HEADS HELD HIGH

SALVAGING STATE GOVERNORS FOR 21ST CENTURY INDIA

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CHAPTER 1

INTRODUCTION

To the casual follower of Indian political news, the State Governor cuts a curious figure. For the most part, the Governor is confined to the side-lines and is not an active part of the news cycle in the way that politicians are; and yet, at various critical points, one finds these otherwise muted figures at the forefront of political chaos. We see this time and again, for example when a State electorate returns a fractured mandate and it is up to the Governor to pick a political party to form the government. In these situations, it may seem like whatever the Governor does, she sharply divides opinions among experts and laypersons alike. Controversies along these lines seem to occur every year. For instance, in the span of three years, there was controversy in Maharashtra in 2019, Karnataka in 2018, and Goa in 2017 (among others). This is not a recent phenomenon either, with the early 1950s being no stranger to controversies involving the Governor. There is also the spectre of President's rule, triggered on the basis of a report made by the Governor. Apart from this report, the Governor's actions during a period of President's rule can also cause controversy, such as in the case of Jammu and Kashmir regarding the abrogation of Article 370 in August 2019. All in all, it is not a stretch to say that persons identifying across the spectrum of political parties have had cause to be displeased by one Governor or the other, over the years. The layperson must surely wonder what is going on, and will have good reason to be concerned.

Every time something like this happens, opinion pieces and television debates abound. News coverage, by definition, has its limitations. Beyond addressing the exigencies of the immediate event, it does not provide a holistic account of what the Governor is supposed to be, the historical background of this office (beyond calling it a colonial vestige), and how should she be expected to act in moments of political crises and otherwise, etc. Without such an account, however, a central feature of the democratic system of State governments will remain shrouded in mystery, even as it is continually catapulted into the limelight. Despite substantial and often creative interventions by the courts, there is still a lack of clarity regarding these matters.

This state of affairs raises some deeper questions as well. How did the Governor come to occupy the role of an umpire of democracy? A largely ceremonial head of state can metamorphose, overnight, into a political kingmaker when placed at the crossroads of multiple political parties at different levels of government. This is a rather peculiar feature of our system of parliamentary, multi-level democracy. Interestingly, even though the system of government at the State level almost exactly mirrors its counterpart at the Centre, there are significant differences between the offices of the Governor and the President. One of these is the fact that the Governor can and is expected to act in her 'discretion' in certain situations. This freedom to independently decide what should be done and act accordingly is in contrast to the norm which entails acting in accordance with the aid and advice of an elected

government. As subsequent chapters in this book will amply illustrate, whenever the Governor acts in her discretion, she is almost always dragged into controversy.

Often, it is not the exercise of discretion itself that is problematic, but the identity of the actors involved. What is the background of the Governor in question? Which party is in power at the Centre? Which party stands to benefit by the Governor's actions in the State? A classic case that inevitably attracts a charge of bias involves a Governor who is a former member of the political party that is in power at the Centre, acting in a manner that benefits that party in the State, at the expense of an opposition party or parties. Governors are appointed by the Centre, and it can remove them from office as well. Therefore, several actions of the Governor, irrespective of her intentions, are understandably seen as tainted by partisan considerations. Governors have to take political decisions, and yet they are expected to be non-partisan, and to be seen as such. This is a tightrope to walk in any scenario, but especially so in a multi-party system which frequently has coalition governments and different political parties in power at different levels of government.

The presence of an unelected, centrally nominated Governor holding the position of head of the State Executive intuitively feels like a paternalistic restriction upon democracy in the States. It is uncomfortably reminiscent of colonial attitudes as well. During that period, reforms that appeared to further democracy in India were strategically counterbalanced by empowering the office of the Governor, which was designed to thwart elected governments and safeguard British interests. With this problematic legacy, coupled with routine allegations of interfering with State politics in a partisan manner, it is no wonder that there have been calls to abolish this office altogether. Burdened by the Constitution with a number of narrow but critical roles, the Governor's office is variously seen as a colonial relic, a sinecure, a meddlesome agent, a linchpin, a guide, a sage, a saboteur, a fire extinguisher, among many others. Considerable difficulties arise from the mere fact that the functions of the Governor are little understood and are certainly not well-defined in the context of the British cabinet system of government in which the idea of such functionaries first took root.

Addressing all these aspects and much more, this book will embark upon a journey into the earliest colonial origins of the Governor, its evolution over time during that period, the considerations that went into its design and incorporation into the Constitution, and the manner in which it has operated in the years that have followed. These narratives are a result of extensive research into primary and secondary documents including colonial legislations, historical accounts, constituent assembly debates, constitutional provisions, case laws, commission reports, legal and political commentaries, biographies, and interviews with former Governors. On the basis of this research, we address the different arguments that have been made for reforming the Governor's office, and carefully consider how such reform should be undertaken. A lot of the literature on the subject matter of this study offer various solutions, often reiterated across decades and presented in varying permutations and

combinations. Many views of the institution have been piecemeal, with a broad swathe of the solutions attempting to circumscribe the Governor's discretionary powers.

As opposed to this, we argue that if the right persons are appointed as Governors through the right processes, and if they are provided with a reasonable security of tenure, then they can and should be expected to act in a desirable manner. Not only this, their actions will likely be seen in a more positive light as well, which is equally important. We believe that this is a better approach than doing away with the office or creating new rules to bind the various actions of Governors. Proposals to reform this high constitutional office should be informed by the long and eventful history of Governors in India, before and after Independence. They should also reflect a clear understanding of the nature of the role that a Governor should be expected to perform in the contemporary Indian polity. The evolution of Indian federalism over the course of the past seven decades should be taken into account, and accordingly, attempts should be made to attach greater relevance to the constitutional designation of the Governor as head of the State. The recommendations that we make in this book flow from this reasoning.

The present study is aimed at providing a holistic picture of the subject matter in three broad parts. The chapter that immediately follows studies the origins of the office of the Governor in the colonial circumstances in which it was first conceived. It traces the evolution of the legal powers and institutional trappings of British Governors through the entire course of constitutional reforms attempted by the colonial rulers and directly on, in an unbroken line, to the adaptation of the Governor into a functionary of the Indian Constitution. The third chapter, continuing where the second left off, traces the evolution of jurisprudence regarding the Governor under the Indian Constitution as well as the actual working of the Constitution in practice. This is done to understand how and why, despite the purposeful retention of the office by the framers of our Constitution, seemingly formidable problems have emerged. The fourth chapter directs itself at shaping an appropriate and adequate solution to these problems, including the conceptual ones mentioned above. The last chapter concludes. Readers should note that the events and legal developments discussed in this book are up to date till March 2020. These should, however, be adequately representative of the subject matter even for happenings since then.

Overall, this book has two distinct aims. First, it attempts to bring out the history of Governors in India for the reader to appreciate the different roles played by this office over time, its different avatars, and the manner in which it has functioned. Apart from the colonial period, the actions of governors under our Constitution itself forms a rich and detailed narrative, highlighting the persistence of certain trends across decades. This contextualises controversies that are more recent in the popular imagination and makes for useful comparisons over time and across different political configurations. Second, it argues for a different approach towards addressing the problems that plague the Governor's office. It is a holistic approach that takes into account every aspect of the Governor's history, role, and

powers, yet it is minimalist and not overly prescriptive, targeting the office-holder's appointment and removal processes rather than each individual action. It is hoped that this book will help readers perceive the Governor and her actions in the appropriate light and influence how we think about reforming this office.

CHAPTER 2

HISTORY OF THE GOVERNOR'S OFFICE

If the office of the state governor didn't exist, no republican democracy would invent it.[1]

An unelected nominee of the Centre leading democratically elected governments in the States is an oddity of our Constitution. On every occasion that actions of a Governor create controversy, questions are naturally asked about why we persist with an institution that appears to be little more than a colonial relic.[2] In this chapter, we discuss our constitutional history in an attempt to narrate how the Constitution came to have the office of the Governor in the form that we find it today.

There is a reason why legal history of Governorships continues to be relevant. In many ways the office of the Governor, even today, evokes a strong sense of the wrongs of our colonial past. The early colonial Governor was the administrative head of company factories – the trading outposts which gradually and insidiously grew to colonise all of India. Following the imposition of Crown rule, the colonial Governor represented the authority of the Crown. This did not change even as the movement for self-rule gained momentum in the early twentieth century. In the ripples of reform emerging from Britain, the Governor was the instrument used to safeguard colonial interest. The dislike we have today for anti-democratic, partisan Governors who serve the interests of powerful outsiders by meddling in the workings of elected governments is, at least partly, a lingering remnant of the disaffection that the colonial Governor bred. The framers of the Constitution were acutely aware of this taint that the Governor's office carried, yet they chose to persist with the institution. The reasons for this constitutional choice (or the lack of reasons) continue to be of immense relevance to discussions around reforming the institution of the Governor.

A caveat is essential before this analysis. The primary focus in the following section is to analyse charters, statutes and other legal instruments including pre-independence constitutional documents and not to detail historical developments *per se*. Many of these instruments were indeed deeply influenced by events and politics of the time in Britain and India. Reference is made to important historical events only to provide context for legal changes. A historical study of the Governor's office might read very differently from what can be found in the ensuing analysis.

2.1 The first Governors in India: Administrators of the Company

[1] Mukul Kesavan, 'Against Governors - Calling Time on a Colonial Office' (*The Telegraph*, 24 May 2018) available at < https://www.telegraphindia.com/opinion/against-governors/cid/1466192 > accessed 8 June 2019.
[2] For example, *see* Rahul Unnikrishnan, 'Governors in Indian states: A colonial imprint' (*Livemint*, 25 March 2017) available at < https://www.livemint.com/Opinion/VCnOT1WVlTs4STlW7Z9cuN/Governors-in-Indian-states-A-colonial-imprint.html > accessed 14 June 2019.

As is well-documented, the English arrived as traders and engaged in commercial activities through the East India Company which was empowered to do so by a Charter of the Queen dated 31st December, 1600.[3] The first Governors in India were appointed by the company to administer depots or factories in India.[4] In 1661, Charles II granted a charter which empowered the Company to appoint Governors and officers (termed 'his council') to govern the factories of the Company and to judge and punish the company's employees or persons who live under them.[5] By a Charter in 1668, the Governor of Bombay was vested with military and judicial powers.[6] By the end of the 17th century, the administration in the three major settlements of Madras, Bombay and Calcutta were headed by Governors.[7]

Legal interventions in the eighteenth century were made by the British Parliament following the Company's acquisition of territorial control in parts of India.[8] In 1773, the East India Company Act, 1773 (commonly known as the Regulating Act 1773) was passed which marked the creation of a formal governmental structure in India for the first time under the English.

The Regulating Act created an Executive Government reporting to a Court of proprietors[9] based on the existing scheme of Governors in the three major settlements known as the Presidencies. The critical change was that the Presidencies of Madras and Bombay were subordinated to the Presidency of Calcutta in matters of declaration of hostilities or war and negotiating any treaty of peace.[10] Further, the Governors in the other Presidencies were required to constantly and diligently transmit advice and intelligence of all transactions and matters relating to government, revenues and interest to the Governor General and Council in Calcutta. Thus, at the head of the new governance structure was the Governor of Calcutta

[3] Rohit De, 'Constitutional Antecedents' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) at p. 19.

[4] By the 1620s, the Company had established factories in Surat, Ahmedabad, Agra and Masulipatnam. The factory in Masulipatnam was shifted to Madras in 1639. Barbara D. Metcalf, *A Concise History of Modern India*, (2nd edn, Cambridge, 2006) at p. 47.

[5] Charter of 1661. *See* J. Shaw, 'Charters relating to the East India Company from 1600-1761' (*Anglo-Indian legal history*) available at < http://angloindianlaw.blogspot.com/p/documents.html > accessed 20 December 2018.

[6] Anil Chandra Banerjee, *Indian Constitutional Documents – 1757 - 1939* (Read Books, 2016) at p. ii.

[7] The Governor was also referred to as a President in some cases leading to the usage of the term Presidency for these three settlements. The Charter of 1726 makes this clear. *See* J. Shaw, 'Charters relating to the East India Company from 1600-1761' (*Anglo-Indian legal history*) available at < http://angloindianlaw.blogspot.com/p/documents.html > accessed 20 December 2018.

[8] By emerging victorious in the Battle of Plassey and the Battle of Buxar in 1757 and 1764, the Company ceased to be traders and gained *de facto* sovereign control over Bengal, Bihar and Orissa. The Company engineered a grant of Dewani from the Mughal Emperor to itself resulting in a sort of dual government in Bengal until 1773. The Company was the real authority operating in the name of the Nawab who was just a figurehead. M. Ramaswamy, 'Constitutional Developments in India 1600-1955' (1956) 8(3) Stanford Law Review.

[9] Sections IV, V, VI and IX, Regulating Act, 1773. *See* J. Shaw, 'Charters relating to the East India Company from 1600-1761' (*Anglo-Indian legal history*) available at < http://angloindianlaw.blogspot.com/p/documents.html > accessed 20 December 2018.

[10] Section IX, Regulating Act, 1773.

rechristened the Governor General aided by a Council of four councillors. Violations of the provisions of the Act by the Governors in other presidencies could lead to their suspension.[11] Thus for the first time, under the Regulating Act, the Presidency Governors were subject to the new central authority of the Governor General for India foreshadowing legislations of the future adopting similar arrangements to govern Provinces in India. It is perhaps worth considering how these early choices regarding centralisation of governance impacted the creation of a united India under British rule.

The East India Company Act, 1784 made major changes in the form of alterations to the composition of the Council of the Governor General and that of Governors.[12] Notably, the Act deepened the subordination of other Presidencies to the Governor General at Calcutta and gave the power to the Governor General and Council to suspend the Governors and Councils of other Presidencies.[13] In theory, this provision vested great power in the Governor General. However, it seems that the other Presidencies retained their independence in great measure as communication between them was an arduous task.[14]

By the nineteenth century, a rough structure of a foreign government appears to have been established in India which was headed by the Governor General in Council with regional executives headed by Governors in the Presidencies. As the control of India was exercised through the Company, the British Parliament renewed the monopoly of the Company to trade in India through Charter Acts every twenty years, often accompanied by alterations to the administrative structure. Towards the end of the nineteenth century, Governors and their Councils started acquiring legislative powers. There was an express recognition of the power of the Governor General in Council to issue regulations that may affect the rights and duties of Indians which the provincial courts of judicature were bound to apply.[15] Similar powers were granted to the Governors and Councils in Madras and Bombay in 1807.[16]

The Company eventually became an instrument for the control of India, and the process of centralisation marched on. In the Charter Act of 1833, we see clear outlines of a federated governmental structure. The Act designated the Governor General of Fort William as the Governor-General of India.[17] As opposed to previous instruments which vested pre-eminence only in certain matters to the government at Fort William, the 1833 Act vested the superintendence, direction and control of whole of the civil and military governments of all

[11] Section IX, Regulating Act, 1773.
[12] Section 18, East India Company Act, 1784.
[13] Sections 31-36, East India Company Act, 1784.
[14] *See* George Chesney, *Indian Polity: A view of the System of Administration in India* (3rd edn, Longmans, Green and co., 1894).
[15] *See* East India Company Act, 1797; C.P. Ilbert, *Government of India* (1907) at p. 74.
[16] C.P. Ilbert, *Government of India* (1907) at p. 75.
[17] Section 41, Charter Act, 1833.

the territories and revenues in India in the Governor General of India.[18] The Governor General in Council was also given the power to make laws and regulations for all of the Crown's territories in India.[19] To aid this function of the Council, a fourth member was to be a part of the Council when it undertook legislative functions.[20] A feature of the subordination of the Presidencies under this Act was that the Governors in Council in the Presidencies had no power to make laws except in case of urgent necessity which would operate until the Governor General of India had signified his assent.[21]

The Governors under the East India Company were first put in place purely to promote commercial interests and administer employees and other similar persons at factories and depots. The scope of their powers eventually expanded to cover the rights and duties of Indians and territorial control in India. By the time the Company's rule was drawing to a close, a clear chain of command for the governance of India had been established. The Crown and Parliament controlled the Company through a Board of Control which supervised the Court of Directors. The appointment of the Governor General of India and the Governors was to be made by the Court of Directors subject to approval by the Crown. Within the country, the regional executives headed by the Governors were subordinated to the Governor General of India and Council.

2.2 The end of Company rule: Governors under the Crown

The last Charter in 1853 renewed the rights of the Company while once again making some changes to the governmental structure. It was around the same time that Lord Dalhousie, Governor General of India between 1848 and 1856, sought to consolidate sovereign power through annexations and interventions including the infamous doctrine of lapse.[22] This was also a period of modernisation in India with the construction of the railway and the introduction of the telegraph.[23] The slow process of colonisation, which had by 1856 installed a government of the British in India, albeit in the guise of a company, had naturally generated great discontent. The simmering anger found expression in the revolt of 1857 in which the British Government in India lost control, for considerable periods of time, over vast swathes of North India.[24] This resulted in the end of Company rule and the transfer of all power exercised by the Company in India to the Crown through the Government of India Act, 1858.

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[18] Section 39, Charter Act, 1833.
[19] Section 43, Charter Act, 1833.
[20] Macaulay was the first member to be so appointed. Macaulay was also part of the Indian Law Commission which was set up under the Act by the Governor General of India. Important laws such as the Indian Penal Code and the Evidence Act were outcomes of foundational work done by this Commission.
[21] Section 59, Charter Act, 1833.
[22] Barbara D. Metcalf, *A Concise History of Modern India*, (2nd edn, Cambridge, 2006) at p. 96.
[23] Barbara D. Metcalf, *A Concise History of Modern India*, (2nd edn, Cambridge, 2006) at p. 96.
[24] Barbara D. Metcalf, *A Concise History of Modern India*, (2nd edn, Cambridge, 2006) at pp. 101-103.

The Company bore the blame for the revolt and was soon divested of all power in India by the British Parliament through the Government of India Act, 1858.[25] India was to be governed by and in the name of the Crown.[26] A new Council for India took over the functions of the Board of Directors and a principal secretary with the title Secretary of State for India was the President of this Council.[27] Consequential changes were made to important procedures. Appointments of the Governor General and Governor were now to be made by the Crown by warrant under the Royal Sign.[28] The 1858 Act was unveiled as a reversal of several of the earlier policies in a proclamation issued by the Queen declaring her intent to rule India directly albeit through her trusted 'Viceroy and Governor General of India'.[29]

In the 1858 Act, most of the major changes pertained to structures within the British Government for the governance of India. The Indian Councils Act of 1861, which followed the Act of 1858, was intended to improve the system of government in India, particularly the Councils of the Governor General and Governors.[30] The Council in India, even though a small body, had adopted British parliamentary practices[31] and the 1861 Act brought in the concept of assent to Bills.

Section 20 of the Act provided:

> When any law or regulation has been made by Council at a meeting for the purpose of making laws and regulations as aforesaid, it shall he lawful for the Governor General, whether he shall or shall not have been present in Council at the making thereof, to declare that he assents to the same, or that he withholds his assent from the same, or that he reserves the same for the signification of the pleasure of Her Majesty thereon.

Another feature of the Act with present day parallels is that the Governor General had the power to enact ordinances in case of urgent necessity.[32]

The Act restored the power of legislation to the Governor in Council in the Provinces[33] and these Councils were also expanded to include additional non-official members for the purposes of law-making.[34] Laws made by the Council required the assent of the Governor

[25] Section 1, Government of India Act, 1858.
[26] Section 2, Government of India Act, 1858.
[27] Sections 3 and 4, Government of India Act, 1858.
[28] Section 29, Government of India Act, 1858.
[29] *See* Queen's Proclamation of 1858. 'East India Proclamations' (1908) available at < http://www.csas.ed.ac.uk/mutiny/confpapers/Queen%27sProclamation.pdf > accessed 15 January 2019.
[30] *See* Long title of the Indian Councils Act, 1861.
[31] Anil Chandra Banerjee, *Indian Constitutional Documents – 1757 - 1939* (Read Books, 2016) at p. 289.
[32] Section 23, Indian Councils Act, 1861.
[33] Section 43, Indian Councils Act, 1861.
[34] Section 29 of the Indian Councils Act, 1861.

General[35] in addition to that of the Governor.[36] Albeit in a rudimentary form, Section 43 contained a legislative list of subjects on which the local Council could not legislate except with the assent of the Governor General. These included matters such as coinage, telegraph and altering the then recently enacted Indian Penal Code.

The Indian Councils Act is interesting for having planted the seeds of various legislative mechanisms which we continue to use today. These include demarcation of subject areas of legislation and the idea of a Governor or the Governor General assenting to legislation passed by legislative Councils. The mechanism of an assent from the central head of state validating legislation at the provincial level also continues, though the circumstances where such consent is required are now narrowly defined. On the other hand, while introducing legislative practices, the core feature of representative democracy was missing in these reforms. The Councils merely served as discussion forums for legislative proposals with no measure of real representation.

The prevalent view amongst the British during this time was that they were a civilising force slowly bringing legislative institutions to a backward and divided population. However, the legislations referred to before in this section which followed the revolt of 1857 had not disbanded the durbar style of governance which existed prior thereto.[37] The Governor and Governor General who were at the head of the Company governments continued to be the epicentre of power notwithstanding the creation of legislative institutions. The central flaw, as aforesaid, was that these legislative institutions did not have any meaningful Indian representation. In any event, the control or power that these Councils exerted over the Governor or Governor General was not substantial. This continued with the Indian Councils Act, 1909 which, to some extent, introduced the elective principle in India. However, it meant little in practice. This was a conscious design choice, and by no means accidental. In a despatch to the Government of India, John Morley, then Secretary of State for India noted:

> I must, therefore, regard it as essential that Your Excellency's Council, in its legislative as well as its executive character, should continue to be so constituted as to ensure its constant and uninterrupted power to fulfil the constitutional obligations that it owes, and must always owe, to His Majesty's Government and to the Imperial Parliament.

This meant that the newly created legislatures also had very limited powers. The veto of the Governor General and Governors over legislations through the mechanism of assent continued.[38] Discussions of issues relevant to public interest and budget were permitted to a

[35] Section 40 of the Indian Councils Act, 1861.
[36] Section 39, Indian Councils Act, 1861.
[37] Barbara D. Metcalf, *A Concise History of Modern India*, (2nd edn, Cambridge, 2006) at p. 169.
[38] Only select provisions of the earlier Acts of 1892 and 1861 were repealed by the 1909 Act. *See* First Schedule to the Indian Councils Act, 1909.

limited extent. There was, however, no scope for any real intervention by elected representatives, and these discussions were more in the nature of 'grand inquests.'[39]

The mechanics of these arrangements were significant for what the office of the Governor came to represent in later years. The Governor, who was in any case the symbol of colonial authority, also came to be the anti-democratic element in the successive waves of constitutional reforms that the British were unveiling. In these reforms, resulting from the engagement between Indians seeking freedom and the British, the Governor's office was very much the centre of attempts to preserve colonial power.

The Government of India Act, 1919 attempted to remake the governmental structure in the Provinces. The Act was based on the Montagu-Chelmsford Report which set out a long-term vision to create a United States of India.[40] The centrepiece of this reform was the idea that there should be a loosening of central control over the Provinces. Three of the four major themes of the proposals were related to establishing responsible government with a measure of autonomy in the Provinces and local bodies.[41] Consequently, unlike earlier Acts, the most significant changes brought about by the Act were in provincial government. The Act divided legislative subjects into provincial and central subjects.[42] The former was divided into reserved and transferred subjects in what was called a system of dyarchy. The transferred subjects were to be dealt with by Ministers appointed by the Governor from the Legislative Council who would hold office during her pleasure.[43] The Act provided for the election of seventy percent of the members of the Council from the local electorate.[44]

However, the Governor had a great say in what could eventually become laws. The requirement of assent continued and where a Bill was not passed in a form recommended by the Governor, it was open to the Governor to certify that it was necessary for the discharge of her functions that the Bill be passed in the suggested form.[45] In respect of the reserved subjects, the Governor in Council would continue to be entirely in charge. The Governor was thus at the helm of the Province heading a composite authority.[46]

While the arrangements put in place by the British soon after the revolt of 1857 did not allow for any representative democracy, when such representation was brought in, only limited powers were granted to such representatives. The arrangement in 1919, while favouring autonomy in the Provinces, empowered the Governor even more. The central control over the

[39] M.P. Jain, *Outlines of Indian Legal and Constitutional History* (Lexis Nexis, 2014) at p. 494.
[40] G.G. Woodwark, *Summary of Constitutional Reforms for India* (Forgotten Books, 2012) at p. 24.
[41] G.G. Woodwark, *Summary of Constitutional Reforms for India* (Forgotten Books, 2012) at pp. 9, 10, 17 and 20.
[42] Section 1, Government of India Act, 1919.
[43] Section 4, Government of India Act, 1919.
[44] Section 7(1), Government of India Act, 1919.
[45] Section 13, Government of India Act, 1919.
[46] G.G. Woodwark, *Summary of Constitutional Reforms for India* (Forgotten Books, 2012) at p. 12.

Provinces had been relaxed both explicitly by the law and also by convention. The Governor was at the centre of the division of power between the representative government and the old executive Council and at the same time at the helm of both. The Governor functioned as the real executive head of the Province, but without accountability to the Legislature. One account of the Governor's role during this period describes the Governors as the real rulers of British India.[47] Thus, while the 1919 Act did move away from a completely non-representative form of government, it retained the essentially authoritarian nature of the Governor's office.

2.3 <u>The Government of India Act 1935: A Governor with vast discretionary powers</u>

The Government of India Act, 1919 required a review of its own effects and operation within ten years of its enactment. The Simon Commission was formed for this purpose and published a report in 1930 calling for the abolition of dyarchy and the establishment of representative government in the Indian Provinces. This was followed by a 1933 White Paper laying down concrete proposals for reform and a 1934 Report of a Joint Parliamentary Committee examining the proposals and finalising a Bill. This was finally passed as the Government of India Act, 1935.

Under the 1935 Act, the Governors of all Provinces were to be appointed directly by the Crown,[48] and were meant to exercise the executive authority of the relevant Province.[49] The actual decision-making authority was bifurcated into two: first, functions to be exercised with the aid and advice of a Council of Ministers drawn from the Provincial Legislature and, second, functions for which the 1935 Act required the Governor to act in her own "discretion". However, for the first category the Act also provides for certain functions, where the Governor is not prevented from exercising her "individual judgment" (explained immediately below).[50] In abolishing the system of dyarchy, the reforms reposed the entire executive authority at the provincial level in the Governor as an individual and did away with the need to act in concert with an Executive Council appointed by the Crown.[51]

Ministers chosen from the Legislature were given the constitutional right to advise the Governor on almost the entirety of provincial subjects.[52] It is important here to distinguish the two terms "discretion" and "individual judgment". In the entire field of provincial subjects, the Ministers had the right to aid and advise the Governor. However, amongst these provincial subjects, certain "special responsibilities" set out in different provisions of the Act

[47] *See* Michael Fenwick Macnamara, *A Governor's Raj: British Administration during Lord Irwin's Viceroyalty, 1926-1931* (SAGE India, 2014).
[48] Section 48, Government of India Act 1935.
[49] Section 49, Government of India Act 1935.
[50] Section 50, Government of India Act, 1935.
[51] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 67.
[52] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 67.

were left to the Governor's individual judgment. Here, while she was to be guided by the advice of her Ministers in ordinary course, she was to ultimately act as she thought was required under the circumstances, even if this diverged from the advice of the Ministers. On the other hand, the Governor's discretion was to be exercised in those functions where ministerial aid and advice was not ordinarily envisaged and could be dispensed with.[53]

The special responsibilities left to the Governor's *individual judgment* included the prevention of any grave menace to the peace or tranquillity of the province, the safeguarding of legitimate interests of minorities, the rights and interests of members of the public services, the rights of Indian Princely States, the prevention of commercial discrimination, securing execution of Governor General's orders, etc. These responsibilities were not only areas where the Governor could overrule her Ministers, but their enumeration was also like a listing of legislative entries given that the Governor could indeed enact any law or appropriate revenues on the ground that it was essential to the fulfilment of any of the said responsibilities.[54] The Governor could restrict proceedings in the Provincial Legislature on the ground that it would affect the discharge of a special responsibility.[55] For example, the Governor of Bihar disallowed a resolution regarding flying the national flag on government buildings, of which notice had been given by a Congress member of the Bihar Legislative Assembly.[56] On the ground that the discharge of a special responsibility was being impeded, she could even dismiss a Minister, or dismiss the Council of Ministers as a whole, or declare a breakdown of constitutional machinery and assume to herself all requisite powers.[57]

Apart from this, a number of other roles were envisaged in the 1935 Act where the Governor's own *discretion* was to be applied. These included the power to appoint and dismiss ministers, summon and prorogue provincial legislatures, dissolve the lower House, assent or veto legislations, their dismissal in the event of a breakdown of constitutional machinery, governance in what was referred to as "Excluded Areas", etc.

In the power to assent or withhold assent to legislation, the 1935 Act does not seem to hold any ambiguity as to the ability of the Governor to veto legislation by withholding assent entirely in her own discretion.[58] Whatever the ulterior motive in retaining executive control

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[53] Section 52(3), Government of India Act, 1935; Report of the Joint Committee on Indian Constitutional Reform (1934) at paras 73, 75 and 92; An illuminating discussion on the distinction between discretion and individual judgment, along with a clarification of the meanings of these terms from British Parliamentary debates on the Government of India Act, 1935 appears in Lokur, J.'s concurring opinion in *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, paras 245-249.

[54] Section 90, Government of India Act, 1935; Report of the Joint Committee on Indian Constitutional Reform (1934) at paras 92 and 104.

[55] Section 86(2), Government of India Act, 1935.

[56] R. Coupland, *Indian Politics: 1936-1942* (Oxford University Press, 1943) at p. 118; Binod Kumar Sinha, *Governor as a Factor of Indian Federalism* (Classical Publishing Company, 1992) at p. 17.

[57] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 92.

[58] Section 75, Government of India Act, 1935; Report of the Joint Committee on Indian Constitutional Reform (1934) at para 74.

over legislative powers, the Joint Parliamentary Committee explained this as being necessary given the special nature of a representative government with communal representation. Indeed, the entire array of the Governor's reserve powers under the 1935 Act were argued to be a guarantee of responsible government in the face of communal representation in legislatures and the need for an efficient and impartial civil service.[59]

In selecting the Ministers that were to advise her, the Governor was not only to consult the person who, in her estimation, held the largest following in the Legislature, but she was also to appoint members of important minority communities (both categories of Ministers were to collectively be in a position to command the confidence of the Legislature).[60] The difficulties of reconciling minority representation with ministerial responsibility apart, this requirement was not inserted into the Act itself, keeping it devoid of any guidance in relation with the choice of Ministers.[61] Instead, this guidance was meant to come from an Instrument of Instruction issued by the British Crown.[62] The discretionary power to dismiss ministers[63] was used by Governors in controversial circumstances surrounding the Quit India movement. The Governor of Sindh dismissed Premier Allah Bux in 1942, and the Governor of Bengal forced Premier A.K. Fazlul Haq to tender his resignation in 1943.[64]

Provision was made for the Governor to assume all such executive and legislative powers as necessary when there was a breakdown of constitutional machinery and she could then exercise them at her discretion.[65] This power was exercised by the Governor during World War II when, owing to differences between the Congress and the British Government over certain war-related issues, provincial ministries in all Congress-dominated provinces resigned.[66] The 1935 Act also provided for the issuance of ordinances by the Governor as (a) emergency legislative measures at any time in relation with functions in which the Governor exercises discretion or individual judgment and, (b) stop-gap measures while the Provincial Legislature was not in session. While the latter was envisaged as requiring subsequent approval from the Legislature, the former was not.[67] The former power was used by the Governor of Sindh, where a coalition government comprising non-Congress parties was in power at the time.[68] This was justified in the British House of Commons on the ground that,

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[59] Report of the Joint Committee on Indian Constitutional Reform (1934) at paras 112-114.
[60] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 85.
[61] Section 51(1), Government of India Act, 1935.
[62] Section 53, Government of India Act, 1935; Report of the Joint Committee on Indian Constitutional Reform (1934) at para 85.
[63] Section 51(5), Government of India Act, 1935.
[64] Binod Kumar Sinha, *Governor as a Factor of Indian Federalism* (Classical Publishing Company, 1992) at p. 15.
[65] Section 93, Government of India Act, 1935.
[66] Binod Kumar Sinha, *Governor as a Factor of Indian Federalism* (Classical Publishing Company, 1992) at pp. 17-18.
[67] Sections 88 and 89, Government of India Act, 1935.
[68] R. Coupland, *Indian Politics: 1936-1942* (Oxford University Press, 1943) at p. 118.

in view of the special responsibilities placed on the Governor, "it may be necessary for him to proceed by ordinance".[69]

Apart from the vast reserve powers in the Governor's hands, it is appropriate to consider how she would operate in relation with those functions in which the Act neither provided her with discretion nor allowed her to act in individual judgment. Specifically, while the Act permitted the Ministers to aid and advise the Governor in all these other functions, no binding rule was created requiring the Governor to adhere to such advice as, according the Joint Parliamentary Committee, this would "convert a constitutional convention into a rule of law and thus … bring it within the cognisance of the courts."[70] Instead, the actual relations between the Governor and her Ministers were left entirely to the abovementioned Instrument of Instructions.[71] This Instrument was thus intended to be a key tool to allow for the growth of responsible government in the face of such a strong executive force as the Governor.[72]

The considerable measure of control granted to the Governor despite the creation of a Provincial Legislature followed the pattern of protecting the interests of colonial government, in this case arising from demands of the ruling Conservative Party in Britain.[73] The White Paper and Joint Parliamentary Committee Report preceding the 1935 Act relied once again on the broad argument suggesting that constitutional reform and the growth of responsible and representative government could not happen too suddenly and required an intermediating force to maintain stability.

This naturally led to friction with the leaders of the national movement, as has been illustrated above. At the outset itself, before permitting its members to accept posts as ministers in the Provincial Government, the Congress demanded that the Governor would not use her special powers to interfere in day-to-day administration.[74] The Governors initially refused, and the Congress therefore refused to accept office. This deadlock led to the Viceroy having to clarify that the special responsibilities of the Governor would not entitle her to randomly interfere in the working of the Ministry. After this statement, the Congress Working Committee in July 1937 permitted its members to join the Provincial Government.[75]

The broad approach of the British in justifying their impositions thus revolved around presenting themselves as a government that was "disinterested enough to play the part of an impartial arbiter, and powerful enough to control the disruptive forces generated by

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[69] Rajgopala Aiyanger, *The Government of India Act, 1935 – With a Commentary, Critical and Explanatory* (Madras Law Journal Office, 1937) at p. 106
[70] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 74.
[71] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 74.
[72] M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978) at p. 22.
[73] *See* R.J. Moore, *Endgames of Empire: Studies of Britain's India Problem*, (OUP India,1988).
[74] Rajgopala Aiyanger, *The Government of India Act, 1935 – With a Commentary, Critical and Explanatory* (Madras Law Journal Office, 1937) at p. 75.
[75] Binod Kumar Sinha, *Governor as a Factor of Indian Federalism* (Classical Publishing Company, 1992) at p. 15.

religious, racial and linguistic divisions".[76] *The safeguards built into the Government of India Act, 1935 flowed from this logic, retaining British control over the entirety of India while suggesting that this would meet various ends of good governance such as prompt and decisive action by a strong executive, an authority that could balance conflicting interests and protect those without influence or ability to protect themselves, as well as flexibility and impartial authority pending the growth of responsible government.*[77] *In effect, however, provincial autonomy was only being granted while still "buried in a pile of reservations, safeguards and discretion."*[78] *These exceptions to responsible government and provincial autonomy were mostly in the nature of powers vested in the Governor, thus cementing the anti-democratic image of the office.*

2.4 <u>The constitutional Governor: Burying a colonial ghost?</u>

The last constitutional reform that emerged from Britain, the Government of India Act, 1935 was in many ways the template with which the framers of the Constitution began their work. This was at least in part because of the experience of the framers as part of the governments of various Provinces. The framers were, no doubt, aware of the flaws in the system of Provincial government that the 1935 Act had created, including the perils of vesting powers in an unelected Governor.

Before discussing the Constituent Assembly Debates which specifically deal with various aspects of the office of the Governor, it is essential to locate these deliberations within the larger context of historical events at the time. This is necessary, because these events played a decisive role in informing these deliberations and ultimately in the adoption of the scheme that we find in the Constitution. The Cabinet Mission Plan (1946) had outlined an Indian Union consisting of British Provinces and Princely States. According to this structure, the Centre was to limit itself to matters concerning foreign affairs, defence and communications.[79] All other subjects were to be vested in State Governments.[80] The Constituent Assembly, which was elected on the basis of this Plan, initially intended to give effect to this broad framework.[81]

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[76] Report of the Joint Committee on Indian Constitutional Reform (1934) at para 10.
[77] Report of the Joint Committee on Indian Constitutional Reform (1934) at paras 23, 25, 69-72.
[78] Quoting Sir Chimanlal Setalvad, as per C.Y. Chintamani and M.R. Masani, *India's Constitution at Work* (1940) at p. 93.
[79] Point 15(1), Cabinet Mission Plan, May 16, 1946, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 1, at p. 213.
[80] *See* Point 15(3) and (4), Cabinet Mission Plan, May 16, 1946, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 1, at p. 213.
[81] B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 1, at p. 208.

This original intention completely changed post-Partition. As various regional demands had in a sense been fulfilled by Partition itself, the Union Powers Committee[82] came to the conclusion that the Cabinet Mission Plan need not be followed any longer, and the Committee was not bound by the "limitations on the scope of Union Powers". [83] The committee now unanimously held the view that a weak central authority would be injurious to the interests of the country.[84] Overall, it was of the view that "the soundest framework for our Constitution is a Federation, with a strong Centre".[85]

Partition also generated a general fear of fissiparous tendencies and a focus on ensuring unity and integrity. It was feared that giving greater powers to the Provinces would lead to further disintegration.[86] These factors resulted in the Assembly favouring a strong Central Government.[87]

H.V. Pataskar explained and summarised this shift in approach in the Constituent Assembly by stating that had it not been for Partition,

> "we would have stuck to our original plan of having a scientific, systematic, complete federation of Units. But these events were combined with the task of framing the Constitution and this largely affected our outlook, which was till then consistent, and also affected many of the aspects of our task. The suddenness of the intervening

[82] The Union Powers Committee, chaired by Jawaharlal Nehru, was set up by the Assembly in order to consider the question of Union powers in greater detail, in light of the scheme envisaged by the 1946 Plan. *See* Resolution setting up the Union Powers Committee, January 25, 1947, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 2, at p. 707.

[83] K.M. Panikkar expressed a similar view, stating that the Government of India Act, 1935 "brought in the idea of Federation, primarily because such a conception reduced the possibility of a Hindu majority Centre dominating the Muslim majority Provinces and also in a measure to enable the [Princely] States to accede to a Union." But due to partition, the whole purpose behind "breaking up the Central structure of British India vanishes and the never-too-desirable system of government based on checks, prohibitions, and limitations, all trying to stunt the growth of a united nationhood, need no longer be considered." *See*, A note on some general principles of the Union Constitution by K. M. Panikkar (sent to the Union Constitution Committee), May 1947, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 2, at pp. 534-35.

[84] Second Report of the Union Powers Committee, July 5th, 1947, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 2, at p. 778;

[85] Second Report of the Union Powers Committee, July 5th, 1947, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 2, at p. 778.

[86] Constituent Assembly Debates, speech by Balkrishna Sharma, Vol 4, 15th July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-15 > accessed 22 November 2018.

[87] However, some members of the Assembly argued against this proposition. Amiyo Kumar Ghosh for instance believed that over-centralisation would lead to constant friction between the Centre and States, which might endanger the whole structure of the Constitution. Constituent Assembly Debates, speech by Amiyo Kumar Ghosh, Vol 11, 21st November 1949, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-21 > accessed 22 November 2018.

> events blurred, to some extent, our vision. A strong Central Government suddenly became a matter of urgent necessity."[88]

He observed that due to the fear complex that emerged due to Partition, as well as in light of the prevalence of illiteracy, adult franchise in the States

> "came to be looked upon not only with grave suspicion, but as a matter of grave danger. The result was that the autonomy of the States … came to be looked upon as a matter of national danger. We kept the form of the federation, but changed the substance or contents of that federation."89

The office of the Governor was also subject to the influence of Partition and the manner in which it shaped the nature and structure of the federation adopted in the Constitution. With this in mind, the Constituent Assembly Debates will now be discussed, focusing specifically on the appointment and removal of Governors, as well as the question of discretionary powers.

a. The Governor as a Central agent

The outlines of the governmental structure to be adopted in the Constitution were drawn by the Union Constitution Committee and the Provincial Constitution Committee. Both these Committees preferred a model of government based on the British parliamentary system. Most politicians in India at the time of constitution-framing were familiar with the British system and unsurprisingly, a similar form of Government found favour with the Committees. The debates in the House also reveal the thought process of the members: an existing model was to be adapted to suit Indian conditions. There were discussions about the merits and demerits of the American system and the British system in which the latter quite easily prevailed.[90]

The Assembly seems to have been fully aware that the position of the formal head in the United Kingdom was a result of its peculiar history.[91] Nonetheless, the idea that the structure of government in Britain was something to be replicated with all its constituents (as in other newly formed dominions such as Canada and Australia) had strong appeal. Whether the new governments at the Centre and the States should necessarily have a formal head of state, thus,

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[88] *See* Constituent Assembly Debates, speech by H. V. Pataskar, Vol 11, 18th November 1949, available at < https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-18 > accessed 22 November 2018.
[89] *See* Constituent Assembly Debates, speech by H. V. Pataskar, Vol 11, 18th November 1949, available at < https://cadindia.clpr.org.in/constitution_assembly_debates/volume/11/1949-11-18 > accessed 22 November 2018.
[90] *See* Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at para 4.32.28.
[91] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at para 4.32.71.

did not separately come up for discussion when choosing between the parliamentary and presidential systems.

In fact, there is nothing to suggest *a priori* that a formal head of state as in the English system is necessary in a democracy forged in the English mould. A formal head in the form of a monarch probably belongs to the category Bagehot had in mind when he referred to elements of the English Constitution that are the "accidents of a period and a region; they belong only to one or two centuries in human history, and to a few countries".[92] His defence of the monarchy also similarly relies on reasons that are arguably peculiar to England[93] or at any rate have no relevance in the Indian context. Bagehot's position is revealing to the extent that even if the English Constitution was the model to be followed, it was not imperative to create an Indian version of this office – albeit shorn of the regal elements – while drafting a democratic constitution. One may, however, argue that a formal head of state could represent the permanence of the State as opposed to the transitory nature of governments. But this theoretical and conceptual distinction does not have any practical utility, and there are several countries around the world where the same post is both head of state as well as head of government.[94] Be that as it may, the choice of establishing a formal head was made for both the Centre and the States.

