

GOVERNOR AND HIS POWERS

ROLE “: The first is that of a constitutional Head of the State, bound by the advice of his Council of Ministers. The second is to function as a vital link between the Union Government and the State Government. In certain special/emergent situations, he may also act as a special representative of the Union Government. He is required to discharge the functions related to his different roles harmoniously, assessing the scope and ambit of each role properly.

He is not an employee of the Union Government, nor the agent of the party in power nor required to act under the dictates of political parties.

DISCRETIONARY POWERS :

Under the Constitution, there are several categories of action which the Governor may take in his discretion, viz. :

- (1) Art. 200 requires him to reserve for the President’s consideration any Bill which in his opinion derogates from the powers of the High Court;
- (2) To reserve any other Bill [Art. 200];
- (3) To appoint the Chief Minister of the State;
- (4) Governor’s report under Art. 356;
- (5) Governor’s responsibility for certain regions such as the Tribal Areas in Assam and responsibilities placed on the Governor’s shoulders under Arts. 371A, 371C, 371E, 371H.

In all other matters, the Governor, like the President, acts on the advice of his Council of Ministers.

GOVERNOR AND HIS POWERS – PART I :

PART- I :

1. ROLE OF GOVERNOR.
2. APPOINTMENT AND REMOVAL
3. DISCRETIONARY POWERS OF GOVERNORS.

WHO IS THE GOVERNOR ? He is head of the state (province). Each state has a governor, in some cases, for 2 or more states, there can be common governor. (Art.153)

HIS MULTI-FACETED ROLE :

1. LINK-BETWEEN THE CENTRE AND THE STATE : He informs the affairs of the State to the centre. This helps the centre to discharge its constitutional functions + responsibilities towards the State. As a representative of the centre = he works as a channel of communication and contact between the State and the Centre.
2. AS CONSTITUTIONAL HEAD OF THE STATE¹ : He appoints the CM + other ministers + discharges important functions of Legislative assembly of the state. With his fixed tenure of 5 years, he assures continuity in the State Administration while CM may come and go as per his majority in the elections.
3. AS AN AGENT OF THE CENTRE : When proclamation of state emergency² is in operation,

HOW THE GOVERNOR IS APPOINTED /NOMINATED? His office has now become a balance wheel of the Centre-State relationship. By president on the advice of the Prime Minister (Presidential Nomination). For smooth sailing of the State Government, it may be advisable to have a non-political, non-party, man eminent in some walk of life as the State Governor.

QUALIFICATIONS : 35 YEARS AGE + CITIZEN OF INDIA.

¹ A. Sanjeevi v. State of Madras, AIR 1970 SC 1102 :

² Failure of constitutional machinery in the state Under Art.356.

WHY SHOULD WE NOMINATE HIM, WHY CANNOT WE JUST ELECT HIM?

1. SURRENDER OF DEMOCRACY : If we elect the governor directly by the people ; What is point of electing the Chief Minister (CM) by the people? Wouldn't this amount surrender of Parliamentary Democracy?
2. MONEY FOR ELECTION : The Governor being only a symbol, a figurehead, there would be no point in spending money in having him elected.
3. PROVINCIAL BIAS : If he's elected for a province, he may show separatist provincial (provincial bias) tendency instead of promoting all-India Unity.
4. We cannot expect him to be impartial since he may show favouritism towards his party men, therefore he should be nominated and kept as a more detached figure (from politics) so as to function to function + co-operate fully with the government.

Preferable Choice : Eminent persons in the field of education or other fields of life.

REMOVAL OF THE GOVERNOR . 2011 UPSC.

BASICS :

1. As per Article 155 and Article 156 of the Constitution, a Governor of a state is an appointee of the President, and he or she holds office "during the pleasure of the President". If a Governor continues to enjoy the "pleasure of the President", he or she can be in office for a term of five years.
2. "Pleasure of the President" merely refers to this will and wish of the central government.

DOCTRINE OF PLEASURE : ENGLAND VIS-À-VIS INDIA : The doctrine of Pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where the rule of law prevails, there is nothing like unfettered discretion or uncountable action. As a result when the Constitution of India provided that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however, necessarily be read as being subject to the "fundamentals of constitutionalism".

B.P. Singhal v. Union of India :

1. The President, in effect the central government, has the power to remove a Governor at any time without giving him or her any reason, and without granting an opportunity to show cause.
2. Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power **under Article 156(1) cannot be exercised in an arbitrary, capricious or unreasonable manner.**
3. The power will have to be exercised in **rare and exceptional circumstances** for valid and compelling reasons.

EXAMPLE : The compelling reasons are not restricted to those enumerated by the petitioner (that is physical/mental disability corruption and behavior unbecoming of a Governor) but are of a wide amplitude. What would be compelling reasons would depend upon the facts and circumstances of each case.

