act, 1935
- Adoption Order, 1950
- Draft Constitution, 1949
- Constitution of India, 1951

Secondary Sources

1.Books

- DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA, 22nd ed. 2015, Lexis Nexis, Gurgaon.
- M LAXMIKANTH, INDIAN POLITY FOR CIVIL SERVICES EXAMINATIONS, 4th ed. 2016, McGraw Hill Education (India) Private Limited, New Delhi.

- H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 2022 (4th ed.) 2009
- PYLEE, M.V., CONSTITUTIONAL GOVERNMENT IN INDIA, 67 (1965).
- WOODRUFF, PHILIP, THE MEN WHO RULED INDIA, Vol. I 146 (1954).
- A.C. BANERJEE, INDIAN CONSTITUTIONAL DOCUMENTS 16 (1945).
- MAHENDRA PAL SINGH (ED.), V.N. SHUKLA'S CONSTITUTIONAL OF INDIA, 12th ed., Eastern Book Company, Lucknow.
- MP JAIN, INDIAN CONSTITUTIONAL LAW, 7TH ED. 2014, LEXIS NEXIS, GURGAON.
- R.K. CHAUBEY, FEDERALISM, AUTONOMY AND CENTRE-STATE RELATIONS, 1ST ED. 2007, SATYAM BOOKS, ANSARI ROAD, DARYA GANJ, NEW DELHI.
- PARMATMA SARAN, THE PROVINCIAL GOVERNMENTS OF THE MUGHALS 343, 1990
- DR. J.N. PANDEY, CONSTITUTION LAW OF INDIA 18 (52ND ED. 2015).

2.Web sources

- A.V. Dicey, "Introduction To The Study Of The Law Of The Constitution", http://files.libertyfund.org/files/1714/0125_Bk.pdf
- Britannica. Federalism. https://www.britannica.com/topic/federalism (last visited 21.17.2020)
- Britannica, Federalism, https://www.britannica.com/topic/Gupta-dynasty (last visited 21.17.2020)
- Britannica, Imperial Guptas, https://www.britannica.com/topic/Gupta-dynasty (last visited 21.17.2020).
- Jagranjosh, https://www.jagranjosh.com/general-knowledge/charter-act-of-1853-main-features-1443010549-1
- Byjus, https://byjus.com/free-ias-prep/ncert-notes-morley-minto-reforms/ (last visited on 21.07.2020)

3.Articles and Journals

- Irfan Nabi, "*Cooperative Federalism: A Comparative Study*", p. 4, http://www.academia.edu/9267593/cooperative_Federalism_A_comparative_Study
- Editorial, "*Governors, Lieutenant Governors have important role to play in constitutional system of country: President Ram Nath Kovind*" The Hindu (Dec 23,2019). https://www.thehindu.com/news/national/governors-lt-guvs-have-

important-role-to-play-in-constitutional-system-of-country-president/article30059450.ece

- Yogesh Pratap Singh, "*Governance begins with Governor"*, THE STATESMAN (KOLKATA) AUGUST 31, 2016. https://www.thestatesman.com/supplements/governance-begins-with-governors-162756.html
- Rajni Goyal, *The Governor: Constitutional Position and Political Reality*, 53 THE INDIAN J. OF POL. SCIENCE (October-December 1992). https://www.jstor.org/stable/41855632?Search=yes&resultItemClick=true&searchText=rajni+goyal&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Drajni%2Bgoyal%26acc%3Don%26wc%3Don%26fc%3Doff(July 30, 2020)
- Sibranjan Chatterjee, *Role of Governor in Indian Politics Since 1967*, 32 THE INDIAN J. OF POL. SCIENCE (October- December 1971). https://www.jstor.org/stable/41854471?Search=yes&resultItemClick=true&searchText=Role+of+Governor+in+Indian+Politics&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DRole%2Bof%default%3A1d9c0e47b5cb5a224be7ab47215d532f&seq=1#metadata_info_tab_contents
- Dilip Singh, *The Role of The Governor Under the Constitution and the Working of Coalition Governments*, 29 THE INDIAN J. OF POL. SCIENCE (January-March 1968) https://www.jstor.org/stable/41854247?Search=yes&resultItemClick=true&searchText=The+Role+of+The+Governor+Under+the+Constitution+and+the+Working&searchUri=%2Faction%2FdoBasicSearch%
- Ashutosh Salil and Tanmay Amar, *Constitutional convention: The Unwritten Maxims of the Constitution,* PL WebJour 3 (2005).). https://www.ebc-india.com/lawyer/articles/2005_plw_3.htm
- Nirmalendu Bikash Rakshit , "*Governor: Serving at the President's pleasure"*, THE STATESMAN (Kolkata) May 30, 2019**.** https://www.thestatesman.com/supplements/governance-begins-with-governors-162756.html
- Editorial, "*Explained: Amid Maharashtra drama, recalling a landmark SC judgment — S R Bommai*", THE INDIAN EXPRESS (Nov 27,2019) https://indianexpress.com/article/explained/s-r-bommai-amid-maharashtra-drama-recalling-a-landmark-sc-judgment-6138103/
- Nirmalendu Bikash Rakshit, "*Role of Raj Bhavan"*, THE STATESMAN (Delhi) March 22.2017. https://www.thestatesman.com/supplements/role-of-raj-bhavan-1490216783.html