The adoption of this model meant that various clauses from the much-maligned Government of India Act, 1935 found their way into the draft Constitution. As shall be seen below, in the Assembly, at various points in the debates on the provisions relating to the Governor, members did raise the issue that the office should not be an anti-democratic office as it had been in the past. At the same time, the office was considered to have a certain dignity and status, and there was a feeling that the Governor could positively influence this new parliamentary experiment in India. This can be viewed as an extension of the colonial logic, as described in the preceding section. This section argues that the Constituent Assembly, while keenly aware of the problems prevalent in the old scheme under the Government of India, 1935, ended up creating an institution which could at critical points of working the Constitution, function as an agent of the Central Government.

b. Appointment of the Governor

Various proposals regarding the appointment of Governors were discussed in the Constituent Assembly and its Committees, ranging from direct election, indirect election, nomination by President, etc. The original proposal made by Constitutional Adviser B.N. Rau to the Provincial Constitution Committee was that Governors should be elected by the State Legislatures according to proportional representation by single transferable vote. This would

[92] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 43.
[93] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 43.
[94] For example, *see* Sections 83, 85 and 86 of the Constitution of the Republic of South Africa.

have made the appointment process of Governors analogous to the indirect elections conducted for Presidents.[95]

The Provincial Constitution Committee did not agree with B.N. Rau's proposal, and suggested instead that the Governor should be elected directly by the people of the State.[96] Sardar Patel, chairman of this committee, explained in the Assembly that a popularly elected Governor was preferable as it would be in keeping with the dignity and status of the office held by her. Another advantage was that such a Governor would be able to effectively influence the elected Ministry, as well as the State as a whole.[97] In July 1947, when the Committee's report was being discussed in the Constituent Assembly, members widely endorsed the idea of directly elected Governors.[98]

Two years later, the provision on electing Governors again came up before the Assembly. The Drafting Committee, chaired by Dr. B.R. Ambedkar, had little faith in popular Governors, and presented two alternative proposals regarding appointment. The consensus had by then shifted from a directly elected Governor to an appointed Governor, with most members of the Assembly having a change of heart. One important reason for this, as expressed by H.V. Kamath in the Assembly, was that a directly elected Governor would naturally command the popular support of the people of the entire State, and might thereby come to think that she represents a more legitimate source of authority than a Chief Minister who is elected from only one constituency leading to conflicting sources of power within the State.[99]

Another proposal by the Drafting Committee was for a Governor appointed by the President from a panel of four persons elected by the State legislature.[100] This represented an intermediate mechanism, positioned in between the extremes of indirect and direct elections as discussed above on the one end (which would have left the appointment process entirely in the hands of the State), and unfettered appointment by the President (with no role of the State) on the other. This proposal, unfortunately, did not find favour in the Constituent Assembly.[101]

All the mechanisms outlined so far, whether direct or indirect elections, or panel-based appointment by the President, would have resulted in local persons belonging to that

[95] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at pp. 30-31; B. N. Rau, *India's Constitution in the Making*, (Orient Longmans, 1960) at pp. 141-146, 151.
[96] Report of the Provincial Constitution Committee, June-July 1947, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol 2, at p. 657.
[97] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947 at p. 593.
[98] Shubhankar Dam, 'Executive' in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) at p. 311.
[99] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at pp. 428, 429.
[100] Article 131, Draft Constitution.
[101] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, p. 429.

particular State occupying the office of Governor. It was believed that this might give encouragement to fissiparous tendencies, which were a grave concern in light of partition, as discussed above.[102] Jawaharlal Nehru felt that these mechanisms would result in far fewer common links with the Centre.[103] Though they were heads of States, Governors in reality were to be seen as agents of national reconstruction, he implied. It was felt that the newly independent, post-Partition India was still fragile and as such needed strong regional hands. The abovementioned mechanisms, particularly direct elections, were likely to promote provincial voices not all of which were fully reconciled to the idea of a united India. The laborious and often unseemly experience of stitching together India's Union between 1947 and 1949, involving integration of several Princely States, perhaps played a role here as well.[104]

Taking all of the above considerations to their logical conclusion, Brajeshwar Prasad moved an amendment to the Draft Constitution suggesting an insertion that would result in the Governor being appointed by the President.[105] After a lengthy discussion in the Assembly, it was finally felt by the majority that this mechanism was in the best interest of preserving the unity, stability, and tranquillity of the country, which were paramount considerations at the time.[106] This amendment was adopted, and is contained in the present Constitution as Article 155.[107]

The Assembly was hopeful that certain conventions would emerge regarding the appointment of Governor at least some of which would operate as safeguards against whittling down of the autonomy of States. The first convention was that the person so appointed is normally a resident of a different State. This was in furtherance of the aforesaid fears of fissiparous tendencies and lack of common links with the Centre. The second convention which the members of the Constituent Assembly expected would emerge was that the Central Government would consult the State Government prior to appointing a person as Governor. Alladi Krishnaswami Ayyar was confident that such a convention would emerge in India, as it had in Canada and Australia.[108] Jawaharlal Nehru also expressed the view that the Governor should be acceptable to the State.[109] However, K.T. Shah, was doubtful whether such a convention was likely to emerge in India.[110]

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[102] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 36.
[103] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at p. 455.
[104] Shubhankar Dam, 'Executive' in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) at p. 312.
[105] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, p. 426.
[106] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 30.
[107] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at p. 426.
[108] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at pp. 431-32.
[109] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at p. 455.
[110] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at p. 471.

Apart from the manner of appointment, some members discussed the nature of persons who should be appointed as Governor. For instance, Alladi Krishnaswami Ayyar highlighted the importance of appointing a person of ability and standing in public life, not mixed in party politics of the State.[111] Vallabhbhai Patel believed that the candidate should be a person of substance, age and experience.[112] T.T. Krishnamachari stated that it should be a person who will hold the scales impartially as between the various factors in the politics of the State.[113] However, no stringent provisions in this regard were incorporated into the Constitution.

c. Removal of the Governor

Similar to the deliberations over appointment, the mechanism for removal of the Governor also underwent significant change over the course of discussions in the Constituent Assembly. The Draft Constitution provided the following mechanism for removal of a Governor from office (based on B.N. Rau's suggestion to the Provincial Constitution Committee).[114] First, a charge would be preferred by the State Legislature for impeachment of Governor for violation of the Constitution. The proposal to prefer such a charge had to be contained in a resolution moved after a notice in writing signed by not less than thirty members of the State Legislature, and the resolution had to be supported by a two-thirds majority. If a charge had been so preferred, the Speaker of the State Legislature would inform the Chairman of the Rajya Sabha, after which the Rajya Sabha would constitute a Committee (which may include members who are not part of the Rajya Sabha) to investigate the charges. In this investigation, the Governor would have a right to appear and be represented. If, as a result of the same, a resolution was passed by a two-thirds majority of the Rajya Sabha declaring the charge to be sustained, then such resolution would have the effect of removing the Governor.[115]

This elaborate mechanism was done away with rather abruptly. In the Assembly, Dr. B. R. Ambedkar moved an amendment which provided that the Governor would hold office during the pleasure of the President.[116] This amendment was adopted and the process containing all the safeguards as detailed above was dropped. This move was criticised by many members of the Assembly. K.T. Shah, for instance, was of the view that the Governor's office should not be left entirely up to the pleasure of the President, and so long as a Governor acts in accordance with the aid and advice of her Ministers, it should not be possible to remove her.[117] S.L. Saksena expressed the fear that this amendment would completely affect the

[111] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat, Vol 8, 1949, at p. 431
[112] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat, Vol 4, 1947, at p. 609).
[113] Soli Sorabjee, L.P. Singh, et al. (eds), *The Governor: Sage or Saboteur* (Roli Books, 1985) at p. 17; Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat, Vol 8, 1949, at p. 462).
[114] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 593.
[115] *See* Article 132 read with Article 137, Draft Constitution.
[116] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 470.
[117] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 471.

independence of the Governor, as she would now be a mere creature of the President, that is, of the party in power at the Centre. Moreover, "the Centre would try to do some mischief through [them]."[118] This concern, expressed summarily, fully anticipates the most significant affliction that ails the Governor's office today. Another criticism of the adopted mechanism for removal was that the Governor is completely free from the control of the elected representatives of the State. It was pointed out that there was no effective check on the powers of the Governor by the State Legislature which can prevent her from misusing her authority.[119]

d. Discretionary powers of the Governor

The nature of functions to be performed by the Governor was also a point of intense controversy during the framing of the Constitution. Constitutional Advisor B.N. Rau was of the view that the Governor should, for the most part, act on the advice of her ministers, except in the case of certain special responsibilities, namely prevention of any grave menace to the peace and tranquillity of the State and safeguarding the legitimate interests of minorities.[120] On similar lines, it was proposed by the Provincial Constitution Committee that the Governor was expected to act on the aid and advice of her Council of Ministers, except insofar as she is by or under this Constitution required to exercise her functions in discretion.[121] Multiple areas were outlined in the report where she was expected to exercise such discretion. The wording of the general discretionary power, as discussed above, led to a lot of criticism in the Constituent Assembly. H.V. Kamath observed that it was a blind copy of the scheme under the Government of India Act, 1935.[122] He emphasised that after nominated Governors had been accepted in place of elected Governors, it would be wrong to provide such discretionary powers to her which would be a departure from the principles of constitutional government.[123]

Addressing these criticisms, the members of the Drafting Committee assured the Assembly that no general discretionary power was being given to the Governor, as the scope of Draft Article 143 would be strictly limited to those functions with respect to which the other provisions of the Constitution specifically required the Governor to act in her discretion.

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[118] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 473.
[119] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at pp. 196-97; S.M. Sayeed, 'The Governor - A Titular Head?', 1971 15(12) *Parliamentary Studies*, New Delhi, at p. 24.
[120] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 31; B.N. Rau, *India's Constitution in the Making*, (Orient Longmans, 1960) at pp. 141-146, 151.
[121] *See* Clause 9, Report of the Provincial Constitution Committee, June-July 1947 in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012) Vol 2, at p. 659.
[122] H.N. Kunzru agreed, characterising it as "an unpleasant reminder of the old order". *See* Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 493; S.L. Saksena similarly observed that it was "a reminder of the humiliating past" and "out of place". *See* Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 494.
[123] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 489-90.

Ambedkar stated that Draft Article 143 would have to be read in conjunction with such other provisions which specifically reserved the power to the Governor, and it was not a general clause enabling the Governor to disregard the advice of her ministers in any matter.[124] In other words, the Governor would normally act on the advice of her Ministers, except when acting under constitutional provisions which specifically empowered her to exercise discretion.[125] Ultimately, the same wording was retained in the present Constitution, as Article 163.

There were several provisions in the Draft Constitution which contained functions that the Governor was expected to perform in her discretion. These were the following:

- Appointment and dismissal of Ministers;[126]
- Summoning the State Legislature and dissolution of the Legislative Assembly;[127]
- Returning bills to the State Legislature for reconsideration;[128]
- Issue of proclamation in an emergency superseding her ministers and assuming to herself executive functions;[129]
- Appointment of the State Auditor-in-Chief,[130] and of the Chairman and other members of the State Public Service Commission.[131]

In addition to these, the Governor of Assam was also empowered to act in her discretion regarding certain tribal areas, and to determine disputes regarding the share of mining royalties.[132]

The proposed powers of the Governor underwent a change when the elected Governor was replaced with the Governor to be nominated by the President as discussed above.[133] A Special Committee constituted by the President of the Constituent Assembly met on April 10th and 11th, 1948, and reached the conclusion that in the changed situation "all references to the exercise of functions by the Governor in [her] discretion should be omitted from the Draft Constitution."[134]

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[124] He specifically clarified that "except insofar as he is by or under this Constitution" did not mean "except whenever he thinks that he should exercise this power of discretion against the wishes or against the advice of the ministers". *See* Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 501.
[125] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 491.
[126] Article 144(6), Draft Constitution.
[127] Article 153(3), Draft Constitution.
[128] Article 175, Draft Constitution.
[129] Article 188(4), Draft Constitution.
[130] Article 210(1), Draft Constitution.
[131] Articles 285(1) and (2), Draft Constitution.
[132] *See* paras 9 and 18, Sixth Schedule, Draft Constitution.
[133] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 51.
[134] Meetings of the Special Committee, April 11, 1948, in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012), Vol. 4, at p. 411.

Accordingly, the areas where the Governor is to exercise discretion have been, for the most part, left unspecified in the Constitution, after several amendments were passed in furtherance of the Special Committee's decision to remove explicit references to discretion. This leads to a degree of confusion because, as aforesaid, Draft Article 143 was supposed to be read in conjunction with such other Articles which had explicitly provided discretionary power to the Governor. Ambedkar mentioned in the Assembly that the Governor was not to have any function which "[she] is required to discharge either in [her] discretion or in [her] individual judgment."[135] In other words, the Governor was required to follow the advice of her Ministry in all matters. However, he also observed that vesting the Governor with certain discretionary powers is in no sense contrary to, or a negation of, responsible government.[136] This lack of clarity is a lacuna or a "drafting anomaly",[137] that has been a source of controversy ever since.

The binding nature of aid and advice under Article 163(1) can also be clarified by an examination of the Constituent Assembly Debates on Draft Article 143. The broader question was first adverted to in discussions regarding the President's powers under Draft Article 61 (later Article 74). The Assembly's own President and later the first President of India, Dr. Rajendra Prasad, pointedly asked of Ambedkar: "Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?" Prasad remarked that Draft Article 61 only placed a duty on the Ministers to advise the President but no duty on the President to be guided by such advice. In response, Ambedkar explained that the language employed was the same as in a number of constitutions in other jurisdictions and that the binding nature of the advice was undisputed there. He also remarked that this would be clarified in the Instrument of Instructions and other amendments could be inserted.[138] Reminded of this matter a few months later by H.V. Kamath, Ambedkar made clear that the establishment of a parliamentary democracy could be understood to mean the supremacy of certain governmental organs over others and that such matters were "implicit in the Constitution itself". Framed in this light, the question of the binding nature of ministerial advice could be seen as a general matter regarding the way in which the Constitution determined the *inter se* relations of functionaries:[139]

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[135] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 467.
[136] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 500.
[137] D.D. Basu, *Commentary on the Constitution of India*, Vol 2 (S. C. Sarkar & Sons, Calcutta, 1954) at p. 8; N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 263.
[138] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 215-216. In *Samsher Singh,* the Supreme Court referred to this episode as "[t]he most powerful dramatisation of the constitutional issue". *Samsher Singh v State of Punjab,* (1974) 2 SCC 831 at para 112. The proposal to retain an Instrument of Instructions for the President had earlier been made by Ambedkar in discussions regarding the appointment of ministers at the Centre. Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 7, 1948, at p. 1157.
[139] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 10, 1949, at pp. 268-269.

> No constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which has to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of [her] Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution.

Pressed on the point further, Ambedkar agreed with Kamath that if the President refused to follow advice, she would definitely be in violation of the Constitution and liable for impeachment. He also accepted that certain "marginal cases" existed where the requirements of responsible government could necessitate the refusal of ministerial advice (such as the choice of ministers or the dissolution of Parliament) but that "these [were] matters of convention".[140] Calls for more detailed elaboration in the Constitution on such points did come from H.V. Kamath, Naziruddin Ahmad and S. L. Saksena but these were not accepted by the Assembly.[141] Even as the Instruments of Instructions were excluded from the final Constitution, no other details on the manner of exercise of "discretionary" functions was found necessary.[142] Below, the provisions that explicitly require the Governor's discretion are discussed in light of the Constituent Assembly Debates.

i. Appointment and dismissal of Ministers

The Provincial Constitution Committee in its report had provided that the Governor's Ministers would be chosen by her and would hold office during her pleasure,[143] and the Governor would be guided by conventions of responsible government in this regard.[144] This

[140] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 269-70. In this context, Dr. Ambedkar had also previously had the opportunity to outline the scheme for the President's office. He had on that occasion argued against an amendment creating discretion for the President, noting that there was no need for such discretion as the President would only have certain "prerogatives but not functions and there is a vast deal of difference between prerogatives and functions as such." The need for such prerogatives was defended on the basis that there were no feasible alternatives, such as with the appointment of the Prime Minister and the dissolution of Parliament. Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 7, 1948, at p. 1158.

[141] A. Krishnaswami Ayyar assured the Assembly that explicitly requiring ministerial responsibility to Parliament implicitly meant that the President was to be guided by ministerial advice or else he would be obstructing the ministers in their responsibility to Parliament. He also cited the Canadian, Australian, Irish and German precedents to argue that a detailed list of the "incidence of responsible government" was not necessary. Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 10, 1949, at pp. 270-271.

[142] As discussed previously, the Schedules containing Instruments of Instructions for the President had been removed as there was no office or institution that could ensure adherence with the Instrument.

[143] Clause 12, Report of the Provincial Constitution Committee, June-July 1947 in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012) Vol 2, at p. 659.

[144] Clause 14, Report of the Provincial Constitution Committee, June-July 1947 in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012) Vol 2, at p. 659.

scheme was adopted in the Draft Constitution. Draft Article 144 provided that, "The Governor's ministers shall be appointed by [her] and shall hold office during [her] pleasure", and also that, "The functions of the Governor under this article with respect to the appointment and dismissal of ministers shall be exercised by [her] in [her] discretion."[145]

This provision also specified that in choosing her Ministers and in her relations with them the Governor shall be generally guided by the Instructions set out in the Fourth Schedule of the Draft Constitution.[146] These Instructions provided that, the Governor was to appoint in consultation with the person who in her best judgement is most likely to command a stable majority in the Legislature. In so acting, the Governor was to be mindful of the need for fostering a sense of joint responsibility among the Ministers.[147] The Schedule also made it *explicit* that in all matters within the scope of the executive power of the State, except those functions in which she is required by or under this Constitution to exercise discretion, the Governor *shall be guided by* the advice of her ministers in exercising the powers conferred upon her.[148]

However, this Schedule was subsequently deleted. Krishnamachari, while moving an amendment for the deletion of the said Schedule from the Draft Constitution, observed that a set of written instructions was unnecessary and superfluous and should instead be left entirely to convention.[149] Ambedkar, arguing in favour of its deletion, stated that the purpose of the Instrument of Instructions as originally devised by the British for governing its colonies was to give certain directions to the head of the States as to how they should exercise their discretionary powers. Secondly, Ambedkar also argued that considering how the Governor had hardly been left with any discretion at all under the Draft Constitution such instructions were not necessary.[150]

The deletion of this Instrument is worth noting, especially because in earlier deliberations in the Assembly, it had been cited as an example of a safeguard against misuse of power by the Governor. For example, Jaipal Singh, referring to the language of the similarly worded clause in the Provincial Constitution Committee's report, had said that even though it appeared as though arbitrary powers were being vested, that was not the case and such fears are remote

[145] Articles 144(1) and (6), Draft Constitution.
[146] It further clarified that the validity of anything done by the Governor shall not be called into question on the ground that it was done otherwise than in accordance with such Instructions. *See* Article 144(4), Draft Constitution.
[147] Para 2, Fourth Schedule, Draft Constitution.
[148] Para 3, Fourth Schedule, Draft Constitution; The schedule also contained the following general instruction: "The Governor shall do all that in him lies to maintain standards of good administration, to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the State, and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments." *See* Para 4, Fourth Schedule, Draft Constitution.
[149] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 10, 1949, at p. 114.
[150] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 10, 1949, at p. 115.

"if we consider that there is such a thing as the Instrument of Instructions, the Schedule as we prefer to call it now, by which [she] is bound."[151]

Another fear was expressed that the Governor was being given unguided discretion to appoint anyone, and not necessarily a leader who commanded a majority in the House, at her pleasure. Ambedkar, commenting on the above, assured the members of the Assembly that the principle embodied in the Draft Constitution was that the Ministry holds office during such time as it has the confidence of the majority in the State Legislature. He further clarified that "during [her] pleasure" is always understood to mean that the pleasure shall not continue even if the Ministry has lost the confidence of the majority. The only reason why this is not expressly stated is that no Constitution which establishes a parliamentary form of government states it thus, and this is a "stereotyped phraseology which is used in all responsible governments".[152] It is worth noting that a new clause (1a) was inserted in Draft Article 144, which provided that "The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State".[153]

ii. Summoning the State Legislature and dissolution of Legislative Assembly

Article 153(2) of the Draft Constitution provided that the Governor may, from time to time, summon the Houses or either House to meet at such time and place as she thinks fit, prorogue the House or Houses, and dissolve the Legislative Assembly. Article 153(3) further stated that with respect to summoning and dissolution as aforesaid, the Governor was to exercise these functions in her discretion.

H.V. Kamath observed that this provision conferred on the Governor the power to dissolve the Legislative Assembly without specifying that she should be guided by the advice of her ministers in this regard. He felt that this power would be out of tune with the new set-up.[154] Mohd. Tahir suggested that some conditions and circumstances under which the House could be dissolved should be enumerated in the Constitution, to prevent the possibility that the Governor may find some reasons to dissolve the Assembly simply because she does not agree with the views of the majority party.[155]

In the face of these concerns, Ambedkar moved an amendment deleting Draft Article 153(3).[156] In its amended form, with the discretionary aspect omitted, this provision is contained in the present Constitution at Article 174.

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[151] Constituent Assembly Debates, speech by Jaipal Singh, Vol 4, 17th July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-17 > accessed 22 November 2018.
[152] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 520.
[153] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 521.
[154] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 556.
[155] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 555.
[156] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 555-56.

iii. Returning bills to the State Legislature for reconsideration

When the clauses of the Report prepared by the Provincial Constitution Committee were being discussed in the Constituent Assembly, K. Santhanam suggested the insertion of a new clause to the Governor's function in relation with Bills. This amendment provided that the Governor was to have the right to return, at her discretion, a Bill passed by the State Legislature for reconsideration as well as suggest amendments to the Bill. If the Bill is passed again by the State Legislature, with or without amendments, she shall assent to it.[157] The amendment was accepted. The intention behind the amendment was to vest in the Governor a limited power of asking for reconsideration of Bills passed by the State Legislature, especially where such Bills were passed by a snatch vote or by a very narrow majority. K. Santhanam further explained that the reason why this was to be a discretionary power was that "a ministry which rushes a Bill through by a narrow majority will not care to advise reconsiderations".[158] As noted earlier in this chapter, the seeds of a provision of this nature can be traced back all the way to the Indian Councils Act, 1861.[159]

Lakshmi Maitra criticised this amendment, stating that it would lead to a conflict between the Governor and the Ministry, and it was unnecessary, against democracy, and against the independence and responsibility of State Legislatures.[160] N.V. Gadgil suggested that "there should be a time limit within which the Governor should send a Bill back with or without amendments, failing which it should be taken automatically that [she] has assented to the Bill."[161] Ananthasayanam Ayyangar supported the amendment, and justified it on the grounds that there may be cases where a sufficient number of members might not have been present in the State Legislature when the Bill was passed, and it may have involved important matters relating to minorities or other such matters where consideration at greater length ought to have taken place.[162] He did not believe that a Governor would use this power to interfere at every stage with the Ministry, but she should be on her guard and exercise a wholesome influence. Similarly, M. A. Muthiah Chettiyar argued that there may be occasions when legislators may not have had the time to study a Bill brought before them, and they will only be glad to get a chance to look at it again. The press and public opinion would play a great

[157] Constituent Assembly Debates, speech by K. Santhanam, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[158] Constituent Assembly Debates, speech by K. Santhanam, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[159] *See* Sections 39 and 40, Indian Councils Act, 1861.
[160] Constituent Assembly Debates, speech by Lakshmi Maitra, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[161] Constituent Assembly Debates, speech by N.V. Gadgil, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[162] Constituent Assembly Debates, speech by Ananthasayanam Ayyangar, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.

part in shaping the Governor's views in this regard, and Chettiyar did not feel that she would misuse these powers.[163]

Interestingly, Ramnarayan Singh, Hussain Imam, and Ahmed Ibrahim supported the amendment and allayed fears that the Governor would misuse this power by pointing out that the Governor was to be directly elected from the State itself. [164] As discussed above, at the time that this discussion was taking place, the agreed mechanism for appointment of Governor was direct elections. However, it is worth noting that ultimately, this changed and the present system of appointment by the President was adopted.

This was largely adopted in the Draft Constitution. Draft Article 175 provided that the Governor may "in [her] discretion" return the Bill to the House with a message requesting the House to reconsider it, or reconsider the desirability of introducing any amendment recommended by the Governor. Ambedkar moved an amendment for deletion of the phrase "in [her] discretion" because "it was felt that in a responsible government there can be no room for the Governor acting on discretion".[165] Krishnamachari was in support of this amendment, and stated that since the Governor is no longer vested with any discretion, where she does send back a Bill for further consideration, she can only do so expressly on the advice of her Council of Ministers.[166] It was also pointed out by others that although the Governor was the nominee of the President, it was quite possible that the party in power in the Province might not be the same as the party in power in the Centre. In such a scenario, this discretionary power to go against the express wish of the State Legislature and Council of Ministers would introduce a very wrong principle.[167]

The amendment was accepted, and in this form, Draft Article 175 was incorporated into the present Constitution as Article 200.

iv. Emergency powers

The most controversial matter was the Governor's special responsibility to prevent any grave menace to the peace and tranquillity of a State.[168] The Provincial Constitution Committee's

[163] Constituent Assembly Debates, speech by M. A. Muthiah Chettiyar, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[164] Constituent Assembly Debates, speech by Ramnarayan Singh, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018; Constituent Assembly Debates, speech by Husain Imam, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018; Constituent Assembly Debates, speech by Ahmed Ibrahim, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018.
[165] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at p. 41.
[166] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at p. 61.
[167] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at p. 61.
[168] Clause 15, Report of the Provincial Constitution Committee, June-July 1947 in B. Shiva Rao (ed), *The Framing of India's Constitution: Select Documents* (Universal Law Publishing, 2012) Vol 2, at p. 659.

choice was explained as vesting a limited power to report to the President any such grave situation, and not any other power which may bring the Governor into conflict with the Ministry.[169] "The conditions prevailing in the country" were said to warrant some provision of this nature which confers special responsibilities.[170]

Several amendments were suggested to this proposal. K.M. Munshi proposed an amendment which provided that if the Governor is satisfied in her discretion that such a grave situation had arisen and it is not possible to carry on the government of the Province with the aid and advice of her Ministers then she may, by Proclamation, assume to herself the functions of Government and powers vested in or exercisable by any provincial body/authority, except the High Court. This proclamation would have to be communicated to the President who might thereupon take appropriate action under her emergency powers.[171] B.N. Gupte had proposed a similar amendment,[172] and the rationale behind that was that if peace was threatened, a mere power to report to the President is not sufficient. If the Governor had to discharge this responsibility with any chance of success, she must act immediately and for that purpose be provided necessary powers.[173]

K.M. Munshi's amendment was opposed on multiple grounds. First, it was argued by H. N. Kunzru that it was practically a reproduction of the scheme under the Government of India Act, 1935.[174] The distrust that permeated the previous scheme, owing to the fear that popularly elected Ministers would, by exercising their powers, make British authority impossible to maintain, could not be allowed to be carried forward into the Constitution. Ministers must be trusted and allowed to occupy key positions in the Provincial Government. H. N. Kunzru apprehended that in case of a conflict between the Governor and the Ministers, the position would be one of great embarrassment for both parties, leading to administrative complications and loss of prestige in the eyes of the public. Finally, H. N. Kunzru also believed that it was not proper to allow one person to sit in judgement over the Ministers. However wise a Governor might be and by whatever method she might be elected, it was not desirable that her personal view should prevail over the collective view of the Ministers.[175]

Govind Ballabh Pant also criticised the amendment proposed by K.M. Munshi, observing that if the Governor had control over the executive in day-to-day administration, it would have been reasonable to expect her to adequately deal with an emergency situation. However, when the Governor was to be aloof from administration in normal times, to expect her to be able to face a delicate situation at a time when the ministers are supposedly not equal to the

[169] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 578.
[170] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 707.
[171] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 709.
[172] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 708.
[173] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 763.
[174] *See* Section 93, Government of India Act, 1935.
[175] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat, New Delhi), Vol 4, 1947, at pp. 765-67.

task, was to create chaos and exacerbate an already grave situation.[176] According to Pant, the Ministers should be given a free hand to deal with the situation of maintaining the peace and tranquillity of the Province.[177]

Despite all these arguments, the Constituent Assembly accepted the amendment proposed by K.M. Munshi,[178] and it was incorporated in the Draft Constitution as Article 188.[179] The functions of the Governor under this provision was to be exercised by her in her discretion.[180] Subsequently, however, it was deleted, and is not present under the current constitutional scheme.[181] Ambedkar, while moving a motion for the deletion of this Article, observed that no useful purpose would be served by allowing the Governor, in the first instance, the power to suspend the Constitution merely for a fortnight when ultimately the President was to take the responsibility of entering into the provincial field in order to sustain the Constitution. Therefore, Draft Article 188 "is a futility and is not required at all".[182] Ultimately, the present position (as contained in Articles 356 and 357 of the Constitution) vests in the Governor only the duty to submit a report to the President indicating that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The President has to herself be "satisfied" to this effect, and the Governor's report is not a necessary precondition for the President to arrive at such satisfaction.[183]

e. Dissonance in the intended role of the Governor

On the whole, it is clear that the office of the Governor was considered to be a constitutional necessity in independent India. But the Constituent Assembly was caught in a dilemma between its desire to do away with the legacy of anti-democratic colonial Governors on the one hand, and its preference for a strong Centre to counter post-Partition fissiparous tendencies on the other.[184] Various aspects of the Governor's office in the Constitution reflect uneasy compromises between these two conflicting impulses.

Though the office was that of the head of the State, a considerable part of the discussion around the Governor's office was devoted to creating an office that would protect the interests of the Central Government. Thus, the office was created to account for the needs of the Central Government in its relationship with the States, to act as a link between the Centre and the States, and to protect and preserve certain special interests such as tribal

[176] "But to keep a man out of water – and then when there are storms to ask him to keep the boat sailing is to court disaster."
[177] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at pp. 775-76.
[178] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 4, 1947, at p. 781.
[179] *See* Article 188, Draft Constitution.
[180] Article 188(4), Draft Constitution.
[181] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 41.
[182] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at p. 133.
[183] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 50.
[184] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 52.

development.[185] Here again the Assembly was unable to establish any clear, coherent line of thought. Mahavir Tyagi observed in the Assembly that the Governor as an agent of the Centre could ensure that the Centre's policy is being carried out in the States.[186] Ambedkar notably observed that State Governments are required to work in subordination to the Central Government. The Governor was to reserve certain things and give the President the opportunity to see whether the State Governments are acting in accordance with the Constitution and in subordination to the Central Government.[187] Yet, Krishnamachari stated that he would "at once disclaim all ideas that we in this House want the future Governor who is to be nominated by the President to be in any sense an agent of the Central Government."[188]

The design of the office of the Governor as a whole and as ultimately adopted in the Constitution, reflects a dual capacity. On the one hand, she is the constitutional head of the State in a formal sense. On the other hand, as aforesaid, the Governor is a representative of the Central Government in the State.[189] This linkage role was greatly emphasised, and was expected to help in maintaining unity and integrity.[190] The possible conflict between these two roles was not fully explored. Therefore, in what manner and to what extent the Governor was intended to account for the Centre's interests remained unclear.

At the same time, in hindsight, the intended object of constraining the discretion vested in the Governor was not achieved satisfactorily. The Assembly, having drastically curtailed the discretion of the Governor when compared to the template that they started with, nonetheless left various provisions open-ended with the possibility of being filled by Governor's discretion. These included the power to appoint the Chief Minister, in assenting to and reserving Bills, and even in the summoning of the Assembly, not to mention powers like Article 356 which almost necessarily always requires the Governor to exercise discretion. The Assembly underestimated the vast potential for discretion in these final provisions.

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[185] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at pp. 52-53; M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77; Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 489, 495

[186] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 494-95.

[187] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 502.

[188] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 460.

[189] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77; Interestingly, it was thought that a convention would develop which would regulate this dual role. *See* N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 56; "It is unfortunate that our democracy could not develop the uniform conventions for the dual role of the Governor". *See* C. H. Alexandrowicz, *Constitutional Development in India* (Oxford University Press, 1957) at p. 145.

[190] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 53; M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77; Mahavir Tyagi, for instance, noted in the Assembly that the States needed to be linked together, and the Governor can guarantee such integration. *See* Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 489, 495

The real possibility of a Governor being caught between the interests of the Centre and the State in exercising this discretion did not sufficiently engage their attention. As highlighted above, some members did anticipate this problem. However, prominent members who wanted a strong Centre saw this as a necessary feature of a strong Union. Some scholars have attempted to read the debates to provide a clear line of interpretation to govern such situations. M.P. Jain argues that the Governor's role as an agent of the Centre should take precedence over her role as head of the State. On the basis of his reading of the Constituent Assembly debates, he asserts that this is the direct result of the Governor being the nominee, and holding her office during the pleasure of, the President.[191] In other words, through their choice of mechanism for appointment and removal, the framers deliberately intended to accord primacy to the role of the Governor as an agent of the Centre over other interpretations of the same. Therefore, according to Jain, "exercise of discretionary powers by the Governor as the Centre's representative is constitutionally justifiable".[192]

This line of argument is, however, questionable. First, it is problematic to infer substantive intent on the basis of design features alone, especially when the design features were chosen for independent reasons. For instance, as has been noted above, the wording of the provision which covers appointment of Ministers by the Governor was defended against criticisms that it may be misused by pointing out that this power was circumscribed by the Schedule of Instructions which would inform the Governor in this regard.[193] Regarding Governor's power to return bills as well, similar fears of possible misuse were allayed by relying on the fact that the Governor was to be directly elected from the State itself.[194] Both the Schedule of Instructions and direct elections were subsequently omitted after future deliberations, for independent reasons as has been discussed above. The consequences of these subsequent deletions were not fully considered in the Assembly. This has led to the peculiar present scenario wherein both the power to appoint Ministers as well as to return Bills remain vested in the Governor, despite the deletion of the safeguards on the basis of which they were defended.

Similarly, the mechanisms for appointment and removal of Governors were altered from their original schemes without bearing in mind the consequences of these changes to her exercise of discretion at all, let alone with the express intention of materially changing the nature of the discretion. It would, therefore, be inappropriate to overly rely on the debates to argue that

[191] In this connection, he notes: "One of the reasons for the Constituent Assembly to adopt the system of centrally-nominated, rather than elected, Governor was that he would keep the Centre in touch with the State and would remove a source of possible 'separatist tendencies'." M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.

[192] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.

[193] Constituent Assembly Debates, speech by Jaipal Singh, Vol 4, 17th July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-17 > accessed 22 November 2018.

[194] For example, *see* Constituent Assembly Debates, speech by Ramnarayan Singh, Vol 4, 21st July 1947, available at < http://cadindia.clpr.org.in/constitution_assembly_debates/volume/4/1947-07-21 > accessed 22 November 2018

it was intended that the Governor ought to exercise discretion first and foremost as an agent of the Centre *because* she is appointed by the President and holds office during the latter's pleasure. As pointed out above, it is unclear whether the framers intended the Governor to be an agent of the Centre in the first place, or whether it was their intention that she would merely account for the interests of the Centre as one among several relevant considerations. Despite this, owing to the choice of design features, the practical consequence may be that it is possible to reduce the Governor's exercise of discretion to merely carrying out the instructions of the Centre.

In summary, it appears that the scheme of the Constitution at its very inception contemplated a Governor's office with strong links to the Centre. However, the idea was not to create an office that would interfere with the workings of a responsible government in the States. The rejection, by and large, of the proposal to vest discretion with an unelected Governor points in this direction. But the discretion that remained was neither sufficiently articulated nor fully guided. Further, the framers left open, by vesting full and unbridled power of appointment and removal in the Central Government, the possibility of a Governor completely subservient to the Centre. This was bound to give rise to problems in the absence of any clear normative line demarcating the role of the Governor as the constitutional head of the State from her role in linking the Centre and the State. Thus, various constitutional provisions relating to the Governor came to carry a hidden risk of a Governor disregarding the advice of the State Government or even acting completely at the Centre's behest thereby threatening the federal and democratic fabric of the Constitution. Thus, the Assembly failed to fully bury the ghost of the old colonial Governor by retaining an unelected constitutional head with hidden discretionary powers, extremely susceptible to external influence.

Some of these flaws in design were such that they could have been eliminated or ironed out in practice by working the provisions in a non-partisan manner informed by the core principles of the Constitution. Unfortunately, the constitutional experience – which we consider in the next chapter – has proven to be otherwise.

CHAPTER 3

GOVERNORS AS UMPIRES OF DEMOCRACY: THE CONSTITUTIONAL EXPERIENCE

Governorships are an anomaly; they always have been.[195]

The position of the Governor in the Indian Constitution is indeed anomalous. The anomaly at the core of the design of the institution of the Governor was the struggle to balance the seemingly conflicting objectives of provincial autonomy on one hand and the need to counter fissiparous tendencies on the other. Crucial provisions relating to the Governor reflect this tension, perhaps none more so than those that relate to appointment and removal. Article 154 of the Constitution emphasises that the Governor is the head of the State Executive, albeit in a formal sense. Yet, under Article 155, the figurehead at the apex of a democratically elected State Government is to be appointed and removed at the pleasure of the Union Executive.

At the time of drafting, it was believed that the link via appointment and removal to the Centre, while promoting federal harmony, would have only a benign effect on the autonomy of State Governments. While this argument did overlook some aspects of the Governor's role, it was perhaps a plausible argument at the time. However, the working of the Constitution in changed political circumstances resulted in the accretion of powers and functions in the Governor far exceeding the intentions of the framers.[196] The accretion of powers and functions have not transformed the Governor into an office of immense significance in the everyday work of governance; rather at vital points of constitutional action such as the appointment of a Ministry or when it loses the confidence of the Assembly, the Governor suddenly becomes the focus of attention with a critical say in outcomes. The Governor almost overnight becomes the bearer of a huge responsibility to the State and its future. It is in this expanded role that the Governor has come to be an umpire of democracy. This expansion of the Governor's role has accentuated anomalies in design and caused structural problems affecting the legitimacy of the office. In this chapter, we outline these problems.

The constitutional role of the Governor can be crudely categorised into two on the basis of the dual capacity that we referred to in the previous chapter. As the formal head of the State Government, important functions that the Governor exercises include appointing the Chief Minister and the Council of Ministers and communicating with the Council of Ministers. The business of the government is carried on in the Governor's name and the Governor makes rules for the transaction of business for this purpose. The Governor is formally a part of the State Legislature and is entrusted with summoning, proroguing or dissolving its House(s). The legislative process is complete when the Governor assents to a Bill. Ordinances are

[195] Shubhankar Dam, 'Executive' in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) at p. 328.
[196] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p.142.

issued in the name of the Governor. Apart from these functions, appointments to such offices as that of the Advocate General and judges of subordinate courts are made in the name of the Governor.

By contrast, the Governor is also a trigger and conduit for Centre-State interactions of a wide variety. The most (in)famous example is Article 356 where the report of the Governor can form the material for dismissal of the State Government by the Centre. Another centralist feature of the Constitution operates through the Governor: she can reserve a Bill passed by the Houses of the State Legislature for presidential assent under Article 200. However, the centripetal feature that makes the Governor appear as a link between the State and the Centre is the fact that the Governor is appointed by the President and can be removed by the President by withdrawing pleasure. This factor colours the functioning of the Governor in both these roles.

In this chapter, we attempt to study all these aspects of the Governor's functions in some detail. The important features of the office, including its powers, functions and duties, are studied in separate sections of this chapter. We begin with the most prominent and controversial feature of the office: appointment and removal by the President. Thereafter, we examine the extent of the discretion that the Governor possesses. Here, we consider the implications of Article 163 in some detail, the provision which in many ways controls the discretion of most gubernatorial functions under the Constitution. This is followed by analyses of various powers of the Governor.

This Chapter is intended as a positive analysis of the law relating to the relevant provisions and is in part descriptive. It discusses the provisions as they are and the issues that have arisen in the working of these provisions as highlighted in controversial or problematic episodes. We also analyse the judicial response to such problems when such matters have been adjudicated.

3.1 Appointment and removal of Governors: Constitutional provisions and practical experience

a. Constitutional provisions, conventions and trends related to appointment

Article 153 provides that each State shall have a Governor, and Article 154 provides that the executive power of the State shall be vested in the Governor, exercisable by her either directly or through subordinate officers in accordance with the Constitution. The State Executive thus consists of the Governor, who is the head of the State, and the Council of Ministers with the Chief Minister at its head. The pattern of the State Executive is analogous to that of the Central Executive, with a parliamentary form of responsible government.[197] Article 155, which covers the appointment of the Governor, provides that "The Governor of a State shall be appointed by the President by warrant under his hand and seal." Since the

[197] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.

President acts on the aid and advice of the Council of Ministers headed by the Prime Minister, the Central Government has the effective power in this regard.[198]

Article 157 lays down the qualifications for appointment as Governor. The Article is brief and does not lay down any real condition of eligibility. Instead, the only two requirements are that the person should be a citizen of India and must have completed thirty-five years of age. Apart from the qualifications as aforesaid, there are certain conditions for occupying the office of the Governor as per Article 158. For instance, the Governor cannot be a member of Parliament or any State Legislature[199] and she cannot hold any other office of profit. The Governor is also entitled to official residences (without payment of rent), and to emoluments, allowances and privileges as determined by Parliament.[200] Accordingly, in 1982, Parliament passed the Governors (Emoluments, Allowances and Privileges) Act. Article 158 further provides that the emoluments and allowances of the Governor shall not be diminished during her term of office.

Article 159 provides that the Governor shall, before entering her office, make an oath in the presence of the Chief Justice of the High Court of that State, solemnly affirming to preserve, protect and defend the Constitution and the law, and to devote herself to the service and well-being of the people of the State.[201] Interestingly, the wording of this oath has been used in judicial rulings to interpret the nature of the Governor's discretionary powers.[202]

In post-Independence years, the appointment of Governors as per the aforesaid constitutional scheme has been at the centre of numerous controversies. Apart from particular instances, the overall trends with respect to appointment also demonstrate a gap between the intention of the framers and the realities that have emerged.

A study by Ashok Pankaj[203] regarding the backgrounds of India's post-Independence Governors from 1950 to April 2015 reveals that they have been primarily politicians or civil

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[198] *See* Article 74(1), Constitution of India; M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.

[199] If a member of Parliament or of any State Legislature is appointed as Governor, he shall be deemed to have vacated his seat on the date on which he enters upon his office as Governor. Article 158(1), Constitution of India.

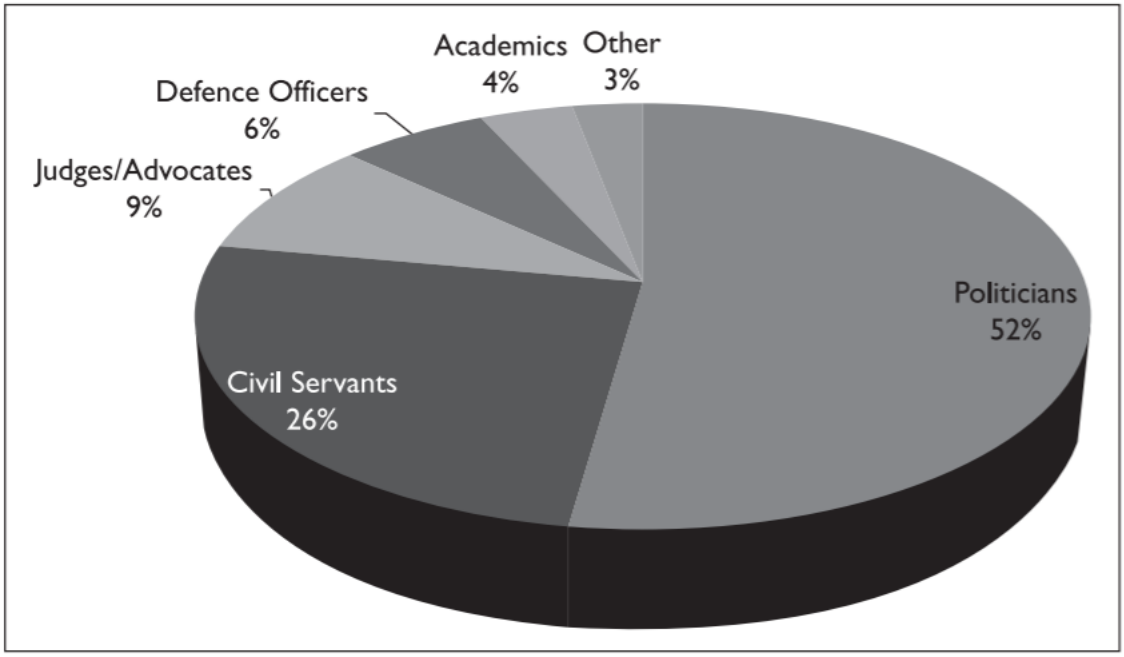
[200] Until Parliament passed such a law, these were to be as specified in the Second Schedule of the Constitution.