- A Governor cannot be removed on the ground that *he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre.*
- Nor can he be removed on the ground that the Union Government has **lost confidence in him.**
- It follows therefore that change in government at the Centre is not a ground for removal of Governors holding office to make way for others favoured by the new Government.

As there is no need to assign reason, any removal as a consequence of withdrawal of the pleasure will be assumed to be **valid and will be open only to limited judicial review.**

HOW IS IT LIMITED?

- If the aggrieved person is able to demonstrate prima facie that his removal was either arbitrary, mala fide, capricious or whimsical, the Court will call upon the Union Government to disclose to the Court, the material upon which the President had taken the decision to withdraw the pleasure.
- If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical, or mala fide, the Court will interfere.

However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient.

Recommendations of Various Commissions : Three important commissions have examined this issue.

The *Sarkaria Commission (1988)* + *Venkatachaliah Commission (2002)* : recommended that Governors must not be removed before completion of their five year tenure, except in rare and compelling circumstances.

The *Punchhi Commission (2010)* suggested that the phrase “during the pleasure of the President” should be deleted from the Constitution, because a Governor should not be removed at the will of the central government; instead he or she should be removed only by a resolution of the state legislature.

The above recommendations however were never made into law by Parliament. Therefore, they are not binding on the central government.

DISCRETIONARY POWERS OF GOVERNOR : 2006 UPSC.

Article 163 of the Constitution says, “There shall be a Council of Ministers with the Chief Minister as 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.”

Article 163(2) says, “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.”

- **‘AID AND ADVISE THE GOVERNOR’** : The implication of Art. 163(1) is that in the exercise of his **discretionary powers**, the Governor does not have to seek ministerial advice. Governor’s discretionary functions thus lie outside the area of ministerial responsibility.

- The expression “by or under” the Constitution used in Art. 163(1) has a wide import.

COMPARISON ART.74(1) AND 163(1) :

ARTICLE 74(1) – PRESIDENT	ARTICLE 163(1) - GOVERNOR
(1) No discretion is left with the President. He is bound by ministerial advice in all his functions	Governor receives “aid and advice” from his Council of Ministers only in those functions which lie outside his ‘discretion’.
REASONING	Prima facie, the use of the word ‘discretion’ for the Governor, but not for the President, indicates that while the Constitution envisages the possibility of the Governor acting at times in his discretion, i.e., independently of the Ministers, no such possibility has been envisaged for the President. Therefore, it can be said the Governor is expected to play a somewhat more activist role than the President, and, to this extent, the Governor differs from the President.
(2) After the 42nd Constitutional Amendment enacted in 1976, ministerial advice has been made binding on the President [Art. 74(1)],	but no such provision has been made with respect to the Governor.
REASONING	Article 163(1) only says that there shall be a Council of Ministers “to aid and advise” the Governor except in so far as he acts in his discretion. Unlike Art. 74(1), Art. 163 does not bind the Governor in accordance with the advice of the Ministers even in the exercise of his non-discretionary functions. But that would hardly make a difference. The position is similar to what existed at the Centre before the amendment of Art. 74(1) in 1976 by the 42nd Constitutional Amendment. Ordinarily, therefore, the Governor acts on the advice of his Ministers except when the function is within his discretionary area.
(3) President can require the Council of Ministers to reconsider the advice given by it, and he is bound to act in accordance with the advice given after reconsideration	there is no such provision in the case of the Governor. This also indicates that a Governor may have certain functions to discharge independently of ministerial advice.
REASONING	The Governors’ Committee has clarified the position thus: “..... even though in normal conditions the exercise of the Governor’s powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may

find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently." The Constitution expressly mentions only a few functions which a Governor exercises in his discretion. As to what other functions fall within this category has been left vague and flexible; the Constitution provides no guidelines for deciding this and, in effect, the final judge of the matter is the Governor himself.

GOVERNOR'S DISCRETIONARY POWERS :

1. **GENERAL RULE :** Governor should act in accordance with aid and advice of the council of the ministers, not independently or contrary to it.
2. **EXCEPTION :** He can act in his own discretion or "by or under the constitution" in certain functions.

WHY DISCRETIONARY POWER ? a) To impartially serve as an agent of the Central Government in the state b) To serve as important link between the centre and state to maintain the unity and integrity of the country.

- **WHO DECIDES WHETHER A CERTAIN FUNCTION FALLS WITHIN HIS DISCRETION OR NOT?** Governor Himself. His decision is final.
- **CONSEQUENCE OF THIS EXCEPTION :** In the discharge of these certain functions, he is not required to seek the "aid and advice" of his Council of Ministers.
- **CAN IT BE CALLED IN THE COURT ?** The validity of any thing done by the Governor is not to be called in question on the ground that "he ought or ought not to have acted in his discretion.

Under the Constitution, there are several categories of action which the Governor may take in his discretion, viz. :

- (1) Art. 200 requires him to reserve for the President's consideration any Bill which in his opinion derogates from the powers of the High Court;
- (2) To reserve any other Bill [Art. 200];
- (3) To appoint the Chief Minister of the State;

(4) Governor's report under Art. 356;

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In all other matters, the Governor, like the President, acts on the advice of his Council of Ministers.

DISCRETIONARY POWERS OF THE GOVERNOR :

APPOINTING CHIEF MINISTER : (Art.164(1)) : The constitutional provision confers discretionary power on the Governor in the appointment of Chief Minister, which is non-justiciable.

Why ? Immunity granted to the Governor under Art. 361, therefore, he is not answerable to the Court even on the ground of *mala fides*. But the question of *mala fides* can be dealt by the president as the governor holds only during the pleasure of the president.

MAJORITY : If the party leader commands a majority support in the House, then his task becomes = mechanical + non-discretionary ; i.e., as he has to call upon the leader of the majority party to form the government.

NO MAJORITY : When no party has clear majority in the Assembly, in such a situation, the Governor's role may become crucial as he has to take a decision, after making such enquiries as he thinks proper, as to the person who will be in a position to command a majority in the Assembly and invite him to form the Government.

Eg : Haryana Governor appointed a congress man as CM. It attracted a lot of criticism as it did not enjoy majority. But CM was later able to attract a few members from other parties and thus managed a majority for himself.

SEEKING 'VOTE OF CONFIDENCE'? *Sapru Jayakar Motilal C.R. Das v. Union of India :*

At times, while appointing the Chief Minister, the Governor imposes the restriction that he should seek a vote of confidence from the House concerned. *Is it constitutional to ask because the Constitution does not specifically refer to anything like a vote of confidence.*

HELD :. The Court has invoked two constitutional features to support such a condition, viz., (1) collective responsibility of the Council of Ministers to the House; and (2) discretionary nature of the Governor's power to appoint the Chief Minister.

HOW ? Vote of confidence serves two purposes, viz. : (1) it assures the Governor that his choice of the Chief Minister was right; and (2) it satisfies the electorate that the Chief Minister enjoys majority in the Assembly.

CASE LAWS :

- the "sole and exclusive authority"³ / "acts in his sole discretion"⁴ to appoint a Chief Minister
- *the immunity of the Governor is absolute and beyond even the writ jurisdiction of the High Court*⁵
- He is the sole judge to ascertain as to who commanded the support of the majority in the Assembly".

It follows, therefore, that the right of the Governor to withdraw pleasure, during which the Ministry holds office, is absolute, unrestricted and unfettered."

(b) DISSOLVING THE HOUSE :In the question of dissolving the House some discretion has now come to be conceded to the Governor in this area. He is to take a decision to dissolve or not to dissolve the House on a consideration of the **totality of circumstances**.

REFUSE TO ACCEPT THE ADVICE > He may refuse to accept the advice of the Ministry which has lost the majority support if in his view an al to accept the advice for dissolution by a Ministry having a majority support.

Therefore, dissolution of the Assembly ought to be resorted to only as a last resort. This enhances the discretion of the Governor instead of reducing it. This also encourages the cult of defection of members from one party to another.

³ S. Dharmalingam v. His Excellency Governor of Tamil Nadu

⁴ Mahabir Prasad Sharma v. Prafulla Chandra Ghose

⁵ Jogendra Nath v. State of Assam

(c) DISMISSAL OF MINISTRY:

PRINCIPLE: As at the Centre, so in a State, the Council of Ministers is collectively responsible to the Legislative Assembly and holds office during the Governor's pleasure.

NON-CONTROVERSIAL QUESTION : When the party in power loses the majority or vote of no-confidence is passed against it : it is duty of governor to dismiss the ministry. This is not exercise of his discretionary power. Such a step vindicates the normal working of the parliamentary form of government + promotes constitutionalism + democratic norms.

Mahabir Prasad Sharma v. Prafulla Chandra Ghose : Here the Governor is not really exercising any personal discretion for the decision has already been taken by the House (that ministry lost popular support) and he is merely implementing the same.

WHEN THE QUESTION BECOMES CONTROVERSIAL : When a Ministry enjoying the majority support, however,

- acts to thwart the Constitution, or
- makes a mockery of the democratic and parliamentary institutions, or
- infringes a specific constitutional obligation, e.g., *it fails to convene the Legislature within six months of the last session, recourse may be had to the Presidential power under Art. 356.*

Should the Governor take action to dismiss the Ministry, or wait till the Assembly meets and votes the Ministry out?

Legislative Assembly can pass no confidence motion but it has no power to remove or dismiss a Ministry. If a Ministry does not vacate office, after the passage of a vote of no-confidence against it by the Assembly, **it is then for the Governor to withdraw his pleasure** during which the Ministry holds office and the discretion of the Governor is **“absolute and unrestricted”**.