[201] Dahiya argues that the wording of this oath was borrowed verbatim from the American Constitution, without taking into account the context and nature of the office for which it was originally drafted. M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978) at p. 48.

[202] For instance, in *State of Rajasthan v Union of India*, (1974) 2 SCC 831, the Supreme Court observed that "as the defender of the Constitution and the law" and "the watch-dog of … the well-being of the people of his State", the Governor is vested with certain discretionary powers in the exercise of which she can act independently. In the context of making a report to the President as under Article 356(1), the Court observed that as the Governor is appointed by the President to defend the Constitution and the law, she acts as an observer on behalf of the Union. She has to keep a watch on the working of the administrative machinery and each organ of the constitutional Government in the State.

[203] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 18.

servants (at 52 per cent and 26 per cent respectively). The other notable groups include judges and advocates (9 per cent), defence officers (6 per cent) and academicians (3.9 per cent). The remaining proportion includes former rulers of Princely States and freedom fighters. Interestingly, almost one-fifth of all Governors have been former MPs and MLAs. This has been illustrated in the following pie-chart:[204]



The above study also reveals certain State-specific trends. For instance, defence officers have primarily been appointed as Governors in States such as Jammu & Kashmir, Chhattisgarh, and the North Eastern States, probably due to the security threats in these States. Appointments of civil servants as Governors has also occurred along similar lines, with Governors in Jammu & Kashmir and Chhattisgarh being predominantly from these backgrounds. Former Chief Ministers have been mainly appointed in States such as Andhra Pradesh, Madhya Pradesh, Tamil Nadu and Maharashtra. Pankaj observes that politicians have been appointed as Governors primarily in those states which have been politically important (in terms of number of seats in the Lok Sabha), have non-Congress opposition and which have been "in the forefronts of mobilisation for greater autonomy to the states under Indian federalism."[205]

The members of the Constituent Assembly had expected certain conventions to develop with respect to appointment of Governors. There is some evidence that in the early years immediately following Independence, there was an attempt to establish a convention that the

[204] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 19.
[205] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at pp. 18-19.

Council of Ministers of the concerned State should be consulted in the matter of gubernatorial appointment.[206] In 1952, the then Prime Minister Jawaharlal Nehru had in a letter to Chief Ministers mentioned that the appointment of a Governor should only be on merit, from outside the State, and in consultation with the concerned Chief Minister.[207] Persons of high calibre are thought to have been appointed as Governors during this period. [208] In the early years, with one-party rule at the Centre and in the States due to the dominance of the Congress party, this consultation was effectively a mere formality.[209]

However, in 1967, non-Congress Governments were formed in various States. This in turn led to a demand for Governors who were loyal to the ruling party at the Centre, which resulted in this nascent convention being violated on multiple occasions. The reasons behind this shift were evidently political, and appointment of Governors became a contentious issue.[210] At the same time, the non-Congress State Governments demanded that the convention of consultation be strictly adhered to. The Chief Minister of West Bengal, for instance, went to the extent of claiming that his express consent should be obtained by the Central Government before appointing a Governor.[211]

Far from obtaining consent, in many cases the Chief Ministers were not consulted at all which quite soon became more than a mere exception to the rule. For instance, the Chief Minister of Uttar Pradesh was not consulted before the appointment of Dr. B. Gopala Reddy as Governor in 1967.[212] The Haryana Chief Minister Rao Birender Singh wanted a panel of names for the appointment of Governor to be discussed with him. However, the Central Government refused to accept this principle and suggested only one name which, naturally, had to be accepted by the Chief Minister.[213] In appointing B.D. Pande as the Governor of West Bengal in 1981, the Chief Minister of the State, Jyoti Basu, was not consulted. Similarly, when B.D. Pande was transferred from West Bengal to Punjab in 1983 and replaced by A.P. Sharma, the State Government was once again not consulted.[214] Another infamous example was when the Central Government announced Nityanand Kanungo as Governor of Bihar even though the State Government had expressly objected to the

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[206] *See* D.D. Basu, *Commentary on the Constitution of India* (Lexis Nexis, 2016) Vol 1; M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.
[207] Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at p. 578.
[208] *See* Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 17.
[209] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1, at p. 471.
[210] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 18.
[211] *See* N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 40, fn 8.
[212] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 34; *See* D.D. Basu, *Commentary on the Constitution of India* (Lexis Nexis, 2016) Vol 1.
[213] *See* N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977).
[214] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 177.

appointment.[215] In this case, the State Government had sent a telegram to the Union Home Minister expressing its strong disapproval.[216] The Home Minister Y.B. Chavan argued in the Lok Sabha that whereas the Chief Minister of a State should indeed be consulted, she cannot be given "the right to veto" the President's choice for appointment as Governor.[217]

This trend appears to have solidified over the years. In the last few years as well, several Chief Ministers have reported a lack of consultation with respect to appointment of Governors. In 2014, Kerala Chief Minister Oommen Chandy said that he was not consulted in the appointment of former Chief Justice of India P. Sathasivam as Governor. Interestingly, however, he mentions that he was consulted by the Centre in previous appointments during his tenure as Chief Minister.[218] In the same year, Karnataka Chief Minister Siddaramaiah also reported that he was not consulted in the appointment of Vajubhai Vala as Governor. Expressing his unhappiness over the same, he described consultation as being "customary".[219] In 2015, Bihar Chief Minister Nitish Kumar voiced his displeasure at not being consulted in the appointment of Ram Nath Kovind as Governor, stating that he only got to know of the same through media reports. He too characterised consultation as "the precedent so far".[220] It is worth noting that all three cases involved opposition-ruled States, once again highlighting the political undertones of the frequent violation of this convention.

In conclusion, it is safe to say that despite Chief Ministers still believing that the convention of consultation holds some relevance and desiring it to be followed, frequent violations over time, particularly along political lines, show that the Centre does not feel bound by it.

As far as the convention regarding appointing Governors from outside the State is concerned, it has largely been observed by the Central Government. Nonetheless, there have been exceptions in this regard as well. For instance, Sardar Ujjail Singh was appointed as Governor of Punjab, H.C. Mukherji in West Bengal, and the erstwhile Ruler of Mysore as Governor of Mysore.[221] In fact, Governors have often been appointed from neighbouring States. This has the effect of enabling Governors with a political background (which is the

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[215] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 34.

[216] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 176.

[217] Lok Sabha Debates, Vol 9, 1967, Colms. 1174.

[218] Biju Govind, 'Centre did not consult for appointment of Governor: Chandy' (*The Hindu*, 1 September 2014) available at < https://www.thehindu.com/news/national/kerala/centre-did-not-consult-for-appointment-of-kerala-governor-oommen-chandy/article6369147.ece > accessed 12 May 2019.

[219] Press Trust of India, 'Karnataka CM unhappy he was not consulted on Governor's appointment by Centre' (*News 18*, 31 August 2014) available at < https://www.news18.com/news/india/karnataka-cm-unhappy-he-was-not-consulted-on-governors-appointment-by-centre-710812.html > accessed 12 May 2019.

[220] Press Trust of India, 'Not Consulted Over Bihar Governor's Appointment: Chief Minister Nitish Kumar' (*NDTV*, 9 August 2015) available at < https://www.ndtv.com/india-news/not-consulted-over-bihar-governors-appointment-chief-minister-nitish-kumar-1205306 > accessed 13 May 2015.

[221] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 35; *See also* K. V. Rao, 'The Governor at Work', (1968) 1(3) The Journal of the Society for the Study of State Governments at p. 89.

case with most Governors, as noted above) to maintain political relations with their own States. Governors were seen to be demanding their own transfers to this effect, and the practice of transferring Governors from one State to the other has not been uncommon.[222]

Several contemporary examples can be cited where politicians have been appointed as Governors of States neighbouring the one where these persons have been politically active. For example, former Gujarat Chief Minister Anandiben Patel was appointed as Governor of Madhya Pradesh in 2018, two years after resigning as Chief Minister. Draupadi Murmu, a politician from Odisha, was appointed as Governor of Jharkhand in 2015. Also, Lalji Tandon, a former Member of Parliament from Uttar Pradesh, was appointed as Governor of Bihar in 2018.

Till 1965, there was only one instance where a Governor was appointed from a political party other than the party in power at the Centre: P.T. Pillai from the Praja Socialist Party in Kerala, who was appointed as the Governor of Punjab in 1964. However, this appointment was made to serve the interests of the Congress Party in Kerala,[223] as P.T. Pillai had to resign as Chief Minister of Kerala to become the Governor of Punjab.[224] Nath Pai observed in the Lok Sabha in 1967 that the appointment of Governors had been "abused for boosting up the tottering fortunes of a tottering old party" in reference to the practice of old Congress politicians being appointed as Governors.[225]

There have been numerous instances of persons appointed as Governors continuing their connection with active politics, and in some cases even returning to active politics, after ceasing to be Governors.[226] For example, Biswanath Das, after having been the Uttar Pradesh Governor, became Chief Minister of Orissa, and Harekrushna Mahatab became Chief Minister of Orissa after serving as the Governor of Bombay.[227] Commenting on this trend, B.K. Nehru, a former Governor of Gujarat and Jammu & Kashmir, described the Governor as a "burnt out superannuated member of the ruling party for whom a Governorship was a kind of luxurious retirement."[228] C. Subramaniam, also a former Governor, thought that the

[222] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 36; M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978).
[223] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 36; *See* S.P. Aiyar and Usha Mehta (eds), *Essays on Indian Federalism* (Allied Publishers, 1965) at p. 185.
[224] M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978) at p. 37.
[225] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 36; Lok Sabha Debates, Vol 9, 1967, Colms. 798.
[226] M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978) at p. 37; Report of the Administrative Reforms Commission on Centre-State Relations (1968) at Ch 18, para 17; N.R. Deshpande, 'The role of the Governor in the Parliamentary Governments in the States', (1959) 10(1) The Indian Journal of Political Science at p. 21.
[227] J.R. Siwach, *Office of the Governor: A Critical Study, 1950-73* (Sterling Publishers, 1977) at pp. 8-9.
[228] Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at p. 575.

Governor was essentially 'a party man' working in the interest of the ruling party at the Centre.[229]

The close connection between active politicians and the office of the Governor has continued and is now more prevalent than ever. Sushil Kumar Shinde, the Chief Minister of Maharashtra, was removed from the State but was accommodated as a Governor in 2004. While serving as Governor, he was appointed as a Minister in the Central Government in 2006.[230] Sheela Dixit, who was Chief Minister of Delhi for three terms, was appointed as Governor of Kerala after losing the 2013 Assembly Elections.[231] In March 2019, the Mizoram Governor K. Rajasekharan resigned (after merely nine months since his appointment) in order to contest in the Lok Sabha elections for the BJP from Thiruvananthapuram in Kerala.[232] Around the same time, Rajasthan Governor Kalyan Singh expressly stated his desire to see the BJP emerge victorious in the Lok Sabha elections.[233]

These examples show that not only have persons with political backgrounds generally been favoured for appointment as Governors, such persons were often also politically active at the time of appointment. Their links to active politics were not severed during their time as Governors either, evidenced from the fact that several have jumped right back into the political fray after their governorships, without any cooling-off period. These instances highlight the extent to which the office of the Governor has been politicised, with very little separating Governors from the politics of the day.

b. Constitutional provisions and trends related to tenure and removal

Article 156 covers the term of the office of the Governor and clause (1) provides that the Governor shall hold office during the pleasure of the President. As discussed in the previous chapter and similar to the case of appointments, the mechanism for removal of Governor also underwent significant change over the course of deliberations in the Constituent Assembly. Earlier proposals envisaged a role for the State Legislature as well as the Rajya Sabha, providing both a certain security of tenure to the Governor, as well as enabling the State Legislature to keep a check on her.

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[229] Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at p. 575.
[230] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 20.
[231] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 23.
[232] 'Mizoram Guv acts on BJP's SOS, quits post to contest against Shashi Tharoor' (*Hindustan Times*, 8 March 2019) available at < https://www.hindustantimes.com/india-news/lok-sabha-elections-2019-mizoram-governor-k-rajasekharan-resigns-may-contest-against-shashi-tharoor/story-9nUOJFZpN6D0A0HI8ZSsgM.html > accessed 14 May 2019.
[233] 'Kalyan Singh faces flak over remarks backing Modi' (*The Hindu*, 26 March 2019), available at < https://www.thehindu.com/news/national/other-states/kalyan-singh-faces-flak-over-remarks-backing-modi/article26638485.ece > accessed 15 May 2019.

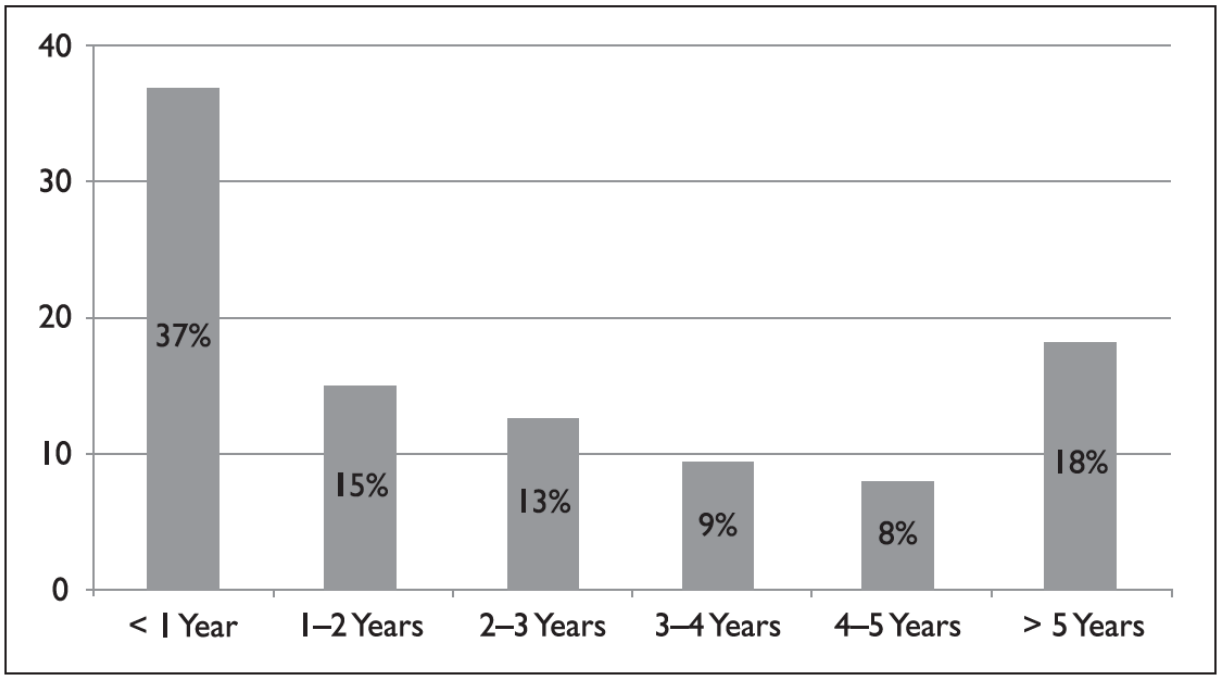
As opposed to this, the present position appears to confer unfettered power to the President (and through her to the Central Government) regarding removal. This however depends on the meaning and interpretation of 'pleasure', which is a term that appears in multiple constitutional provisions and has been extensively interpreted in judicial rulings.[234] Unlike in the case of certain other constitutional functionaries, there is no impeachment process for Governors despite the latter being the head of the State Executive.[235]

Article 156 further provides in clause (2) that the Governor may resign her office by writing to the President to this effect. Clause (3) provides that, subject to the above, the Governor shall hold office for a term of five years. Interestingly, the Draft Constitution had provided that the Governor was eligible for reappointment only once. There is no such restriction in the final Constitution.[236]

Arguably, removal of Governors as per Article 156 of the Constitution has proved to be even more controversial than appointments. In most cases, Governors have been unable to complete their full term of five years, and in some cases, their removal has been challenged in courts. The general trends that have been observed in practice, in addition to particular instances, will now be studied. Article 156 and its impact have also been studied by commissions, jurists, and courts, and their interpretations will be explored.

A study of gubernatorial tenures, covering the period from 1950 to April 2015, reveals that only one-fourth of Governors have completed their full terms of five years. Many Governors have been removed unceremoniously, and some of them have filed cases in court with respect to the same.[237] A substantial number of Governors (37 per cent) had tenures less than one year, and another 15 per cent had tenures of 1 to 2 years. This means that more than half of all Governors have served for under two years, which is less than half of the full term as specified in Article 156(3). The below graph displays these results:[238]

[234] Apart from Article 156, it also appears in Articles 75, 76, 164, 165, 239AA, 310, and 310.
[235] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2, at p. 2025.
[236] J.R. Siwach, *Office of the Governor: A Critical Study, 1950-73* (Sterling Publishers, 1977) at p. 14.
[237] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 15.
[238] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 25.



The author of the study notes that the average tenure of Governors has been higher in those States which had a larger proportion of Governors from civil services and defence backgrounds (such as Jammu & Kashmir), and lower in States which had Governors from predominantly political backgrounds (Bihar, Gujarat, etc.).[239] Another interesting feature is that the average length of tenures has been shorter after 1967, when non-Congress governments first emerged in certain States. In fact, the Sarkaria Commission observed that from 1947 to 1967, about half of all Governors served their full five-year terms, whereas between 1967 to 1986, only one-fifth of all Governors could manage the same.[240]

As discussed above, the 1967 elections that led to the formation of non-Congress governments in various States established some new trends with respect to Governors. The 1977 General Elections that saw the Janata Party come to power at the Centre – the first instance of a non-Congress party forming the Central Government – was a comparable event at the central level. The new government proceeded to remove fifteen Governors that were appointed by the previous government.[241] Subsequently, when the Congress returned to power in 1980, they likewise proceeded to remove Governors appointed by the Janata Party. Examples of this include Governors such as Prabhudas Patwari of Tamil Nadu and Raghukul

[239] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 28.
[240] Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at p. 581.
[241] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 28.

Tilak of Rajasthan, who were removed in 1980 and 1981 respectively.[242] This became a new trend, and has been followed consistently in subsequent instances of a change in the ruling party at the Centre. For instance, in 2004, the UPA-I government removed four Governors, including Kidar Nath Sahni of Goa and Vishnu Kant Shashtri of Uttar Pradesh, who were appointees of the previous NDA-I government. In 2014 when NDA-II came to power, it too removed several Governors who were appointed by UPA-II, including Kamla Beniwal of Mizoram, Shekhar Dutt of Chhattisgarh and M.K. Narayanan of West Bengal.[243]

In 2014, the former Governor of Uttarakhand Aziz Qureshi filed a petition in the Supreme Court challenging his removal. This petition is pending before a constitutional bench of the Supreme Court, and it seeks to clarify the President's power under Article 156 with respect to removal of Governor in light of the *B.P. Singhal* case.[244] Qureshi was later appointed as Governor of Mizoram, in 2015, but was removed once again, within three months of his appointment.[245]

c. Consequences of the constitutional scheme of appointment and removal on the independence of Governors

The Supreme Court pointed out, in *Hargovind Pant v. Raghukul Tilak*,[246] that the appointment of the Governor by the President is only a mode of appointment. It does not define the role of the Governor and does not convert the Governor into an employee of the Central Government.[247] The Governor, in the Court's view, is neither amenable to the directions of the Centre, nor accountable to it, and she occupies an independent constitutional office not subject to the control of the Centre. M.P. Jain has rightly noted that the Court's observations in this case are largely theoretical and overlook actual practice.[248]

Constitutional scholar Seervai acknowledges the difficulty with the provision for removal noting that if the Governor takes action contrary to the policy of the Centre, she would risk being removed. However, he insists that a prudent Central Government would not advise, and would not be justified in advising, the removal of a Governor who has only honestly discharged her duty though she may have taken action which does not fall in line with the policy of the Centre.[249] It is true that the text of the Constitution has left room for a strict,

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[242] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 179.
[243] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 28.
[244] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 24.
[245] Aman Sharma, 'Mizoram gets 7th Governor in 8 months, Aziz Qureshi sacked' (*The Economic Times*, 28 March 2015), available at < https://economictimes.indiatimes.com/news/politics-and-nation/mizoram-gets-7th-governor-in-8-months-aziz-qureshi-sacked/articleshow/46726713.cms > accessed 21 January 2019.
[246] *Hargovind Pant v Raghukul Tilak*, (1979) 3 SCC 458.
[247] Samaraditya Pal, *India's Constitution: Origins and Evolution*, (1st edn, LexisNexis, 2015) Vol 4, at p. 464.
[248] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.
[249] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2, at p. 2066.

principle-based interpretation limiting the withdrawal of pleasure under Article 156. However, there is nothing in the evidence thus far to indicate the evolution of such a norm. On the contrary, as brought out in Ashok Pankaj's study quoted above, less than half of the Governors post-independence have managed to complete two years of their envisaged five-year tenure.

This is because Article 156 *prima facie* appears to confer upon the President an unprecedented power over the tenure of the Governor. After all, clause (3), which specifies a five-year term is explicitly made subject to clause (1) which provides for the President's pleasure in this regard. The Sarkaria Commission, however, took a different view of the matter. Reading clause (1) of Article 156 with clause (3), the Commission observed that in prescribing a five-year term for the Governor's office, the framers of the Constitution intended to circumscribe the President's pleasure. This means that such pleasure should not be withdrawn without showing cause. It argued that any other inference would render clause (3) futile.[250] Soli Sorabjee also arrived at a similar conclusion, but through a different line of argument. He states that:[251]

> … it is possible to challenge the [removal of a Governor by the President], not on account of a breach of convention, but on the ground that the power of removal, though absolute in terms, is subject to an implied or inherent limitation—that it can be exercised only in cases of violation of the Constitution, or other similar acts on the part of the Governor which renders [her] unfit to occupy this constitutional office. Above all, any action which is established to be arbitrary, capricious and mala-fide can be successfully challenged.

The landmark judgment on this issue is *B.P. Singhal v. Union of India*,[252] which was decided in 2010 by the Supreme Court and concerned the removal of four Governors by the President in 2004 when the UPA Government came to power at the Centre. The court held, first, that the doctrine of pleasure under Article 156 enables the Centre to dismiss Governors without requiring either any notice to be given to the person being removed or a hearing or opportunity to show cause. There is no requirement to disclose any reason for removal either. That being said, the doctrine as contained in Article 156(1) was not a "licence to act with unfettered discretion", or "to act arbitrarily, whimsically, or capriciously", and even though it is not expressly limited, it is still subject to the "fundamentals of constitutionalism".[253]

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[250] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.8.07; The Supreme Court in *B. P. Singhal v Union of India*, (2010) 6 SCC 331 took a contrary view. It held that clause (3), which denotes the five-year term for Governors, is not intended to be a restriction or limitation upon the power to remove the Governor at any time, as per the pleasure doctrine contained in clause (1). Clause (3) is clearly made subject to "the foregoing provisions of this article", and therefore it follows that the five-year term is subject to the pleasure of the President.

[251] Soli Sorabjee, L.P. Singh, et al. (eds), *The Governor: Sage or Saboteur* (Roli Books, 1985) at pp. 19-20.

[252] *B. P. Singhal v Union of India*, (2010) 6 SCC 331.

[253] In this connection, the Supreme Court identified three different types of tenure in the Constitution. First – those who hold office during the pleasure of the President or Governor (e.g. Article 156); second – those who

Pleasure cannot be withdrawn according to the whims of the concerned authority but only for valid reasons. Second, the Court also held that "there is a distinction between the need for a cause for the removal, and the need to disclose the cause for removal." Accordingly, the President need not disclose to the Governor the cause for her removal but a cause must necessarily exist and the removal cannot be arbitrary or malafide. Third, the Court specified that a Governor cannot be removed on the ground that "[she] is out of sync with the policies and ideologies of the Central Government or the party in power at the Centre. Nor can the Governor be removed on the ground that the Central Government has lost confidence in [her]".[254] Consequently, change in government at the Centre is not a ground for removal of Governors holding office. Fourth, the Court held that the decision to remove a Governor is subject to a limited extent of judicial review. This means that in case a removal is challenged, the aggrieved person will have to bear the burden of proof and establish a *prima facie* case of arbitrariness or malafides, as the court will assume that the Centre had valid and compelling reasons for the same. If satisfied to the contrary, the court can require the Central Government to prove that there were indeed good and compelling reasons, the definition of which would depend on the facts of the particular case.

Despite the categorical nature of the above findings of the Supreme Court, *B.P. Singhal* did not curb the practice of Governors changing with a change in government at the Centre. As discussed above, this practice was continued after the 2014 General Elections as well. The position continues to be that the Governor emerges as the least secure and the least protected of all constitutional functionaries as far as security of tenure is concerned.[255]

As the Governor is entirely dependent on the Central Government's whims for continuing in office, it is naturally difficult for her to be independent. The simple fact seems to be that the Governor is thought of as a person who enjoys the faith of the Central Government. Governors are appointed on this basis and are removed, almost instantly, if they fail to toe the Centre's line. The Sarkaria Commission linked the lack of independence of Governors to the unfettered power of Central Government to remove Governors. The Commission observed that:[256]

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hold office during pleasure which is made subject to explicit restrictions (e.g. Articles 310 and 311); and third – those who hold office for specified terms with immunity against removal, except by impeachment, who are not subject to the doctrine of pleasure (e.g. Articles 56, 124, 148, 218 and 324). Accordingly, it is not possible to extend the type of protection against removal granted to one category of offices, to another category. *See B. P. Singhal v Union of India*, (2010) 6 SCC 331.

[254] This was in light of the fact that the Governor is the constitutional head of the State and not an employee or an agent of the Union Government. Moreover, the relation between the Union Government and the Governor was qualitatively different from the one between the Prime Minister and the Council of Ministers (purely political) and between the Union and the Attorney General (lawyer-client). Therefore, whereas loss of confidence may be a relevant criterion for removal in those other cases, it cannot be a relevant ground for removal of Governor. *See B. P. Singhal v Union of India*, (2010) 6 SCC 331.

[255] Soli Sorabjee, L.P. Singh, et al. (eds), *The Governor: Sage or Saboteur* (Roli Books, 1985) at p. 13.

[256] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.7.08.

> … the ever-present possibility of the tenure being terminated before the full term of 5 years, can create considerable insecurity in the mind of the Governor and impair [her] capacity to withstand pressures, resist extraneous influences and act impartially in the discharge of [her] discretionary functions.

The Commission also observed that the frequent transfers of Governors from one State to another, as though they were civil servants, can lower the prestige of the office to the detriment of both the Centre and the concerned State. Accordingly, the Commission was of the view that "the Governor's tenure of five years in a State should not be disturbed except very rarely and that too for some extremely compelling reason."[257]

In *B.P. Singhal*,[258] the Supreme Court seemed to have a chance to address this problem. A stronger interpretation of Article 156, perhaps on the lines of what the Sarkaria Commission had suggested could have been explored. However, the Supreme Court, while seeming to lay down the proposition that the power of the Central Government is not unfettered and cannot be exercised arbitrarily, or whimsically failed to set out any practical limitations on that power. Such limitations necessarily have to be, at least in part, procedural. The complete rejection of the need for disclosure of reasons by stating that a cause must merely exist seems to undo the requirement that a removal cannot be arbitrary. The intent of the framers and the text of the Constitution may understandably have limited the Court. However, in areas such as appointment of judges, the Court has not let the text of the Constitution or the intent of the framers come in the way of creative interpretation of provisions to claim almost complete control over appointment and removal of judges.

Rather than offer a modicum of protection to the Governors, the Supreme Court, however, largely agreed with Seervai, and observed that it is wrong to assume that Governors appointed on account of their stature, experience, maturity and distinction "will be demoralised or be in constant fear of removal, unless there is security of tenure".[259] The profiles of persons who have been appointed as Governor, and the manner in which this office has been used for political purposes generally, contradicts this observation almost entirely. The routine practice is of mass removals of Governors following a new political party coming to power at the Centre. Governors appointed as part of such cycles are unlikely to be impervious to the Centre's power with respect to removal, having entered upon office on account of a questionable exercise of the same power in the first place.

The present mechanisms for appointment and removal of Governors can have a determinative effect on the office's functioning. By determining not just the identity of the appointee but also her term in office, the Centre appears to have effectively imposed its political interests (whether legitimate or not) onto Governors. Post-independence practice has shown that there is considerable political colour to the operation of the appointment and

[257] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.7.08.
[258] *B. P. Singhal v Union of India*, (2010) 6 SCC 331.
[259] *B. P. Singhal v Union of India*, (2010) 6 SCC 331.

removal mechanisms. Additionally, judicial review has not served to create any effective scrutiny into the intrusion of such political interests, opting not to demand the disclosure of reasons in partisan removals.

3.2 Article 163 and the Governor's discretion

a. The interpretation of Article 163 and its significance

Examining Article 163 of the Constitution is critical in order to fully appreciate the role of the Governor in India's polity. Understanding the origins of this provision and the constitutional experience that it is steeped in can provide considerable clarity on the nature of the problems that the institution currently faces. The text of the provision reads as:

> 163. Council of Ministers to aid and advise Governor.
>
> (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

A plain and literal reading of this provision can lead to interpretations that are quite divorced from the intention of its framers as well as from the manner in which it has come to be understood over time. Clause (1) appears to only require the existence of a Council of Ministers to aid and advise the Governor in the exercise of her functions. Insofar as it imposes any legal duty at all, it appears to do so in relation with the Council of Ministers and not the Governor. The words "aid" and "advise" are not the same as the words "instruct" or "command". A fundamental question that the text leaves unanswered and that has been a flashpoint throughout the constitutional working of the provision is whether the aid and advice of the Council of Ministers is binding on the Governor.

The exception in clause (1) provides a backdrop against which to understand the Governor's functions. The exception differentiates two kinds of situations: those in which the aid and advice of the Council of Ministers is envisaged and those in which the Governor is "by or under this Constitution required to exercise his functions or any of them in his discretion". The first point that emerges from the exception is that where the Constitution requires the Governor to apply her discretion, aid and advice from her Ministers is not envisaged. The text does not suggest anywhere that the aid or advice is binding. On this point, one can argue that

even where the Governor is not *required* to apply discretion, she may not be *disallowed* from applying it though ministerial aid and advice is envisaged for the same. A second point that emerges is that the Governor may be required to exercise her functions or *any of them* in her discretion, suggesting that the application of the Governor's discretion is not inherently tied to any particular set of functions and may emerge in all of them.

Whatever the effect of constitutional requirements to apply discretion, clause (2) of the provision seeks to make the Governor's determination regarding such constitutional requirements final and does not allow for any remedy in the form of a review of the determination. This would mean that where the Governor decides that the Constitution requires her to exercise her functions in her own discretion, that decision is not justiciable in a court.

If the functions of the Governor under the Constitution were of limited importance and extended only to hosting dinners and giving interviews, the mysteries of Article 163 would perhaps not have been worth solving. Article 154 of the Constitution instead vests in the Governor the entire executive power of the State which, as per Article 162, extends to all matters regarding which a State Legislature can make laws. As described below in further sections of this chapter, a host of other functions are also specifically assigned to the Governor in relation with crucial appointments, legislative activity, rules on recruitment, reports to the President etc. Significantly, Article 166(3) requires that the Governor make rules for the transaction and allocation of State Government business unless the business is such where the Governor is required to "act in [her] discretion." Depending on the meaning of Article 163, the Governor can be authorised to exercise all these functions at varying degrees of personal freedom. She may exercise the functions without hearing any party and acting on her own designs; she may be bound to hear the advice of her ministers but not bound to follow it; she may be free to act against the advice of her ministers but bound by some other constitutional provision or mandate; or, of course, she may be a nominal head bound to exercise her functions only in the way that she has been advised. How much "discretion" does Article 163 envisage?

It should be clear that how one reads Article 163 can have considerable knock-on effects on a number of other aspects regarding Governors. In other words, the question of how a Governor is expected to interpret the nature and contours of her discretion and exercise the same is intimately linked to the question of what a Governor's role ought to be. Of particular concern is the possibility that a Governor's discretionary actions could be guided not by her own conscience but by an external force such as her appointing authority – the Central Government. As the discussion in chapter 2 revealed,[260] the design of the office of the Governor reflects a dual capacity – the Governor as constitutional head of the State, and the Governor as the representative of the Central Government in the State. The often conflicting

[260] *See* chapter 2.4 of this book.

natures of these two roles was not fully explored in the Constituent Assembly. Post-independence commentators have continued to highlight this aspect of the Governor's role.

In its report to the Administrative Reforms Commission in 1967, M.C. Setalvad's Study Team prefaced its findings on the Governor by highlighting that the position had a dual role. The Governor had to have the abilities needed "to discharge with skill and detachment [her] dual responsibility towards the centre and towards the State Executive of which [she] is the constitutional head."[261] In a concurring opinion in the case of *Samsher Singh*[262] in 1974, Krishna Iyer J. referred to the Governor's ability to reject aid and advice as being available "to the limited extent that Article 163 permits and [her] discretion, remote controlled by the Centre, has play."[263] The 1988 Report of the Sarkaria Commission outlines a three-part role for the Governor: as the constitutional head of a state, a vital link between the centre and the state, and as an agent of the Central Government.[264] In the 1994 case of *S.R. Bommai*,[265] referring to the Governor's function of reporting to the President, Jeevan Reddy J. found that it would be "a case of [the Governor] reporting against [her] own Government … a case of [her] wearing two hats, one as the head of the State Government, and the other as the holder of an independent constitutional office…"[266] At a Conference of Governors in 2005, the then Prime Minister Manmohan Singh stated that Governors were "the representatives of the centre in states" and that they brought "a national perspective to state level actions and activities".[267]

However, Article 163 contains no hint of a legitimate space for the interests of the Centre in the considerations of a State's Governor. Moreover, as highlighted in chapter 2, understanding the nature of gubernatorial discretion by drawing inferences on the basis of design features alone (i.e., the Centre's role in appointing and removing Governors) may be inaccurate, considering that the design features were chosen for independent reasons without appreciating their repercussions on the exercise of discretion. In this section, the evolution of Article 163 will be outlined so as to facilitate a holistic view of the provision's legal meaning.

b. Original intent: "Discretion" in the technical Sense

The literal meaning of Article 163(1) appears to indicate that the Governor has a general power to act in discretion whenever and wherever she is required to do so by or under the Constitution. On the other hand, Article 74 is a provision in the Constitution analogous to

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[261] Administrative Reforms Commission, Report of the Study Team on Centre-State Relationships (1968), Vol 1 at para 18.1.
[262] *Samsher Singh v State of Punjab,* (1974) 2 SCC 831.
[263] *Samsher Singh v State of Punjab,* (1974) 2 SCC 831, Krishna Iyer, J. (Sep. Op.) at para 122.
[264] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.4.01.
[265] *S.R. Bommai v Union of India*, (1994) 3 SCC 1.
[266] *S.R. Bommai v Union of India*, (1994) 3 SCC 1, at paras 282, 8 (Jeevan Reddy and Agrawal, JJ. (Pandian J. concurring)).
[267] Dr. Manmohan Singh, 'PM's speech at Governors Conference' (June 15, 2005) available at < https://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=132 > accessed 12 January, 2019.

Article 163 but in relation with the President of India and it does not contain any exception allowing for discretion as Article 163 does.[268] The existence of an exception requiring the exercise of the Governor's discretion at least makes clear that the aid and advice of the Council of Ministers is not envisaged for all of her functions. To read the provision otherwise would be to treat the exception as if it does not even exist.[269] To give the exception some force, however, raises a choice: is the Governor to act in discretion wherever she feels the Constitution requires her to do so or is it only available where there is an explicit requirement?

Arguably, the controlling paradigm for the actions of the Governor and President are as formal constitutional heads of their respective Executive governments.[270] It is also in the broader context of the Constituent Assembly Debates that we need to understand the Governor's functions and the scope of her discretion. As discussed in the previous chapter, the exception to ministerial aid and advice in the Governor's functions under Draft Article 143, which became the present Article 163, came under considerable criticism in the Assembly but was retained on the basis of assurances that it was not a general grant of discretion but would only be activated where the Constitution explicitly granted the Governor discretion, just as it had been under the Government of India Act, 1935. However, a number of provisions where the Governor had earlier been granted discretion were amended to remove the same from the final Constitution.[271] The intention was thus to ensure that the Governor did not exercise discretion in relation to those functions and acted in accordance with ministerial aid and advice. The previous chapter showed that the Constituent Assembly placed considerable weight on the operation of constitutional conventions in the marginal cases where ministerial advice was lacking or where it would run contrary to a principle of responsible government. Article 163 should not be read literally as Governors were conventionally meant to be bound by the aid and advice of their Ministers in most circumstances and conventionally meant to exercise only certain prerogative powers. The exception for "discretion", on the other hand, was meant to be read as existing outside ministerial responsibility only where explicitly "required by or under [the] Constitution."

[268] In fact, following the 42nd and 44th Constitutional Amendments in 1976 and 1978 respectively, the provision now specifically says that the President must act in accordance with the advice of the Council of Ministers, clarifying that the advice is of a binding nature. No such change has been made in relation with the Governor in Article 163.

[269] Established doctrine on interpretation requires that all efforts should be made to give meaning to every word used by the Legislature. "It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute." *Aswini Kumar Ghose v Arabinda Bose*, AIR 1952 SC 369, at p. 377.

[270] This understanding, arising from the adoption of the conventions of a British-style parliamentary system, had been affirmed since early Supreme Court cases, notably *State of Travancore-Cochin v Bombay Co. Ltd.*, AIR 1952 SC 366 and *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549.

[271] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at pp. 489-502.

This understanding of the Governor's discretion hewed close to the technical meaning of the term as under the Government of India Act, 1935.[272] However, since the Constitution's text differed from the 1935 Act by eliminating explicit grants of discretion in almost all areas, conventions and conventional prerogatives were meant to operate there, for example in ensuring that the Governor chooses her Ministers on the basis of whether they commanded the confidence of the House in question. A literal reading of the Constitution could otherwise yield an "absolute and untrammelled" executive power in all of the Governor's functions and this would necessarily be contrary to the parliamentary system of responsible government that had been put into place throughout the Constitution's other provisions.[273] Thus, the solution to any "piquant situations" (appointment and dismissal of ministers, proroguing and dissolving the Assembly etc.) would be the usage of conventions as understood in other parliamentary responsible governments.[274] Soon after the Constitution came into force, Dr. B.R. Ambedkar became Law Minister in the Central Government and in this capacity had the chance to make clear his views on the Governor's discretion:[275]

> There are, in fact, only two cases mentioned in the Constitution in which a Governor can act in [her] discretion both of which relate to the functions of the Governor of Assam, and these will be found in Para 9(2) and 18 of the Sixth Schedule to the Constitution.

There seems to be little doubt, therefore, that "discretion" under Article 163 of the Constitution was meant to only have a technical meaning: the exercise of a function by the Governor where ministerial responsibility was excluded. However, given the impact of such discretion on parliamentary democracy, it was meant to arise only in a narrow set of circumstances where explicitly granted.[276] A very explicit instance of such a grant is in Article 239(2), which reads:

> Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a

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[272] The exclusion of ministerial responsibility in the exercise of "discretion" and the distinction between this concept and "individual judgment" has been described previously, citing discussions in the British Parliament leading up to the passing of the Government of India Act, 1935. *See* chapter 2.3 of this book.

[273] *K.A. Mathialagan v The Governor of Tamil Nadu*, (1973) 86 LW 340 (Mad) (FB), at p. 350.

[274] *K.A. Mathialagan v The Governor of Tamil Nadu*, (1973) 86 LW 340 (Mad) (FB), at pp. 353-354.

[275] This opinion of Dr. Ambedkar's was recounted in the 1971 Report of the Bhagwan Sahay Committee (*Report of the Committee of Governors* (President's Secretariat, 1971)) and is also cited in *K.A. Mathialagan v The Governor of Tamil Nadu*, (1973) 86 LW 340 (Mad) (FB), at p. 360. The Madras High Court, in the above case, wholeheartedly accepted the opinion and further relied upon the 1971 Committee Report to point out that ministerial responsibility was not to be excluded unless this was explicitly provided for.

[276] High Court cases prior to 1974 adhere closely to this view. *See Chittoor Varadaraja Iyer Narayana Iyer v State of Travancore*-Cochin, 1952 SCC OnLine Ker 153, at para 20, in the context of removal of judges under Article 311; *Biman Chandra Bose v Dr. H.C. Mukherjee*, AIR 1952 Cal 799, at para 5, in the context of nominations to the State Legislative Council under Article 171; *K.A. Mathialagan v The Governor of Tamil Nadu*, (1973) 86 LW 340 (Mad) (FB), in the context of prorogation of a Legislative Assembly under Article 174.

> Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers.

The provision makes an exception from Part VI of the Constitution on 'The States' for the purposes of a State Governor acting as an administrator of a Union Territory and here she must act *independently of her Council of Ministers*. It may seem unclear whether the Governor instead acts on the instructions of the President given the fact that the territory in question is, after all, a Union Territory.[277] The operation of the Governor's discretion, where explicitly granted, is certainly a functioning facet of our Constitution as becomes clear on an examination of cases related to similar provisions that make such explicit grants.[278] However, even here, the appropriate language by which such explicit grants are made has not been without controversy. While there is an explicit demarcation of discretionary powers under the Sixth Schedule, the legal position in the Fifth Schedule has suffered from ambiguity. The Fifth Schedule does not clearly spell out that the Governor is to take decisions in relation with Scheduled Areas in her discretion and yet it has been interpreted as such in some instances.[279]

Before we proceed to a discussion of how the judicial interpretation of discretion has evolved from the original position, it is appropriate to note certain contexts in which the Governor's actions remain bound but not by ministerial advice alone. One such situation may be found in Article 192 of the Constitution. Clause (1) of the provision requires questions regarding the disqualification of a member of a State Legislature to be referred to the Governor and makes her decision on the matter final. However, clause (2) makes it mandatory for the Governor to obtain the opinion of the Election Commission and makes clear that she "shall act according to such opinion".[280] Other similar situations arise in the conflict between a High Court's

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[277] On this point, it may be noted that the Sarkaria Commission unequivocally characterises the function of the Governor as an administrator of a Union Territory to be one in which she is "an agent of the Union Government" even during normal times. *See* Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.4.01(c).

[278] *See*, for instance, *Pu Myllai Hlychho v State of Mizoram*, (2005) 2 SCC 92, in the context of paragraphs 2(1), 2(6-A) and 20-BB of the Sixth Schedule of the Constitution, finding that the Governor of Mizoram had both discretionary and non-discretionary powers and that he was bound by ministerial advice in the latter; other provisions that explicitly grant discretion may be seen in Article 371A at clause (1)(b) and (d) as well as clause (2)(b) and (f) in relation with Nagaland (interestingly, in a careful transplantation of the technical compartmentalisation of the Government of India Act, 1935, Article 371A(1)(b) refers to the Governor having a "special responsibility" to be discharged in "his individual judgment" after consulting his ministers but on a question as to whether he is to exercise his individual judgment or not, the Governor's decision is to be "in his discretion"), as well as Article 371F(g) in relation with Sikkim ("subject to such directions as the President may, from time to time, deem fit to issue") and Article 371H(a) in relation with Arunachal Pradesh (with the same phraseology as Article 371A(1)(b)).

[279] *See*, for instance, *Bhuri Nath v State of Jammu & Kashmir*, (1997) 2 SCC 745, at paras 21-25, differentiating between discretionary and non-discretionary powers under different statutes and under the Fifth Schedule to the Constitution; National Commission for Scheduled Tribes, Special Report: Good Government for Tribal Development and Administration (May 2012) available at < https://tribal.nic.in/DivisionsFiles/NCST-RM/NCST/18SplNCSTReport(mainReport).pdf > accessed 1 March, 2019, at pp. 20-23; Bhupinder Singh, 'The Fifth Schedule of the Constitution: A Critique', (2019) LIV(4) Economic & Political Weekly at p. 28.