- The power to appoint or dismiss the Chief Minister or the Ministry are exclusive pleasure-cum-discretion of the Governor.

- The Governor is not answerable to the Court even in respect of a charge of mala fides in connection with his official acts. The Court pointed out that as the Governor holds office during the pleasure of the President (Art. 156), the President may conceivably go into any allegation of mala fides against the Governor.

HIS DISCRETION – CANNOT BE MISUSED: This, however, is the legalistic position. In practice, the Governor must keep certain matters in view while exercising the power, the basic consideration being that the Governor is to **use his powers to promote, not to thwart, responsible government in the State.**

- Whenever a Governor takes any such action, he is bound to become the centre of a big political controversy. His action may be characterised as politically motivated. He may make an error of judgment. Not only the Governor, but the Central Government also is drawn into the vortex of political controversy. If the newly installed Ministry fails to secure majority support in the House, the Governor's action would be politically indefensible, and *he may have no other choice but to resign his office.*
- A Governor should, therefore, act with extreme care and circumspection in such a crucial matter.

All said and done, the soundest democratic convention in this regard would appear to be that, but for the extreme and exceptional situations, **the Governor may not use his discretion and wait till the Assembly gives its verdict.**

ARC RECOMMENDATION : The Administrative Reforms Commission has suggested that when a question arises as to whether the Council of Ministers enjoys majority support in the Assembly, the Governor *may suo-motu summon the Assembly to obtain the verdict if the Chief Minister does not advise him to convene the Assembly.* The Central Government has refused to endorse this suggestion.

INSTANCES: On February 21, 1998, the U.P. Governor dismissed the Kalyan Singh Government and installed in office another person (Jagdambika Pal) as the Chief Minister. The Governor's plea was that the Kalyan Singh Ministry had lost its majority in the Legislative Assembly because of defection of some of its supporters. There was no vote of no-confidence passed against the Kalyan Singh Government.

A writ petition was filed in the Allahabad High Court on February 23, 1998, challenging the action of the Governor. Following Bommai, the Allahabad High Court overturned the Governor's action, restored the Kalyan Singh Government and left it open to the Governor to convene a session of the State Legislative Assembly to prove its majority/ Then, the newly installed Chief Minister approached the Supreme Court. *The floor test was held as directed by the Supreme Court and Kalyan Singh won the day.*

It becomes clear from the above-mentioned decisions of the High Courts and the Supreme Court that the Governor's discretion to dismiss the Chief Minister is exercisable only if the Chief Minister loses his majority in the Assembly and this has to be ascertained only on the floor of the House and not in the chambers of the Governor. **It is very clear now that the Governor's pleasure is to be exercised for promotion, and not for supplanting, the democratic parliamentary system.** The Governor ought not to exercise his pleasure at his own whim and fancy but only after a floor-test in the Assembly. Thus, the Governor's discretion to dismiss the Ministry has been effectively restricted by judicial pronouncements.

WAY FORWARD :

1. The only way to reduce the occasions for the Governors to exercise their discretion is to evolve acceptable conventions to take care of various situations which arise.
2. Governor's discretionary actions may lead to uncertainty and lack of uniformity in constitutional practices as different Governors may respond differently to identical or near identical situations.
3. The Administrative Reforms Commission suggested in 1969 that some guidelines should be evolved to enable exercise of these discretionary powers by the Governor for the purpose of preserving and protecting democratic values. + to secure uniformity of action and eliminate all suspicions of partisanship or arbitrariness. The Government felt that the best course would be to allow conventions to grow up.
4. Presently it seems that **a convention has come into existence that in case of doubt whether the Ministry enjoys the confidence of the House or not, the Governor requires the Chief Minister to seek a vote of confidence from the House.**

Under an Act passed by the Haryana Legislature, the State Governor was appointed as the Chancellor of a University. In *Hardwari Lal*⁶, the High Court ruled that the Act intended that the State Government, as such, ought not to interfere in the affairs of the University, and that the State Government could not give advice to the Governor in the discharge of the functions as the Chancellor. In this capacity, the Governor acts in his discretion and not on the aid and advice of his Council of Ministers. His discretionary power can be used to deal with any unforeseen situation and to promote and protect the institution of the parliamentary form of government and not to take arbitrary decisions.

HIS DISCRETION UNDER ARTICLE 200 : As the representative of the Centre, the Governor has to serve as the eyes and ears of the Centre and so has to act in his discretion in certain matters.