[280] The Supreme Court has repeatedly affirmed that the Governor is indeed bound to make her decision in accordance with the opinion of the Election Commission. *See Brundaban Nayak v Election Commission of*

control over the subordinate judiciary and the powers of the Governor in relation with service matters of judicial officers. Thus, in the case of *Rajendra Singh Verma*,[281] the Supreme Court surveyed a long line of decisions to reaffirm that a Governor was not to act on the aid and advice of her Council of Ministers on a matter of the compulsory retirement of a judicial officer in the subordinate judiciary and was bound to act only on the recommendation of the relevant High Court by virtue of the 'control' granted to said High Court over district courts and subordinate courts under Article 235 of the Constitution.[282] It may be noted that this last instance where the Governor is bound to act on the determinations of another authority is not explicit in the provisions of the Constitution but has been found to be a "plain implication" of Article 235.[283] As it turns out, such forms of interpretative deviations are precisely how the idea of the Governor's discretion has evolved even where it has been expanded from the original conception described above.

c. Necessary implication: The Governor's new "discretion"

The discretion of the Governor eventually came to be affirmed not just as it was originally conceived – a limited power where explicitly granted by or under the Constitution – but also where the provisions of the Constitution by necessity implied actions against the aid and advice of her Council of Ministers. While such implied discretion is today a well-established doctrine (with some fuzzy margins), it is important to understand how it was first conceived of. The first indication of this new stance of the Supreme Court came in the case of *Samsher Singh v. State of Punjab*,[284] a case that required the review of an earlier decision, *Sardari Lal v. Union of India*.[285] In *Sardari Lal*, the Supreme Court examined Article 311(2)(c) on the dismissal, removal or reduction in rank of any member of the civil service and found that the power of the President or the Governor to do away with an inquiry for such actions was to be based on the *personal* satisfaction of the President or Governor and not the satisfaction of their respective Councils of Ministers. This finding was made on the basis of a reading of certain provisions of the Constitution that seemed to specifically name the President or Governor as the competent authority (e.g. the use of the phrase "if the President is satisfied" in Article 360) and on the basis of the understanding that certain functions of these constitutional heads were not capable of being delegated.[286] This would, of course, effectively mean that the aid or advice of the Council of Ministers for the purpose of such functions would not be binding on the President or the Governor.

India, AIR 1965 SC 1892; *Election Commission of India v Dr. Subramaniam Swamy*, (1996) 4 SCC 104 at para 7.

[281] *Rajendra Singh Verma v Lt. Governor (NCT of Delhi)*, (2011) 10 SCC 1.

[282] *Rajendra Singh Verma v Lt. Governor (NCT of Delhi)*, (2011) 10 SCC 1, at para 135.

[283] *Rajendra Singh Verma v Lt. Governor (NCT of Delhi)*, (2011) 10 SCC 1, at para 135.

[284] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831.

[285] *Sardari Lal v Union of India*, (1971) 1 SCC 411.

[286] *Sardari Lal v Union of India*, (1971) 1 SCC 411, at paras 5-9, relying on *Moti Ram Deka v General Manager, N.E.F. Railways, Maligaon, Pandu*, AIR 1964 SC 600 and *Jayantilal Amrit Lal Shodhan v F.N. Rana*, AIR 1964 SC 648.

In *Samsher Singh*, the Supreme Court overruled the *Sardari Lal* judgment, finding that its reasoning was flawed and that almost all of the functions of the Governor were only to be carried out on the basis of the satisfaction of her Council of Ministers with their aid and advice being binding on the Governor. The Court found that the judges in *Sardari Lal* had not had their attention drawn to certain judgments that made clear the requirement of legislative control over the executive branch in the parliamentary or cabinet system of government.[287] Thus, while the Executive had the primary responsibility to formulate policy, maintain order, promote welfare and carry on general administration, this was always meant to be subject to the executive retaining the confidence of the relevant Legislature and acting subject to its control. While executive power may be formally vested in a constitutional head, the real powers would always vest in the Ministers of the relevant Cabinet who were directly answerable to the Legislature.[288] Similarly, it is essential to understand that the provisions of the Constitution that require there to be a Council of Ministers to aid and advise the President or the Governor (Articles 74(1) and 163(1) respectively) are mandatory in nature, meaning that action by such constitutional heads is ordinarily never to be without or contrary to the aid and advice of their respective Councils.[289] On the back of this reasoning, the Supreme Court in *Samsher Singh* held:[290]

> … We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations.

So far, of course, this ruling aligned with the original intent of the framers of the Constitution and very much clarified the precise position of law regarding the ordinary functioning of the constitutional heads of our country, cementing the understanding that Presidents and Governors are bound by the aid and advice of their respective Councils. The more precarious question that remained was the matter of the "few well known exceptional situations". On this, the majority had not only pointed out the provisions of the Constitution where the Governor is explicitly granted discretion but had also remarked that she may act against the aid and advice of her Council of Ministers in the cases of reporting failure of constitutional machinery to the President under Article 356 and refusing assent to Bills under Article

[287] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831, at paras 33-36 and 47. The judgments in question were *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549; *A. Sanjeevi Naidu v. State of Madras*, (1970) 1 SCC 443; and *U.N.R. Rao v Indira Gandhi*, (1971) 2 SCC 63.
[288] *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549, at paras 13-14.
[289] *U.N.R. Rao v Indira Gandhi*, (1971) 2 SCC 63, at para 8.
[290] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831, para 154 of the concurring opinion of Krishna Iyer and Bhagwati JJ.

200.[291] Similarly, in the concurring opinion, the "exceptional situations" were mentioned as below:

> Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister) restricted though this choice is by the paramount consideration that he should command majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory.

It is in a very narrow manner that the view in *Samsher Singh* deviates from the view that appears to have been originally envisaged by the Constituent Assembly. This is well expressed by the constitutional scholar H.M. Seervai:[292]

> [I]t is submitted that after the [Supreme Court's] decision in *Samsher Singh's Case* the proposition that the Governor is required to act in [her] discretion only by express provision is no longer good law, for, as we have seen, both the judgments in that case held that in some cases the Governor had power to act in [her] discretion as a matter of necessary implication. Again, the statement that the words "in [her] discretion" have the technical meaning given to them under the G.I. Act, 35, is also not good law, for the Sup. Ct. gave those words their plain natural meaning, namely, that where the Governor acts "in [her] discretion" [she] is not obliged to follow the advice given to [her] by the Council of Ministers.

Thus, while it does not appear to have been stated in the judgment in precisely these terms, the Court in *Samsher Singh* found that the idea of the "discretion" of a constitutional head applied not just in the case of an explicitly worded grant by or under the Constitution but could also arise through the purposive interpretation of certain provisions, leading to the *necessary implication* of discretion in those functions. The fact that this reading was limited to areas of absolute necessity in the democratic scheme is clear from the usage of words in the concurring opinion such as "compelled" or "blatantly obligatory". The fact that the reading also departed from the technical meaning of "discretion" under the Government of India Act, 1935 is clear from the conflation of "discretion" and "individual judgment" (two terms compartmentalised from each other under the 1935 Act), in such statements as: "Where the Governor has any discretion, the Governor acts on [her] own judgment."[293]

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[291] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831, at paras 55 and 56.
[292] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2, at para 18.78.
[293] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831, at para 88.

Thus, with time, the view that the Governor applies discretion in certain constitutional predicaments by necessity has become largely accepted in jurisprudence today, as may be seen from the Punchhi Commission Report:[294]

> Article 163 does not give the Governor a general discretionary power to act against or without the advice of [her] Council of Ministers. In fact, the area for the exercise of discretion is limited and even in this limited area, [her] choice of action should not be nor appear to be arbitrary or fanciful. It must be a choice dictated by reason, activated by good faith and tempered by caution.
>
> The Governor's discretionary powers are the following: to give assent or withhold or refer a Bill for Presidential assent under Article 200; the appointment of the Chief Minister under Article 164; dismissal of a Government which has lost confidence but refuses to quit, since the Chief Minister holds office during the pleasure of the Governor; dissolution of the House under Article 174; Governor's report under Article 356; Governor's responsibility for certain regions under Article 371-A, 371-C, 371-E, 371-H etc.

With the evolution of this new rubric in which to view the discretionary powers of a constitutional head, the further development of the law naturally saw the growth of some ambiguities. Some of the particular applications of this doctrine of necessary implication in different functions specifically marked out in the Constitution are discussed below in this chapter in the relevant sections dealing with each of the said functions. However, six cases both before and after *Samsher Singh* may be recounted to explain how the ambiguities came to be.

In *Mahabir Prasad Sharma*,[295] the West Bengal Governor perceived that the Chief Minister had lost the confidence of the Legislative Assembly and requested the Chief Minister to summon the Assembly and prove his majority. However, the Chief Minister declined to do so and only allotted a date further in the future. The Governor then dismissed the Chief Minister and appointed a new one himself. This appointment was challenged before the Calcutta High Court, which found that Ministers hold office at the pleasure of the constitutional head and the withdrawal of the pleasure of the Governor was entirely at her discretion, with there being no restriction in the Constitution in the matter of appointment of a Chief Minister. The possibility of reporting a breakdown of constitutional machinery under Article 356 due to a deadlock between the Governor and the Chief Minister was not examined by the High Court.

In *Satya Pal Dang*,[296] the Speaker had declared a no confidence motion against himself to be unconstitutional and deemed to have not been moved at all and adjourned the Legislative Assembly in question. The Governor prorogued and re-summoned the Assembly, directing it to consider certain items but the Speaker ruled that the House was prorogued on a different

[294] Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.5.
[295] *Mahabir Prasad Sharma v Prafulla Chandra Ghose*, AIR 1969 Cal 198.
[296] *State of Punjab v Satya Pal Dang*, AIR 1969 SC 903.

date from the one declared by the Governor and that the re-summoning was illegal and void. He then adjourned the Assembly again but the Deputy Speaker occupied the chair and transacted legislative business. In its judgment, while the Supreme Court was more concerned with the actions of the Speaker, it did not find the actions of the Governor problematic.

In *Pratapsingh Raojirao Rane*,[297] once again the Governor dismissed the Chief Minister as in his opinion the latter had lost the confidence of the Legislative Assembly, only this time the Chief Minister had sought a vote of confidence and had succeeded to secure it (though with some controversy). A challenge was made at the Bombay High Court to the dismissal of the Chief Minister and the High Court found, referring to *Mahabir Prasad Sharma*, that it was valid for the Governor to withdraw his pleasure at will and such actions could not be subjected to judicial scrutiny at all as a result of Articles 163(2) and 361.

In *R.S. Nayak*,[298] in a matter regarding sanction to prosecute the Chief Minister for corrupt activities, the Supreme Court found that it was appropriate for the Governor to provide the said sanction instead of the Law Minister or any other Minister not only because the court felt that such an exercise of individual discretion was appropriate (where there is inherent bias apparent in the proposed action of a Ministry on such a question) but also because, as per the Court, "when there is to be a prosecution of the Chief Minister, the Governor would, while determining whether sanction for such prosecution should be granted or not under Section 6 of the Prevention of Corruption Act, as a matter of propriety, necessarily act on [her] own discretion and not on the advice of the Council of Ministers."

In *M.P. Special Police Establishment*,[299] the Governor went by the report of the Lokayukta (that there was sufficient ground to prosecute two Ministers for corrupt activities) and granted sanction to prosecute in disregard of the advice of the Council of Ministers. The Supreme Court, hearing a challenge to the grant of sanction, found that it was appropriate to carve out an exception to the rule that the aid and advice of the Council of Ministers is binding: this time on the ground that if sanction to prosecute was refused or withheld despite there being a *prima facie* case, there could be a breakdown of rule of law and democracy. Thus, while sanction to prosecute must normally only be granted on the aid and advice of the Council of Ministers, the Governor would be permitted to apply her own discretion if it is a matter of propriety, if the Council of Ministers disables or disentitles itself, in a case of bias inherent in the advice or apparent from the facts, in a case of manifest error of record or arbitrary exercise of power, or in a case of non-consideration or non-application of mind to relevant factors.[300]

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[297] *Pratapsingh Raojirao Rane v Governor of Goa*, AIR 1999 Bom 53.
[298] *State of Maharashtra v Ramdas Shrinivas Nayak*, (1982) 2 SCC 463, at paras 9 and 10.
[299] *Madhya Pradesh Special Police Establishment v State of Madhya Pradesh*, (2004) 8 SCC 788.
[300] *Madhya Pradesh Special Police Establishment v State of Madhya Pradesh*, (2004) 8 SCC 788, at paras 19 and 24.

In *R.A. Mehta*,[301] in a matter related to the appointment of a Lokayukta by the Governor, the Supreme Court found that there may be instances where, despite the Constitution not specifically providing for this, the Governor may "refuse to accept the advice rendered to [her] and act in [her] discretion". Amongst a number of illustrations, the Court pointed to circumstances where the advice is not available at all (e.g. in the case of the appointment of a Chief Minister) and also provided, by way of example, the refusal of ministerial advice for dissolving a House "which may be detrimental to the interests of the nation".

These cases may have appeared to raise some uncertainty as to the scope and application of a doctrine of necessary implication in relation to the Governor's discretion, but these ambiguities came to be largely resolved with the judgment of the Supreme Court in *Nabam Rebia* (a case on the unilateral summoning of a Legislative Assembly by the Governor as well as determination of matters that the Assembly was to consider) where it was held[302] that the discretionary powers of the Governor are to be limited to the scope postulated under Article 163(1) and that they extended to a) constitutional provisions that expressly required discretion, b) provisions that could be legitimately interpreted to grant discretion and could not be construed otherwise, and c) situations earlier declared by the Supreme Court where accepting the aid and advice of ministers would be impermissible by reason of conflict of interest. Lastly, the Court also found that, regardless of Article 163(2)'s language to the effect that the decision of the Governor on the incidence of her own discretion was final, it would still be subject to judicial review as the Governor could not be seen to have such powers and functions as would grant her a "dominating position" over the State Executive and State Legislature and make her into an "all-pervading, super-constitutional authority". On this basis, the Court also overruled the *Mahabir Prasad Sharma* and *Pratapsingh Raojirao Rane* judgments insofar as they interpreted Article 163(2) to allow for such undesirable outcomes by preventing judicial review.

d. Today's problems and history's lessons

With the judgment in *Nabam Rebia*, a rather long arc of jurisprudential history has come to some form of resolution. There is now considerable certainty regarding the ordinary position: the binding quality of ministerial aid and advice. There is also clarity on certain principles and approaches taken by the Supreme Court in *Samsher Singh*. Primarily, the idea of granting Governors discretion through necessary implication has gained explicit approval. It is increasingly clear that reliance on the growth of constitutional conventions to deal with tricky political questions (Ambedkar's suggestion at the Constituent Assembly) has not been seen as a fruitful course of action in the actual working of the Constitution. One may also note a similar lack of trust in conventions from the rule-oriented solutions that have been suggested by various Commissions that have examined the relevant constitutional provisions.

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[301] *State of Gujarat v R.A. Mehta*, (2013) 3 SCC 1, at para 38.
[302] *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, at paras 140-155.

This poses a very peculiar dilemma because our Constitution is already quite lengthy. While a long constitution merely indicates, according to some, that there is low trust in the society, others additionally argue that longer constitutions could actually hamper economic growth and promote corruption.[303]

The present position of law on the Governor's discretion is well encapsulated in the classification of discretionary functions provided by the Sarkaria Commission and reiterated in Lokur J.'s concurring opinion in the *Nabam Rebia* judgment. There is effectively a four-fold classification of gubernatorial discretionary functions:[304]

(i) The Governor acting in her discretion;
(ii) The Governor acting in her individual judgment;
(iii) The Governor acting in her discretion independently of the Council of Ministers; and
(iv) The Governor acting in her discretion *under* the Constitution.

The first category refers to discretionary functions explicitly granted in constitutional provisions through the use of the phrase "in [her] discretion". Examples of these in the Sixth Schedule and Articles 371A, 371F and 371H are mentioned above. Here the Governor would be free to take decisions without soliciting the aid and advice of her ministers and would be able act against such aid and advice in any case. The second category also arises from explicit constitutional provisions and is marked by a requirement that the function be discharged in the Governor's "individual judgment". Such instances in Articles 371A(1)(b) and 371H(a) are also mentioned above. Here the Governor is to act only after having consulted her Council of Ministers but is not bound to follow their aid and advice. The third category of discretionary functions consist of those areas where judicial rulings have marked out the legality of the Governor acting against the aid and advice of her Ministers even if the Constitution has not explicitly permitted such contrary actions and the discretion in these functions have all been derived through necessary implication. Examples of these are the appointment of the Chief Minister, dismissal of a Ministry where it has lost the confidence of the Legislative Assembly, requiring a matter decided by a Minister to be considered by the

[303] Alvaro A. Montenegro, 'Constitutional design and economic performance', (1995) 6(2) Constitutional Political Economy at p. 161; Christian Bjørnskov and Stefan Voigt, 'Constitutional verbosity and social trust', (2014) 161(1/2) Public Choice at p. 91; Rosalind Dixon, 'Constitutional drafting and distrust', (2015) 13(4) International Journal of Constitutional Law at p. 819; George Tsebelis and Dominic J. Nardi, 'A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries', (2016) 46(2) British Journal of Political Science at p. 457; "India is not inherently a low trust society but it became so because of the adversarial relationship between the government and the people, established by the British and continued post independence". Atanu Dey, 'Why India needs a new Constitution', (*Livemint*, 6 December 2016) available at < https://www.livemint.com/Opinion/Il2MQqKxm60JzDVpkXfJnL/Why-India-needs-a-new-Constitution.html > accessed 2 July 2019.

[304] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.3.09 and 4.14.01-4.14.05; *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1 (Lokur J. concurring op.), at paras 323-333.

Council of Ministers, reports to the President under Article 356, and assents to Bills and reservation for the consideration of the President, as well as the newly evolved area of discretion in relation with sanctions to prosecute Ministers. The fourth and final category consists of discretion granted through some executive action authorised by the Constitution, an example of which is the grant of a "special responsibility" to the Governor by Presidential Orders authorised under Articles 371(2) and 371C(1).

It should be immediately clear that the first two categories show that a vestige of the reasoning under the Government of India Act, 1935 (its compartmentalisation of "discretion" and "individual judgment") is still very much an operational part of our Constitution as it currently stands. The worrisome fact that these legal nuances have been largely ignored in the later evolution of jurisprudence has been highlighted in the concurring opinion in *Nabam Rebia*, where Lokur J. points out that the concept of gubernatorial "discretion" should not be expanded to such a great degree as to make it a proxy for what was originally termed "individual judgment". Governors should not imagine that they are permitted to take actions contrary to ministerial advice where such advice is constitutionally envisaged and the ordinary presumption should be in favour of maintaining communication between the Governor and her Council. In extreme situations, instead of presuming discretion or individual judgment, the Governor should instead take recourse to provisions on the breakdown of constitutional machinery or conventions on proving confidence in the Legislature.[305]

It is clear that a number of exigencies in the working of the Indian Constitution have resulted in courts departing from the original intent of the Constitution's framers so as to adapt the Governor's role into one that operates as a limited counterweight against political opportunism in the States. There remains however the problem of the limits of the necessary implication doctrine and the absence of clearly defined rules for the judiciary to apply in marginal cases. Arguably, recourse to constitutional breakdown provisions and confidence conventions stand as alternatives to the Governor taking on discretionary functions that she considers to be necessarily implied by the Constitution.[306] On an understanding of how judicial rulings may result in the organic growth of a living Constitution (as well as the creation of considerable ambiguities and uncertainties), it may only be hoped that the strictures created under the Nabam Rebia *judgment will ensure greater clarity with time on what other discretionary functions could potentially come to be necessarily implied.*

3.3 <u>The Governor's role in appointing and retaining a Ministry in office</u>

[305] *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1 (Lokur J. concurring op.), at paras 245-258, 304, 322, 335, 360, 374 and 379-384.
[306] Especially as per the principles related to bias outlined in *Madhya Pradesh Special Police Establishment v State of Madhya Pradesh*, (2004) 8 SCC 788.

The Governor's role as an umpire of democracy is most pronounced when she is called upon to give effect to the will of the people, as expressed in a State election. Article 164 of the Constitution confers a critical function upon the Governor – appointment of ministers. This role is comparable to that of the President at the national level, as contained in Article 75.

Article 164(1) provides that the Governor shall appoint the Chief Minister of a State, and that the other Ministers (who will, together with the Chief Minister, form the Council of Ministers) will also be appointed by her.[307] On the face of it, the wording of this provision appears to give the Governor a more or less unfettered power. As there is no Council of Ministers when the Ministry itself is being appointed, by necessary implication, the Governor cannot act upon the aid and advice of Ministers who are yet to be appointed, for the appointment itself.[308]

As discussed in chapter 2, a provision granting discretion to the Governor in this regard was removed from the Draft Constitution and a new clause providing for collective responsibility[309] of the Council of Ministers to the State Legislative Assembly was added.[310] This new clause was retained in Article 164(2) of the Constitution. Collective responsibility implies that the Council of Ministers must enjoy majority support in the Legislative Assembly.[311] Reading clauses (1) and (2) of Article 164 together, it follows that the Governor's discretion is limited in the sense that she can only appoint a person as Chief Minister who can command majority support in the Assembly.[312] This reflects the English convention that the party which commands the widest support in the House of Commons in England is called upon to form the government.[313]

However, this convention does not help in all cases. In fact, it is of little assistance in controversial cases. It should first be borne in mind that, overall, there may be three kinds of cases. First, where a party secures an absolute majority, the Governor has no discretion and must invite the leader of the party. Second, where an alliance or coalition fighting an election wins an absolute majority, once again the Governor has little discretion and should ordinarily

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[307] Article 164(1A) provides that the total number of Ministers cannot exceed 15 percent of the total number of members of the Legislative Assembly of that State. However, the total number of ministers cannot be lesser than at least 12.

[308] *See* chapter 3.2 of this book.

[309] The principle of collective responsibility can be traced to the English convention of Ministers maintaining a common front against the King, collectively accepting responsibility for their decisions. Thus, under Article 164(2), the entire Council of Ministers is held politically responsible for the decisions of each Minister, which is presumed to have been done with the support of the whole Ministry. *State of Karnataka v Union of India*, (1977) 4 SCC 608.

[310] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at p. 507.

[311] Thus, in case of a doubt regarding whether the Chief Minister enjoys majority support, the Governor can call upon her to prove her majority in the Assembly by a floor test. M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77.

[312] M.P. Jain, *Indian Constitutional Law* (6th edn, LexisNexis, 2013) Vol 1 at pp. 470-77; H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2 at p. 2064.

[313] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2, at pp. 2062 - 2063.

invite the leader of the coalition to form the government. The third case, which almost always leads to controversy, is where no party or coalition achieves an absolute majority. In such a case, the Governor is required to act to ensure that there is a stable government in the State.

The role of the Governor in such situations is especially complicated because in most cases, the ruling party at the Centre is itself one of the contesting parties in the hung State Assembly. This is problematic when considered in light of the fact that the Governor is appointed by and holds office during the pleasure of the President.[314] There are, thus, legitimate fears regarding the Governor's role in a situation where a lot depends on her tact, judgment and the respect she commands for the impartial discharge of her duty. At the same time, inviting a minority party other than the one in power at the Centre may also prove to be problematic: Such a party may convert itself into a majority by engineering defections through offering ministerships to members of other parties.[315]

The manner in which the power under Article 164 has been exercised can be ascertained through a perusal of some factual instances. In the 1967 state elections, the constitutional scholar Seervai observes that there were three types of situations. First, in Andhra Pradesh, Maharashtra and Mysore, the Congress party secured an absolute majority and was called upon to form the Government. Second, the DMK and a combination of different communist and non-Congress parties secured the required majority in Madras and Kerala respectively, with the Congress being reduced to a minority. Consequently, the DMK in Madras and the coalition of parties in Kerala were called upon to form the government.[316]

It is in the third type of situation where problems arose. In some States, while the Congress party did not secure an absolute majority, it was not clear whether any other party or group of parties commanded such a majority either. There were also a large number of independent candidates. This led to a dilemma – should the Governor invite the single largest party, or a combination of minorities who, unlike the single largest party, can together command an absolute majority?

A study of the exercise of discretion by the Governor in such situations reveals that there has been no uniformity or consistency. State elections in Madras in 1952, Uttar Pradesh in 1967 and Himachal Pradesh in 1982 are all examples where the single largest party was invited by the Governor to form the government despite not enjoying a majority in the House[317] Predominantly, the Congress party was the beneficiary of this criterion. In contrast, Kerala in

[314] Articles 155 and 156, Constitution of India.
[315] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2 at p. 2063.
[316] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2015) Vol 2 at p. 2063.
[317] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 121; For example, in the Madras state elections of 1952 which led to a hung Assembly, the Governor invited the Congress as the single largest party to form the government. This was despite the fact that a combination of non-Congress parties had come together, thereby commanding a combined strength greater than that of the Congress. Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 112.

1965, Orissa in 1971 and Meghalaya in 1983 are examples where this criterion was not followed.[318]

From 1950 to the late 1980s, Sibranjan Chatterjee argues that the practice of inviting the leader of the single largest party had generally been followed when the State unit of the ruling party at the Centre emerged as the single largest party. This observation is applicable in contemporary times as well. He also notes that there are only a few examples where the Governor did not invite the State unit of the ruling party at the Centre to form the ministry, when it had emerged as the single largest party.[319]

Based on the experience between the 1950s and 1980, the Sarkaria Commission created a priority of claims as follows where no party gets a majority:

(i) An alliance of parties that was formed prior to the elections.
(ii) The largest single party staking a claim to form the government with the support of others, including "independents".
(iii) A post-electoral coalition of parties, with all the partners in the coalition joining the government.
(iv) A post-electoral alliance of parties, with some of the parties in the alliance forming a government and the remaining parties, including "Independents" supporting the government from outside.[320]

The Commission also stressed the importance of the subjective judgment of the Governor and that the Governor's objective must be achieve a stable government. While helpful, these guidelines have not been entirely successful in dealing with the situation.

The changes in politics in the States in the nineties leading to fragmentation of mandates have made matters even more difficult. Moreover, the introduction of the anti-defection law has not completely prevented defection. Instead, whenever an indecisive mandate is returned by the people, the appointment of the Chief Minister becomes a complex game of numbers with Governors and Speakers becoming umpires of various constitutional processes. And Governors and Speakers have struggled to play these roles satisfactorily.

This has resulted in the undesirable phenomenon of approaching courts to monitor floor tests.[321] In *Anil Kumar Jha v Union of India*,[322] the Supreme Court issued a series of directions in a short order dictating the manner and procedure (including the agenda of the

[318] For example, in the Kerala state elections of 1965, the CPI(M) was not given an opportunity to form the Government despite being the single largest party and their leader in the state, E.M.S. Namboodiripad, declaring support from other parties. Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 112.
[319] For example, the case of Orissa in 1971. Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 123.
[320] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.11.04.
[321] *Jagdambika Pal v Union of India*, (1999) 9 SCC 95 at p. 96.
[322] *Anil Kumar Jha v Union of India*, (2005) 3 SCC 150.

House) for conducting a floor test in the Jharkhand Assembly to determine the relative strengths of the claimants for Chief Ministership. This included fixing the date of floor test and the insistence on various safeguards such as video recording and monitoring by unelected officials. The fact that courts had been invited to oversee proceedings in legislatures was a clear sign of the failure of the institutions that had been charged under the Constitution to perform this role. The order of the Supreme Court was rightly critiqued as having violated the principle of separation of powers.[323] Yet, this phenomenon has continued and in fact, has clearly taken root.

Despite the general acceptance of the Sarkaria Commission guidelines, Governors continue to struggle to legitimately interpret electoral mandates. And Governors routinely invite charges of bias by attempting to favour the party at the Centre. In the 2017 Goa State elections, the Congress emerged as the single largest party, but the Governor invited a BJP-led coalition to form the government.[324] The exact same scenario played out in the 2017 Manipur state elections as well, with a BJP-led coalition being invited to form the Government despite the Congress being the single largest party.[325] And yet, in the 2018 Karnataka state elections, the BJP as the single largest party was initially invited by the Governor to form the government. Only after the Supreme Court intervened to order a floor test within two days did the newly appointed Chief Minister B.S. Yeddyurappa resign. A Congress coalition was able to prove its majority in the said floor test, and the Governor had to invite it to form the government.[326] Similarly, the 2019 Maharashtra state elections also proved to be controversial, with the Governor first appointing the BJP's Devendra Fadnavis as Chief Minister.[327] The BJP had emerged as the single largest party, but did not have an absolute majority. After the Supreme

[323] *Aravali Golf Club v Chander Hass*, (2008) 1 SCC 683 at p. 692.

[324] Maneesh Pandey and Harish Nair, 'Goa: From being the single-largest party to sitting in Opposition, how Congress lost the plot' (*India Today*, 15 March 2017) available at < https://www.indiatoday.in/mail-today/story/goa-election-results-congress-single-largest-manohar-parrikar-965598-2017-03-15 > accessed 18 May 2019.

[325] Shiv Sahay Singh, 'BJP combine invited to form government in Manipur' (*The Hindu*, 14 March 2017) available at < https://www.thehindu.com/elections/manipur-2017/bjp-led-combine-invited-to-form-government-in-manipur/article17461903.ece > accessed 18 May 2019.

[326] 'From results to resort politics: how Karnataka formed its government' (*The Hindu*, 22 May 2018) available at < https://www.thehindu.com/elections/karnataka-2018/from-results-to-resort-politics-how-karnataka-formed-its-government/article23960753.ece > accessed 22 May 2019.

[327] This case involved a further complication due to the involvement of NCP leader Ajit Pawar, who joined hands with Fadnavis and was initially appointed as Deputy Chief Minister. Although this appeared to indicate that the BJP had the NCP's support, NCP chief Sharad Pawar later clarified that the NCP itself does not support the BJP, and Ajit Pawar was acting personally and against the wishes of the party. 'Ajit Pawar's decision to side with BJP his own, not that of NCP: Sharad Pawar' (*Times of India*, 23 November 2019) available at < https://timesofindia.indiatimes.com/india/ajit-pawars-decision-to-side-with-bjp-his-own-not-that-of-ncp-sharad-pawar/articleshow/72194106.cms > accessed 12 February 2020.

Court ordered a floor test, Fadnavis resigned and a coalition of parties including the Shiv Sena, NCP and Congress formed the government.[328]

In Goa and Karnataka, the Supreme Court had advanced the dates of the floor test. Far from the situation in 2005 when a court-ordered floor test was thought to be a violation of separation of powers, in the 2018 case of Karnataka, it was seen as a necessary intervention.[329] The Governor in Karnataka was a former member of the BJP and it was widely believed that he had granted the BJP leader 15 days' time to prove his majority so as to facilitate the party to secure the support of more legislators, by luring them away from the opposition which had also staked claim to form the Government. Allegations of bias were made in 2019 against the Governor of Maharashtra as well.[330]

These instances show that very few Governors remain impartial in trying circumstances. Governors who fear removal or are otherwise loyal to the Centre through old party connections almost invariably support the party at the Centre in these circumstances. This exposes the fallacy of the Supreme Court in *B.P. Singhal* in relying on the hope that Governors are likely to be people of stature, experience, maturity and distinction, who will be independent and impartial in discharging their duties.

Much of what has been said in the context of appointment of the Chief Minister applies in the context of removal of a Ministry as well. The withdrawal of pleasure by the Governor ought to coincide with the Legislative Assembly's loss of confidence in the Ministry.[331] In other words, similar to appointment of ministers, the Governor's discretion in dismissal is not unfettered. In the sixties, when the contours of the Governor's powers were not clearly drawn, there were instances where Governors seemed to have acted well beyond their constitutional authority. As has been discussed, in 1967, Governor Dharam Vira dismissed the Chief Minister of West Bengal as the latter disagreed with the Governor on the need for an immediate floor test. The Council of Ministers decided to give themselves a month longer than what the Governor proposed, leading to the dismissal. In *Mahabir Prasad Sharma v Prafulla Chandra Ghose*,[332] the Calcutta High Court upheld this decision of the Governor, taking the view that she has absolute, exclusive and unrestricted discretion regarding both

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[328] 'Uddhav Thackeray, first of his clan, takes oath as chief minister of Maharashtra' (*India Today*, 28 November 2019) available at < https://www.indiatoday.in/india/story/uddhav-thackeray-maharashtra-chief-minister-1623468-2019-11-28 > accessed 12 February 2020.

[329] 'When Governors Decide', (2018) 53(20) Economic and Political Weekly; Shrutisagar Yamunan, 'Karnataka governor invites Yeddyurappa: Here's why the Supreme Court needs to step in' (*Scroll*, 16 May 2018) available at < https://scroll.in/article/879255/karnataka-governor-invites-yeddyurappa-heres-why-the-supreme-court-needs-to-step-in > accessed 5 May 2019.

[330] *See* 'Maharashtra Governor's Move "Biased, Mala Fide": Kapil Sibal In Top Court' (*NDTV*, 24 November 2019) available at < https://www.ndtv.com/india-news/maharashtra-governor-bhagat-singh-koshyaris-move-biased-mala-fide-kapil-sibal-in-supreme-court-2137925 > accessed 12 February 2020.

[331] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 139.

[332] *Mahabir Prasad Sharma v Prafulla Chandra Ghose* AIR 1969 Cal 198.

appointment of a Chief Minister as well as dismissal or withdrawal of pleasure under Article 164(1).[333] A similar line of argument was accepted in 1998 in *Pratapsingh Raojirao Rane v Governor of Goa*,[334] when the Governor of Goa dismissed the Chief Minister and appointed a different Chief Minister in 1998, in exercise of his powers under Article 164(1) on the assumption that the Chief Minister had lost the confidence of the House.

As noted previously, these authorities have been overruled in the 2016 case of *Nabam Rebia v Deputy Speaker*,[335] by the Supreme Court. The Court noted that the judgment in *P.C. Ghose* "confers excessive powers on the Governor, well beyond his status as a formal or constitutional head of the Executive". The Court further observed that the decision as to whether a Chief Minister has lost the majority of the Legislative Assembly is an exclusive function of the Assembly itself. Accordingly, the Governor cannot take an unchecked decision in this regard, in her discretion. Regarding the *Pratapsingh* case as well, the Supreme Court held that that decision "proceeds on the incorrect basis and assumption that the Governor is the best person to know whether the Chief Minister of a State has lost the confidence of the Legislative Assembly."

However, dismissal for loss of a majority becomes exceedingly complex when coalition governments with thin majorities are involved. Throughout the term of such ministries, parties in the opposition are involved in attempts to destabilise the government. In many cases, they succeed, most often by persuading some legislators that form part of the ruling coalition to defect to the opposition as was the case in Uttarakhand in 2016 and Arunachal Pradesh in 2015-2016. This once again sets off a game of a numbers which also involves applying the rules in the Tenth Schedule of the Constitution. Here the very act of summoning the House to conduct a floor test becomes intensely contested.[336] The Governor is required to do a tight rope walk in these cases. Where a claim has been made that the Government no longer holds the confidence of the House, the Governor is not bound by the advice of the Council of Ministers as far as summoning of the House is concerned. As laid down in the case of *S. R. Bommai*,[337] it becomes the duty of the Governor to summon the House and order a floor test.

At the same time, the Governor cannot interfere in other constitutional processes which may already be in motion such as the determination by the Speaker as to whether any legislators are guilty of defections.[338] The disqualification of any such members may be determinative of the outcome of any floor test. In all this, as mentioned above, the Governor is required to tread an independent and impartial path – a role that many Governors fail to fulfil. In *Nabam*

[333] The Court also held that, in view of Article 163(2), the exercise of this discretion could not be questioned before a court.
[334] *Pratapsingh Raojirao Rane v Governor of Goa*, AIR 1999 Bom 53.
[335] *Nabam Rebia v Deputy Speaker*, *Arunachal Pradesh Legislative Assembly* (2016) 8 SCC 1.
[336] *Nabam Rebia v Deputy Speaker*, *Arunachal Pradesh Legislative Assembly* (2016) 8 SCC 1.
[337] *S.R. Bommai v Union of India*, (1994) 3 SCC 1.
[338] *Harish Rawat v Union of India* (2016) SCC Online Utt 502.

Rebia for instance, the Governor, acting by himself, preponed the meeting of the State Assembly and sent a message asking the Assembly to expeditiously consider a resolution for the removal of the Speaker.[339] The Supreme Court held that these steps taken by the Governor, without the aid and advice of the Council of Ministers, were beyond the scope of his constitutional responsibilities. Even if his intentions were bona fide, the Governor is expected to act within his constitutional mandate and cannot interfere in other areas such as in the removal of the Speaker.

The appointment of Chief Ministers has raised other controversies as well. Apart from the requirement of majority support, there is another limitation with respect to appointment of Ministers. Clause (4) of Article 164 provides that if any Minister is not a member of the State Legislature for six consecutive months, then she would cease to be a Minister.[340] This has been interpreted as enabling the Governor to appoint ministers who are not members of the State Legislature, provided that they become a member within a period of six months.[341] Perhaps the most egregious case in this regard was that of C. Rajagopalachari in 1952. When he was appointed as Chief Minister of Madras in 1952, he was neither a member of the State Legislature at the time of appointment, nor did he subsequently get himself elected. Instead, the Governor controversially used his power under Article 171(3)(e) to nominate him to the Legislative Council, which is the upper house of the State Legislature.[342]

Other examples of this include the appointment of Morarji Desai as Chief Minister of Bombay in 1952, even though he was not an elected member of the State Legislature at the time, and of A.K. Antony as Chief Minister of Kerala in 1977.[343]

In 2001, Tamil Nadu Governor Fathima Beevi, a former Supreme Court judge, appointed J. Jayalalitha as Chief Minister even though she was barred from contesting elections due to a conviction in a criminal case. The Supreme Court quashed this appointment in its judgment in *B.R. Kapur*,[344] holding that it is necessary that a person appointed as Chief Minister should possess the qualifications for membership of the Legislative Assembly as laid down under

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[339] The context to this was that certain rebel legislators had communicated to the Governor their displeasure with the Speaker. Subsequently, the Speaker disqualified some of these rebel legislators.

[340] Similarly, Article 164(1B) provides that if a member is disqualified on the ground of defection, as specified in the Tenth Schedule, shall also be disqualified from being appointed as a Minister (until her term of office expires, or until she gets re-elected, whichever is earlier).

[341] *Har Sharan Verma v Tribhuvan Narain Singh*, AIR 1971 SC 1331; The inclusion of a non-member in the Council of Ministers is a "privilege" that only extends for six months, which represents a one-time slot during the term of the Legislative Assembly. It is not permissible for a Minister to resign before the expiry of the said six months, and get appointed once again. *S.R. Chaudhuri v State of Punjab,* (2001) 7 SCC 126. In the Constituent Assembly, Mohammad Tahir had suggested an amendment to this article, which specified that the Minister had to be a member of the State Legislature at the time of appointment itself. This amendment was not adopted. Constituent Assembly Debates (Reprinted by the Lok Sabha Secretariat), Vol 8, 1949, at pp. 505, 521.

[342] *In re P. Ramamoorthi*, AIR 1953 Mad. 94.

[343] Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (1st edn, Mittal Publications, 1992) at p. 111.

[344] *B.R. Kapur v State of Tamil Nadu*, (2001) 7 SCC 231.

Article 173 and is not disqualified from the same under any ground specified in Article 191.[345] The appointment was questionable to begin with and certainly not one that should have been made by a former judge of the Supreme Court.[346] At the time the Governor invited Jayalalitha to be Chief Minister, there was no doubt that the latter was not eligible to be a legislator in the House. That should have been sufficient for the Governor to steer clear of the appointment. Unfortunately, that was not to be the case.

Remarkably, even after the Supreme Court's intervention in *B.R. Kapur* almost two decades ago, Sikkim Governor Ganga Prasad exercised his powers under Article 164 in an identical manner. In May 2019, he appointed Prem Singh Tamang as Chief Minister of Sikkim even though at the time of appointment, Tamang was disqualified from contesting elections on account of a conviction in a corruption case.[347] His appointment was challenged in the Supreme Court, but the Election Commission eventually reduced the period of Tamang's disqualification in exercise of its powers under section 11 of the Representation of the People Act, 1951.[348] This enabled Tamang to contest in and win a by-poll, following which he was appointed as Chief Minister again.[349] The Governor's actions in this case clearly show that even where the courts intervene and lay down a precise rule, Governors continue to exercise their discretion in questionable ways.

In what is one of the primary functions of a formal constitutional head in a parliamentary democracy, the Governor is expected to appoint her Ministers and retain them in office so long as they enjoy the confidence of the State Legislature. However, in the course of our post-Independence history, there has been considerable inconsistency in the various ways in which Governors have opted to carry out this weighty role, adding to the impression that their choices are partisan. Consequently, this has led to an increased judicialisation of the process with court-monitored floor tests. Courts have gone some way in ensuring that the floor of the House is made the final touchstone for democratic legitimacy. However, judicial

[345] *B.R. Kapur v State of Tamil Nadu*, (2001) 7 SCC 231. In this case, it was accordingly held that a person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State under Article 164(1) read with (4). *See also Manoj Narula v Union of India*, (2014) 9 SCC 1, where the Supreme Court observed "when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner."

[346] *See* P.P. Rao, 'Judges as Governors', 27 The Indian Advocate, at p. 36.

[347] Apoorva Mandhani, 'Why Sikkim CM Prem Singh Tamang's appointment has been challenged, and what do rules say' (*The Print*, 31 July 2019) available at < https://theprint.in/judiciary/why-sikkim-cm-prem-singh-tamangs-appointment-has-been-challenged-and-what-do-rules-say/270152/ > accessed 12 February 2020.

[348] For a discussion on this, *see* Shrutisagar Yamunan, 'Despite Election Commission order, Sikkim's Tamang has lost the legal right to remain chief minister' (*Scroll*, 29 September 2019) available at < https://scroll.in/article/938912/despite-election-commission-order-sikkims-tamang-has-lost-the-right-to-remain-chief-minister > accessed 12 February 2020.

[349] Karishma Hasnat, 'Sikkim Chief Minister Prem Singh Tamang Takes Oath for Second Time' (*News 18*, 1 December 2019) available at < https://www.news18.com/news/india/sikkim-chief-minister-prem-singh-tamang-takes-oath-for-second-time-2407635.html > accessed 12 February 2020.

interventions may never be able to arrive at universal, principled methods for determining which claimant is to get the first chance at forming government or determining how much time is to be given before their claim to a majority is assessed through a floor-test.

3.4 Summoning, prorogation and dissolution of the State Legislature

The Governor has a more apparent relation with the State Executive, as the executive power of the State is vested in her as per Article 154(1) and executive action of the Government of a State being expressed to be taken in her name. However, the Governor also has a few narrow but crucial functions in the context of the State Legislature. Article 168 of the Constitution, titled "Constitution of Legislatures in States" opens with the line "For every State there shall be a Legislature which shall consist of the Governor …". This section examines the role of the Governor as a part of the Legislature, specifically studying the position of law on Article 174, which deals with the power/duty to summon and prorogue the House or Houses of a State Legislature and to dissolve a Legislative Assembly.

a. The significance of legislative sessions for democratic accountability

Article 174 of the Constitution consists of two clauses. The first places a duty on the Governor to "from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit" and limits the incidence of such summons by stating that "six months shall not intervene between [the House's] last sitting in one session and the date appointed for its first sitting in the next session". The second clause empowers the Governor to "from time to time" prorogue the House or either House of a State Legislature and dissolve the Legislative Assembly.

Early in the history of the Republic, certain issues arose in relation with Articles 85 and 174 as they originally stood. Surprising as it may now seem, by May 1951 Parliament had been in continuous session since November 1950 and the session was slated to continue even further. Articles 85(1) and 174(1) of the Constitution as they then stood required that Parliament and the House or Houses of State Legislatures "shall be summoned to meet twice at least in every year" and clause (2) of both Articles empowered the President and the Governor respectively to, "from time to time", also summon the respective legislatures at such time and place as they deemed fit (apart from the powers to prorogue and dissolve). This raised the strange predicament that because Parliament had been in session continuously since the previous year, by May 1951 it had not been summoned to meet at all and there had technically been a breach of Article 85.

As a result, in the Constitution (First Amendment) Act, 1951, both provisions were amended to remove the requirement that the legislatures meet twice every year and only the embargo on intervals of greater than six months was retained to ensure the regularity of legislative business that had been intended. Additionally, however, the power of the President and the Governor to summon in clause (2) of both Articles was removed and the passive voice of

clause (1) in each Article ("shall be summoned") was changed to the active voice ("The President shall… summon…" and "The Governor shall… summon…"). In defending the amendment in Parliament, Prime Minister Nehru clarified that there had to be "some final authority which you presume will function according to the Constitution" and, by choosing the active voice, the requirement of summoning had been made clearly mandatory on the constitutional heads such that if they failed to summon the respective legislatures, they would be in grave breach of the Constitution.[350]

This makes clear the mandatory nature of the Governor's duty to summon the State Legislature and appears to indicate that while the Governor and the Governor alone is bound to issue such summons, she has no discretion to do so on her own. The prime source of disagreements on Article 174 has been the singular exigency of a loss of majority on the part of the government in power or a likely loss of the confidence of the State Legislature in the ministry while the Legislature itself is not in session so as to be able to have an immediate floor test. If the Legislature is not in session and there is no way for the Governor to decide herself whether the government has lost the confidence of the Legislature, would she be constitutionally justified in unilaterally summoning the legislators for a session? An allied and equally significant issue emerges where the Speaker presiding over a Legislative Assembly is sought to be removed by the members of the Assembly but the Assembly is not in session or the Speaker misuses her powers to prevent the proceedings on removal.

The problems created by ambiguities in political majorities and the possibility of loss of confidence while a Legislature is not in session can perhaps as easily come up as a result of preemptive prorogation or dissolution in avoidance of a motion of no confidence. There may also be serious issues that arise where a loss of confidence raises a dilemma as to whether a new Chief Minister may be installed or whether the matter is to be decided by the electorate in fresh elections. It is essential to note how these questions have a linkage with other issues in relation with the Governor's office: the Governor cannot adequately carry out her duty of retaining a Ministry that enjoys the confidence of the Legislature if she cannot ascertain clearly whether the current ministry or some alternative potential one does indeed enjoy the Legislature's confidence. The precondition that the Legislature be in session for the majority to be ascertained speaks to the critical significance of such sessions in ensuring that a democratically elected government remains in power. Confidence demonstrated in a running session of a Legislature is the only touchstone for accountability that a democracy can tolerate. Too long a gap in such sessions can also lead to another old concern for democratic accountability: opportunities for defection. The approach of political actors and judicial decisions on these matters must thus be studied.

[350] The circumstances of this constitutional amendment are recounted by Lokur J. in his concurring opinion in *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1 (Lokur J. concurring op.), at paras 270-276.

As the defined problems have a clear linkage with the question of retention of the Ministry by the Governor, certain judicial rulings on the matters at hand have already been discussed both in the above section on the Governor's discretion generally under Article 163 and in the above section on the Governor's role in appointing and retaining a ministry in office.[351]

It is appropriate here, however, to clearly highlight two contentious areas where the Governor's discretion has some potential of coming into play. First is a situation where the Governor perceives that the government in power has lost the confidence of the Legislature and the Chief Minister, despite having been so requested, refuses to advise the Governor to summon the Legislature for a floor test. Here it is arguable that the Governor may either report to the President that there has been a breakdown of constitutional machinery, dismiss the Chief Minister or summon the Legislature herself without having been advised to do so. Second, where there has been a dismissal or resignation of the Chief Minister either on the circumstances above or because of a floor test establishing loss of the Legislature's confidence, it is arguable that the Governor may either give an opposition party or coalition the opportunity to form the government by appointing a new Chief Minister or she may dissolve the Legislature so that eventually fresh elections may be held. These two situations will be discussed below.

b. Law and convention in relation with sessions of the Legislature

The convention that ordinarily stands is that the Governor remains bound by the aid and advice of her Council on the question of summoning. In their treatise on the legislative process, Kaul and Shakdher point out:[352]

> The power to summon [the] Lok Sabha is vested in the President. He exercises this power on the recommendation of the Prime Minister or the Cabinet. He may make informal suggestions to the Prime Minister as to the more convenient date and time of summoning the House, but the ultimate advice in this matter rests with the Prime Minister.

The authors further elaborate how this conventional understanding of the matter also applies to the Governor in relation with her Council. As has been discussed in the appropriate sections above, certain judicial rulings had at one point insulated the actions of Governors from judicial review and scrutiny in the event of unilateral actions by the Governors impacting relations with the State Legislature.

In *Mahabir Prasad Sharma*, [353] the Governor had requested that the Legislative Assembly be summoned and had dismissed the Chief Minister on being refused, illustrating the primary alternative available to a Governor who is unable to ascertain whether the Ministry commands the confidence of the Legislature. The High Court not only found that there was

[351] *See* chapters 3.2 and 3.3 of this book.
[352] M.N. Kaul and S.L. Shakdher, *Practice and Procedure of Parliament* (7th edn, Lok Sabha Secretariat, 2016), at p. 190.
[353] *Mahabir Prasad Sharma v Prafulla Chandra Ghose*, AIR 1969 Cal 198.

nothing in the Constitution restricting the power of the Governor to dismiss the Chief Minister but also that the decision of the Governor could not be called into question in judicial proceedings. On the other hand, in *Satya Pal Dang*,[354] the Governor unilaterally prorogued and re-summoned the Legislative Assembly as well as directed matters for its consideration as the Speaker in that case was attempting to avoid a motion for his removal. The Supreme Court did not find any problems with the actions of the Governor.

Actions such as these, which can appear constitutionally problematic, began to arise largely after 1967, when coalition governments began to come into existence and the domination of the Congress in many State Legislative Assemblies began to reduce.[355] The significance of coalition politics in such issues of loss of confidence was further cemented by the anti-defection law that came in the form of the Tenth Schedule to the Constitution with the Constitution (Fifty-second Amendment) Act, 1985. As a government in power would not be likely to lose its majority merely through defection, it would only be the withdrawal of support in a coalition government that could result in there being any chance of success with a motion of no-confidence.

Examining the viability of the Governor unilaterally choosing to summon the Legislature so as to assess the government's majority, Dahiya writes in 1979:

> There is no such provision under which the Governor is empowered to take note of the majority or minority of the Ministry during the interval of six months [between the last and first sittings of consecutive sessions of the Legislature]. This is not the function of the Governor. After the appointment of the ministry, the function of the Governor is over and the Legislative Assembly comes in the picture. The Governor is simply the Constitutional Head and has nothing to do with the business of the government to be transacted in the Legislative Assembly. This is the function of the Ministry. Therefore, it leads to its logical corollary that the Ministry would determine the summoning of the Assembly, when there is enough business before it. If there is no business before the government and the Governor compels the Chief Minister to convene the session, it looks quite absurd. If the contention that the Governor can compel the Chief Minister to summon the session when there occurs defection in the ruling party is accepted, the Legislative Assembly will have to remain in continuous session because the game of defection is gaining ground and the changing of party by the legislators is just like [the] changing of a coat.

Two salient arguments emerge against any discretionary power of the Governor to unilaterally summon the Legislature for a floor test: first, that allowing the Governor to keep track of party strength in the Legislature and to react to the same would result in a slippery slope of constant summoning for floor tests where the numbers are in flux, and second, that it has always been the decision of the Executive to summon the Legislature as otherwise there

[354] *State of Punjab v Satya Pal Dang*, AIR 1969 SC 903.
[355] M.S. Dahiya, *Office of the Governor in India: A Critical Commentary* (Sandeep Prakashan, 1978) at p. 118-119.

would not be business for the legislators to transact. Arguably, the first contention has been somewhat obviated in the context of anti-defection law as there is a far more coherent picture today of potential loss of confidence due to the withdrawal of support of a coalition partner. The second argument may be bolstered using certain proceedings at the Constituent Assembly. The Assembly not only agreed upon the removal of the explicit grant of discretion to the Governor in summoning, proroguing and dissolution but also rejected an amendment permitting the Speaker to summon the Legislature where half its members demanded such summons.[356] In this regard, Ambedkar had defended the power of the constitutional head to summon the Legislature in question in this manner:[357]

> If the President does not summon the Legislature it means that the Executive Government has no business which it can place before the House for transaction. Because, that is the only ground on which the President, on the advice of the Prime Minister, may not call the assembly in session. … [T]he Speaker cannot provide business for the Assembly, nor can the Chairman provide it. The business has to be provided by the Executive, that is to say, by the Prime Minister who is going to advise the President to summon the Legislature.

The idea that the Legislature cannot be summoned except to transact business provided to it by the Executive has only been further bolstered with time.[358] While there is much merit in the idea that the time of a Legislature should not be wasted in mere futilities or just so as to enact absurd theatrics, it is also arguable that rather more than its function in transacting ordinary legislative business, any Legislature has a far more significant duty in ensuring that the government in power has its confidence and is not enjoying its position merely because there is no running session. It is perhaps for this reason that noted jurists like M.C. Chagla have argued that "if the Governor is satisfied that a Chief Minister has lost the confidence of the Legislature, he should ask him to convene a meeting of the Legislature immediately, and if he fails to do so he should convene it himself under Article 174."[359]

In this context, we can attempt to understand how exceptions may have emerged to the ordinary convention of binding advice in relation with summoning of the State Legislature. For instance, the Punchhi Commission Report cited the Report of the Sarkaria Commission in this regard and expressly reiterated the latter's recommendations in arguing that the advice of the Council of Ministers was to be binding on the Governor unless it was "patently unconstitutional" and "would lead to an infringement of a constitutional provision" if acted

[356] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at pp. 555, 558-559.
[357] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949 at pp. 99 and 106.
[358] Lokur J., for instance, cites Ambedkar's arguments on this point in his concurring opinion in *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, at paras 265-266.
[359] M.C. Chagla, 'Developments in U.P.: Limits of discretion allowed to Governor', *The Statesman* (Calcutta, 2 October 1970), cited in Sibranjan Chatterjee, *Governor's Role in the Indian Constitution* (Mittal Publications, 1992), at p. 59.

upon or where the Council of Ministers has ceased to enjoy the confidence of the Assembly. On this basis, the Punchhi Commission Report states:[360]

> The Sarkaria Commission recommended that, if the Chief Minister neglects or refuses to summon the Assembly for holding a "Floor Test", the Governor should summon the Assembly for the purpose. As regards proroguing a House of Legislature, the Governor should normally act on the advice of the Chief Minister. But where the latter advises prorogation when a notice of no-confidence motion against the Ministry is pending, the Governor should not straightaway accept the advice. If he finds that the no-confidence motion represents a legitimate challenge from the Opposition, he should advise the Chief Minister to postpone prorogation and face the motion. As far as dissolution of the House is concerned, the Governor is bound by the decision taken by the Chief Minister who has majority. However, if the advice is rendered by a Chief Minister who doesn't have majority, then the Governor can try to see if an alternate Government can be formed and only if that isn't possible, should the House be dissolved.
>
> This Commission reiterates the recommendations of the Sarkaria Commission in this regard.

The position above on the question of dissolution may also be understood in light of certain previous decisions on the matter. In *Bijayananda Patnaik*,[361] the Governor had dissolved the Legislature after the ruling government lost its confidence and did not give any opportunity to the opposition to form a government of its own. The Orissa High Court recognised that there was a convention in favour of attempting to find alternative Ministers to form the government before dissolution was opted. However, it expressed helplessness in enforcing any such convention. In contrast, in *Jagdambika Pal*, [362] the Chief Minister had been dismissed without having been given the opportunity to prove his majority on the floor of the House and the Governor appointed a new Chief Minister instead. On an appeal from the order of the High Court reinstating the original Chief Minister, the Supreme Court merely ordered a special session of the Legislative Assembly with the sole agenda of carrying out a composite floor test to determine which of the two rival claimants had majority. This is indicative of the distance travelled by the polity (and the judiciary, especially) between 1974 and 1999.

This position of the Punchhi and Sarkaria Commissions mentioned above additionally came to be adopted in a significant 2016 case on the question, *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*.[363] In this case, as a result of the simultaneous pendency of a resolution for the removal of the Speaker of the Assembly as well as proceedings for the disqualification of certain dissident MLAs, the Governor had called for an earlier date of summoning under Article 174 and had sent a message to the Assembly

[360] Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.5.04.
[361] *Bijayananda Patnaik v President of India*, AIR 1974 Ori 52.
[362] *Jagdambika Pal v Union of India*, (1999) 9 SCC 95, on appeal from *Narendra Kumar Singh Gaur v Union of India*, 1998 (32) ALR 395.
[363] *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1.

under Article 175 requiring the Assembly to not be adjourned till the removal of the Speaker was not decided upon, requiring the matter of the Speaker's removal to be considered first, and requiring the Speaker not to alter the composition of the House (both actions having been taken without ministerial aid and advice). The Supreme Court came down heavily on these actions, finding that by no stretch of imagination did Articles 163, 174 and 175 envisage any discretion for the Governor in summoning the Assembly and directing legislative business under the circumstances. The Court did not consider Article 163(2) to be any shield for the Governor from judicial scrutiny.[364]

Supported by Constituent Assembly Debates and the authority of Kaul and Shakdher (quoted above), the judgment affirms the ordinary rule that operations like summoning are to only be on ministerial advice but also clarifies the abovementioned exception:[365]

> The above position would stand altered, if the Government in power has lost the confidence of the House. As and when the Chief Minister does not enjoy the support from the majority of the House, it is open to the Governor to act at his own, without any aid and advice. … [T]he Governor would summon or prorogue the House or Houses of the State Legislature, on the aid and advice of the Chief Minister. … [I]t would be open to the Governor to suggest an alternative date for summoning or proroguing the House or Houses of the State Legislature, but the final determination on the above issue rests with the Chief Minister or the Cabinet, which may decide to accept or not to accept, the alternate date suggested by the Governor. … The position only gets altered, when the Government in power loses its majority in the House. … From the above exposition it emerges, that the Chief Minister and his Council of Ministers lose their right to aid and advise the Governor, to summon or prorogue or dissolve the House, when the issue of the Government's support by a majority of the members of the House, has been rendered debatable. We have no hesitation in endorsing the above view.

The judgment's further nuances on certain other situations need not be reiterated here but insistence is categorically made that the mere occurrence of a few defections should never be taken to be equivalent to a loss of the confidence of the Legislature and that the final test must be on the floor of the House.[366]

In the function of regulating the incidence of legislative sessions, Governors are posed with problems both similar to and overlapping with the question of appointing and retaining the

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[364] *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, at paras 155 and 167.

[365] *Nabam Rebia v Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, at paras 164-165.

[366] A final postscript may be provided: the rulings in *Nabam Rebia* appear to have been followed in the later judgment of *Shurhozelie Liezietsu v Nagaland Legislative Assembly*, MANU/GH/0332/2017. Here, the Governor had unilaterally summoned the Assembly for a floor test due to the supposedly bonafide belief that the Chief Minister had lost the confidence of the House. The Gauhati High Court found no infirmity in this course of action and found that the Governor was in fact constitutionally obligated to verify the Chief Minister's majority support.

Ministry in office. As with that question, the inconsistency and perceived partisanship of Governors have led to the intervention of courts for the purpose of requiring assessments of the confidence of the State Legislature in the State Executive. However, as floor tests have come to be seen as a condition precedent to the exercise of the Governor's pleasure, courts have been more willing to allow Governors to determine when a government needs to prove its majority and when alternative governments need to be given a chance to prove theirs. On the one hand, Governors may be able to ensure the timely assessment of legislative confidence by keeping a close eye on when a government's legislative majority has been rendered debatable. However, there may be understandable concerns that a blank cheque to Governors in such a role may encourage partisan choices regarding who should and who should not have to face up to democratic accountability as well as when such assessments are needed.

3.5 The Governor's role in the legislative process

Another practice of British constitutionalism adopted by the Indian constitution at both the federal and state levels is that a bill becomes a law only when assented to by the formal head of the state. Article 200, for the most part, replicates the scheme in Article 111 where on a Bill being passed by both Houses of the Legislature, the Governor has the option of assenting to the same or withholding assent or a third option of returning it with a message suggesting amendments. Once the Bill is reconsidered by the Legislature and sent back to the Governor, the Governor is required to assent to the same and cannot withhold assent.[367] The option of returning a Bill is not available to the Governor if it is a money Bill.[368] In respect of a money Bill, however, the same can be introduced in the House only on the recommendation of the Governor.[369]

However, the position of the Governor differs from the President, as Article 200 offers a fourth option of reserving a Bill for presidential assent. This could arise in a number of situations. For instance, under Article 254, where a State wishes to legislate on a subject in the concurrent list where a central law operates, and a provision of the state Bill is contrary to a provision in the central law, the provision in the state law can nonetheless be given effect to by seeking the assent of the President. Here, as the words of Article 254 indicate, the onus is on the State to seek presidential assent if it wishes to give effect to such provisions. Of a different kind is the second proviso to Article 200 which makes it obligatory on the Governor to refer a Bill for presidential assent if the Bill affects the role of the High Court under the Constitution.[370] The question of the Governor's discretion in these matters has to be examined separately for each of the different situations Article 200 contemplates.

[367] Article 200, Constitution of India.
[368] Article 200, Constitution of India; *See also Hoechst Pharmaceuticals v State of Bihar*, (1983) 4 SCC 45.
[369] Article 207, Constitution of India.
[370] Article 200, Constitution of India.

a. Article 200 and ordinary Bills

Speaking generally, royal assent is amongst the least controversial constitutional conventions in the United Kingdom.[371] The idea that the prerogative of assent has to be exercised on the aid and advice of the Council of Ministers seems fairly well-entrenched.[372] This was a bone of contention when Article 200 was debated in the Constituent Assembly. Strong doubts were raised by members that the provision could be used by the Governor to thwart the will of a democratically elected Legislature.[373] The provision survived after it was made clear to the Assembly that the Governor "is no longer vested with any discretion".[374]

The drafting history points to the clear principle that a Governor cannot act against the wishes of a democratically elected Legislature and its government. Once a Bill completes the regular legislative process, the Governor must ordinarily assent to it in line with the advice received from the Council of Ministers. However, this proposition is not beyond doubt. In the case of *Samsher Singh*,[375] Ray C.J. (on behalf of five judges) cited Article 200 as an instance where the Governor can independently choose the course of action to be adopted:[376]

> Similarly Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which are not detrimental to the State.

However, the concurring opinion in *Samsher Singh,* in its stronger view of the cabinet form of Government adopts a different view.[377]

> We have no doubt that de Smith's statement regarding royal assent holds good for the President and Governor in India:
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> > 'Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless be unconstitutional.'

This seems to suggest that there is no room for the Governor to exercise any discretion whatsoever under the provision. At the same time, this observation fails to fully capture the complexities involved in the Governor's role under Article 200. Subsequent judgments have glossed over the difference between the majority judgment and the concurring judgment on this point and preferred the view expressed in the latter. For instance, in *State of Gujarat v*

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[371] Geoffrey Marshall, *Constitutional Conventions* (Clarendon, 1984) at p. 84.
[372] Geoffrey Marshall, *Constitutional Conventions* (Clarendon, 1984) at p. 84.
[373] For example, *see* Constituent Assembly Debates, speech by Brajeshwar Prasad, Vol 9, 1st August 1949, available at < https://cadindia.clpr.org.in/constitution_assembly_debates/volume/9/1949-08-01 > accessed 22 April 2018.
[374] Constituent Assembly Debates, speech by T.T. Krishnamachari, Vol 9, 1st August 1949, available at < https://cadindia.clpr.org.in/constitution_assembly_debates/volume/9/1949-08-01 > accessed 22 April 2018.
[375] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831 at para 154.
[376] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831 at para 56.
[377] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831 at para 154.

R.A. Mehta,[378] the Court listed Article 200 as a provision where the Governor is bound by the aid and advice of the Council of Ministers.

While it is safe to assert that Governors should ordinarily be bound by the aid and advice of the Council in assenting or withholding assent, in practice, the Governor seems to have a measure of independence which judgments and Commissions have been unwilling to recognise fully. Governors have withheld assent or returned Bills on several instances and it is certainly not the case that they were acting "only upon and in accordance with the advice of the Council of Ministers"[379] as noted in *Samsher Singh.* Chatterjee cites the instance of H.V. Pataskar, who, as Governor of Madhya Pradesh in 1965, withheld assent to a Bill which he believed was detrimental to the administration of the State. Similarly, another recorded instance is that of Jammu & Kashmir Governor B.K. Nehru who, in 1982, returned the Jammu and Kashmir (Resettlement) Bill forcefully championed by the Government of the State, doubting its constitutional validity. Contrary to the belief of the framers, these acts of withholding assent or that of returning the Bill were not based solely on the advice of the government of the day.

A more recent example brings out better the political and constitutional complexities which may arise around the relatively simpler provision of assent. In April 2018, Governor Sathasivam of Kerala withheld assent in respect of a Bill passed by the Kerala State Legislature regularising certain admissions to two medical colleges in Kerala. The need to validate these admissions arose as the High Court had earlier invalidated these admissions and the order of the High Court had been affirmed by the Supreme Court. An ordinance attempting to regularise these admissions (and indirectly abrogate the judgments) which was signed by the Governor in 2017 had evoked considerable criticism.[380] The ordinance was stayed by the Supreme Court and in these circumstances that the Kerala Legislature passed the Bill aimed at regularising the admissions.

One note by an Additional Chief Secretary forming part of the documents submitted to the Governor along with the Bill itself indicated that the Bill maybe constitutionally suspect in light of earlier Supreme Court orders.[381] This view was contradicted by the Law Secretary who vouched for the validity of the Bill while also pointing out that under the rules of business it was not incumbent on the Additional Chief Secretary to offer his opinion on the

[378] *State of Gujarat v. R.A. Mehta*, (2013) 3 SCC 1, para 36.
[379] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831 at para 154.
[380] Manu Sebastian, 'Constitutional Embarrassment: When SC Stays Ordinance Signed By Ex-CJI On Ground That It Nullifies Court Orders' (*Live Law*, 6 April 2018) available at < https://www.livelaw.in/constitutional-embarrassment-sc-stays-ordinance-signed-ex-cji-ground-nullifies-court-orders > accessed 26 January 2019.
[381] 'Governor P Sathasivam withholds medical bill' (*Deccan Chronicle*, 8 April 2018) available at < https://www.deccanchronicle.com/nation/current-affairs/080418/governor-p-sathasivam-withholds-medical-bill.html > accessed 26 January 2019.

Bill.[382] Various political leaders had also urged the Governor not to assent to the Bill.[383] In these circumstances, the Governor withheld assent to the Bill.[384]

The action of the Governor, in these circumstances, was not in accord with the aid and advice of the Council of Ministers. Rather, it was clear that he had taken an independent view of the matter, perhaps after considering the aid and advice of his Ministers.[385] In September 2018, the ordinance was struck down by the Supreme Court.[386] Sensing that his signing of the ordinance was likely to be perceived as illegitimate in the circumstances, the Governor soon sought to distance himself from the Ordinance, by suggesting that he had been pressured by political leaders (both in government and in the opposition) into signing the ordinance. [387]

The legal and ethical quandaries that emerge from the anomalous provisions governing the office of the Governor are demonstrated in this episode. The controversy surrounding the Bill was only a manifestation of a much deeper problem. Governor Sathasivam was earlier the Chief Justice of India and his appointment by the President as Governor of Kerala (in 2014) had invited severe criticism by many who saw it as a clear case of *quid pro quo*.[388] The appointment had been criticised by former judges, eminent lawyers and scholars.[389] His conduct, thereafter, has also not fully allayed such doubts.[390]

While Governors have often signed off on ordinances questioning Supreme Court decisions, the 2017 ordinance was the first time that a former Chief Justice of India had done this.[391] Governor Sathasivam was placed in a difficult position when the Bill was sent to him for assent a couple of days after the Supreme Court had stayed the ordinance. The difficulty, as an opinion noted at that point was "an occupational hazard of an ex-CJI being the

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[382] K.P. Saikiran, 'Law, health secretaries differ over medical admission regulation bill (*The Times of India*, 8 April 2018) available at < https://timesofindia.indiatimes.com/city/thiruvananthapuram/law-health-secretaries-differ-over-medical-admission-regulation-bill/articleshow/63664544.cms > accessed 26 January 2019.

[383] Santosh Kumar, 'Governor snubs Assembly on college bill' (*The Telegraph*, 9 April 2018) available at < https://www.telegraphindia.com/india/governor-snubs-assembly-on-college-bill/cid/1341362 > accessed 1 February 2019.

[384] 'Governor says 'No', deals government a blow' (*New Indian Express*, 8 April 2018) available at < http://www.newindianexpress.com/states/kerala/2018/apr/08/governor-says-no-deals-government-a-blow-1798508.html > accessed 26 January 2019.)

[385] This would have been tantamount to the Governor acting in her "individual judgment", in the manner envisaged for certain functions specified under the Government of India Act, 1935. *See* chapter 2.3 of this book.

[386] *Medical Council of India v State of Kerala* (2018) SCC Online SC 1467.

[387] 'Governor cautions against Ordinances that defy courts' (*The Hindu*, 28 November 2018) available at < https://www.thehindu.com/news/national/kerala/governor-cautions-against-ordinances-that-defy-courts/article25617394.ece > accessed 28 January 2019.

[388] Ramachandra Guha, 'Judging the judges' (*The Telegraph*, 7 March 2015) available at < https://www.telegraphindia.com/opinion/judging-the-judges/cid/1438565 > accessed 1 February 2019.

[389] Ramachandra Guha, 'Judging the judges' (*The Telegraph*, 7 March 2015) available at < https://www.telegraphindia.com/opinion/judging-the-judges/cid/1438565 > accessed 1 February 2019.

[390] 'Kerala governor skips text critical of Centre in policy address' (*The Times of India*, 22 January 2018) available at < https://timesofindia.indiatimes.com/india/kerala-governor-skips-text-critical-of-centre-in-policy-address/articleshow/62606289.cms > accessed 1 February 2019.

[391] *See* P.P. Rao, 'Judges as Governors', 27 The Indian Advocate, at p. 36.

Governor".[392] The Governor withheld assent and later disowned the ordinance promulgated in his name. The excuse that he had given in to pressure from leaders of the State was telling. A former Chief Justice of India was unclear on the institutional role of the Governor.

Withholding assent has generally been seen as anti-democratic. The National Commission to Review the Working of the Constitution ('NCRWC') had suggested that the power to withhold assent be done away with.[393] This view has since been reiterated by the Punchhi Commission as well.[394] But as the above example shows, in some cases, the act of withholding assent may seem legitimate even where it is contrary to the advice of the elected government.

Thus, the idea that the Governor is completely bound by the aid and advice of the Council in exercise of her role under Article 200 may be misleading. Equally misleading may be the suggestion that the Governor acts independently. The Sarkaria Commission's attempt at coherently interpreting Article 200, rather than repeating these extreme positions, resulted in a more nuanced discussion. The Commission, in line with the intent of the framers, adopted the position that the Governor does not generally have any discretion under Article 200. At the same time, as per the Commission, the Article does provide a limited discretion to be exercised in rare circumstances. The Commission identified patent unconstitutionality of a Bill either on the ground that the State lacks legislative competence or that the Bill violates fundamental rights as grounds on which the Governor may deal with a Bill in exercise of discretion.[395] The Commission further observed that assent should not be refused on the ground that the policy underlying the Bill is not to the liking on the Governor.

While these formulations seem attractive, they may still be too broad as far discretion of the Governor is concerned. Yet, it may indeed be a part of the function of the Governor to consider whether a Bill that has been submitted for assent is constitutional. As such, the Governor may be entitled to seek aid and advice from the Council of Ministers and more generally from the government in this regard. In fact, returning the Bill by drawing attention to the problematic provisions may seem like a legitimate option in these circumstances even if that course is contrary to the advice received by the Governor. However, the idea that the Governor would be free to act independently in such circumstances and even withhold assent may be akin to granting Governors the power to review legislation.

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[392] Manu Sebastian, 'Constitutional Embarrassment: When SC Stays Ordinance Signed By Ex-CJI On Ground That It Nullifies Court Orders' (*Live Law*, 6 April 2018) available at < https://www.livelaw.in/constitutional-embarrassment-sc-stays-ordinance-signed-ex-cji-ground-nullifies-court-orders > accessed 26 January 2019.

[393] Report of the National Commission to Review the Working of the Constitution (2001), 'A Consultation Paper on the Institution of Governor under the Constitution' at para 29 read with Report of the National Commission to Review the Working of the Constitution (2001), at paras 8.14.1 and 8.14.4.

[394] Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at p. 70.

[395] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 5, para 5.6.13.

b. Article 200 and presidential assent

The room for the Governor to act independently increases vastly when a Bill is of a nature that it raises the question whether it must be reserved for presidential assent. The Constitution uses the mechanism of presidential assent to give effect to certain kinds of state laws. The second proviso to Article 31A(1), and the proviso to Article 31C make presidential assent a requirement if State laws are to be immune from challenges under Article 14 and Article 19 as provided for in those articles. Article 254, which has been referred to above, calls for presidential assent to be obtained where a State wishes to give effect to a law relating to a matter in the concurrent list if any provision in the law is contrary to an existing central law on the subject.[396] Article 304(b) incorporates a slight variation that a Bill which seeks to impose reasonable restrictions on the freedom of trade and commerce in public interest can be introduced only with the previous sanction of the President. It has been suggested by the Supreme Court that the absence of presidential sanction may be made good by presidential assent *post facto.*[397] The second proviso to Article 200 makes it obligatory on the Governor to reserve any Bill which affects the power of the High Court under the Constitution. The use of the word "shall" in this proviso in contrast to the directory 'may' in Article 200 makes it clear that this course is mandatory.

In the working of these provisions, Courts have commented on the nature of the assent of the Governor and the President. As a general proposition of law, the grant or refusal of assent is not per se justiciable.[398] Further, the Governor and the President cannot assent to the same Bill. Therefore, when the Governor seeks to reserve a Bill for the assent of the President, the Governor ought not grant assent to the same.[399] The presidential assent serves as the assent converting the Bill into a law for all practical purposes.[400]

Following the position adopted in the concurrent opinion in *Samsher Singh*,[401] it is possible to contend that the Governor must only reserve a Bill acting on the aid and advice of the Council of Ministers. Equally tenable is the contention that where the Constitution mandates that a Bill be reserved for Presidential assent, that procedure has to be followed. In the case of *Hoechst Pharmaceuticals,*[402] the Supreme Court noted:

> A Bill which attracts Article 254(2) or Article 304(b) where it is introduced or moved in the Legislative Assembly of a State without the previous sanction of the President or

[396] *M Karunanidhi v Union of India*, (1979) 3 SCC 431.
[397] *Hoechst Pharmaceuticals v State of Bihar*, (1983) 4 SCC 45 at para 86.
[398] *Hoechst Pharmaceuticals v State of Bihar*, (1983) 4 SCC 45 at para 86.
[399] *State of Bihar v Kameshwar Prasad*, 1952 SCR 889.
[400] At odds with this proposition are the findings in *Gram Panchayat of Village, Jamalpur v Malwinder Singh*, (1985) 3 SCC 661 and *Kaiser - I - Hind v National Textile Corporation*, (2002) 8 SCC 182 that the assent of President is valid only for the purposes for which it was sought.
[401] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831, at para 154.
[402] *Hoechst Pharmaceuticals v State of Bihar*, (1983) 4 SCC 45.

> which attracted Article 31(3) as it was then in force, or falling under the second proviso to Article 200 has necessarily to be reserved for the consideration of the President.

But that may be too narrow a rule. As the majority view in *Samsher Singh* suggested, the best judgment of the Governor may inevitably come into play in some circumstances in the working of this mechanism. This may be the result of indeterminacy as noted by the Court in *Hoechst* where it observed:[403]

> There may also be a Bill passed by the State Legislature where there may be a genuine doubt about the applicability of any of the provisions of the Constitution which require the assent of the President to be given to it in order that it may be effective as an Act. In such a case, it is for the Governor to exercise his discretion and to decide whether he should assent to the Bill or should reserve it for consideration of the President to avoid any future complication.

Genuine doubts of the nature described could arise often, particularly where the legal position is complex, for instance under Article 254 where it may not be clear whether the provisions of a Bill are indeed in conflict with an earlier central law. However, a Governor acting in pursuance of a genuine doubt as to the applicability of Article 254 is not really the problem.

The constitutional mechanism under Article 254 is a strong, centralist feature[404] of the Indian Constitution which makes laws made by State Legislatures (sovereign in their sphere of competence) to executive assent from the federal government. At least some states had suggested to the Sarkaria Commission that this mechanism requires a substantive rethink and that Parliament should be the body, if at all, charged with resolving conflicts in the concurrent sphere.[405] The Governor's discretion in the matter must be viewed against this background. There exists a real possibility that the Governor can reserve a Bill for the consideration of the President with a view to thwart legislative action. The grant or refusal of assent by the President is governed by Article 201 which does not prescribe any time limit for such assent. Further, in a departure from the provisions of Article 111 and 200, under Article 201, where a Bill returned by the President is sent back by the State Legislature (with or without amendments) the President is not bound to grant assent. Thus, a Bill could potentially be killed off by reserving it for presidential assent as noted by the Punchhi Commission[406]

Where the President withholds assent or a Bill is kept pending for consideration without any decision, the Governor is likely to be seen as having been influenced by the Central

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[403] *Hoechst Pharmaceuticals v State of Bihar*, (1983) 4 SCC 45.

[404] Katharine Adeney, 'Centrifugal and Centripetal Elements of Indian Federalism' in Subrata Mitra and Bernd Rill (eds), *Indien heute: Bennpunkte seiner Innenpolitik (India Today: Domestic Priorities)* (Hans Seidel Stiftung, 2003) at pp. 47-54

[405] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 5, para 5.2.02.

[406] Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at p. 70.

Government to reserve the Bill, in cases where the Governor has differed with the aid and advice of the Council. An example noted by the Sarkaria Commission is worth quoting:[407]

> Yet, another State Government has alleged that powers under Articles 200 and 201— are being misused to serve the partisan interests of the Union Council of Ministers. It has cited a recent example of a Bill to amend the law governing a University, reserved by the Governor in his discretion for the consideration of the President.

It is clear that the mistrust of the Governor appointed by the Centre runs deep. Even actions such as reserving a Bill for the consideration of the President, may be seen as illegitimate and partisan. To use the Governor to thwart law-making in the States, by keeping legislations pending, is perhaps the most cynical abuse of constitutional provisions. These are not normally matters in which there is any direct political interest at stake. Yet, Central Governments have often indulged in such practices with even political allies complaining, on occasion, that the operation of Presidential assent has been demeaning.[408] While the office of the President does publish the status of the Bills, no reasons are provided for cases where assent has been withheld.[409] Thus a Bill passed by the Legislature of a State may be merely dismissed by the President acting on the advice of the Union Executive for no clear reason. This is a clear distortion of the federal and democratic principles which run through the Constitution.

The role of a formal, constitutional head in providing their approval to legislation that has passed through the gauntlet of legislative procedure may appear to have become uncontroversial in other parliamentary democracies. However, the exercise of gubernatorial power in this regard continues to raise significant questions in India pertaining to interference in core legislative functions as well as the outright subversion of the federal principle. While courts have not proved to be interventionist on this matter, there has also not been complete clarity on the nature of discretion that the Governor enjoys. There has also been considerable concern in relation to the Governor's ability to reserve Bills for presidential assent as it permits her to thwart legislative action in the States under the guise of defending Parliament's exclusive field of competence in the federal scheme. It remains unclear as to how it may be ensured that Governors exercise restraint in blocking a State's legislative process along with sound judgment in either requiring the reconsideration of a Bill or its reservation for presidential assent.

3.6 The Governor's role in the proclamation of emergencies under Article 356

a. Background and developments before Bommai

[407] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 5, para 5.2.02.
[408] 'Governor 'Adventurism'', (2016) 51(30) Economic and Political Weekly.
[409] *See* President's Secretariat, Rashtrapati Bhavan, 'State Bills', available at < https://rashtrapatisachivalaya.gov.in/state-bills > accessed 8 June 2019.

Amongst the provisions of the Constitution that tilt Indian federalism towards the Centre, the most drastic is Article 356. The article titled 'Provisions in case of failure of constitutional machinery in the State' permits the Centre to impose President's rule where the President is satisfied that the government in the State cannot be carried on in accordance with the provisions of the Constitution. The effects of President's rule are severe and could include dismissal of the State Government along with suspension or dissolution of the lower House in the States.

The anti-democratic nature of the device is, thus, plain. This provision, which operates through the formal heads at the Centre and the State, effectively permits the temporary suspension of democratic government in the states. This was thought of as a check on Indian rule under the Government of India Act, 1935.[410] Article 356 is closely modelled on Section 93 of that Act.

Under Article 355, the Centre has a duty to protect the States from external aggression and internal disturbance and to ensure that the governments in the States are carried on in accordance with the Constitution. The framers hoped Article 355 would circumscribe the use of Article 356 and prevent wanton invasions into the "sovereign authority" of the states.[411] However, the phrase "the Government cannot be carried on in accordance with the provisions of the Constitution" in Article 356 is not a precise one.[412] Familiarity was the reason cited for using this phraseology borrowed from the Government of India Act, 1935. Indian politicians, with their experience (though limited) under the Government of India Act, 1935 were thought to be familiar with the limits of the power both *de facto* and *de jure*.[413] This approach papered over the ambiguities inherent in the provision.

The case for similarity between the section 93 of the 1935 Act and Article 356 understated the vast differences between Government of India Act and the Constitution. Section 93 in the former was clearly drafted with the aim of ensuring that the colonial Governor could, if the need arose, take over the administration in the province. In the centralist turn that the Constituent Assembly took for fear of separatist tendencies, this provision was modified to enable the Centre to unseat the State Government. As it had been decided that the unelected Governor should not possess any such power, the role of the Governor under Article 356 was reduced to the furnishing of a report. This report would form part of the material for the Centre in deciding whether a proclamation under Article 356 should be made.

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[410] *See* chapter 2.4 of this book; Report of the National Commission to Review the Working of the Constitution (2001), 'A Consultation Paper on Article 356 of the Constitution' at para 2.1.
[411] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 83.
[412] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 204.
[413] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at para 9.111.34.

Ambedkar famously expressed hope that this provision would never be used and democratic governments in the States would not be wantonly dismissed.[414] Experience has shown this to be little more than wishful thinking. The expected restraint was lacking right from the early Central Governments itself with even a democrat like Nehru leaving himself open to the charge of misuse of this provision.[415] There is a wealth of literature documenting the use, misuse and abuse of Article 356. Most Commissions set up to study Centre-State relations have dealt with the subject at length. From Punjab in 1951 to Uttarakhand in 2016, Article 356 has been resorted to 112 times.[416] Not all of these were perhaps unwarranted. The Sarkaria Commission, for instance, categorised roughly a third of the 75 proclamations that it analysed as inevitable. However, all too often, Central Governments have used the provision to displace a State Government led by a party in opposition. The focus in this section is on the many instances where they have found willing accomplices in Governors.

Article 356 may come into play in a wide variety of situations. The significance of the Governor's role depends on the nature of the situation demanding emergent action. The Sarkaria Commission usefully considered circumstances grouped under four heads to identify situations where dismissal of a State Government would be proper.[417] These are political crisis, internal subversion, physical breakdown and non-compliance with directions issued by the Centre under the Constitution. It is tempting to think that a dismissal arising from, say, a physical impossibility resulting from some sort of internal disturbance or natural calamity may *prima facie* not dent the federal principle of the Constitution. However, these categories may not be watertight or as apolitical as the categorisation seems to suggest.

For example, take the category of internal subversion. The framers of the Constitution were clear that maladministration *per se* is not a reason justifying the invocation of Article 356. The Sarkaria Commission reiterated the same while noting that there could be cases of internal subversion of the constitutional scheme which justifies dismissal on grounds such as circumstances where a Ministry has been carried on for a period of time disregarding the Constitution and the law. The distinction between what is perceived to be maladministration and terms such as internal subversion may be a matter of degree, as some examples considered below show.

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[414] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at para 9.111.34.

[415] For instance, the grounds on which Article 356 was invoked in the case of Kerala in 1959 have been extracted in J.R. Siwach, *Office of the Governor: A Critical Study, 1950-73* (Sterling Publishers, 1977) at p. 273. None of the reasons justified the dismissal of the Government as noted by the Governor.

[416] 'Statement showing date of proclamation and revocation regarding President's Rule in States under Article 356 of the Constitution', Ministry of Home Affairs, Government of India (3 May 2016), available at < https://2nafqn3o0l6kwfofi3ydj9li-wpengine.netdna-ssl.com/wp-content/uploads//2018/06/MHA-Presidents-Rule.pdf > accessed 10 May 2019.

[417] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 6, para 6.4.01.

However, amongst these situations, it is in a political crisis that the Governor's office becomes pivotal. As we have seen above, the Governor has a variable discretion depending on the political situation in the State. It wanes in the face of a strong responsible government and waxes during political instability, be it an inconclusive mandate following an election or if the government is struggling to retain a majority in the House. The loss of numbers in the House disengages the Governor from the aid and advice of the Council of Ministers. The Governor's powers to appoint and dismiss Ministers, the power to summon the House or to send a message to the House become tools with far reaching impact.

In such situations of political instability in a State, the party in power at the Centre may have a direct or indirect interest in the possible outcomes in the State. As with the appointment of a Chief Minister when the electoral outcome is not clear, the picture of the Governor as an umpire of democracy is most vivid in a crisis. The Governor is expected to disinterestedly apply constitutional norms and conventions in determining whether Article 356 should be invoked. However, the Governor's links to the Centre, both formal and informal, are not conducive to the performance of this role. Where the party in power at the Centre is involved as an active player in the political theatre of the State, the actions of the Governor are likely to be viewed with suspicion and mistrust by the other side. The Governor, at least in such circumstances, suffers from a legitimacy deficit.[418]

Some time-worn instances which illustrate the problem are worth recounting in brief. In 1959, the Central Government headed by Jawaharlal Nehru dismissed the communist government of E.M.S. Namboodiripad in Kerala on a report received from the Governor that spoke of maladministration, subversion of democracy and stated that the government had lost the mandate of the people judging from protests that had broken out in the State.[419] The reasons put forth in support of the proclamation were weak,[420] more so when viewed from a contemporary perspective. The dismissal, while supported by some at the time,[421] has been largely viewed since as an illegitimate use of Article 356.[422] This is a case where the Governor and the Central Government perceived a case of "subversion" of democracy which was undoubtedly coloured by their perception of communism.

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[418] This was acknowledged in the Constituent Assembly. While stressing the need for the word 'otherwise' in Article 356, Thakus Dass Bhargava noted: "If the Governor is not independent and is only an agent of the Central Government, what is the use of his report?". Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 9, 1949, at para 9.111.10.

[419] Extracts from the Governor's report are available in N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 215.

[420] *See* J.R. Siwach, *Office of the Governor: A Critical Study, 1950-73* (Sterling Publishers, 1977) at p. 273.

[421] K.M. Munshi described the action of the President as a triumph of the Constitution over the Communist attempts to force totalitarianism of their brand over Kerala. N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at p. 217.

[422] V.R. Krishna Iyer, 'EMS of 1957 vintage', (1998) 15(8) Frontline available at < https://frontline.thehindu.com/static/html/fl1508/15081220.htm > accessed 10 May 2019. V.R. Krishna Iyer was a minister in the EMS Namboodiripad-led government.