- One such matter is reservation of Bills passed by the State Legislature for the assent of the President [Art. 200]. In doing so, the Governor may not always be in agreement with his Council of Ministers. The Governor may be justified to reserve a Bill for Presidential sanction, even if his Council of Ministers advises otherwise, if, in his opinion, the Bill in question would affect the powers of the Union or contravene any provision of the Constitution. Obviously, the State Ministry is not expected to tender any advice to the Governor to reserve a Bill for the Presidential assent (except when the Constitution specifically makes it obligatory to do so). The Governor will, therefore, have to exercise his discretion in the matter whether he should assent to a Bill or reserve it for President's assent. He must reserve the Bill where the Constitution stipulates President's assent.
- Under the second proviso to Art. 200, it is obligatory for the Governor to reserve a Bill for President's consideration if, in his 'opinion', if it becomes law, it will so derogate from the powers of the High Court as to endanger the position which that Court is designed to fill by the Constitution. The words 'in his opinion' are very suggestive. It suggests that the Governor has to decide the matter in his discretion. In other cases, the Governor may reserve the Bill if he thinks it to be against the larger interests of the concerned State or India as a whole.

⁶ *Hardwari Lal v. G.D. Tapase, Chandigarh*, AIR 1982 P&H 439. Also, *Kiran Babu v. State of Andhra Pradesh*, AIR 1986 AP 275.

In 1982, the Governor of Jammu and Kashmir refused to give assent to the controversial Resettlement Bill earlier passed by the Legislature and returned the Bill to the House for reconsideration. In his statement, the Governor detailed several constitutional, legal and other reasons for his not giving his assent to the Bill. He said that if he had given his assent to the Bill, it would have paved the way for a severe and grave threat to the security, integrity, solidarity and sovereignty of the country.

TO PROSECUTE CM/MINISTER : NOT HIS DISCRETION :

The Court cannot take cognizance of an offence committed by a public servant under Ss. 161, 164 and 165, I.P.C., and under the Prevention of Corruption Act, without the previous sanction of the State Government. It is the Governor who appoints the Chief Minister and he can dismiss the C.M. in his discretion.

Theoretically, the Governor appoints and can dismiss a Minister but he does so on the advice of the Chief Minister and, thus, the Governor's role in this matter is only formal or passive. Therefore, the question is whether the Governor can sanction prosecution of a Minister in his own discretion, or he should act in this matter on the advice of the Chief Minister.

In the matter of grant of sanction to prosecute a Chief Minister or a Minister the Governor is normally required to act on the aid and advice of the Council of Ministers and not in his own discretion. It is also presumed that a high authority like the Council of Ministers will normally act in a *bona fide manner, fairly, honestly and in accordance with law*.

- WHEN THERE IS CHANCE OF COM ACTING IRRATIONALLY OR WITH BIAS – HE CAN USE HIS DISCRETION : Where as a matter of propriety the Governor may have to act in his own discretion, or where bias is inherent or manifest in the advice of the Council of Ministers or, on those rare occasions where on facts the bias becomes apparent or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, **the Governor would be right to act in his own discretion and grant sanction.**
- IF COM NOT GIVES HIM THE ADVICE : Similar would be the situation if the Council of Ministers disables itself or disentitles itself from giving such advice. In

appropriate facts and circumstances, the Governor may exercise in his own discretion otherwise it would lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted.⁷

The constitutional provisions regarding the Governor's appointment, tenure, functions, etc., show that the Governor holds a dual capacity. On the one hand, he is the constitutional Head of the State and is, thus, a part of the State apparatus. On the other hand, he is the representative of the Central Government in the State and, thus, provides a link with the Centre. From this angle, the Governor's position differs from that of the President who functions merely as the constitutional Head at the Centre.

ARTICLE 167 : TO BE INFORMED ABOUT ADMINISTRATIVE DEVELOPMENTS IN THE STATES – DOES NOT GIVE POWER TO OVERRULE MINISTERIAL DECISION : Like the President, the Governor is also enabled to keep himself informed of the administrative developments in the State; and like Art. 78. Art. 167 makes corresponding provisions. Thus, the Chief Minister is obligated to communicate to the Governor all decisions of the Council of Ministers relating to the State administration and proposals for legislation [Art. 167(a)], and to furnish such other information to him as the Governor may call for regarding administration of the affairs of the State and proposals for legislation [Art. 167(b)]. Further, if the Governor so requires, the Chief Minister will submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister without reference to the Council of Ministers [Art. 167(c)].

This provision does not vest the Governor with a power to overrule a ministerial decision, but is designed to strengthen the principle of collective responsibility. It is merely a matter of caution that a decision which in the opinion of the Governor is such as requires the imprimatur of the whole Cabinet, and not of a single Minister alone, should so receive it. No individual Minister should take an important decision behind the back of his colleagues and thus bind them without their knowing anything about it.

⁷ M.P. Special Police Establishment v. State of M.P., (2004) 8 SCC 788. When the Council of Ministers takes a decision in exercise of its jurisdiction, it must act fairly and reasonably. It must not only act within the four corners of the statute but also for effectuating the purpose and object for which the statute has been enacted where the decision of the Council of Ministers was ex facie irrational and based on non-consideration of relevant matters the Governor can decide on his own discretion and grant sanction whereas the decision of the Governor was not.