In a pure political crisis, the perennial problem has been that of the Governor as an umpire in a game of numbers. For example, in the 1967 elections in more than one State, the Congress Party fell short of a majority despite being the single largest party. In the political crises that followed in States such as Rajasthan and West Bengal, Governors failed to play the non-partisan role expected of them. In Rajasthan, the Governor belatedly invited the leader of the Congress Party to form the Government, by which time a united opposition had made it publicly known that they had the numbers.[423] The Governor relied on the problematic precedent of Madras from 1952 discussed earlier. On the leader of the Congress in Rajasthan expressing his disinclination to form the government in the wake of protests that broke out, instead of inviting the opposition grouping, the Governor reported a failure of constitutional machinery and President's rule was declared.[424] There are many such instances between 1950 and 1990, where Governors often thought it fit to surmise when a Government had lost its majority in the Assembly often to the advantage of the party in power at the Centre. It was not uncommon for Governors to recommend President's rule when they entertained a suspicion that the government lacked numbers in the Assembly. The claim of the Government or rival factions that they do command a majority in these cases went unexplored as Governors deemed floor tests to be unnecessary before recommending the invocation of Article 356. The Sarkaria Commission catalogued these instances separately in its appendix to the chapter on Article 356.[425]

Thus, in the invocation of Article 356, we have a history of Governors playing unedifying roles. However, there are honourable exceptions such as S.S. Barnala who took independent stands at the cost of earning the displeasure of the Centre.[426] Barnala, in 1991, refused to recommend the dismissal of the Tamil Nadu government, where he was Governor. He was promptly transferred to Bihar and chose, instead, to resign. Such instances show how the tool of transfer and removal can be potent weapons to control the office of the Governor in the invocation of Article 356.

b. Bommai*: Reviewing Governors' reports*

All this is, however, antediluvian. The inflection point in post-constitutional jurisprudence on Article 356 was the nine-judge bench decision in *S.R. Bommai v Union of India*.[427] This case involved the imposition of President's rule in the States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Rajasthan and Himachal Pradesh. The facts varied across States, but the

[423] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at pp. 227-228.
[424] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at pp. 227-228.
[425] Report of the Sarkaria Commission on Centre-State Relations (1988) at Annexure VI.4 to ch 6.
[426] 'Surjit Singh Barnala: Moderate Akali politician who almost became PM' (*The Economic Times*, 14 January 2017) available at < https://economictimes.indiatimes.com/news/politics-and-nation/surjit-singh-barnala-moderate-akali-politician-who-almost-became-pm/articleshow/56540012.cms?from=mdr > accessed 8 May 2019.
[427] *S.R. Bommai v Union of India*, (1994) 3 SCC 1.

dismissal of the BJP-led governments in Madhya Pradesh, Rajasthan and Himachal Pradesh were linked to the demolition of the Babri Masjid by *kar sevaks* or volunteers associated with the BJP and allied groups, and the subsequent communal riots. This raised several fascinating legal questions, most importantly regarding the scope of judicial review of actions taken under Article 356. In a lengthy judgment (with five opinions) the Supreme Court almost completely removed the cloak of immunity that had thus far protected illegitimate presidential proclamations under Article 356.[428]

This was a departure from its earlier decision in *State of Rajasthan v Union of India*,[429] where the Court spoke of a proclamation under Article 356 as a political question which Courts should steer clear of. The facts of that case concern the outcome of the general elections of 1977, held after the 1975-77 Emergency. The Janata Party emerged victorious in these elections, ousting Indira Gandhi's Congress party. After they formed the government at the Centre, the Union Home Minister wrote to the Chief Ministers of nine Congress-ruled States, asking them to advise their Governors to dissolve the legislative assemblies and seek a fresh election. Several State Governments challenged this letter, and sought an interim injunction restraining the Central Government from imposing President's rule under Article 356. The rationale behind this letter was that since the Congress had lost in the general elections, the Congress-led State Governments had lost the confidence of the people in those States as well.

The Supreme Court, while upholding the Centre's actions, left open a narrow window for judicial review in this case. Bhagwati, J. (who spoke for himself and Gupta, J.), stated that the courts could intervene only in case of a mala fide declaration or a constitutionally impermissible proclamation based on extraneous or irrelevant grounds. However, it should be noted that when this judgment was passed, clause (5) of Article 356 stated that the satisfaction of the President regarding the failure of constitutional machinery in a State was final and conclusive, and could not be questioned in any court. This clause, which had been inserted by the 38th Amendment in 1975, was itself deleted by the 44th Amendment in 1978. This restraint on judicial review thus did not exist when similar questions were raised before the Supreme Court in *S.R. Bommai.*

In *Bommai,* the Court held that the power under Article 356 is a conditioned power which is not immune from judicial review.[430] The window of review was considerably widened as the court could review the relevance of the material on the basis of which the satisfaction of the President was arrived. By confining itself to the material before the President, the court technically avoided any review of the advice of the Council of Ministers in line with Article 74(2).[431] The actual material before the President may be of two kinds. Article 356 says that the President may be satisfied that there is a failure of constitutional machinery on a report

[428] *See S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 434.
[429] *State of Rajasthan v Union of India*, (1977) 3 SCC 592 at p. 662.
[430] *State of Rajasthan v Union of India*, (1977) 3 SCC 592 at p. 662.
[431] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 434.

from the Governor or otherwise, indicating thereby that the satisfaction can be formed on the basis of other material as well. As to what the material must show, the text of the provision does not provide much guidance. Article 356(1) states that a proclamation is an option only where a government cannot be carried on as per the provisions of the Constitution. Sawant, J. in *Bommai* read this phrase to impose a fairly high burden on the President:[432]

> In other words, the provisions require that the material before the President must be sufficient to indicate that unless a Proclamation is issued, it is not possible to carry on the affairs of the State as per the provisions of the Constitution. **It is not every situation arising in the State but a situation which shows that the Constitutional Government has become an impossibility, which alone will entitle the President to issue the Proclamation.** (emphasis supplied)

This standard of impossibility echoes the sentiment expressed in the Constituent Assembly that the provision is one of last resort. The burden of proof in a challenge to a proclamation is closely aligned with this standard. At least three judges in Bommai indicated that once a petitioner challenging the proclamation makes out a *prima facie* case of invalidity, the burden shifts on the Centre to satisfy that there exists material to show that government in the State cannot be carried on in accordance with the Constitution.[433] This position of law attributes a central role to the Governor in the invocation of Article 356. Though the Centre may rely on other material, the Governor's report is normally the material on which a proclamation is based. The importance of the Governor is emphasised by Ramasawamy, J. in Bommai.[434]

> The Governor, thus, should play an important role. In his dual undivided capacity as a head of the State he should impartially assist the President. As a constitutional head of the State Government in times of constitutional crisis he should bring about sobriety. The link is apparent when we find that Art. 356 would be put into operation normally based on Governor's report. He should truthfully and with high degree of constitutional responsibility, in terms of oath, inform the President that a situation has arisen in which the Constitutional machinery in the State has failed and the Government of State cannot be carried on in accordance with the provisions of the Constitution, with necessary detailed factual foundation. **The report normally is the foundation to reach the satisfaction by the President.** (emphasis supplied)

Thus, where the Governor is of the view that Article 356 must be invoked, the report must lay out the factual foundation justifying this opinion. Where a report fails to meet this burden, it will be considered irrelevant material. Interestingly, by couching it in terms of relevance of material, the court, in *Bommai*, seems to have indicated some sort of deference to the views of high constitutional functionaries. Some opinions also adopt the deferential line "that

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[432] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 60.
[433] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at paras 87 and 153.
[434] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 175; *See also S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 198.

correctness or adequacy of material is beyond the pale of review".[435] However, while applying this test of relevance, the review of Governor's reports (and actions) have been harsh and have included findings of inadequacy and incorrectness. For instance, in *Bommai* itself, the Governors of Karnataka and Meghalaya came in for serious criticism. In Karnataka, the Governor had failed to conduct a floor test and had recommended the invocation of Article 356 on the ground that the Government had lost the support of the House. Sawant, J. found the material in the report to be the unverified opinion of the Governor who had acted in "undue haste and thrown all canons of propriety to wind".[436] Sawant, J. also found that the Governor of Meghalaya had shown unnecessary anxiety to dismiss the Government even as a majority of members were in fact voting in favour of the Government. The material before the President, in his opinion, was irrational and motivated by factual and legal mala fide.[437] Reddy, J. found the report of the Governor of Karnataka "vitiated by more than one assumption unsustainable in law"[438] and the conduct of the Meghalaya Governor was found to be regrettable.[439] By contrast, the reports of the Governors of Madhya Pradesh, Rajasthan and Himachal Pradesh, which included facts about the Governments being complicit in acts of communal violence, were found to be relevant to the proclamations in those States. These reports were seen as evidence of the fact that the governments in those states had failed to uphold the constitutional value of secularism.[440]

A rule of conduct that emerges clearly from Bommai is that Governors cannot hazard guesses about the confidence of a majority in the Legislature.[441] Whenever there are conflicting claims of majority, the only constitutionally ordained forum to test the same is the floor of the House.[442] This rule binds Governors even in the face of variations in party compositions and conflicting claims of strength arising from defections. To some extent, the judgment normalises the phenomenon of shifting loyalties amongst members of political parties. The Court noted that the Tenth Schedule had been brought in to curb the practice of defection. However, it is not open to a Governor to forget the duty of ensuring responsible government and suggest the imposition of President's rule on the ground that unethical practices are being indulged in by legislators. This is clear from the finding of Sawant, J. in the case of the Nagaland Governor's report:

> On the facts of this case also we are of the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House. This was particularly so because the Chief Minister, Shri Sema had already submitted his resignation to the Governor. **This is notwithstanding the fact that the Governor in his report had stated**

[435] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 434.
[436] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 118.
[437] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 123.
[438] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 391.
[439] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 402.
[440] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 422.
[441] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 119.
[442] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 119.

> **that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress I MLAs were allured by the monetary benefits and that amounted to incredible lack of political morality and complete disregard of the wishes of the electorate**. (emphasis supplied)

Bommai, thus, constructed a whole new normative structure to guide Governors in performing their role under Article 356. Governors from then on, in their invocation of Article 356, have been judged by the law declared in *Bommai*. Some of the notable instances are considered below.

c. Governors after Bommai

The first prominent case of President's rule post-*Bommai* where the Governor's role came under scrutiny was in Uttar Pradesh in 1996. The election to the Assembly was conducted when the State was under President's rule. The people gave a fractured mandate and no majority combination came forth to stake claim to form a Government. The Governor, in this situation, submitted a report to the President suggesting re-imposition of President's rule under Article 356 on the ground that barring defections, the chances of a government that commanded a majority in the House were bleak.[443] The President revoked the earlier proclamation which had continued for a year and issued a fresh proclamation the same day. The proclamation was challenged in the Allahabad High Court and a full bench declared it to be invalid.

In its judgment in *H.S. Jain*,[444] the core of the reasoning of the High Court focused on the idea that the Governor had not explored all possibilities before resorting to a provision which on its true interpretation was a provision of last resort. The Assembly had not even met once when the Governor suggested that it be kept under suspended animation. The High Court held that the Governor ought to have used his powers to summon the Assembly and sent a message to the Assembly that a majority leader had to be found if President's Rule was to be avoided.[445] *H.S. Jain* is a clear indication of the impact of *Bommai* on the role of the Governor. The discretion of the Governor in these circumstances has been firmly reoriented towards ensuring responsible government. She is duty-bound to exercise constitutional powers towards this end.

In 1997, Article 356 was sought to be invoked in U.P. once again as the Kalyan Singh government seemed to have lost its majority. On this occasion, the Governor gave the Chief Minister a chance to prove his majority in which he succeeded. The confidence vote was far from peaceful and at times descended into chaos, but the Chief Minister ultimately prevailed. The Governor nonetheless proceeded to submit a report to the Centre suggesting President's Rule on the basis of the events in the House and additionally raising concerns regarding

[443] *H.S. Jain v Union of India* (1997) 1 UPLBEC 594.
[444] *H.S. Jain v Union of India* (1997) 1 UPLBEC 594.
[445] *H.S. Jain v Union of India* (1997) 1 UPLBEC 594.

defections amongst legislators and a breakdown of law and order. The Cabinet which proceeded to act on this report was thwarted by President K.R. Narayanan, who on a close reading of the judgment in *Bommai* sent back the file to the Cabinet.

A newspaper report from the time reveals the President's line of reasoning:[446]

> His three line message, dictated to his secretary and conveyed to the Prime Minister, comprised two sentences, the first merely recording the fact of his sending it back for reconsideration … The second sentence recorded the President's view that **the Governor's report had not established that the constitutional machinery had broken down** and that President's rule, including dissolution of the Assembly, was called for - in the light of Bommai. In the circumstances, these three lines carried with them great power. (emphasis supplied)

Presidents until then had not usually rejected the advice of the Council of Ministers to take action under Article 356. As is clear from the extract above, it was the unpersuasive report of the Governor that prompted the President to send back the file. In 1998, President K.R. Narayanan returned another proposal to impose Article 356 in Bihar after finding the Governor's report wanting. A minute recorded by the President which was accessed by the magazine Frontline noted:[447]

> President Narayanan's Minute concludes with a succinct statement of reasons, or grounds, for returning to the Cabinet its recommendation of Central Rule. First, the communication states, **"the condition precedent for the invocation of Article 356, viz. that there has been failure of the Constitutional machinery in the state, has not been adequately made out by the Governor**." Secondly, it holds, "it would be imprudent to take action under Article 356 in Bihar when preliminary steps such as warning, directives and eliciting explanation from the state have not been taken by the Union." Thirdly, it says, "the fact that the government headed by Shrimati Rabri Devi enjoys majority support in the Legislative Assembly has to be borne in mind as per the Sarkaria (Commission) passage cited in the Bommai judgement. (emphasis supplied)

The political nature of Article 356 and how Governors aid the Central Government in its use is clear from the above instances. If it was a BJP government in U.P. at the receiving end in October 1997 from a coalition of regional parties ruling at the Centre, in 1998 a regional government led by Rabri Devi in Bihar was sought to be unseated by the BJP who had by then attained power at the Centre. The law laid down in *Bommai* regarding Article 356 seemed to be lost on Governors who continued to aid the party at the Centre by submitting

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[446] Venkitesh Ramakrishnan and Praveen Swami, 'A crisis defused' (1997) 14(22) Frontline available at < https://frontline.thehindu.com/static/html/fl1422/14220040.htm > accessed 10 May 2019.

[447] *See* Praveen Swami and Sudha Mahalingam, 'The BJP's Bihar Fiasco' (*Frontline*, 10 October 1998) available at < https://frontline.thehindu.com/cover-story/article30248272.ece > accessed 17 March 2019.

reports recommending dismissal of State Governments without meeting the burden of failure of constitutional machinery.[448]

Even as late as 2005, more than a decade after *Bommai*, Governors were prone to hastily resorting to Article 356. In May 2005, the Governor of Bihar sent a report seeking dissolution of the Assembly on the ground that those seeking to claim power following an election were making attempts to cobble a majority by splitting rival parties.[449] The Central Government acted on the report and the Assembly was dissolved by the President two days after the report.

The action of the President was challenged in the Supreme Court. A Constitution Bench of the Supreme Court in *Rameshwar Prasad v Union of India*[450] set aside the proclamation on a finding that the report of the Governor was actually aimed at preventing a particular political party from coming to power and not for protecting the purity of the political process as professed. The action of the Governor was found to be premature and it was held that the Governor had hastily termed political realignment as unethical. The Court further noted that the Governor was not at liberty to assume that there had been horse trading in the absence of coherent material. The majority opinion came down heavily on the Governor, noting that "under no circumstances can the action of the Governor be held to be bona fide when it is intended to prevent a political party to stake claim for the formation of the government."[451] This was as direct an accusation on the Governor (of acting at the behest of the party at the Centre) as the Supreme Court could have made.

An interesting aspect of the judgment is that it linked the frequent misuse of Article 356 to the choice of persons that are appointed as Governors.[452] The Sarakaria Commission had suggested that the Governor should be an apolitical figure. The Court noted that a politician who had not had a cooling-off period, if appointed Governor, may not be able to perform the role expected of her under constitutional provisions such as Article 356 in a disinterested manner. The then Governor of Bihar resigned following the judgment which was rightly read as an indictment of his actions.[453]

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[448] In this episode, the Central Government, however, had its way for a while as it once again sought invocation of Article 356 in February 1999 which the President approved. The victory was temporary, however, as the Union government was forced to revoke the proclamation faced with rejection of the same by the Rajya Sabha. George Iype, 'Vajpayee heeds Cabinet advice, cancels Art 356 in Bihar' (*Rediff*, 8 March 1999) available at < https://www.rediff.com/news/1999/mar/08bihar4.htm > accessed 17 March 2019.

[449] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1 at para 12.

[450] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1 at para 12.

[451] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1 at para 88.

[452] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1 at para 71.

[453] Vinod Sharma, Aloke Tikku and Anirban Guha Roy, 'Buta steps down as Bihar Governor' (*Hindustan Times*, 29 January 2006) available at < https://www.hindustantimes.com/india/buta-steps-down-as-bihar-governor/story-YbRguKY9LUXed0nhYqIjtL.html > accessed 30 March 2019; Priya Sahgal, 'Bihar Assembly dissolution: SC indicts Buta Singh, setback for Congress, UPA' (*India Today*, 6 February 2006) available at <

In 2010, another episode lent credence to this idea that active politicians appointed to Governorships may struggle to be non-partisan in the invocation of Article 356. The Governor of Karnataka, who was appointed to the office from the thick of politics, courted controversy when he recommended dismissal of the BJP State Government on the ground of defections in the House.[454] The Central Government chose to differ with the Governor and did not act on the report.

In 2017, the BJP Government at the Centre was alleged to have imposed President's rule in Uttarakhand in bad faith. The proclamation under Article 356 came on a Sunday[455] on the eve of a Floor Test to be conducted in the Assembly which had been fixed by the Governor after considering allegations that a few legislators of the ruling party had withdrawn their support to the Chief Minister. The Uttarakhand High Court in *Harish Rawat v Union of India*[456] quashed the proclamation under Article 356 finding it to have been issued in a manner contrary to law.

What separates this case from the others discussed above is that the Governor of Uttarakhand did not actually recommend the imposition of President's Rule despite allegations of horse-trading. The position that regulating defections is not the first duty of the Governor seemed to have been understood by the Governor who in his report noted the allegations but avoided recommending President's Rule. His report to the President read:[457]

> Even though the veracity of the video presented in the pen drive, is yet to be fully established, it is prima facie obvious that plans have been afoot to indulge in horse trading of MLAs and the Chief Minister is a party to such machinations. Such behaviour runs contrary to the expected standards of probity from a Chief Minister.
>
> The political atmosphere is likely to get further vitiated, as the MLAs start returning to the State Capital for the Vote on 28th. In the given situation and the surcharged atmosphere, it is possible that the Assembly proceedings on 28th March, may be unruly, chaotic and violent.

This fact assumed importance in the judgment of the High Court. While noting that the President is not powerless to act under Article 356 otherwise than on a report of the

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https://www.indiatoday.in/magazine/nation/story/20060206-bihar-assembly-dissolution-sc-indicts-buta-singh-setback-for-congress-upa-783683-2006-02-06 > accessed 20 March 2019.

[454] Ruhi Tewari, 'BJP meets Patil, wants governor report rejected' (*Livemint*, 17 May 2011) available at < https://www.livemint.com/Politics/QhOsPX5011aobfTrVZOp4L/BJP-meets-Patil-wants-governor-report-rejected.html > accessed 21 March 2019; In early 2019, we interviewed Shri H.R. Bhardwaj, who asserted with conviction that he had acted as per the Constitution and that the situation in Karnataka warranted the imposition of President's Rule.

[455] Press Information Bureau, 'President's Rule imposed in Uttarakhand: Advisors to Governor of Uttarakhand appointed', Ministry of Home Affairs, Government of India (27 March 2016) available at < http://pib.nic.in/newsite/PrintRelease.aspx?relid=138366 > accessed 23 March 2019.

[456] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502.

[457] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 59.

Governor, the Court found that such circumstances had not been made out by the Centre.[458] The Governor had proceeded to order a floor test despite the claim that a money Bill had allegedly been defeated on the floor of the House. The Court held that the argument that "whatever the Governor may have done, it is open to the President to take a different view" was not acceptable.[459]

The judgment in *Harish Rawat* deepens the demarcation between mechanisms in the Constitution that advance two distinct but related constitutional principles. One is the duty of the Governor to ensure responsible government in the State which if called into question because of doubts as to the majority of the Government is to be resolved by a floor test. The second is the area in which the Tenth Schedule operates, i.e. to prevent unscrupulous defections. In a situation where the majority-status of the incumbent government is in doubt due to defections, the task before the Governor is to ensure a floor test, notwithstanding allegations of attempts to buy loyalties of legislators. Dealing with defections becomes the task of the Speaker with which the Governor ought not to ordinarily interfere.[460]

Rameshwar Prasad adopted the position that for the Governor to resort to Article 356 in the face of attempts to secure a majority by immoral means, there should be "very cogent material".[461] The judgment in *Harish Rawat* repeats this observation. However, in a time of political crisis, it is difficult to see a Governor having access to completely verified, actionable information on horse trading. In the Uttarakhand case, there was a tape that emerged from a sting operation which suggested that the Chief Minister was attempting to cobble a majority before the confidence vote by making various offers. At the time the tape was available to the Governor, it was unverified (as noted by him in his report). Nonetheless, the Union Cabinet chose to act on the information therein. The High Court held that the law declared in *Bommai* did not permit this. However, by the time the matter was argued before the High Court, the tape was verified and found to be authentic. The High Court resolved the dilemma of having to choose between two threats to democracy namely, the invocation of Article 356 on one hand and that of unethical politics of vote-buying on the other by invoking some kind of hierarchy.

The remedy to corruption in politics should not be such that it threatens federalism and democracy – both of which Article 356 seems to do. The High Court noted:[462]

> Individuals pale into relative insignificance and what emerge as more relevant are the greater values, which, in this case, include democracy and federalism.

[458] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 93.
[459] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 95.
[460] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 88.
[461] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 70.; *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 148.
[462] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502 at para 73.

Much of what has been said about the role of the Governor under Article 356 can be summarised by the above observation. The role of the Governor, though limited to a communicative function, i.e. reporting to the President, is essential to Article 356. This is the ordinary route for imposition of President's rule and therefore where the Governor recommends President's rule, she must make out a case on the basis of verifiable facts as to why the extreme measure of unseating a democratically elected government must be resorted to. The Governor must be mindful of the extreme consequences that the report could have for the State, of which she is the constitutional head. Far from being a figurehead, in these situations, the Governor is an important constitutional functionary on whom the fate of the elected government in the State depends. It requires a fair, objective and impartial application of norms that govern the use of Article 356. Sadly, as is clear from the cases studied above, Governors at the mercy of the Centre rarely rise to this task.

Similar to the case of a number of the other functions of Governors, the proclamation of emergencies on the basis of a Governor's report that there has been a breakdown of constitutional machinery in a State has seen a familiar pattern of initial misuse and partisanship followed by a measure of resolution as a result of judicial intervention and scrutiny. The ability of the Governor to lay out the factual foundation on the basis of which President's rule may be imposed indicates the fundamentally informational nature of any identification of a political crisis as one that may constitute a breakdown of constitutional machinery. Due to judicial scrutiny, before President's rule can now be imposed, there is a heavier burden to be met in showing that all alternatives have been exhausted and constitutional government has become impossible, including as a result of decidedly questionable practices such as opportunistic defection. While the Governor's office may always suffer from some form of informational constraints, the context of this function only makes clearer that the office requires an exacting degree of impartiality.

3.7 Other functions of Governors

In addition to the major gubernatorial functions discussed above, there are other constitutional provisions which vest various kinds of responsibilities on the Governor. The appointment of important constitutional functionaries such as the Advocate-General of the State, the State Finance Commission and the State Election Commission, is done by the Governor (although subject to various restrictions).[463] This highlights the importance accorded to these offices by the Constitution, even though the role played by the Governor herself may sometimes be merely ceremonial.

Why have these functions been allocated to the Governor in the first place? A few reasons are easy to locate. The Governor has been placed at important points to play a facilitative role in ensuring the sound administration of the State. Some functions have been vested in the Governor in order to introduce a measure of integrity and independence to these processes.

[463] Articles 165, 243-I and 243-K, Constitution of India.

The prestige and high status of the office means that a responsible Governor can play an important role through these functions as well.

On the other hand, vesting some of these functions in the Governor can also be seen as a direct consequence of the executive power of the State being vested in the Governor and exercised by her.[464] In *Maru Ram v Union of India*,[465] the Supreme Court observed that "the Governor is but a shorthand expression for the State Government". Moreover, in *State of Uttar Pradesh v Pradhan Sangh Kshettra Samiti*,[466] the Supreme Court highlighted the fact that Section 3(60)(c) of the General Clauses Act, 1897 defines "State Government" to mean "Governor", and observed that this definition is in conformity with the provisions of the Constitution. For example, contracts that are made in exercise of the executive power of the State are expressed as being made by the Governor and are executed on her behalf by such persons and in such manner as may be directed or authorised by her.[467]

Some of the important functions that fall in these categories are considered below in brief.

a. Appointments and dismissals

Several important appointments are made by the Governor. These include appointments in relation to the judiciary, the State Legislature and other State-level constitutional bodies like the State Election Commission, the State Finance Commission and the State Public Service Commission. With respect to the judiciary and legal matters, the Governor appoints the Advocate-General for the State, who holds office during the Governor's pleasure and receives remuneration as determined by the Governor.[468] The Governor also appoints district court judges, albeit in consultation with the relevant High Court.[469] Further, the Governor is consulted by the President when appointing High Court judges.[470] Regarding the conditions of service of the officers and servants of the High Court, the Chief Justice can make rules only with the approval of the Governor.[471] The Governor is also responsible for recruiting

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[464] Article 154(1), Constitution of India. *See also* Article 166(1), Constitution of India, which states: "All executive action of the Government of a State shall be expressed to be taken in the name of the Governor".

[465] *Maru Ram v Union of India*, AIR 1980 SC 2147.

[466] *State of Uttar Pradesh v Pradhan Sangh Kshettra Samiti*, AIR 1995 SC 1512.

[467] Article 299(1), Constitution of India; Similarly, it is the Governor that makes available to the Election Commission and the State Election Commission, such staff as may be necessary for the discharge of their functions. Article 324(6) read with Article 243K(3), Constitution of India; The Governor also makes rules for the allocation of business of the State Government. Article 166(3), Constitution of India; Further, the Governor is vested with the power to entrust to the Central Government (or its officers), conditionally or unconditionally, functions in relation to any matter to which the executive power of the State extends. Article 258A, Constitution of India.

[468] Only a person who is qualified to be appointed as a High Court judge can be appointed to this office. The Governor refers legal matters to the Advocate-General. *See* Article 165, Constitution of India.

[469] Article 233, Constitution of India.

[470] Article 217, Constitution of India. The Governor (with the previous consent of the President) can also authorise the use of Hindi or any other official language of the State in High Court proceedings. Article 348(2), Constitution of India.

[471] With respect to salaries, allowances, leave or pensions. Article 229(2), Constitution of India; Further, the Governor may by rule require that (in such cases as may be specified in the rule) persons not already attached

persons other than district judges to the judicial service, in consultation with the State Public Service Commission and the relevant High Court.[472]

With respect to the State Legislature, the Governor has the power to nominate certain members and make other appointments. The Governor can nominate one member from the Anglo-Indian community to the Legislative Assembly if she is of the opinion that the said community needs representation therein and is not adequately represented.[473] With respect to the Legislative Council, the Governor nominates some members from among persons having special knowledge or practical experience in literature, science, art, co-operative movement or social service.[474]

Apart from these nominations, the Governor may appoint a member of the Legislative Assembly to perform the duties of the office of the Speaker in case this office as well as the office of the Deputy Speaker lies vacant.[475] In similar circumstances, the Governor may appoint a member of the Legislative Council to perform the duties of the office of the Chairman.[476] Until the State makes a law to regulate the recruitment and conditions of service of persons appointed to the Secretariat of the State Legislature, the Governor may make rules for the same.[477]

Another important function vested in the Governor with respect to the State Legislature is regarding disqualification of members under any of the grounds mentioned in Article 191(1). If any question arises in this regard, the question is referred to the Governor who takes a final decision in this respect.[478] However, the Governor has to obtain and act in accordance with the opinion of the Election Commission.[479]

The Governor plays an important role with respect to third tier government, comprising Panchayats and Municipalities. She is required to appoint a State Finance Commission to review the financial position of Panchayats and Municipalities[480] and a State Election Commission for the superintendence, direction and control of all elections to the Panchayats

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with the High Court will not be appointed as officers or servants without consultation with the State Public Service Commission. Article 229(1), Constitution of India.

[472] Article 234, Constitution of India; *See also* Article 237, Constitution of India.

[473] Article 333, Constitution of India.

[474] Article 171(3) read with Article 171(5), Constitution of India; Governors of States that have a Legislative Council in addition to a Legislative Assembly can make rules regarding the procedure for communication between the two Houses, after consultation with the Speaker. Article 208(3), Constitution of India.

[475] Article 180(1), Constitution of India.

[476] Article 184(1), Constitution of India.

[477] These rules have to be made in consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be. *See* Article 187, Constitution of India.

[478] Article 192(1), Constitution of India.

[479] Article 192(2), Constitution of India.

[480] Article 243-I(1) read with Article 243-Y(1); The State may pass a law to provide for the composition of the Commission, the qualifications which shall be requisite for appointment as members thereof and the manner in which they shall be selected. Article 243-I(2), Constitution of India.

and Municipalities.[481] The Governor is responsible for laying before the State Legislature the recommendations of the State Finance Commission along with an explanatory memorandum as to the action taken thereon.[482]

The Governor also appoints the Chairman and other members of the State Public Service Commission.[483] In case the office of the Chairman falls vacant or she is unable to perform her duties, the Governor may appoint any other member of the Commission to perform the said duties.[484] Further, the Governor is empowered to make regulations to determine the number of members of the Commission, their conditions of service, and make provision with respect to the number and conditions of service of the Commission's staff.[485] The Governor has to lay before the State Legislature the annual report of the State Public Service Commission along with a memorandum explaining the reasons for non-acceptance of any advice tendered by the Commission.[486] Apart from the Commission, members of a civil service of the State or any person who holds any civil post under the State, holds office during the pleasure of the Governor.[487]

b. Financial matters

The Governor has been entrusted with certain functions in financial matters as well. The Governor shall cause to be laid before the State Legislature the annual financial statement, comprising the estimated receipts and expenditure of the State for every financial year.[488] No demand for a grant can be made except on the recommendation of the Governor.[489] The Governor is also responsible for laying demands for supplementary, additional or excess grants before the State Legislature.[490]

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[481] Article 243K(1) read with Article 243ZA(1), Constitution of India.
[482] Article 243-I(4) read with Article 243Y(2), Constitution of India; The Governor also specifies by order the institutions and organisations that the District Planning Committee needs to consult in preparing its draft development plan. *See* Article 243ZD(3), Constitution of India.
[483] Article 316(1), Constitution of India.
[484] Article 316(1A), Constitution of India; The Governor can also suspend the Chairman or other members of the Commission, in respect of whom a reference has been made to the Supreme Court by the President in accordance with Article 317(1), until the President has passed orders on receipt of the report of the Supreme Court on such reference. Article 317(2), Constitution of India.
[485] Article 318, Constitution of India. *See also* Article 320(3), Constitution of India.
[486] Article 323(2), Constitution of India; The Governor may request the Union Public Service Commission to serve all or any of the needs of the State as well, with the approval of the President. Article 315(4), Constitution of India.
[487] Article 310, Constitution of India. However, they cannot be dismissed or removed without an inquiry in which they have been informed of the charges against them and given a reasonable opportunity of being heard. That being said, if the Governor is of the opinion that holding such an inquiry will go against the interest of the security of the State, or is not reasonably practicable for some other reason, then this requirement can be done away with. *See* Article 311, Constitution of India.
[488] Article 202, Constitution of India.
[489] Article 203(3), Constitution of India.
[490] And also for laying statements showing excess expenditure before the State Legislature. Article 205(1), Constitution of India.

The Contingency Fund of the State is placed at the disposal of the Governor, out of which she can make advances for meeting unforeseen expenditure, subject to authorisation by the State Legislature.[491] The custody of the Consolidated Fund and the Contingency Fund of the State and of public moneys other than those credited to these Funds are regulated by rules made by the Governor, until a law is passed by the State Legislature for regulating the same.[492] The Comptroller and Auditor General of India submits reports relating to the accounts of the State to the Governor, and the latter is responsible for laying the same before the State Legislature.[493]

c. Scheduled Castes and Scheduled Tribes

The Governor is vested with certain responsibilities with respect to Scheduled Castes and Scheduled Tribes. The report of the National Commission for Scheduled Castes, insofar as it relates to any matter concerning the State Government, is submitted to the Governor who is responsible for laying the same before the State Legislature along with a memorandum detailing the action to be taken thereon.[494] The Governor plays a similar role in relation with the report of the National Commission for Scheduled Tribes.[495] The Governor also has a role to play in the notification of groups as Scheduled Castes and Scheduled Tribes. Although it is the President who issues a public notification that specifies groups as either Scheduled Castes or Scheduled Tribes, the said notification is issued with respect to any State only after consultation with the Governor of that State.[496]

d. Discretion of the Governor with respect to other functions

Largely with respect to these functions, the Governor appears to be bound by the aid and advice of the Council of Ministers. In *State of Gujarat v R.A. Mehta*,[497] the Supreme Court held that the Governor is bound to act on the aid and advice of the Council of Ministers unless she acts as a "*persona designata*" under a particular statute, or acts in her own discretion under the exceptions carved out by the Constitution itself. Regarding discretion by virtue of being a *persona designata* under a statute, the court observed that,

> The exceptions carved out in the main clause of Article 163(1), permit the legislature to entrust certain functions to the Governor to be performed by [her], either in [her] discretion, or in consultation with other authorities, independent of the Council of Ministers.

[491] Article 267(2), Constitution of India.
[492] Article 283(2), Constitution of India.
[493] Article 151(2), Constitution of India.
[494] And in case of non-acceptance of any of the recommendations, the reasons for such non-acceptance. Article 338(7), Constitution of India.
[495] Article 338A(7), Constitution of India.
[496] Article 341(1) read with Article 342(1), Constitution of India.
[497] *State of Gujarat v R.A. Mehta*, AIR 2013 SC 693.

Elaborating further, the court held that for a statute to enable the Governor to act in exercise of her discretion, it needs to make a clear cut distinction between two distinct authorities – the Governor as a statutory authority, for instance a Chancellor of a University, and the Governor as the State Government or head of the State Executive. If such a distinction is made, then the Governor when acting as Chancellor of the University under the relevant statute acts only in her personal capacity. In *R.A. Mehta*, the question was regarding the Governor's role in appointment to the post of Lokayukta under the Gujarat Lokayukta Act, 1986. The Supreme Court held that this function is exercised by the Governor as a head of state (and thus involves the aid and advice of the Council of Ministers) and not independently as a statutory authority.

This was also discussed in the case of *Bhuri Nath v State of Jammu and Kashmir*.[498] Here, a question was raised regarding whether the Governor was bound to act in accordance with the aid and advice of her Council of Ministers when acting as Chairman of the Shri Mata Vaishno Devi Shrine Board, under the Shri Mata Vaishno Devi Shrine Act, 1988. The Supreme Court held in this case,

> the decision is [her] own decision, on the basis of [her] own personal satisfaction, and not upon the aid and advice of the Council of Ministers. The nature of exercise of [her] powers and functions under the Act is distinct, and different from the nature of those that are exercised by him formally, in the name of the Governor, under [her] seal, for which responsibility rests only with [her] Council of Ministers, headed by the Chief Minister.

Additionally, the Governor need not act on the advice of the Council of Ministers where some other body has been specified for the purpose of consultation. For example, in deciding matters under Article 192(2) regarding decisions on questions related to disqualification of members of the State Legislature as aforesaid, the Supreme Court has held that the Governor must act in accordance with the advice of the Election Commission alone.[499]

A large swathe of the Governor's functions places her in a position of high ceremonial regard as the constitutional head of the State Executive. By the mere fact that the Governor is directly required to carry it out, the function itself is infused with a considerable measure of significance. Perhaps the idea was to develop a sense of regard for what may otherwise appear to be mundane governmental actions that are dreary and bureaucratic. On the other hand, some of these miscellaneous roles could also have been allocated because of the sensitivity of the act to be carried out, requiring at least a formal sense of detachment from the State Executive. Beyond these lie certain further functions that may even explicitly view the Governor as a repository of important public duties that require governmental sanction at the highest level; even requiring the Governor to function without the aid and advice of her Ministers. In all these situations, what remains significant is the identity of the person who

[498] *Bhuri Nath v State of Jammu and Kashmir*, AIR 1997 SC 1711.
[499] *Brundaban Nayak v Election Commission of India*, AIR 1965 SC 1892.

fills the office as well as their ability to carry out the duty objectively, impartially and with dignity.

3.8 Governorships: Problems awaiting solutions

Post-Independence India has over the decades slowly gathered an exceedingly rich collection of experiences in the working of a parliamentary democracy with its usual cast of constitutional functionaries. The wealth of this treasure deserves a dignified and sensitive portrayal, in addition to a careful study. A prime difficulty in the task can be the immediate temptation of attempting to solve the host of issues that have emerged over time through blunt legalism. However, it may be more appropriate to appreciate the problems at hand with a measured restraint against such temptations.

In the course of this chapter, there has been an attempt to outline both the form of the Governor's office and its functions, as well as the concerns that have been raised in the actual functioning of the office. Against the backdrop of the Constituent Assembly Debates, the actual functioning of the office has proved that various observations made in the Assembly were prescient. At the same time, it can equally be said that the seventy years of experience have belied the expectations of the Constitution's framers on some key questions.

A root concern in the narrative described in this chapter continues to be in relation with the impartiality of the Governor's office, given the nature of the functions attached to it. On this point, the Constituent Assembly's hopes that robust and healthy constitutional conventions would emerge with time should be considered seriously: it cannot be said that these hopes have been fulfilled even today. Instead, we may be grateful (as well as concerned) that though the crises surrounding the Governor's office were not met from within the executive and legislative branches, creative interventions came from the judicial branch. It is difficult to assess this trend of the judicialisation of the Governor's discretionary functions without feeling niggling doubts regarding the limitations of the rule and process-oriented solutions of the law.

With the failure in the emergence of conventions and the occurrence of regular crises in democratic functioning, external interventions have come in the form of increased scrutiny into the reasons for actions and insistence on the assessment of democratic accountability at the touchstone of the State Legislature. A kind of process of elimination in gubernatorial actions has also increasingly emerged: Governors have with time been required by courts to take more and more extreme actions if and only if less extreme actions have proved futile. Thus, one may trace a very rough sequence of potential responses by the Governor to different kinds of politico-legal problems along the following lines: moral persuasion in the form of warnings, encouragements and advice, requests that a government's majority at the Legislature be proved, direct intervention in summoning the Legislature for the purpose of such floor tests, seeking alternatives for the formation of government where the original government has lost the confidence of the House, dissolving the Legislative Assembly where

no alternatives are available, reporting the breakdown of constitutional machinery where floor tests or other crucial democratic operations are resisted, and finally, taking discretionary action by necessary implication as with the case of a sanction to prosecute where such course is essential for the rule of law (but not essential enough as to necessitate President's rule or capable of being resolved through a floor test).

If nothing else, the analysis in this chapter indicates that the law can only go so far in attempting to fix politics and may not be able to find satisfactory solutions for questions such as, who is to be given the first chance to form the government, how long a time should be provided before majorities are tested at the Legislature, or even how to go about the delicate core job of a constitutional head in providing restrained guidance to the State Executive without hampering the processes of democratic accountability. Aligned with this issue is the key unresolved (and decidedly legal) issue of the control exercised by the Central Government on the actions of the Governor. As may be clear from the discussions in this chapter, the Centre's shadow falls darkly across the entire constitutional experience of the Governor's office. These are the issues that will be sought to be resolved in the chapter that follows.

CHAPTER 4

RETHINKING THE OFFICE OF THE GOVERNOR

The chief lesson I have learned in a long life is that the only way you can make a man trustworthy is to trust him; and the surest way to make him untrustworthy is to distrust him.[500]

We began with the premise that Governorships are anomalous. After tracing the history of this anomalous institution, in the last chapter we have highlighted some of the peculiar problems that Governorships pose. These problems have been studied by various commissions time and again, most notably, the Sarkaria Commission on Centre-State relations which dealt with the office of the Governor in some detail.[501] The proposal for reform suggested by the Sarkaria Commission were, by and large, repeated by the NCRWC and the Punchhi Commission.[502] Helpful as these studies are in envisioning an alternate future for the office of the Governor, their shortcoming is that they do not fully rethink the role of the Governor under the Indian Constitution. Suggestions for reform emerge from a provision-wise analysis (of the sort carried out in the last chapter) without any intervening argument as to how the office of the Governor can be reconceived in light of the principles underlying the Constitution read with the accumulated experience of seven decades of functioning. Hence, these prescriptions do not form part of a coherent whole and engender a distinct feeling that symptoms of the malaise have been addressed without fully studying the underlying cause.

To set out an argument on how the office of the Governor can be transformed into an independent constitutional office useful in its dual role as the head of the State and as a federal instrument is the aim of this chapter. We do this in three parts. Before making any argument for reform, it is necessary to consider the frequently cited argument in favour of abolishing the office of the Governor. In the first section of this chapter, we deal with this argument and contend that for the time being, it is best that we persist with the office of the Governor.

Thereafter, in setting out a principled basis for debating reform, we consider the role of the governor from two perspectives. First, we consider the Governor's role as an institution that plays an important role in federal relations. Here, we argue that the institution has not kept

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[500] Memorandum on the Effects of Atomic Bomb, from Henry L. Stimson, U.S. Secretary of War, to Harry S. Truman, President of the U.S. (11 September 1945) available at < http://www.nuclearfiles.org/menu/library/correspondence/stimson-henry/corr_stimson_1945-09-11.htm > accessed 2 July 2019.
Credit for selecting and juxtaposing these quotations lies with Rosalind Dixon, 'Constitutional drafting and distrust', (2015) 13(4) International Journal of Constitutional Law at p. 819.

[501] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4.

[502] For example, *see* Report of the National Commission to Review the Working of the Constitution (2001), at para 8.14.3; *See also* Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at ch 4.

pace with the evolution of Indian federalism and hence reform should be aimed at federalising Governorships by liberating them from the overwhelming influence of the Centre. Second, we deal with the role of the Governor as the constitutional head of the State Executive. In that part, we set out an argument as to why the Governor should be granted a degree of independence. We further argue that Governors should be empowered to perform an advisory role while ensuring that elected governments pay heed to the advice offered by her. Finally, in the last section, in light of the arguments in this chapter, we consider the specific proposals for reform needed in the office of the Governor and the impact of these reforms on the various functions of Governors.

4.1 Do we need the office of the Governor?

Before we proceed on any full-fledged mission to reconstruct the role of the Governor, the first question that must be asked is whether we really need to persist with the institution at all. As pointed out earlier, a fairly popular claim is that the office should be abolished. If the Governor's office is not of any constitutional importance, the argument goes, the appropriate response should be to amend the Constitution to remove this office. A rethinking of the Governor's role would then be unnecessary. In this section, we weigh the reasons for and against an amendment that removes the office of the Governor from the constitutional scheme.

In addition to the federal and democratic concerns highlighted in the previous chapter, there are other reasons which support the claim that the Governor's office should be done away with. The Governor's office possesses quite a few attributes of a colonial vestige. While the framers pruned the powers of the office substantially, the external symbols of erstwhile vice-regal authority were left untouched. Thus, Governors continue to enjoy an almost royal lifestyle complete with elaborate protocols which have been described as feudal in nature.[503] Considerable sums are spent from the public exchequer in maintaining Raj Bhavans and in providing for staff and other facilities for Governors. The fact that an unelected appointee of the Central Government is to be treated with such reverence in a federal democratic polity naturally evokes resentment.