If this happens very often, the principle of collective responsibility will be sapped of its vitality.

To a great extent, the Chief Minister himself should be able to manage his colleagues and enforce the important constitutional principle of collective responsibility.

The Governor's power is the last safety valve to preserve and promote that principle.

Commenting on Art. 167, the Sarkaria Commission has observed: *"The options available to the Governor under Art. 167 give him persuasive and not dictatorial powers to override or veto the decisions or proposals of his Council of Ministers relating to the administration of the affairs of the State. At best they are powers of giving advice or counselling delay or the need for caution and they are powers which may be used to build bridges between the Government and opposition."*

There is also a practical reason as to why a Governor should have a greater latitude than the President. The governments in the States have been somewhat unstable, and have often suffered from the curse of defection. The Governor acts also as the Centre's representative in the State, and while the President's rule can be imposed in a State under Art. 356, it cannot be done at the Centre where a Ministry must always remain in office. Because of these factors, it is possible to treat a Governor on a somewhat different footing than the President.

UNDER ARTICLE 356 : An important matter in which the Governor acts in his discretion is making a report to the President under Art. 356 invoking President's rule in the State because of the breakdown of the constitutional machinery therein.

- Nor can the Ministry be consulted by the Governor while making a report to the Centre under Art. 356 for the failure of the constitutional machinery in the State may be because of the conduct of the Council of Ministers itself and, therefore, the Governor must, of necessity, and in the very nature of things, exercise his own judgment in this matter.
- Then there are a large number of matters with regard to which the Centre can give directions to the States under the Constitution and presumably the Governor may be required to perform some functions under these directions.

CONFLICT : In a situation when there arises a **conflict between the Governor's roles as the Centre's representative and as the constitutional head in the State** then, undoubtedly, the former obligation should take precedence over the latter.

- This is the direct result of his being the nominee, and holding his office during the pleasure, of the Central Government.
- 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'*.
- Therefore, exercise of discretionary powers by the Governor as the Centre's representative is constitutionally justifiable.

GOVERNOR'S POSITION IN NON-DISCRETIONARY AREA : Besides the specific matters mentioned above, what is the position in matters where the Governor receives advice from his Council of Ministers. Art. 163 does not clarify the position between the Governor and his Council of Ministers in the non-discretionary area. Is the Governor bound to act on the advice of the Council of Ministers? In the opinion of the Governors' Committee, the position is as follows:

"Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice.....In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice."

The above statement assimilates the position of the Governor vis-a-vis his Council of Ministers (in the non discretionary area) to that existing between the President and his Council of Ministers under Art. 74.

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HIS MULTI-FACETED ROLE :

1. LINK-BETWEEN THE CENTRE AND THE STATE :
2. AS CONSTITUTIONAL HEAD OF THE STATE
3. AS AN AGENT OF THE CENTRE :

HOW THE GOVERNOR IS APPOINTED /NOMINATED? By president on the advice of the Prime Minister (Presidential Nomination)

QUALIFICATIONS : 35 YEARS AGE + CITIZEN OF INDIA

WHY SHOULD WE NOMINATE HIM, WHY CANNOT WE JUST ELECT HIM?

1. SURRENDER OF DEMOCRACY : If we elect the governor directly by the people ; What is point of electing the Chief Minister (CM) by the people? Wouldn't this amount surrender of Parliamentary Democracy?
2. MONEY FOR ELECTION : The Governor being only a symbol, a figurehead, there would be no point in spending money in having him elected.
3. PROVINCIAL BIAS : If he's elected for a province, he may show separatist provincial (provincial bias) tendency instead of promoting all-India Unity.

REMOVAL OF THE GOVERNOR . 2011 UPSC.

As per Article 155 and Article 156 of the Constitution, a Governor of a state is an appointee of the President, and he or she holds office "during the pleasure of the

President". If a Governor continues to enjoy the "pleasure of the President", he or she can be in office for a term of five years. "Pleasure of the President" merely refers to this will and wish of the central government.

DOCTRINE OF PLEASURE : ENGLAND VIS-À-VIS INDIA : ENGLAND : Holder of an office can be removed without any reason. But where the rule of law + "fundamentals of constitutionalism" in Indian constitutions restricts its operation.

B.P. Singhal v. Union of India : President can remove governor without giving him any reason or notice. Can be exercised in **rare and exceptional circumstances** for valid and compelling reasons (sickness/death) (Not because of his sync out of politics, confidence etc). But if the such removal is **arbitrary, capricious or unreasonable manner**, then it will be subject to **Limited** Judicial Review. Limited means that onus is on the governor, who has been removed, to prove that his removal arbitrary, mala fide, capricious or whimsical.

Recommendations of Various Commissions : Three important commissions have examined this issue.

The *Sarkaria Commission (1988)* + *Venkatachaliah Commission (2002)* : recommended that Governors must not be removed before completion of their five year tenure, except in rare and compelling circumstances.

The *Punchhi Commission (2010)* deleted the 'pleasure of president' part + he or she should be removed only by a resolution of the state legislature.

The above recommendations however were never made into law by Parliament.

Therefore, they are not binding on the central government.

DISCRETIONARY POWERS OF GOVERNOR : 2006 UPSC.

Article 163 of the Constitution says, "There shall be a Council of Ministers with the Chief Minister as 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."

Article 163(2) says, "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.”

- **‘AID AND ADVISE THE GOVERNOR’** : The implication of Art. 163(1) is that in the exercise of his **discretionary powers**, the Governor does not have to seek ministerial advice. Governor’s discretionary functions thus lie outside the area of ministerial responsibility.
- The expression “by or under” the Constitution used in Art. 163(1) has a wide import.

COMPARISON ART.74(1) AND 163(1) :

ARTICLE 74(1) – PRESIDENT	ARTICLE 163(1) - GOVERNOR
(1) No discretion is left with the President. He is bound by ministerial advice in all his functions	Governor receives “aid and advice” from his Council of Ministers only in those functions which lie outside his ‘discretion’.
(2) After the 42nd Constitutional Amendment enacted in 1976, ministerial advice has been made binding on the President [Art. 74(1)],	but no such provision has been made with respect to the Governor.
(3) President can require the Council of Ministers to reconsider the advice given by it, and he is bound to act in accordance with the advice given after reconsideration	there is no such provision in the case of the Governor. This also indicates that a Governor may have certain functions to discharge independently of ministerial advice.

GOVERNOR’S DISCRETIONARY POWERS :

1. **GENERAL RULE** : Governor should act in accordance with aid and advice of the council of the ministers, not independently or contrary to it.
 2. **EXCEPTION** : He can act in his own discretion or “by or under the constitution” in certain functions.
- **WHO DECIDES WHETHER A CERTAIN FUNCTION FALLS WITHIN HIS DISCRETION OR NOT?** Governor Himself. His decision is final.

- CONSEQUENCE OF THIS EXCEPTION : In the discharge of these certain functions, he is not required to seek the “aid and advice” of his Council of Ministers.
- CAN IT BE CALLED IN THE COURT ? The validity of any thing done by the Governor is not to be called in question on the ground that “he ought or ought not to have acted in his discretion.

Under the Constitution, there are several categories of action which the Governor may take in his discretion, viz. :

1. Art. 200 requires him to reserve for the President’s consideration any Bill which in his opinion derogates from the powers of the High Court;
2. To reserve any other Bill [Art. 200];
3. To appoint the Chief Minister of the State;
4. Governor’s report under Art. 356;
5. Governor’s responsibility for certain regions such as the Tribal Areas in Assam and responsibilities placed on the Governor’s shoulders under Arts. 371A, 371C, 371E, 371H

DISCRETIONARY POWERS OF THE GOVERNOR :

APPOINTING CHIEF MINISTER : (Art.164(1)) : The constitutional provision confers discretionary power on the Governor in the appointment of Chief Minister, which is non- justiciable.

Why ? Immunity granted to the Governor under Art. 361, therefore, he is not answerable to the Court even on the ground of *mala fides*. But the question of *mala fides* can be dealt by the president as the governor holds only during the pleasure of the president.

NO MAJORITY : When no party has clear majority in the Assembly : after making such enquiries as he thinks proper, as to the person who will be in a position to command a majority in the Assembly and invite him to form the Government.

SEEKING ‘VOTE OF CONFIDENCE’? *Sapru Jayakar Motilal C.R. Das v. Union of India* :

At times, while appointing the Chief Minister, the Governor imposes the restriction that he should seek a vote of confidence from the House concerned. *Is it constitutional to ask because the Constitution does not specifically refer to anything like a vote of confidence.*

HELD :. The Court has invoked two constitutional features to support such a condition, viz., (1) collective responsibility of the Council of Ministers to the House; and (2) discretionary nature of the Governor's power to appoint the Chief Minister.

CASE LAWS :

- the "sole and exclusive authority"¹ / "acts in his sole discretion"² to appoint a Chief Minister
- *the immunity of the Governor is absolute and beyond even the writ jurisdiction of the High Court*³
- He is the sole judge to ascertain as to who commanded the support of the majority in the Assembly".

(b) DISSOLVING THE HOUSE :In the question of dissolving the House some discretion has now come to be conceded to the Governor in this area. He is to take a decision to dissolve or not to dissolve the House on a consideration of the **totality of circumstances**. REFUSE TO ACCEPT THE ADVICE > He may refuse to accept the advice of the Ministry which has lost the majority support if in his view an al to accept the advice for dissolution by a Ministry having a majority support. Therefore, dissolution of the Assembly ought to be resorted to only as a last resort.