Of course, this problem may be mitigated if persons of eminence who command the respect of the people of the State (and its elected government) are appointed Governors. While there have certainly been Governors of that description, little known politicians and bureaucrats have also quite often been elevated to Governorships. Rewarding bureaucrats with the position of a Governor is far from an unknown practice, as has been highlighted in chapter 3. Governorships have also been cynically used to get rid of politicians whom the party at the

[503] Faisal Fareed, 'A Question of protocol: The fuss over receiving the Governor' (*Indian Express*, 2 February 2016) available at < https://indianexpress.com/article/explained/a-question-of-protocol-the-fuss-over-receiving-the-governor/ > accessed 20 March 2019.

Centre finds inconvenient in the political theatre of some State.[504] In such circumstances, far from serving the object of uniting India, Governors are viewed as outsiders thrust upon the State system by the Central Government in Delhi. Further, it places the appointee in a difficult position as far as earning the respect of the people of the State and its elected Government is concerned.

As problematic as these difficulties posed by the Governor's office are, getting rid of it is not as simple as it seems. In chapter 2, we had discussed the assumptions on the basis of which the framers decided to have a formal head of state distinct from the Chief Minister. It was their firm belief that the British parliamentary system requires a formal head of state. As we have seen in the last chapter, the Constitution grants both formal and substantive roles to the Governor in important constitutional processes of government. The legislative and executive processes culminate with the approval of the Governor. In executive matters, the role is largely formal, as action in the name of the Governor is mostly taken by the cabinet ministers and officers as empowered in this regard by the General Business Rules. In emergencies and in managing transitions of popular government, the Governor has an important and significant role. The Sarkaria Commission, in response to the demand that the office be done away with, seems to suggest that the office is integral to the form of government that we have adopted. The Commission notes:[505]

> The Governor whether acting with or without the advice of the Council of Ministers, plays a pivotal role in our constitutional system and in its working. He is the Linchpin of the constitutional apparatus of the State.

This line of argument can be found in a milder form in decisions of the Supreme Court as well.[506] However, the mere fact that the office of the Governor intervenes in various processes is not a good enough reason, in and of itself, to conclude that it is *pivotal* in our constitutional system or its linchpin. The role of the Governor is not critical in several of these processes, given the limited discretion that the Governor can exercise. At best, the argument can be made that the Governor is pivotal during democratic transitions and

[504] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.6.01; The practice continues to this date. For example, news reports in the wake of Shri Kummanam Rajashekharan (from Kerala) as the Governor of Mizoram suggested that part of the reason that weighed with the BJP in making the appointment was to affect a leadership change in the party unit in Kerala. Nidheesh M.K., 'Why there's a leadership vacuum in BJP's Kerala unit' (*Livemint*, 11 July 2018) available at < https://www.livemint.com/Politics/tly0j3RHHXbZvziNWFT6CP/Why-theres-a-leadership-vacuum-in-BJPs-Kerala-unit.html > accessed 2 April 2019.

[505] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.5.03.

[506] *State of Rajasthan v Union of India*, (1977) 3 SCC 592 at para 168; *B.P. Singhal v Union of India* (2010) 6 SCC 331.

emergencies. An appropriate description of Indian Governors may be closer to what has been said of Canadian Lieutenant Governors (whose roles are far more limited):[507]

> The Office of the Governor General and the Lieutenant Governor are Constitutional fire extinguishers with a potent mixture of powers for use in great emergencies. Like real extinguishers, they appear in bright colours and are strategically located.

That however does not mean that the multitude of constitutional processes involving the Governor can be entirely discounted while considering amending the Governor out of the Constitution. A logical consequence of contemplating the removal of the Governor from the constitutional scheme is that there should be reasonable alternatives which can enable the reworking of these processes such that they can operate in the absence of a Governor.

What could these alternatives be? Some functions of the Governor can perhaps be handed over to other constitutional functionaries. For instance, overseeing the appointment of a Chief Minister on the basis of election results could be tasked to the Chief Justice of the relevant High Court or to the Chief Electoral Officer.[508] Or better still, the now popular method of Committees could be resorted to, with the Chief Justice and a member of the Election Commission forming part of a Committee that would oversee transitions in government. There would need to be clearer rules to determine the priority of claims if a Committee involving the Chief Justice has to remain impartial in the face of political strategies and manoeuvres. In a similar vein, the Speaker could be entrusted with some functions in relation to the Legislature, including summoning and proroguing the legislative assembly.

It then remains to be considered who will sign Bills into law and play the role of being the formal head of the State. These functions will then have to possibly vest in the Chief Minister who will be the formal and actual head of the State. A government of this nature is not unknown. The Constitution of South Africa is a good example where the Westminster system of government operates without a separate formal head. The executive power of the Republic vests in the President who is the Head of the State[509] chosen by the Legislature at the Union-level.[510] Correspondingly, at the level of the provinces (States), it is the Premier chosen by the State Legislatures.

Section 121 of the South African Constitution contains the power of the Premier to assent to a Bill or refer the same to the Constitutional court, and it is cast in similar terms as Article 200

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[507] Frank MacKinnon, *The Crown in Canada* (McClelland and Stewart West, 1976) as quoted in David S. Donovan, 'The Governor General and Lieutenant Governors: Canada's Misunderstood Viceroys' (Annual Meeting of the Canadian Political Science Association, 2009) available at < https://www.cpsa-acsp.ca/papers-2009/Donovan.pdf > accessed 5 April 2019.

[508] For a suggestion of this nature, *see* Mukul Kesavan, 'Against Governors' (*The Telegraph*, 24 May 2018) available at < https://www.telegraphindia.com/opinion/against-governors/cid/1466192 > accessed 22 April 2018.

[509] Section 85, Constitution of the Republic of South Africa.

[510] Section 86, Constitution of the Republic of South Africa.

of our Constitution.[511] Similarly, Section 125 vests the Executive Authority of the provinces in the Premier.[512] Section 127 lists out the powers and functions of the premier which includes assenting and signing Bills and summoning the Legislature.[513]

However, a mere *prima facie* consideration of the alternatives is sufficient to reveal the sheer number of alterations that doing away with Governors would entail. There are many reasons to be cautious of such an exercise. Even though the Governor may not be integral to our form of government, removing the Governor from the system involves structurally altering, in a very fundamental way, the form of government in the States. The natural choice for the formal head of the State would then be the Chief Minister as it is in many ways ideal that the head of the State is democratically elected. However, in the current state of affairs, vesting more executive authority in the Chief Minister may not be entirely desirable. The problem of concentration of powers in the executive must be accounted for when we consider dividing the Governor's functions amongst other constitutional functionaries. It has been a difficult task in this country to ensure that democratically elected leaders follow the constitution and the laws in both letter and spirit. The call, constantly, is for more and more independent institutions to keep a watch on elected governments at the Centre and the State. Some of the conventional safeguards are not as robust as they should be either. As it is, legislative control over the executive is notoriously weak in India. Collective responsibility under Articles 75 and 164 requires the Prime Minister and the Chief Minister respectively to have a majority in the popularly elected Legislature. However, the majority secured by the leader of a party in the elections is almost coercively safeguarded through the Tenth Schedule.[514] This effectively ensures that it is the Executive that exerts firm control over the Legislature rather than the other way around.

As mentioned above, it may be possible to transfer ceremonial functions such as swearing in of Ministers and other functionaries to the Chief Justice of the relevant High Court with little difficulty. Similarly, managing the swearing in of a popular government by following (or if necessary, interpreting) the electoral mandate as per well-defined rules can also be transferred as discussed earlier in this section. However, assenting to Bills and reporting on breakdown of constitutional machinery pose tougher problems. The former cannot be handed to any agency that is external to the Legislature. Thus, if not the Governor, it has to be the Chief Minister or the cabinet that signs off on legislation. In a situation where the Executive already exerts an undue influence over the process of law-making,[515] this is a course of action best avoided.

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[511] Section 121, Constitution of the Republic of South Africa.
[512] Section 125, Constitution of the Republic of South Africa.
[513] Section 127, Constitution of the Republic of South Africa.
[514] Kartik Khanna and Dhvani Shah, 'Anti-defection law - A death knell for parliamentary dissent', (2012) 5 NUJS L. Rev. at p. 103.
[515] Kartik Khanna and Dhvani Shah, 'Anti-defection law - A death knell for parliamentary dissent', (2012) 5 NUJS L. Rev. at p. 103; Manish Tewari, 'Liberate the legislator' (*The Hindu*, 30 April 2016) available at <

The issue is even more complex in the context of Article 356. Removing the Governor out of the equation would necessarily entail rethinking the entire provision. As has been pointed out in the previous chapter, the provision works ordinarily on the basis of the report of the Governor which is then considered by the President. Here, the Chief Justice is perhaps not an apt substitute for the Governor as various complexities may arise. First, the effect this will have on judicial review of action under Article 356 has to be taken in to account. If indeed, action under Article 356 is be taken on a report of the Chief Justice, such a report will be an administrative act of the Chief Justice which is still reviewable by superior courts. However, there is a chance that courts may revert to some form of deferential review of the pre-*Bommai* era since the determination of failure of constitutional machinery is being made by the Chief Justice of the High Court. A more compelling reason is that an unelected judge would then have a central role to play in the unseating of a democratic government.

There is good reason to be wary of requiring such a function of a judge. Three kinds of problems may be outlined:

First, a professional judge is today strongly required to be a person who has developed her expertise on legal questions involving the interpretation and application of judgments and statutory provisions. As pointed out at the end of the previous chapter, the option of declaring that there has been a breakdown of constitutional machinery exists as a more extreme alternative to a number of other options that need to have been exhausted first, including the choice of requiring floor tests when a majority has been rendered debatable, the choice of an alternative political force that can be given the chance to form the government, and the choice of dissolving the Legislative Assembly on the advice of an outgoing Ministry so that fresh elections may take place. All of these choices require a close understanding of the dynamic contexts and circumstances of local politics as well as policy-making and perhaps even finance (in light of the costs of elections). Judges and lawyers with political acumen may exist, but Chief Justices in general can certainly not be expected to keep a close eye on such varied political nuances.

Second, if judges are thrust into the very heart of the political realm, there are significant issues that emerge regarding the principle of separation of powers. On occasion, a political decision taken by a judge, even on the basis of a careful and contextual examination of the political circumstances, could still be viewed as a politically motivated decision deserving a fitting response from politicians.[516] Further, the opportunity to take direct and regular

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https://www.thehindu.com/opinion/lead/lead-article-by-congress-leader-manish-tewari-on-liberate-the-legislator/article8537888.ece > accessed 30 April 2019.

[516] "[C]redible threats on the court's autonomy and harsh political responses to unwelcome activism or interventions on the part of the courts have chilling effects on judicial decisionmaking patterns. Courts must be responsive to the political environment in which they operate in other respects as well. Because justices do not have the institutional capacities to enforce their rulings, they must take into account the extent to which popular decision-makers will support their policy initiatives." Ran Hirschl, 'The Judicialization of Politics' in Robert Goodin (ed), *The Oxford Handbook of Political Science* (OUP, 2011) at pp. 266-67.

decisions in the political realm may additionally create incentives for apolitical judges to actively become political. They may thus enjoy benefits from political actors for the decisions they take, not just in relation with functions transferred over from the Governor but in ordinary litigations as well. The significant proportion of litigation directly involving the government is worth noting in this context.[517] All of these incentives can irreversibly damage the functional integrity of the judicial role.[518]

Apart from the fact that such gubernatorial functions require a Chief Justice to take a largely political decision, any report which endorses the removal of the government is likely to suffer from want of legitimacy. The fact that the Indian judiciary has not welcomed inter-institutional accountability in the appointment of judges is also likely to militate against the granting of any such role to a Chief Justice.[519]

Third, it would be considerably difficult if not impossible for the Chief Justice to attempt to remain entirely apolitical and apply legal rules instead. As has been discussed in the previous chapter, not only are certain questions (such as the amount of time to be given before a floor-test) not amenable to strict rules of any sort, rules can be actively harmful to the political process in other situations. A strict and inflexible priority of claims regarding who should get the first chance to form the government in a hung assembly would indelibly affect both pre- and post-election coalition politics, always favouring a certain kind of coalition (with or without the single largest party) even before the negotiations for such coalitions can begin. And yet, there is no apparent principled reason as to why any one such kind of coalition should be more favoured.[520] What is more, as discussed previously, there are many troubling aspects to the creation of rules in certain areas of governance in light of how it can promote a low trust society. The nurturing of trust in our constitutional polity requires that space be retained for trust to grow.[521]

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[517] *See* Deepika Kinhal, Shriyam Gupta, and Sumathi Chandrashekaran, 'Government Litigation: An Introduction', Vidhi Centre for Legal Policy (2018), available at < https://vidhilegalpolicy.in/wp-content/uploads/2019/05/GovernmentLitigationFinal.pdf > accessed 13 February 2020.

[518] Jeremy Waldron, 'Separation of Powers in Thought and Practice', (2013) 54(2) *Boston College Law Review* at p. 433.

[519] *SCAORA v Union of India*, (2016) 5 SCC 1 struck down the constitutional and legislative moves that sought to increase the say of the executive in the appointment of judges.

[520] On this point, the logic provided by the Joint Parliamentary Committee in its Report justifying the proposals that would eventually become the Government of India Act, 1935 may be recalled. Although the intention behind creating Governors was essentially colonial, there was a deep understanding and respect for the nature of the formal, constitutional head of state. In its Report, the Committee explained that there should not be a rule binding Governors to follow ministerial advice as this would "convert a constitutional convention into a rule of law and thus … bring it within the cognisance of the courts." Report of the Joint Committee on Indian Constitutional Reform (1934) at para 74.

[521] Alvaro A. Montenegro, 'Constitutional design and economic performance', (1995) 6(2) Constitutional Political Economy at p. 161; Christian Bjørnskov and Stefan Voigt, 'Constitutional verbosity and social trust', (2014) 161(1/2) Public Choice at p. 91; Rosalind Dixon, 'Constitutional drafting and distrust', (2015) 13(4) International Journal of Constitutional Law at p. 819; George Tsebelis and Dominic J. Nardi, 'A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries', (2016) 46(2) British Journal

Of course, these are not the only options. One could entirely reimagine the structure of government in the States. Any such radical alteration, or even the more conservative approach of reallocation of functions in the manner considered above, would require the Constitution to be amended in a manner that will result in the governments in the States no longer being on the lines of that in the Centre. For example, the Chief Minister would be the formal and *de facto* head of the government – a status not granted to the Prime Minister at the Centre. These attendant changes involved in removing the Governor from the constitutional system may have important constitutional repercussions, particularly when viewed from the perspective of the basic structure.[522] Thus, even if one does not consider the Governor *per se* to be an essential feature of our Constitution, removing the office may still be a radical alteration of our Constitution.[523] Such an amendment, along with its consequent amendments, is likely to impact the basic structure.[524] The sheer number of changes would almost completely alter the form of government in the States. An amendment of such width could certainly be assailed on the ground that it impacts the democratic form of government in this country.[525] However, it is difficult to conclusively state, in the abstract, whether such an amendment would actually *violate* the basic structure.

Nonetheless, the broader point can be safely made that the idea of removing the Governor from the Constitution is not the simple solution that it appears to be at first blush. The scale of change that it really involves would also require a disproportionate amount of effort and risk, both politically and legally, when compared to the gains to be made from the exercise. All things considered, the more promising option appears to be reforming the office.

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of Political Science at p. 457; "India is not inherently a low trust society but it became so because of the adversarial relationship between the government and the people, established by the British and continued post independence". Atanu Dey, 'Why India needs a new Constitution', (*Livemint*, 6 December 2016) available at < https://www.livemint.com/Opinion/Il2MQqKxm60JzDVpkXfJnL/Why-India-needs-a-new-Constitution.html > accessed 2 July 2019.

[522] *See* Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP, 2010).

[523] One version of the basic structure test is that radical alterations are not contemplated within the act of amendment. *See Kesavananda Bharati v State of Kerala*, (1973), 4 SCC 225 at paras 1427 and 1432, which state:

"The words "amendment of this Constitution" and "the Constitution shall stand amended" in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. …

It is, no doubt, true that the effect of the above conclusion at which I have arrived is that there would be no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework."

[524] To understand the application of the basic structure doctrine, the following cases, *inter alia*, may be relied on: *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225; *Indira Gandhi v Raj Narain*, (1975) Supp. SCC 1; *M. Nagaraj v Union of India*, (2006) 8 SCC 212; *SCAORA v Union of India*, (2016) 5 SCC 1.

[525] *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225 at paras 292, 482; for an interesting decision on the extent to which the provisions relating to the President and Governors can be amended, *see Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225 at paras 50 and 51.

The office of the Governor in a cabinet or parliamentary system of government fulfils a sui generis *function that cannot be conveniently replaced with a single substitute or even a combination of substitutes. Carrying out a set of inter-related and complementary roles, a Governor is required by necessity to function as a political arbiter of political questions during periods of transition, uncertainty and even crisis. The unique role of such an office is not one that can be granted to the real head of the State Executive, i.e. the Chief Minister, as this would result in further concentration of power in the hands of the executive branch in a situation where the balance between the Executive and the Legislature is already skewed in favour of the former. Similarly, the said powers cannot be handed over to the Chief Justice of the relevant High Court either as the determination of political questions by a judge could easily lead to the politicisation of the judiciary itself. This can have negative effects on the functional integrity of the judicial role, and in any case, political questions may not be amenable to any legalistic resolution in the first place. Another reason for being cautious about replacing the office of the Governor altogether is the possibility of constitutional challenges against the numerous structural alterations that such a measure would necessarily entail.*

4.2 The Governor as a federal instrument

The office of the Governor can be seen as a manifestation of the centralist bias in the Constitution, which was influenced by events of the time in which it was drafted. It is commonplace to think of the Governor as performing a dual role.[526] The major role of the Governor is that of being the constitutional head of state. In a secondary role, the Governor as the executive head also plays a linking function between the State and the Centre. The description of the Governor as performing a dual role is explained as a peculiar feature of Indian federalism. As we have seen in the historical narrative detailed in chapter 2, a Governor fully answerable to the Centre came to be a part of the Constitution through the backdoor in discussions on the grounds that secessionist forces have to be kept at bay. Other notions prevalent at the time of independence include the view that political actors in the States were not sufficiently equipped to run democratic governments. The Governor was conceived as an eminent emissary from the Centre whose sage advice would guide the States. But the primary function of the Governor in this role is to facilitate Centre-State relations. In *B.P. Singhal,*[527] the Supreme Court noted with respect to Governors:

> There may be occasions when he may have to be an impartial or neutral umpire where the views of the Union Government and the State Governments are in conflict. His peculiar position arises from the fact that the Indian Constitution is quasi-federal in character.

[526] Report of the Sarkaria Commission on Centre-State Relations (1988) at p.119; *B.P. Singhal v Union of India*, (2010) 6 SCC 331, at para 40; *See* chapter 2.4 of this book.
[527] *B.P. Singhal v Union of India*, (2010) 6 SCC 331, at para 40.

The design of the office is, however, completely lopsided based on the assumption that the Indian constitution establishes a *quasi-federal* union. This heavily centralised understanding of federalism – quasi-federalism – is a continuing theme in our constitutionalism. However, the experience of Indian federalism has diverged from this design and has also seen movements of power away from the Centre to the States. This evolution of federalism over the years, while captured in academic writings, has not sufficiently permeated the spheres of constitutional interpretation or law reform. Consequently, even when there have been attempts to reform institutions that are critical to federal interaction, such attempts have fallen short from the perspective of federalism. In what follows in this section, we make the argument that the office of the Governor has not been sufficiently federalised to keep pace with the advancement of the federal ideal in the Constitution.

The Constitution, in its design, is undoubtedly a federal one with State Governments being democratically responsible to State Legislatures.[528] However, it also reflects a marked intention of favouring the Centre in the division of powers between the Centre and the States. This was a clear choice made by the framers. In his remarks introducing the draft Constitution, Ambedkar compared the model proposed in the draft Constitution to the federalism of the U.S. Constitution and emphasised that India was not a case of sovereign states coming together; rather, the States and the Union in India form part of a single frame within which they are confined.[529] He also highlighted the elasticity of the federalism in the draft Constitution, considering that it could take on unitary features on certain occasions, which he thought was an advance on the constitutions of other federations. The Constitution, he believed, had struck a balance regarding the strength of the Central Government vis-à-vis the States. This was in keeping with the prevalent view then that a strong federalism would result in a weak government.[530] This line of thought, that there should be a strong Centre, also found favour with the framers on the ground that secessionist and other centrifugal forces needed to be countered.[531] The vesting of exceptional powers with the Centre naturally raised questions as to the nature of federalism that had been adopted. The answer to the charge that the Constitution was not truly federal, was a theoretical one. In the spheres allotted to the

[528] Partha Chatterjee, 'The State' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, 2010) at p. 3.
[529] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 7, 1948, at paras 7.48.210 and 7.48.248.
[530] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 7, 1948, at paras 7.48.212 and 7.48.245; *See also* Sohini Chatterjee, Akshat Agarwal, Kevin James, and Arghya Sengupta, 'Cleaning Constitutional Cobwebs: Reforming the Seventh Schedule', Vidhi Centre for Legal Policy (2019) (submitted to the Fifteenth Finance Commission) at pp. 12-15, available at < https://fincomindia.nic.in/writereaddata/html_en_files/fincom15/StudyReports/Cleaning%20constitutional%20cobwebs_Reforming%20the%20Seventh%20schedule.pdf > accessed 13 February 2020.
[531] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 7, 1948, at para 7.50.84; *See also* Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford, 1999) at p. 560.

States, it was argued, they are not dependent in any way to the Centre, either for their executive or legislative authority.[532] Ambedkar said in the Assembly:[533]

> It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the units by the Constitution. This is the principle embodied in our Constitution.

This, in many ways, constitutes the baseline for Indian federalism. The States are given a smaller space to operate in, but within that space they are protected by the Constitution and are, by and large, independent of the Centre.[534] Any centrifugal tendencies which may creep in by means of the operation of federalism are sought to be controlled by important features of the Constitution that lean in favour of the Centre.[535] The power to admit, merge and divide States is controlled by the Centre.[536] It has more efficient and effective sources of revenue.[537] The distribution of legislative and executive powers leans heavily in favour of the Centre.[538] There are emergency provisions – which lend the elasticity that Ambedkar mentioned – that are drastic in nature and can significantly deprive State Governments of their powers.[539] The office of the Governor which we are concerned with also belongs to this set of provisions which tilt the federal balance heavily to the side of the Centre.[540] The role of the Governor's office in this equation is interesting. In its design, it closely resembles the office of the Lieutenant Governor's office in Canada which is nominated by the Premier and has (in theory) the power to give final approval to State legislations. Macdonald, the first Prime Minister of Canada and a strong votary of a centralist federation, viewed these provisions in the British North America Act as important centralising features.[541]

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[532] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 11, 1949 at para 11.165.314.
[533] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 11, 1949 at para 11.165.314.
[534] This is line with the definition of federalism in the works of earlier theorists. For instance, Wheare speaks of "systems of Government embody predominantly on division of powers between Centre and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so, is that Government federal?", as quoted in S*tate (NCT of Delhi) vs Union of India*, (2018) 8 SCC 501.
[535] Katharine Adeney, 'Centrifugal and Centripetal Elements of Indian Federalism' in Subrata Mitra and Bernd Rill (eds), *Indien heute: Bennpunkte seiner Innenpolitik (India Today: Domestic Priorities)* (Hans Seidel Stiftung, 2003) at p. 48.
[536] Articles 2 and 3, Constitution of India.
[537] Katharine Adeney, 'Centrifugal and Centripetal Elements of Indian Federalism' in Subrata Mitra and Bernd Rill (eds), *Indien heute: Bennpunkte seiner Innenpolitik (India Today: Domestic Priorities)* (Hans Seidel Stiftung, 2003) at p. 48.
[538] Chapter I, Part XI, Constitution of India.
[539] Part XVIII, Constitution of India.
[540] Katharine Adeney, 'Centrifugal and Centripetal Elements of Indian Federalism' in Subrata Mitra and Bernd Rill (eds), *Indien heute: Bennpunkte seiner Innenpolitik (India Today: Domestic Priorities)* (Hans Seidel Stiftung, 2003) at p. 48; See also *State of Karnataka v Union of India*, (1977) 4 SCC 608, paras 43, 44, 223.
[541] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (University of Toronto Press, 2015) at p. 146.

It may be argued that by providing this combination of federalism with exceptional centralising powers, the Constitution did not fully settle the tension between federalism and centralisation. The provisions leaning in favour of the Centre, such as the emergency provisions and the provisions of a centrally nominated Governor have always carried a tinge of illegitimacy. In the Constituent Assembly itself, there were those who suggested that a move to grab more power for the Centre had occurred following Partition.[542] Underlying these sentiments is the fact that there has always been an acceptance of federalism as a natural choice for Indian circumstances. Unifying diverse communities into a nation involves power sharing, a critical advantage that federalism has over a unitary form of government.[543]

The second related advantage is that in constitutions that espouse separation of powers as a check against arbitrary exercise of power, federalism ensures a second kind of separation – a vertical division of powers.[544] Thus, State Governments and Central Governments would act as a check against arbitrary actions of one another, offering an additional level of protection to the rights of the people. By contrast, the merits of centralisation are utterly pragmatic. A strong government capable of resisting centrifugal tendencies and ensuring efficiency by implementing policies uniformly across States is appealing, if practical economic and political goals are kept in mind.[545] The Constitution seeks to achieve both these ends. The unresolved tension between these opposing goals engendered both centralising and federalising forces in the years after the adoption of the Constitution.

Much like in the case of the British North America Act, the initial reactions to the Indian Constitution were that it cannot be described as a truly federal constitution. Particularly influential was Wheare's observation that the Indian Constitution is "quasi-federal";[546] more a unitary constitution with federal features than the other way around. This characterisation of the Indian Constitution being quasi-federal found widespread acceptance in the judgments of the Supreme Court over the decades. In resolving disputes between the Centre and States, the quasi-federal nature of the Constitution is a point on which the Supreme Court has repeatedly dwelled, often en route to deciding the dispute in favour of the Centre. For example, in *State of Karnataka v Union of India*,[547] Chief Justice Beg went so far as to claim:[548]

> that the kind of federation we have in this country with what has been characterised as a strong unitary bias, or, at any rate, with powers given to the Union Government of

[542] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 11, 1949 at para 11.162.40.
[543] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (University of Toronto Press, 2015) at p. 4.
[544] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (University of Toronto Press, 2015) at pp. 91, 92.
[545] *See* Bryce's catalogue of advantages and disadvantages of Federalism as quoted in Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006) at pp.15 and 16.
[546] K.C. Wheare, *Federal Government* (Oxford, 1964) at p. 33.
[547] *State of Karnataka v Union of India*, (1977) 4 SCC 608.
[548] *State of Karnataka v Union of India*, (1977) 4 SCC 608 at para 64. This is a reiteration of his views in *State of Rajasthan v Union of India*, (1977) 3 SCC 952.

> supervision and even supersession, in certain circumstances, of State Government temporarily to restore normalcy or to inject honesty, integrity, and efficiency into State administrations where these essentials of good Government may be wanting.

Austin rightly notes that the proliferation and popularity of terminology such as quasi-federal was indicative of an understanding that one may assume that the Constitution is federal, but in reality it is not federal enough.[549] Through its centralising features, the Constitution, at times, assumed the form of centralised national government that it seemed to foreordain. The 1975-77 emergency was, in many ways, the high-water mark of centralisation.[550]

But the currents have never been unidirectional. The reorganisation of States on the basis of language gave a significant thrust to federalism.[551] The changes in politics in the Centre and the States also had decisive impacts on federalism. Between 1967 and 1969, the hegemony of the Congress was broken down by the emergence (and victory) of other parties in various States.[552] The developments in this period, in the context of the Governor's office, have been alluded to briefly in the previous chapter. In the seventies and the eighties, it became a common feature of the Indian political system to have different political parties in government at the State and Union-level. This naturally led to more complex federal equations than those witnessed in the earlier system that was entirely dominated by the Congress party.

By the nineties, even more significant changes had come about through the emergence of strong regional parties. The prevalence of coalition governments at the Centre meant that regional parties and by extension, States, played a decisive role in the formation of the Government at the Centre itself.[553] There appears to be a consensus to the view that India was federalised significantly by the emergence of federal coalitions, while retaining the essential characteristics of a federation with a strong Centre.[554] The influence of regional parties increased both in the Lok Sabha and the Rajya Sabha leading to a more cooperative union.[555] Dhavan and Saxena, writing in 2006, spoke of federalism having been fortified "by the rise of regional parties, which, in the era of coalitions, have preserved India's diversity within a

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[549] Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at p. 561.

[550] *See generally* on the phases of centralisation: Granville Austin, *Working a democratic constitution: The Indian experience* (Oxford University Press, 1999) at pp. 555-569.

[551] M.P. Singh, 'Federalist Thrust in Indian Political Studies: A Research Note', (2003) 64(1/2) Indian Journal of Political Science 157-161, at p. 158.

[552] Subrata K. Mitra and Matte Pehl, 'Federalism' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, 2010) at p. 45.

[553] Subrata K. Mitra and Matte Pehl, 'Federalism' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, 2010) at p. 45.

[554] Balveer Arora, K.K. Kailash, Rekha Saxena and H. Kham Khan Suan, 'Indian federalism' in K.C. Suri and Achin Vanaik (eds), *Political Science: Indian democracy*, (Oxford University Press, 2013) Vol 2 at p. 114.

[555] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (University of Toronto Press, 2015) at p. 235.

negotiatory federal arrangement".[556] Another consequence of the emergence of strong regional politics is the fact that the political spaces in the State and the Centre are now seen as distinct. This, perhaps, erected new and necessary boundaries where interference by the Centre came to be seen as illegitimate.

The effect of this federalisation has been evident in judicial decisions as well. The strongest example, of course remains *S R. Bommai*[557] which has played a critical role in arresting the misuse of Article 356.[558] Jeevan Reddy, J. made it clear that the theoretical label attached to the nature of federalism in our Constitution is irrelevant, what matters is the practice. The fact that there are democratic elected governments in States "with the same paraphernalia as the Union" means that the area of operation of the exceptions to federalism are narrow. He observed as follows:[559]

> The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union.
>
> …The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule ...
>
> For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi-federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context…

The carving out of separate spaces for the States free from the interference of the Centre is significant. As we saw in the 2016 case of Uttarakhand,[560] even allegations of defections or the claim that a Bill had been defeated in the lower House amidst disorder did not persuade the High Court to hold that the Central Government's interference in the State's political space was justified. This is in stark contrast to Chief Justice Beg's claim in 1977 that the Constitution, when moving along the unitary plane, permits supersession of State Governments if need be to inject honesty and integrity.

The push towards federalisation has also taken other routes which emphasise active cooperation between the States and the Centre. A new vocabulary of cooperative or

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[556] Rajeev Dhavan and Rekha Saxena, 'Republic of India' in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive, and Judicial Governance in Federal Countries* (McGill-Queen's University Press, 2006), at p. 192

[557] *S.R. Bommai v Union of India*, (1994) 3 SCC 1.

[558] M.P. Singh, 'Federalist Thrust in Indian Political Studies: A Research Note', (2003) 64(1/2) Indian Journal of Political Science 157-161, at p. 158.

[559] *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at paras 99 and 100.

[560] *Harish Rawat v Union of India*, (2016) SCC Online Utt 502.

collaborative federalism that attempts to resolve the tension between centralisation and federalism has taken root.[561] This discourse appears to suggest that notions of turfs demarcated by the Constitution is one of the past and the only viable solution for the future is for the Centre and States to work together towards common goals. The espousal of cooperative or collaborative federalism in this form may seem vague and seems to suggest only the avoidance of disputes between the Centre and the State over alleged encroachment into each other's domains. However, there are tangible examples which help explain, to some extent, what cooperative federalism entails. The Goods and Services Tax reform has been proposed and sold on a vision of cooperative federalism.[562] The States have given up a fair share of fiscal autonomy in return for a say in the Goods and Service Tax Council and the assurance of greater fiscal returns. Such configurations aim to fulfil the promise of federalism in protecting the autonomy of the States while not foregoing the efficiency of coordinated action. Whether such moves in the name of cooperative federalism will actually liberate the States or will once again lead to centralisation is a question that has to be examined once such reform has had a full run.

This evolution of Indian federalism has, however, left the office of the Governor largely untouched. It is inadequately federalised[563] and continues on the uncorrected path[564] of quasi-federalism fixed at the time of constitution-framing. It remains an unelected office heavily tilted towards the Centre and thrust upon State Governments that are now backed by formidable and independent political legitimacy. In its present form, it serves very little purpose as far as federal relations are concerned. Rather than working as an instrument for uniting the country, the Governor today is more an impediment to good federal relations. In other words, in its present form, it is achieving exactly the opposite of what the office was meant to do. In a list of anti-federal provisions that smacks of distrust of the States, the Governor's office holds an important position.[565] Reform around the edges has been achieved through judicial intervention which has attempted to incorporate principles laid down in reports such as the Sarkaria Commission as part of judge-made law. But such attempts are now insufficient to deal with the problem. Whatever the gains made by federalism in the decades since Independence, changes in political realities could easily undo the same and

[561] *State (NCT of Delhi) v Union of India*, (2018) 8 SCC 501 at para 119.
[562] Anil Padmanabhan, 'The GST Council template for cooperative federalism' (*Livemint*, 20 March 2017) < https://www.livemint.com/Opinion/QkouwUMhrIUKnJ5NnVnKPI/The-GST-Council-template-for-cooperative-federalism.html > accessed 21 April 2019.
[563] M.P. Singh, Rekha Saxena, and Ritesh Bhardwaj, 'Modi's 'Cooperative Federalism': A Policy Promise in Search of Implementation', available at < http://www.academia.edu/11966997/Modis_Cooperative_Federalism_in_India > accessed 20 May 2019.
[564] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 36.
[565] Subrata K. Mitra and Matte Pehl, 'Federalism' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, 2010) at p. 50.

may already be doing so, as some analysts argue.[566] If we are to reform the office of the Governor to make it a useful federal institution, we must ensure that it sheds its character as an office controlled by the Centre to promote its interests.

The office of the Governor has been understood to be an institution that can promote good federal relations by providing guidance in governance to political actors in the State as the formal head of the State Executive; by protecting the interests of the Centre by keeping any centrifugal secessionist forces at bay; and by acting as a neutral, impartial umpire where the two interests conflict. While in some measure, this unique role was a result of the original quasi-federal design of the Constitution, a number of changes in the character of the Indian Republic in the ensuing years have expanded the federal principle. The Governor, however, remains in the shadow of Partition. To keep up with the changed realities of our polity and secure the advances that have been made, it is essential for the office of the Governor to be reformed in a manner that insulates it from the influence of a powerful Centre and allows for the federal principle to be better effectuated in practice.

4.3. The Governor's role as the head of a democratic government

Though the Governor is mostly seen through the lens of being an appointee of the Centre, her primary role is being the head of the State Executive. There is usually an element of exaggeration while describing the significance of this role. As pointed out earlier, the Governor has been described as occupying an independent constitutional position and as being the linchpin of the state apparatus.[567] The position of the head of the State, as exalted as it sounds, does not really carry with it the expected range of functions or duties. Governors have gone off record to state that they have felt underutilised while in office.[568] Normatively conceiving an appropriate role of the Governor in a democratic set up is certainly not easy. It

[566] Sharma and Swenden argue that since the single party majority of the BJP in the Lok Sabha in 2014, there has been increased centralisation in Centre-State relations, though this process is strongest in the political domain and weakest in fiscal matters. Chanchal Kumar Sharma and Wilfried Swenden, 'Modi-fying Indian Federalism? Centre-State Relations under Modi's Tenure as Prime Minister', (2018) 1(1) Indian Politics & Policy at p. 51. More recently, in the BJP's second term after the 2019 general elections, States are increasingly contesting the Centre, with the passing of the Citizenship (Amendment) Act, 2019 sparking widespread protests and opposition. Several States have passed resolutions against this legislation in their legislative assemblies, and in January 2020, Kerala challenged it in the Supreme Court under Article 131. Similarly, the State of Chhattisgarh challenged the National Investigation Agency Act, 2008 before the Supreme Court. 'West Bengal Passes Anti-CAA Resolution, Becomes 4th State To Do So' (*Outlook*, 27 January 2020) available at < https://www.outlookindia.com/website/story/india-news-west-bengal-govt-moves-anti-caa-resolution-in-assembly-becomes-4th-state-to-do-so/346319 > accessed 3 March 2020; 'Breaking: State of Kerala Files Suit In SC Against Union Govt Challenging Citizenship Amendment Act' (*Live Law*, 14 January 2020) available at < https://www.livelaw.in/top-stories/breaking-state-of-kerala-files-suit-in-sc-against-union-govt-challenging-citizenship-amendment-act-151600 > accessed 3 March 2020; 'Breaking: State Of Chhattisgarh Files Suit In SC Against NIA Act' (*Live Law*, 15 January 2020) available at < https://www.livelaw.in/top-stories/breaking-state-of-chhattisgarh-files-suit-in-sc-against-nia-act-read-plaint-151654 > accessed 3 March 2020.

[567] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.5.03.

[568] Ashok Pankaj, 'Governor in Indian Federalism – II: Hiatus between Constitutional Intents and Practices', (2017) 63(1) Indian Journal of Public Administration 13-40, at p. 33.

would be useful to start with two different purposes that the Governor serves from a much-quoted observation of Ambedkar:[569]

> My submission is that although the Governor has no functions still, even the constitutional Governor, that he is, has certain duties to perform. His duties, according to me, may be classified in two parts. One is, that he has to retain the Ministry in office. Because the Ministry is to hold office during his pleasure, he has to see whether and when he should exercise his pleasure against the Ministry. The second duty which the Governor has, and must have, is to advise the Ministry, to warn the Ministry, to suggest to the Ministry an alternative and to ask for a reconsideration.
>
> …He is the representative not of a party, he is 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, honest administration.

This view of the Governor's power seems to mirror Bagehot's classic attempt at identifying the role of the monarch in the United Kingdom. Bagehot spoke of the power of the monarch at the time of appointment of a ministry, its end and its continuance.[570] In the appointment of a ministry, he said a wise monarch could be occasionally useful,[571] but that such a monarch was rare.[572] In the continuance of a ministry, the monarch, Bagehot famously claimed, has three rights: "the right to be consulted, the right to encourage, the right to warn".[573] Despite Bagehot's authoritative status, it has been argued that he had understated the role of the monarch in matters of appointment where some amount of discretion can be discerned even in the English Constitution.[574]

However, the categorisation by Ambedkar (and Bagehot) is useful. One set of functions of the Governor, intensely political in nature, relate to managing the transition of power in the States. In the performance of this function of *retaining* a Ministry in office, the Governor is guided by a constitutional requirement that the government be collectively responsible to the Legislative Assembly.[575] This could involve both the appointment of a Ministry as well as calling time on a Ministry when it has lost the confidence of the House. As we have seen, both these functions have been fraught with problems, mostly due to the proclivity of Governors to oblige governments at the Centre. This problem with the appointment of

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[569] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 8, 1949, at para 8.97.113.
[570] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 78.
[571] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 82.
[572] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 83.
[573] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 85; Quoted in *Samsher Singh v State of Punjab*, (1974) 2 SCC 831.
[574] Kevin Theakston, 'Walter Bagehot: English Constitution' at p. 20 available at < https://www.academia.edu/20515210/Walter_Bagehot_The_English_Constitution > accessed 21 April 2019.
[575] Article 164(2), Constitution of India.

ministers by a constitutional formal head was foreseen by Bagehot who noted that political parties[576]

> …neither would nor could permit the most honoured and conspicuous of all stations to be filled, except at their pleasure. They know, too, that the grand elector, the great chooser of ministries, might be, at a sharp crisis, either a good friend or a bad enemy. The strongest party would select someone who would be on their side when he had to take a side, who would; incline to them when he did incline, who should be a constant auxiliary to them and a constant impediment to their adversaries.

In the previous chapter, we have adverted to various instances where Governors have invited leaders to form governments contrary to the mandate of the people or by ignoring the stronger claims of others. Of course, such a situation does not arise in every election but only in those where there is no party that can claim an absolute majority in House. It was not perhaps fully contemplated at the time of framing of the Constitution that there would be as much fragmentation of political power in the States as we see today. Where a clear winner emerges in an election, the Governor has no choice really but to invite the leader of that party.[577] This perhaps explains the assumption that the power to appoint the Ministry was really in the nature of a duty alone.

From the instances where Governors are alleged to have acted inappropriately, it is clear that even in circumstances where there is no clear winner, there could often be a leader who has a legitimate first claim to form the government. Apart from the choice of leader to be invited, there are various other factors in play. *Bommai* has laid down the law that proof of confidence of the House can only be ascertained through a floor test in the Assembly, and the Governor should not risk making any assumptions or determination of numbers.[578] This floor test becomes a game of numbers where constitutional functionaries such as the Governor and Speakers are expected to play the roles of impartial umpires. A number of factors become relevant in this race to cobble a coalition. First, the fragmentation of political power at the State level[579] (and national level) has meant that smaller parties may play important or even determinative roles in government formation when the electoral outcome is not decisive. Second, a culture of defection and shifting loyalties has developed where it is not considered morally or ethically wrong to switch parties in order to be part of a ruling coalition. So the race to gain numbers may involve mergers, splits and mercenary movements across party and coalition lines. Third, flowing from the first two, the time allowed to prove a majority in the House also becomes critical as does the fact of getting the first invite. Granting an unreasonably long time enables negotiations to secure the loyalty of undecided legislators

[576] Walter Bagehot, *The English Constitution* (2nd edn, 1873) at p. 84.
[577] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.11.03.
[578] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.11.07; *S.R. Bommai v Union of India*, (1994) 3 SCC 1 at para 119.
[579] Francesca Jenesius and Pavithra Suryanarayan, 'Fragmentation and Decline in India's State Assemblies: A review 1967-2007', (2015) 55(5) Asian Survey 862-881.

sometimes by luring them away from other parties or coalitions. Similarly, in a volatile situation, the fact that a leader has been invited to form the Government may tilt the scales in her favour. The proclivity to shift loyalties is so rife, that it has resulted in unedifying sights such as parties holding legislators captive in hotels and resorts.[580]

The role of the Governor becomes critical in such a situation. As the Supreme Court noted in *Rameshwar Prasad,*[581] in an increasingly volatile system, it is important to recognise the crucial role played by Governors in the working of the democratic framework. Every decision that she takes as far as managing the situation is concerned may have a profound impact on government formation. These include decisions regarding when to summon the House to conduct a floor test. Needless to say, the Governor is required to act impartially by interpreting the mandate of the people even where it is not a clear outcome. A measure of independence is a natural requirement for adequately performing such a function. Yet, this is something which the office does not currently enjoy. From the discussion in the previous section, we have concluded that governorships must be federalised and, in particular, insulated from the overwhelming influence of the ruling party at the Centre. The demands of playing an umpire in government formation also call for, as a minimum, some amount of independence from political parties at both the Centre and the State.

It has been repeatedly suggested that another axis on which reform can be considered to deal with this problem is to arrive at more prescriptive rules that govern the situation. As has been noted in the previous chapter, the Sarkaria Commission suggested guidelines including a priority of claims which was referred to by the Supreme Court in *Rameshwar Prasad.*[582] However, more recent instances have shown that even such rules are inadequate to govern the volatile situations resulting from unclear electoral outcomes. For instance, in Goa in 2017, the incumbent BJP government which seemed to have lost the elections winning 13 out of 30 seats was invited by the Governor based on a claim of a post-poll alliance having been formed. Yet, the same rule was not applied in the case of Karnataka in 2018 where the BJP was invited to form the Government despite the fact that the incumbent Congress government which appeared to have lost the elections had stitched together a post-poll alliance with the Janata Dal (Secular) party. The floor tests in both cases had to be overseen by the Supreme Court which directed that the floor tests be conducted almost immediately after the swearing in of Chief Ministers. This is in stark contrast to the recommendation of the Sarkaria Commission which had suggested that a Chief Minister who does not enjoy an absolute majority should prove majority on the floor of the House with 30 days.[583]

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[580] For a relatively recent example, *see* 'Resort Politics Returns: NCP, Congress & Shiv Sena Lodge MLAs In Mumbai Hotels' (*Outlook*, 24 November 2019) available at < https://www.outlookindia.com/website/story/india-news-resort-politics-resurfaces-in-maharashtra-ncp-congress-shiv-sena-lodge-mlas-in-mumbai-hotels/342936 > accessed 14 February 2020.
[581] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1 at para 47.
[582] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1.
[583] Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, para 4.11.06.

This experience of the Courts routinely being required to oversee transitions in power is clear evidence of the fact that more than prescriptive rules, it is the presence of a neutral, fair and impartial authority overseeing the transition that is essential to the process. The Governor's office in its current state is unable to fulfil this need. The same is the case while managing transitions involving the end of a Ministry. This becomes problematic when fragile coalitions are in power and are alleged to have lost the confidence of the House. All that has been said above in the context of a floor test as part of government formation applies to such cases also. It can be managed only by a Governor who enjoys some measure of independence.

The second set of functions of the Governor, categorised as advising and warning the Ministry, also points towards the need for independence. A close consideration of these functions can help define the degree of independence that the Governor should possess. Defining the role of the Governor as a high constitutional office performing an advisory function serves the important task of limiting the role of the formal head of state. Accepting that the role of the formal head is to merely "warn, encourage or advise"[584] limits the plain text of the Constitution which seems to give far more power to the head of the State. It is important to understand that the classical formulation of this limited role of the formal head, drawing from British constitutional law, does not remain entirely true in the Indian case anymore. In the United Kingdom and other constitutional democracies such as Canada and Australia which have formal heads based on the English system, the exercise of any real power by the monarch or the Lt. Governors is very rare. So rare, in fact, that some of these provisions have been thought of as having fallen into desuetude.[585]

By contrast, Governors in the Indian system have a role to play at various critical junctures in quite a few constitutional processes. In executive functions, while routine orders are merely made in the name of the Governor, the Governor can assume a decisive role where a sanction to prosecute the Chief Minister is required. Similarly, while legislation in the State List merely requires the formal approval of the Governor, there may be occasions where flagrantly unconstitutional legislation may be pushed forward by the government by prioritising political ends. In such cases, the Governor can return the legislation and there have been instances where Governors have withheld assent as well. In the case of Article 356, the Governor's role goes beyond warning and advising. The Governor is called upon to determine whether any factual foundation exists to resort to the extreme measure of unseating an elected government. Such actions on the part of the Governor call for dignified and restrained interventions on her part. The requirement of such non-partisan restraint should

[584] *Samsher Singh v State of Punjab*, (1974) 2 SCC 831 at para 138.

[585] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (University of Toronto Press, 2015) at p. 146; for an understanding of the Canadian position, *see* David S. Donovan, 'The Governor General and Lieutenant Governors: Canada's Misunderstood Viceroys' (Annual Meeting of the Canadian Political Science Association, 2009) available at < https://www.cpsa-acsp.ca/papers-2009/Donovan.pdf > accessed 5 April 2019; for the Australian position, *see* David Hamer, 'Can Responsible Government survive in Australia' (The Department of the Senate, Parliament House, 2004) at pp. 154 to 171 available at < https://www.aph.gov.au/binaries/senate/pubs/hamer/book.pdf > accessed 5 April 2019.

also be understood in light of the original British intention in designing the office of the Governor (discussed in chapter 2) as one that could maintain stability pending the growth of responsible representative government in India. One can only wonder whether such growth has yet taken place in India's States and whether it ever can if it continues to be boxed in by interventions from the Centre.

The common thread in all these cases is that the Governor is expected to act, from within the Executive, as a check to actions of the *de facto* Executive i.e. the Council of Ministers. However, in affirming such a role for the Governor, there is reason to be cautious. While it is necessary to endow Governors with a degree of independence to perform a role that may be at odds with the intent of an elected government, it is important not to reform the office into an institution that reviews executive and legislative action. After all, there are other institutions such as constitutional courts to perform that task. Any argument that builds on some kind of separation of powers will be inapposite in the context of the Governor. To create yet another authority that reviews and invalidates legislative or executive action even before the completion of the process would be detrimental to the democratic principle that runs through our Constitution's provisions.

Instead, a more promising path would be to augment the advisory role of the Governor and ensure that the advice of the Governor is of some consequence and not merely advice which elected governments can brush aside on the strength of their majority in the House. One way of envisioning a constructive role for the Governor is to see the Governor as performing an advisory role that has a strong communicative component. Though not an advisory function, it is instructive to refer to the importance attached to the Governor's report under Article 356. The Governor does not directly take action under Article 356, yet because her report is at the heart of Article 356, the Governor's assertions carry great weight, particularly in light of the fact that proclamations are judicially reviewable. If the Governor has sent a report and has not recommended imposition of President's rule (as in the case of Uttarakhand in 2016[586]), it might be critical to the legality and legitimacy of any subsequent action by the Centre.

The role of the Governor in the legislative and executive processes could be conceived of along similar lines. In the case of any legislation that appears to be suspect, the Governor could, while sending it for reconsideration, give full and complete reasons as to why the matter should be reconsidered. A similar course should be adopted in the case of reservation of Bills for assent of the President. If the Governor is of the view that a Bill must be sent for such assent, it should follow that the Governor informs the Executive of the reasons for reserving the Bill. Similarly, in the culmination of an executive action, for example, in the appointment of any important constitutional or statutory functionary, the Governor could ask the government to reconsider its decision based on stated reasons if there are pressing concerns to the contrary.

[586] *Harish Rawat v Union of India*, 2016 SCC Online Utt 502.

The challenge, really, is in ensuring that the advice of the Governor is not ignored. One potent method for addressing this issue could be ensuring public access to the advice and reasons recorded by the Governor. Where the reasons asserted by the Governor are valid and are placed in the public domain, a government that is proposing to act in an unconstitutional or generally ill-conceived manner would likely reconsider its actions. The act of bluntly opposing the aid and advice of the Council of Ministers may indeed be seen as anti-democratic. However, if a Governor is able to forcefully ask the government to reconsider a decision in the aforesaid manner, the government would be compelled to at least take this factor into account. Where such reasons find favour with the general public, the government would be required to engage with such reasons or provide a reasoned response to them to the satisfaction of the people. Offices of Governors are already equipped to aid the governor in the performance of such tasks. The Governor is assisted by a full secretariat manned by bureaucrats appointed by the State.[587] With appropriate assistance, a Governor with some understanding of her constitutional role would not find it difficult to perform this function.[588]

There are reasons which may weigh against such disclosure. The NCRWC, when considering the suggestion that the report of Governor under Article 356 should be made public, rejected the same on the ground that:[589]

> …taking this matter to the public domain at this stage may apparently allow for transparency but is likely to generate a great deal of heat in the political domain providing the anti-social forces a free play for social disharmony and violence.

There might be good reason to be cautious with information which seriously endangers national security or incites violence. However, apart from these narrow categories, there should be no room for doubt that providing access to reasons offered by the Governor is essential, especially following the enactment and widespread use of the Right to information Act.

All this is related to the choice of Governors as well. The words and advice of a Governor must carry weight. This is in addition to the requirement that we have already identified that Governors must have a highly developed sense of discretion, impartiality and the ability to comprehend the narrow but weighty and complicated constitutional duties that she may have to discharge on occasion. These functions of the Governor give an indication of the kinds of persons who should be appointed Governors. Any attempt to prescribe eligibility conditions or describe the kind of persons suited for governorships must necessarily be based on these expectations that we have of Governors.

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[587] On the basis of information obtained through interviews with Shri H.R. Bhardwaj and Shri V.K. Duggal, on file with the authors.

[588] The Governor can readily obtain relevant information in order to perform this function by virtue of Articles 167(a) and 167 (b), Constitution of India.

[589] Report of the National Commission to Review the Working of the Constitution (2001), at para 8.19.3.

The role of the Governor as the constitutional head of the State Executive may be seen as a twofold one: first, she has certain functions related to transitions in a democracy for the purposes of retaining the Ministry in office, and second, she has certain advisory and communicative functions in relation with executive and legislative actions. While the former functions are critical in the smooth working of what could otherwise be a volatile democratic framework, the latter functions are needed to push the actions of a State Government towards public reason and a culture of justification by warning, encouraging and advising. For performing both these kinds of functions adequately, the Governor has to act as a restrained check on the actions of her Council of Ministers. For this purpose, the office must be made more independent from the Central Government so that Governors can attempt to be neutral even where they are required to be political. Further, fulfilling the duty of providing the government with guidance can become a futile exercise unless the opinion of the Governor is given some weight and broader publicity of recorded reasons may be needed for this purpose.

4.4 Recommendations

As has been discussed immediately above, the office of the Governor should be retained within the constitutional scheme as it plays an important role as a federal instrument linking the Centre and the States and as the head of democratic State Governments. To perform these roles effectively, Governors require a measure of independence, which should be understood in the context of the need to balance the pragmatic considerations of centralisation with the principle-based considerations of federalism.

In furtherance of the above arguments, this section will lay down certain recommendations for reforming the office of the Governor. In order to achieve these aims, we primarily focus on the constitutional processes for appointment and removal of Governors. Certain recommendations are also made in order to bolster the advisory and communicative role played by the office. This section will then make a case as to how these changes represent the best chance of solving the various problems and controversies that have emerged in post-Independence experience, as has been detailed extensively in the previous chapter.

a. Reform in the appointment mechanism of Governors

Efforts to reform the office of the Governor must start with the appointment process itself. In furtherance of the arguments made above, such reform should incorporate the following considerations.

First, it is worth reiterating that the present appointment system leaves the selection of the Governor entirely at the hands of the Central Government.[590] In the Constituent Assembly, this mechanism was ultimately adopted in preference to a series of alternatives which had, to varying degrees and in different ways, given a say to States regarding the appointment of

[590] *See* chapter 3.1 of this book.

their formal head. Given the dual role that a Governor is expected to perform, viz. acting as a Centre-State link and as the head of the State Executive, there is considerable merit in adopting an approach that does not leave the Governor's office completely under the control of either the Centre or the State. This is essential for ensuring that the Governor acts in an independent manner, giving due consideration to the interests of both the entities she is expected to link without unduly favouring either.

An example of an intermediate arrangement of this nature was considered by the Constituent Assembly: Governors could be appointed by the President from a panel of four persons elected by the State Legislature. The convention regarding consulting the Chief Minister of the State with respect to the Centre's choice of Governor can also be seen along the same lines, as a counterweight to the otherwise unbridled discretion that the Centre enjoys in this regard by virtue of Article 155 as it currently stands.

Second, in addition to designing a process of appointment that adequately caters to federal concerns, there is a need to provide some guidance in the Constitution itself regarding the kind of persons that ought to be appointed as Governors. Naturally, these requirements should not be too prescriptive, but should be broadly indicative of the type of persons that ought to be considered in light of the roles that the office is expected to perform. Even though the Constitution is currently silent regarding this aspect, this question was discussed in the Constituent Assembly. As noted in chapter 2, the framers expected persons of ability, substance, experience and standing in public life to be appointed to this office. The underlying idea was that such persons would be able to act independently and impartially, ably balancing the complex and often conflicting considerations which a Governor has to deal with. As we have seen, both from an analysis of the trends in gubernatorial appointments over the years and from the sheer number of controversies into which this office is routinely dragged into, this expectation has been belied. In particular, it is noteworthy that the Governor's actions often suffer from a legitimacy deficit, as she is seen to be acting on partisan considerations as an agent of the Centre.

Third, since impartiality and independence are qualities that need to be injected into the office of the Governor, it has been argued that the office should be depoliticised to an extent.[591] Specifically, it is important that the Governor's actions are neither partisan nor seen to be partisan. In this regard, the Supreme Court has observed that it is difficult to expect

[591] For example, the Sarkaria Commission had recommended that appointees to the Governor's office "should be [a] detached figure and not too intimately connected with the local politics of the State and "should be a person who has not taken too great a part in politics generally, and particularly in the recent past." Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.16.01; This was reiterated by the NCRWC. Report of the National Commission to Review the Working of the Constitution (2001), at para 8.14.2; On this point, the Punchhi Commission had recommended: "The Governor should be a detached person and not too intimately connected with the local politics of the State. Accordingly, the Governor must not have participated in active politics at the Centre or State or local level for at least a couple of years before his appointment." Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.4.11.

detachment from party politics from persons appointed as Governors without any cooling-off period separating them from active politics.[592] However, concerns regarding depoliticising the gubernatorial office should not translate to wholesale restrictions on politicians in particular from being appointed as Governors. As we have seen, partisan Governors have come from several backgrounds, including former civil servants and Supreme Court judges.[593] On the contrary, hands-on political experience can prove to be extremely valuable in performing various functions of the office. Since a Governor often finds herself in the middle of key political processes which require deft and tactful handling, a political background can in fact prove to be an asset.

The focus, therefore, should be on establishing the right processes to ensure that the right kinds of persons are appointed as Governors, and not on blanket cooling-off periods targeting politicians. It is trite to observe that politicians who are determined to act in a partisan manner as Governors will not be deterred by a cooling-off period alone. That being said, governorships should not serve as a means to joining politics or furthering political careers. Therefore, it makes sense to bar Governors from joining or returning to politics after their tenure.

Any reform proposal that designs an appointment mechanism by incorporating these considerations would go a long way towards ensuring that the Governor performs her functions in the manner that she ought to. As an example of such a reform proposal, we recommend the following amendments to be made to Article 155 of the Constitution:

- Instead of being appointed by the President, the Governor of a State should be appointed by an appointment committee comprising the Prime Minister, Leader of Opposition in the Lok Sabha, the Chief Minister of the State, the Leader of Opposition in the State Assembly and the Chief Justice of the High Court that has jurisdiction in that State (or their nominees).[594] The Prime Minister, given her rank, should be the chairperson of the committee.
- The persons to be considered by the appointment committee for appointment as Governor should be persons having eminence, experience and standing in public life.[595]

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[592] *Rameshwar Prasad v Union of India*, (2006) 2 SCC 1.

[593] *See* P.P. Rao, 'Judges as Governors', 27 The Indian Advocate, at p. 36.

[594] The NCRWC in a consultation paper had also recommended an appointment committee for this purpose, comprising the Prime Minister, the Union Home Minister, the Speaker of the Lok Sabha and the Chief Minister of the State (and possibly the Vice President as well). However, the NCRWC did not adopt this recommendation in its final report, recommending instead that Governors should continue to be appointed by the President, albeit after consultation with the Chief Minister. Report of the National Commission to Review the Working of the Constitution (2001), 'A Consultation Paper on the Institution of Governor under the Constitution' at para 26; Report of the National Commission to Review the Working of the Constitution (2001), at para 8.14.2.

[595] The Sarkaria Commission had also recommended that appointees to the Governor's office should be "eminent in some walk of life". Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.16.01. This was reiterated by the NCRWC and the Punchhi Commission. Report of the National

- After the completion of a Governor's term, she should not join or return to active politics as a candidate in elections for a political party, or become an office-bearer of a political party.[596]

It is appropriate here to provide a brief explanation on the proposed appointing authority. While no similar body may currently be in place for the appointment of any constitutional functionary, the normative and conceptual explanation in the prior sections of this chapter outlined the *sui generis* position of the Governor in our polity. This necessitates the designing of a unique mechanism that can create a balanced incentive structure that adequately tempers the behaviour of the Governor. The composition of the appointment committee combines features supporting cooperative federalism and features drawn from recent committee-based appointment mechanisms aimed at ensuring independence.[597] The two executive heads of government and the two leaders of opposition in the committee provide broad-based representation to the most significant political actors at the central and state levels. The aim is to balance out conflicting political interests in a way that should ultimately lead to the appointment of eminent, non-partisan and able candidates. The judicial representative is intended to operate as a neutral force that upholds constitutional propriety and acts as a check on political interests that may potentially unite across party lines.

Another convention that the framers had in mind regarding appointments to the Governor's office was regarding appointing persons from outside the State. This convention should be seen in the context in which the Constituent Assembly deliberated these provisions – the dire circumstances brought about by Partition. The idea was to protect the fledgling nation-state

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Commission to Review the Working of the Constitution (2001), at para 8.14; Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.4.11.

[596] The Sarkaria Commission had recommended that, as a matter of convention, "after quitting or laying down his office, the Governor shall not return to active partisan politics." Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.16.01 and 4.16.08. The Punchhi Commission reiterated this recommendation, stating that it should be brought into effect by way of a constitutional amendment. Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.4.19.

[597] For an example of comparable adversarial methods of arriving at non-partisan appointments, *see* Sections 12(3) and 15(3) of the Right to Information Act, 2005 on the appointments of the Central and State Chief Information Commissioners and Information Commissioners. Another example may be seen in Section 3 of the Constitution (Ninety-Ninth) Amendment Act, 2014 (since struck down), inserting a new Article 124A, balancing the proposed National Judicial Appointment Commission's composition with members from the judiciary and the executive as well as civil society appointees of a committee composed of the Prime Minister, Leader of Opposition and the Chief Justice of India. The principle behind such adversarial, committee-based mechanisms has been elaborated by the Law Commission of India in proposals regarding appointments to Bar Councils in its 266th Report on the Advocates Act, 1961 (Regulation of Legal Profession) (2017), at p. 54. It had stated: "The identity of the electors and nominators determines the extent of control exercised by groups and bodies over a regulator. Nominations indicate direct control and elections indicate diffused and indirect control. A good practice would be to split seats across different groups to accommodate regional and technical knowledge-based diversity and split seats across bodies so that each body has a say but does not exercise complete control." Further justification may be drawn from transaction costs theory under economic analysis, where the purposeful *increase* in transactions costs (making agreements more difficult) has been argued as a means of combating corruption. *See*, for example, Johann Graff Lambsdorff, 'Making corrupt deals: contracting in the shadow of the law', (2002) 48 Journal of Economic Behavior & Organization 221, at pp. 222 and 239.

from secessionist tendencies, and it was thought that a local person occupying the Governor's office might encourage such tendencies. However, as has been discussed, Indian federalism has evolved considerably over the course of the post-Independence years, and the position of the States vis-à-vis the Centre has undergone a significant transformation. Considerations of unity and integrity are no longer as urgent or relevant as they were during the period of the Constitution's framing, and as such, they do not need to be enforced via this convention. Accordingly, we recommend that the appointment committee should not consider this convention and appropriate persons from within or outside the State should be selected in the manner outlined above.

As an alternative to the appointment committee specified in the reform proposal outlined above, Article 155 can instead be amended to give constitutional recognition to the convention of consulting the Chief Minister before appointing Governors.[598] A third alternative can also be considered – amending Article 155 to require the appointment of an *ad hoc* committee in the Rajya Sabha including the Prime Minister as a member of the committee for the purpose of appointing Governors to particular States. While this would mean that the concerned State does not get to have a direct say in this matter, the Rajya Sabha in its capacity as a Council of States does operate as a forum for collective articulation of States' interests. The merit in considering these alternatives is that they may prove to be less cumbersome to work out in practice. However, strictly speaking, these alternatives do not represent as rigorous a balance between central and state interests in the appointment process. It should be noted that these alternatives would still require the other measures regarding kinds of persons and barring of post-tenure political activities that have been mentioned above with the original proposal.

b. Reform in the removal mechanism of Governors

Along with the appointment mechanism, the removal mechanism of Governors as contained in Article 156 also needs to be amended in light of the arguments advanced in this chapter. As has been discussed, Governors presently have a tenure of five years, but hold office during the pleasure of the President. An analysis of trends and numerous factual instances reveals that the average Governor does not complete her five-year term, and is either transferred or removed from office with a change in government at the Centre.

In the Constituent Assembly, prescient concerns were raised regarding the implications of adopting the present removal mechanism which, similar to appointments, vests full discretion

[598] The Sarkaria Commission had made a similar recommendation: "In order to ensure effective consultation with the State Chief Minister in the selection of a person to be appointed as Governor the procedure of consultation should be prescribed in the Constitution itself by suitably amending Article 155." Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.16.03. On this point, the NCRWC had also recommended: "the Governor of a State should be appointed by the President, after consultation with the Chief Minister of that State." Report of the National Commission to Review the Working of the Constitution (2001), at para 8.14.2.

in the Centre. In particular, it was observed that the elected representatives of the State do not have any means to prevent the Governor from misusing her authority.[599] This is problematic, in light of the fact that an unelected Governor is the formal head of the elected State Government and is expected to play a linking role between the Centre and the State. The crux of the issue lies in placing as fundamental an element of the Governor's office as the removal mechanism entirely in the hands of the Centre, when the Governor is supposed to balance and link the interests of both the Centre and the States.

Before the present mechanism was adopted, however, a draft proposal had offered a more balanced (albeit complex) route. This involved the State Legislature preferring a charge for impeachment of the Governor for violation of the Constitution, after which the Rajya Sabha would constitute a committee to investigate the charge and pass a resolution by two-thirds majority on the findings of a committee to sustain the charge, leading to the removal of the Governor. The Governor was to have a right to appear and be represented in this investigation. The merit in this proposal was that it correctly identified the need, on a principled and pragmatic level, to give a say to the concerned State in this important aspect.

The removal mechanism as it currently stands is one of the main reasons why Governors often end up acting in a partisan manner. Routine mass removals of Governors with a change in government at the Centre is indicative of how the Centre can use this mechanism as a means to influence the decisions of the Governor. Although the Supreme Court in *B.P. Singhal*[600] sought to remedy this issue by holding that the Centre's discretion in this regard is not unfettered and cannot be arbitrary or for reasons of party politics, it did not set any practical limitations on the same. Therefore, the problem persists and requires intervention through constitutional reform.

Accordingly, to reform the removal mechanism, certain considerations need to be kept in mind. *First*, the mechanism should balance the interests of the Centre and the State by giving both entities a say in the process. In other words, full control should not be placed in the hands of either the Centre or the State. *Second*, the Governor herself should have a right to be heard, in accordance with the principles of natural justice. *Third*, to ensure that Governors are not removed for arbitrary reasons, the grounds of removal should be specified in the Constitution itself.

Any reform proposal which accommodates these broad points should lead to Governors performing their duties in a far more desirable manner. As an example of such a reform proposal, we recommend that in Article 156, the following changes should be made to replace the current mechanism under which the Governor holds office during the pleasure of the President:

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[599] N.S. Gehlot, *The Office of the Governor: Its Constitutional Image & Reality* (Chugh Publications, 1977) at pp. 196-97; S.M. Sayeed, 'The Governor - A Titular Head?', (1971) 15(12) Parliamentary Studies at p. 24.
[600] *B.P. Singhal v Union of India*, (2010) 6 SCC 331.

- The Governor may be removed from office only for violation of the Constitution by impeachment.
- The process for impeachment may be initiated either on a motion for impeachment preferred by the Legislative Assembly of the concerned State or by a formal order of the President. In the former case, the resolution that contains the proposal to prefer such a charge should be supported by not less than two-thirds of the total membership of the Assembly.
- When a charge has been so preferred, the Rajya Sabha should appoint a committee which may consist of or include persons who are not Rajya Sabha members, to investigate the charge. The Governor must have the right to appear and be represented at such investigation.
- Ultimately, a resolution declaring that the charge preferred against the Governor has been sustained, supported by not less than two-thirds of the total membership of the Rajya Sabha, may be passed. This should have the effect of removing the Governor from her office.[601]

Since the Governor has to perform a dual role as aforesaid, it is appropriate that both the Centre and the concerned State should have the power to initiate impeachment proceedings against her. The choice of the Rajya Sabha as the ultimate deciding authority has been made keeping in mind its composition as a Council of States. Since the Rajya Sabha as an institutional feature of Indian federalism operates as a chamber where State interests are collectively articulated, it is an appropriate choice for determining questions of gubernatorial impeachment. This is also in keeping with our understanding of the role of the Governor's office as a federal instrument. Requiring a thorough investigation in a process that incorporates natural justice along with specifying the ground of violation of the Constitution (similar to the President's impeachment) should ensure that Governors cannot be removed arbitrarily and for purely political reasons. This is in keeping with the view of the Supreme Court in *B.P. Singhal*, and represents a practical application of the theoretically high

[601] The Sarkaria Commission had recommended the following removal mechanism for Governors: Governors should be informally apprised of the grounds of removal by the President and afforded a reasonable opportunity for showing cause against it. The Governor's explanation in this regarded should be examined by an Advisory Group consisting of the Vice President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India. After receiving the recommendation of this Group, the President may pass such orders in the case as she may deem fit. The Central Government should also lay a statement before both Houses of Parliament explaining the circumstances leading to the ending of the tenure of the Governor as well as the explanations offered by her in her defence. *See* Report of the Sarkaria Commission on Centre-State Relations (1988) at ch 4, paras 4.16.06 and 4.16.07. On this point, the NCRWC had recommended: "… removal or transfer of the Governor should be by following a similar procedure as for appointment i.e. after consultation with the Chief Minister of the concerned State." Report of the National Commission to Review the Working of the Constitution (2001), at para 8.14.2. The Punchhi Commission had recommended amending Article 156 in the following manner: "A provision may be made for the impeachment of the Governor by the State Legislature on the same lines as the impeachment of the President by the Parliament. (See Article 61 of the Constitution.) Such impeachment can be only in relation to the discharge of functions of the office of a Governor or violations of the principles laid down in the Constitution." Report of the Punchhi Commission on Centre-State Relations (2010), Vol 2 at para 4.4.17.

constitutional status that a Governor is supposed to occupy. The security of tenure that Governors can expect to have with such a mechanism in place should bolster their independence and impartiality.

An alternative reform proposal may also be considered: Article 156 may be amended to require the Central Government to introduce a motion for impeachment in the Rajya Sabha for the removal of a State Governor for violation of the Constitution. Such a motion can only be introduced after it has been referred to the concerned State Legislature so that their views on the matter can be ascertained,[602] and after the Governor herself is offered a chance to provide an explanation. If the State Legislature and Governor make submissions to this effect, then these should be laid before the Rajya Sabha for its consideration along with the Centre's reasons for pursuing impeachment. The motion for impeachment should be decided upon accordingly, and should require a two-thirds majority to pass. Although this proposal represents a relatively weaker manifestation of the three aforesaid considerations, it might prove to be a more workable approach.

The above recommendations on appointment and removal do, however, necessitate a caveat. There is a certain asymmetry in the powers and responsibilities of the Governor's office across States – Governors have additional responsibilities in certain States.[603] This report does not explore the implications of the above recommendations on the Governor's special role in these States. Therefore, the implementation of these recommendations may need to account for these exceptions, which would be in keeping with the spirit of asymmetric federalism which permeates the Constitution.

c. Reform in the communicative and advisory role of Governors

Alterations to the mechanisms for the appointment and removal of the Governor may allow them to become impartial political arbiters. As such, they should be better able to carry out functions requiring the application of some measure of discretion at pivotal moments in the democratic functioning of a State. As described above, some of the most intensely political of these functions involve actions by the Governor where the aid and advice of her Ministers is either not available; or where decisions need to be taken to preserve the functioning of essential democratic operations by summoning the Legislature for proving majority on the floor of the House; or dissolving the Assembly so that elections may take place.

The other set of functions has been defined above in relation with *warning, encouraging or advising* the State Executive. These functions bring the Governor into more direct conflict with the democratic principle. As such, the Governor's decisions here should embody the

[602] For an example of this kind of mechanism in the context of reorganisation of States, *see* proviso to Article 3, Constitution of India.
[603] For example, *see* Articles 371A(1)(b) and (d), 371A(2)(b) and (f), Constitution of India, for Nagaland; Article 371F(g), Constitution of India, for Sikkim; Article 371H(a), Constitution of India, for Arunachal Pradesh.

measured nuance of moral persuasion and not the blunt force of law. To adequately perform this persuasive role, the Governor can benefit from the expert advice of her well-staffed secretariat and obtain necessary information from her ministers.[604]

If the appointment and removal mechanisms for Governors are reformed in the manner suggested above, it will likely lead to eminent persons from within the State being appointed to the office. This could lead to the State's electorate holding the Governor in higher esteem and placing greater weight on her opinion regarding various matters. Within the State apparatus itself, these matters include the Governor returning a Bill under Article 200, submitting a matter decided by a Minister for the consideration of the entire Council of Ministers under Article 167(c), or seeking the reconsideration of any other executive action being taken in her name. The Governor's communicative functions also include communications with the Centre, such as when Bills are reserved for the consideration of the President under Article 201 or when reports are sent to the President recommending President's rule under Article 356.

To bolster this further and ensure greater publicity for gubernatorial warnings and advice, we recommend the following:

- The communications of the Governor in all the above situations should be made available under the Right to Information Act, 2005.[605]
- The Governor's Secretariat should maintain a public website disclosing the official actions of the Governor as well as the written reasons for such actions.[606]
- The official actions of the Governor as well as her written reasons for the same should be placed before the State Legislature at regular intervals and be opened for debate. This may require an appropriate constitutional amendment, perhaps to Article 163, mandating such legislative scrutiny.
- To all these measures requiring transparency and publicity, it would be best to retain certain exceptions along the lines of section 8 of the Right to Information Act, 2005.[607]

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[604] *See* Article 167(a) and (b), Constitution of India.

[605] The question of whether the office of the Governor is public authority under the Right to Information Act, 2005 had been answered in the positive in *Public Information Officer, Joint Secretary to the Governor, Raj Bhavan, Donapaula, Goa v Manohar Parrikar*, AIR 2011 Bom 71. Though the matter was appealed (SLP (Civil) No.33124/2011), the Supreme Court found it to have become infructuous in an order on 30th January, 2018. The impugned High Court judgment was held not to be a precedent and the question of law was left open. However, a Minister of State, in reply to a query in the Lok Sabha, stated that the government did not consider the office of the Governor to be a public authority under the 2005 Act. PTI, 'CJI, Governor's office not under RTI Act: Governor' (*The Economic Times*, 2 August, 2017) available at < https://economictimes.indiatimes.com/news/politics-and-nation/cji-governors-office-not-under-rti-act-government/articleshow/59879637.cms?from=mdr > last accessed 5 July 2019.

[606] As an example, one may note that the President's Secretariat maintains a website recording the status of State Bills referred to the President for assent under Article 201 but this website does not reveal the relevant reasons for any instances where such assent has been withheld. *See* President's Secretariat, Rashtrapati Bhavan, 'State Bills', available at < https://rashtrapatisachivalaya.gov.in/state-bills > accessed 8 June 2019.

With these measures, a well-respected Governor who is selected through a more balanced appointment process and enjoys a certain security of tenure could ably warn, encourage and advise the State Executive. Her opinion could have the effect of driving the government towards a culture of justification by providing sound public reasons on crucial executive decisions.

d. Expected impact of the reform proposals

In this chapter, the broader conceptual justification for a specific kind of reform in the Governor's office has been provided in detail, culminating in the specific recommendations outlined above. Given the detail in which this study has gone into the colonial history of the Governor's office, the circumstances of its constitutional framing and the experiences of its post-Independence functioning, the limited nature of the substantive recommendations may appear somewhat anti-climactic. However, we believe that the minimalist nature of the suggested changes to the institution of the Governor flow from a more nuanced understanding of the office than has been previously offered, especially in judicial interpretation. While the recommendations may appear limited in form, they carry far-reaching implications and have the potential to transform a colonial relic into a truly useful institution for our modern Republic.

Underpinning our recommendations are two salient observations made in the course of this study: first, that the identity and dignity of a person holding a public office will always be of far greater significance than all the rules that can be imagined for binding them, and second, that while rules are powerful means of influencing the behaviour of institutions, an institution that is entirely bound by rules cannot be expected to rise to any significant occasion.

The expected impact of the recommendations of this study will now be briefly outlined in relation with the functions discussed in detail above. If the limited recommendations are followed, the Governors who emerge would be much closer to being impartial arbiters in federal conflicts and during transitions in State governments. They will also be persons with enough ability and commanding enough respect as to be able to provide useful guidance and moral suasion to the actions of State Governments.

The recommendations seek to design the right incentive structure to facilitate these outcomes. A committee with key political actors from the ruling parties and the oppositions at both the central and state levels accompanied by an experienced judicial member would be influenced by the sheer tensions of their political disagreements and constitutional commitments. This should lead to the appointment of Governors who can be trusted by all the members of the

[607] These include information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; etc. *See* Section 8, Right to Information Act, 2005.

committee to carry out her functions with non-partisan integrity and farsighted acuity. Armed with this trust and supported with broader publicity and transparency, the Governor may then occupy her office in the State with the knowledge that her choices and opinions would not be taken lightly.

At the same time, she would not have to be wary of a sudden withdrawal of the pleasure of the President. Removal would only be through an impeachment on established facts that she has violated the Constitution, initiated by either the Central Executive or the State Legislature and completed by the Rajya Sabha. While there may be a certain degree of ambiguity regarding what precisely constitutes violation of the Constitution, the Governor should rest assured by the rigours of her multi-stage, multi-institutional impeachment process involving diverse political players. Her integrity would be safeguarded as long as Indian federalism is healthy, and at the same time, the possibility of impeachment would restrain her from becoming a loose cannon.

How would these recommendations affect the exercise of her discretion? In functions related to the safeguarding of national interests at the State level, the Governor would not be unduly favourable to the ruling party at the Centre. For example, she would report a case of failure of the constitutional machinery in the State with a greater concern for accuracy due to the threat of not just judicial review, but also of public scrutiny. As Ambedkar had hoped, this may mean that the invocation of President's rule would fall into desuetude and its threat would not constantly hang over State politics. The same fate would be likely for refusal of assents to Bills and reservations for the assent of the President. For functions related to transitions in State politics, she would also not be expected to side by default with the political party in power at the Centre. In choices regarding the retention of the Ministry in office, she would be able to appoint persons, dismiss them, or summon Houses for floor tests with the understanding that the wrong choice could result in the eventual formation of a different political majority in the State Assembly; such a majority could then initiate her impeachment, especially if she had acted in a manner that would invite the wrath of the Rajya Sabha. Understanding Governors to be aware of such eventualities, State politicians who do come to power would be unlikely to hold her *bona fide* choices against her even if she had chosen against them. Finally, in her role as guide and advisor to the State Government, the Governor's eminence and the publicity of her reasoned opinions could have a real chance of pushing the State Executive and Legislature towards greater accountability and better reasoning.

Even after applying the limited reforms recommended in this book, it may still be necessary to eventually put in place specific reforms in relation with each of the functions of the Governor studied in the previous chapter. If that were to be the case, there is certainly no dearth of solutions that have been offered by scholars and Commissions along this line. However, it is our case that the approach outlined in our recommendations is preferable to the continued judicialisation of the Governor's discretionary functions. While increasing rules

may appear to strengthen the rule of law, in this case it would in fact reduce the esteem of the justice system by routinely dragging it into the thick of political tussles. Although there is good reason to appreciate the creative bravery of our judges in sallying forth into the political field, it is equally necessary to give them less reason to have to do so. An appreciation of the importance of the independence of judges highlights why this is necessary. The office of the Governor, on the other hand, has not enjoyed such independence. It is appropriate, for more reasons than one, that the reform of the institution begins from there.

To reform the office of the Governor, the process of appointment to the same should ensure greater independence from the Central Government and entail the selection of better-suited and non-partisan persons. For providing Governors better security of tenure, control over their removal should be federalised and the basis for their removal should be fair and pegged to defined grounds. Further, to effectively allow for the Governor's communicative and advisory role, it is necessary that her opinion be given more weight by her Ministers. Accordingly, we recommend that Governors be appointed by a broad-based appointment committee consisting of political actors from the ruling party and the opposition at both the central and state levels, along with a judicial member. The committee should appoint persons having eminence, experience and standing in public life and Governors should not be allowed to join or return to active politics after the completion of their term. The removal of Governors should only be for violation of the Constitution and the removal mechanism should give both the State Legislature and the Central Executive the power to initiate impeachment, while leaving the final say on the matter to the Rajya Sabha after an appropriate investigation. For the communicative and advisory roles, there should be greater publicity to and scrutiny of the written reasons for the Governor's official actions through the applicability of the Right to Information Act, 2005, maintenance of a public website, and the placing of the reasons before the State Legislature. We believe that with this approach, manifested through these limited reforms, the Governor's office can be transformed into a truly effective instrument of federalism and a worthy head of the State Executive.

CHAPTER 5

CONCLUSION

It has been a long and chequered journey from the first Governors of India to the ones we see making occasional headlines in stories on State politics today. The occasionality of their entrances on the political stage only renders their appearance all the more awkward and incongruent. In this study, we have made every effort to portray the institution in a more holistic light, providing historical, constitutional and political context to its role in our Republic. We hope that this fuller image can lend itself to an appreciation of the reform possibilities that have been outlined.

In our historical analysis in chapter 2, we traced the story of Governors in India right from the seventeenth century when the East India Company first came to the subcontinent. Although they came pursuing commercial interests, eventually they stayed to rule and administer territory through early Governors in a centralised hierarchical structure. After 1857, the British Crown took over and there were various administrative reforms that gradually moved towards a limited form of representative government substantially checked by a strong executive represented by the same Governors. The Government of India Act, 1935, which would later form the base material for our Constitution, continued the trend towards representative government along with greater provincial autonomy. However, these measures were counterweighted with strong safeguards in the form of significant powers vested in the Governor for protecting British colonial interests.

The British forwarded this conception of the Governor under the cloak of various good governance objectives such as the need for a strong and flexible administration and for impartiality in the face of conflicting community interests. It is tempting to dismiss these justifications wholesale as imperialist sophistry. However, as the tensions in the Constituent Assembly Debates show, the design of the constitutional Governor reflected uneasy compromises in pursuing the goal of an independent but united India while mirroring colonial forms. Although independent India's Governors were left with only a shadow of the discretion that British Governors had, the Centre's control over the office left the appointee vulnerable to charges of being an agent of the Centre.

In chapter 3, we analysed the constitutional experience of how this office has functioned in practice. Constitutional provisions, factual instances, trends, and judicial rulings with respect to the Governor's appointment and removal were first studied, followed by a similar study of the Governor's discretion under Article 163, her role in appointing and retaining a Ministry in office under Article 164, in summoning, prorogation and dissolution of the State Legislature under Article 174, in the legislative process with respect to assent to Bills under Article 200, in the proclamation of emergencies under Article 356, and in various other miscellaneous functions.

Analysing the Governor's discretion across these functions revealed that the office has been routinely dragged into controversy, with the Centre's insidious influence seen to be colouring her actions. In general, conventions which the framers had expected would develop have failed to establish themselves, which has led to a consequent judicialisation. This increased judicial scrutiny of gubernatorial actions has in turn given rise to a process of elimination in gubernatorial responses such that their responses have to be strictly commensurate to the politico-legal problems that they are directed towards. By and large, however, judicial interventions have failed to effectively (or at least conclusively) solve the significant complications that the Governor's office finds itself mired in. Apart from this instrumental criticism, judicialisation as a solution has inherent limitations when dealing with a fundamentally political problem.

In chapter 4, we considered what the role of the Governor in a modern Republic ought to be and addressed various arguments and considerations regarding rethinking the gubernatorial office. The intuitively attractive suggestion of abolishing the office of the Governor is not the straightforward solution that it may appear *prima facie*, as alternatives such as vesting her functions in the Chief Minister or the Chief Justice of the relevant High Court may prove to be counter-productive. Reforming the Governor's office is instead understood in the context of the primary roles that she should be expected to fulfil: a federal instrument that links the Centre and the States, the head of a democratic State Government, and a neutral arbiter where these two roles clash. In keeping with the increased federalisation of our polity over the years, the Governor's office itself needs to be federalised to serve as an effective conduit in this regard. For this, it is necessary to sequester the Governor from the overbearing influence of the Centre. This is also necessary for the Governor to effectively play her role as head of the State Executive, which involves retaining the Ministry in office and exercising certain advisory and communicative functions.

In light of these considerations, we make certain recommendations that shift control over gubernatorial appointments and removals from the current monopoly of the Centre to a more federal and cooperative framework. These involve a balanced appointment committee for appointments and giving the final say to the Rajya Sabha for removals. To infuse the institution with a greater concern for public reason, we additionally recommend that the considerations for appointment and removal be made explicit in the Constitution itself and that written reasons for official gubernatorial actions be made public. These limited legal modifications should go a long way towards reorienting the currently undesirable trajectory that the office of the Governor has taken.

Given the significant way in which these recommendations withdraw power from the Centre and create space for a more independent constitutional Governor, one may wonder why any Central Government would choose to yield control over this office. This would also entail letting go of the concomitant strategic leverage that this gives to the Centre in State politics as a whole. An argument on these lines can draw upon the significance of the Governor's office

in maintaining national integrity, but this argument has been analysed and rebutted in the discussion above. One may also consider this as a question of *realpolitik*, where the near-proprietary Central control over Governors is viewed as an immediate political benefit that any Central Government would naturally enjoy and would see no reason to yield. However, this ignores the significant advantages that our recommendations hold for political actors at both the national and state levels.

For one matter, there is no reason to consider the attainment of a political majority in Parliament as a means to simultaneously earn dividends at the level of State politics. There is no normative reason why the risks involved in taking part in politics should be aggregated such that the bets in one game (National Elections) are given higher stakes than the bets in others (State Elections). This is the political equivalent of putting most of one's eggs in one basket. If the games are disaggregated and played separately at the level of the Centre and each of the States – as indeed they should be in a federal polity – each player will always have higher chances of at least winning some prizes. Along with this, there is likely to be a positive impact on democratic accountability and context-sensitive policymaking if State politics develops a more coherent and distinct identity of its own. These benefits are of relevance to both State-level politicians as well as national political forces that are seen to set such transformations into motion.

For another matter, a short-sighted, tight-fisted Centre that is loath to give up on its control over States is one that significantly ignores the nature of *constitutional* politics. It is often in the best interest of a political player in control of constitutional amendments to make use of the constitutional stage of democratic politics to set the rules of the game with the long-term in mind. After all, such pre-commitments would bind not only it but also every other player in the same position in the future.[608] Any government in power because of its majority in the Lok Sabha is also likely to have political interests in the States so as to complete its control over the Rajya Sabha as well. In this context, any party standing behind the government and being well-versed in the nature of democratic action should also be aware that it may lose its majority at the Centre one day to a different government. Why, at such a time, should it simultaneously lose some of its winnings in the States? Constitutional politics should be played in the spirit of *constitutionalism*,[609] and effectuating the vertical division of powers that our federalism entails should be a guiding force, both on a principled and pragmatic level, for all our politicians.

[608] Jon Elster, 'Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment', (2003) 81 *Texas Law Review* at p. 1751; Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process', (1995) 45 *Duke Law Journal* at p. 364.
[609] *See* Uday S. Mehta, 'Constitutionalism', in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford, 2010) at pp. 15-27.

Particularly given its power over constitutional amendments, a party in power at the Centre must always remain sensitive to the ideas behind constitutionalism, as described by Nehru in the Constituent Assembly:[610]

> We are here not to function for one party or one group, but always to think of India as a whole and always to think of the welfare of the four hundred million that comprise India … The time comes when we have to rise above party and think of the Nation … When I think of the work of this Constituent Assembly, it seems to me, … [we] have to rise above our ordinary selves and party disputes and think of the great problem before us in the widest and most tolerant and most effective manner so that, whatever we may produce, should be worthy of India as a whole and should be such that the world should recognise that we have functioned, as we should have functioned, in this high adventure.

As did they, so must we.

[610] Constituent Assembly Debates (Reprinted by Lok Sabha Secretariat), Vol 1, 1946, at p. 60.