(c) DISMISSAL OF MINISTRY:

When a Ministry enjoying the majority support, however,

- acts to thwart the Constitution, or
- makes a mockery of the democratic and parliamentary institutions, or
- infringes a specific constitutional obligation, e.g., *it fails to convene the Legislature within six months of the last session, recourse may be had to the Presidential power under Art. 356.*

Should the Governor take action to dismiss the Ministry, or wait till the Assembly meets and votes the Ministry out?

¹ S. Dharmalingam v. His Excellency Governor of Tamil Nadu

² Mahabir Prasad Sharma v. Prafulla Chandra Ghose

³ Jogendra Nath v. State of Assam

Legislative Assembly can pass no confidence motion but it has no power to remove or dismiss a Ministry. If a Ministry does not vacate office, after the passage of a vote of no-confidence against it by the Assembly, **it is then for the Governor to withdraw his pleasure** during which the Ministry holds office and the discretion of the Governor is **“absolute and unrestricted”**.

- The power to appoint or dismiss the Chief Minister or the Ministry are exclusive pleasure-cum-discretion of the Governor.

HIS DISCRETION – CANNOT BE MISUSED: This, however, is the legalistic position. In practice, the Governor must keep certain matters in view while exercising the power, the basic consideration being that the Governor is to **use his powers to promote, not to thwart, responsible government in the State.**

It becomes clear from the above-mentioned decisions of the High Courts and the Supreme Court that the Governor’s discretion to dismiss the Chief Minister is exercisable only if the Chief Minister loses his majority in the Assembly and this has to be ascertained only on the floor of the House and not in the chambers of the Governor. **It is very clear now that the Governor’s pleasure is to be exercised for promotion, and not for supplanting, the democratic parliamentary system.**

HIS DISCRETION UNDER ARTICLE 200 : One such matter is reservation of Bills passed by the State Legislature for the assent of the President [Art. 200]. The Governor may be justified to reserve a Bill for Presidential sanction, even if his Council of Ministers advises otherwise, if, in his opinion, the Bill in question would affect the powers of the Union or contravene any provision of the Constitution. He must reserve the Bill where the Constitution stipulates President’s assent.

TO PROSECUTE CM/MINISTER : NOT HIS DISCRETION : In the matter of grant of sanction to prosecute a Chief Minister or a Minister the Governor is normally required to act on the aid and advice of the Council of Ministers and not in his own discretion. It is also presumed that a high authority like the Council of Ministers will normally act in a *bona fide manner, fairly, honestly and in accordance with law.*

- WHEN THERE IS CHANCE OF COM ACTING IRRATIONALLY OR WITH BIAS – HE CAN USE HIS DISCRETION :

ARTICLE 167 : TO BE INFORMED ABOUT ADMINISTRATIVE DEVELOPMENTS IN THE STATES – DOES NOT GIVE POWER TO OVERRULE MINISTERIAL DECISION : Like the President, the Governor is also enabled to keep himself informed of the administrative developments in the State; and like Art. 78. Art. 167 makes corresponding provisions. Thus, the Chief Minister is obligated to communicate to the Governor all decisions of the Council of Ministers relating to the State administration and proposals for legislation [Art. 167(a)], and to furnish such other information to him as the Governor may call for regarding administration of the affairs of the State and proposals for legislation [Art. 167(b)]. Further, if the Governor so requires, the Chief Minister will submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister without reference to the Council of Ministers [Art. 167(c)].

UNDER ARTICLE 356 : An important matter in which the Governor acts in his discretion is making a report to the President under Art. 356 invoking President's rule in the State because of the breakdown of the constitutional machinery therein.

CONFLICT : In a situation when there arises a **conflict between the Governor's roles as the Centre's representative and as the constitutional head in the State** then, undoubtedly, the former obligation should take precedence over the latter.

- This is the direct result of his being the nominee, and holding his office during the pleasure, of the Central Government.
- 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'*.
- Therefore, exercise of discretionary powers by the Governor as the Centre's representative is constitutionally justifiable.

GOVERNOR'S POSITION IN NON-DISCRETIONARY AREA : Besides the specific matters mentioned above, what is the position in matters where the Governor receives advice from his Council of Ministers. Art. 163 does not clarify the position between the Governor and his Council of Ministers in the non-discretionary area. Is the Governor bound to act on the advice of the Council of Ministers? In the opinion of the Governors' Committee, the position is as follows:

“Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice.....In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice.”

The above statement assimilates the position of the Governor vis-a-vis his Council of Ministers (in the non discretionary area) to that existing between the President and his Council of Ministers under Art. 74.