

REASSESSING THE ROLE OF THE RAJPRAMUKH: AN ANALYSIS OF THE CONTINUING RELEVANCE OF THE GOVERNOR'S POSITION

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Beginning with the Constituent Assembly, the issue of gubernatorial discretion has often invited great debate, which has only intensified over time. In this paper, we attempt to identify the need to continue with the position of the Governor as the Centre-appointed Head of the state. Considering that the debates in this field remain highly polarised even today, we trace the trajectory of the Constituent Assembly Debates regarding the creation of the post of the Governor, so as to examine what this position was envisaged to entail. Further, we revisit the controversies surrounding the exercise of 'gubernatorial discretion', and analyse the Supreme Court's decisions emphasising the limits to the same, as well as the recommendations of the Sarkaria and Punchhi Commissions on Centre-State relations. Our analysis culminates in a discussion regarding the ultimate utility of retaining this position in the future in light of the recent political developments. We seek to espouse a fresh perspective towards understanding the continued relevance and significance of this office, and aim to provide holistic suggestions for maintaining its apolitical mandate, as conceived by the Founding Fathers of India and as manifested in the text of our Constitution.

I. INTRODUCTION

The continued relevance of the position of the Governor was the subject of a renewed debate at the recently concluded meeting of the Inter-State Council – a largely dormant body which was originally created with a view to promote cooperation between the Centre and the states.¹ The meeting, conducted in mid-July last year, allowed the states to voice their grievances before the Centre, demanding greater inclusion in governance.² A number of issues

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¹ Livemint, *FAQ on the Inter-State Council Meeting*, July 16, 2016, available at <http://www.livemint.com/Politics/HCyw491QuV6gOydcMIVuO/FAQ-on-the-inter-state-council-meeting.html> (Last visited on May 2, 2017).

² *Id.*

were raised on behalf of the states, prominent among which was the demand made by the Chief Minister of Bihar, Mr. Nitish Kumar, for the removal of the post of the Governor.³ This suggestion, though not completely novel, set the proverbial cat amongst the pigeons and reopened the debate over the relevance of the Governor's position within the Indian polity.

Beginning with the Constituent Assembly, the issue of gubernatorial discretion has often engendered public discourse, which has only intensified over time. While this position was created by the Central Government to monitor the working of the states, the wide discretionary powers granted to the Governor, and the misuse thereof, were among the chief reasons for the establishment of the Sarkaria Commission on Centre-State relations ('Sarkaria Commission') in the 1980s.⁴ The dismissal of several 'belligerent' state governments through the Governor's report, and the consequent imposition of President's rule in the states, led to huge public outcry in the past, with allegations being raised about the Governor acting as the 'agent of the Central Government' in destabilising democratically elected governments in these states.⁵ The Supreme Court has time and again iterated the need for greater restraint on part of the Governor in exercising the power to report 'the breakdown of constitutional machinery'.⁶

At present, the position of the Governor has been reduced to a retirement package for aging politicians, and political considerations have come to trump the constitutional requirements of an appointed (as opposed to 'elected') Head of the state.⁷ The continuing tradition of Governors being routinely changed with a change in the Central Government has brought into

³ The Times of India, *Bihar CM Nitish Kumar Seeks Abolition of Governor's Post*, July 16, 2016, available at <http://timesofindia.indiatimes.com/city/patna/Bihar-CM-Nitish-Kumar-seeks-abolition-of-governors-post/articleshows/53243678.cms> (Last visited on May 2, 2017).

⁴ SARKARIA COMMISSION ON CENTRE-STATE RELATIONS, *Role of Governor*, Chapter 4 115-138 (1988), available at <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf> (Last visited on May 2, 2017) ('Sarkaria Commission').

⁵ In recent times, instances of gubernatorial misconduct have led to wrongful dismissal of a number of state governments. Several of these decisions, based on the reports by their respective Governors, have reopened the issue of politicisation of the Governor's post. See generally Hindustan Times, *When Governors Play Politics: From Uttarakhand to Arunachal Pradesh*, July 14, 2016, available at <http://www.hindustantimes.com/india-news/when-Governors-play-politics-from-uttarakhand-to-arunachal-pradesh/story-sIJJQg3SYOqqvn8MwHA3YO.html> (Last visited on May 24, 2017); The Indian Express, *The Governors and their Role, Once Again at the Centre of Things*, February 3, 2016, available at <http://indianexpress.com/article/explained/the-Governors-and-their-role-once-again-at-the-centre-of-things/> (Last visited on May 20, 2017).

⁶ V.N. SHUKLA, CONSTITUTION OF INDIA 131 (M.P. Singh, 4th ed., 2008); *State of Rajasthan v. Union of India*, (1977) 3 SCC 592; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

⁷ *Id.*; See also Rajni Goyal, *The Governor: Constitutional Position and Political Reality*, 53 INDIAN J. POL. SCI. 505-523 (1992); The Indian Express, *Laying a High Office Low*, August 10, 2016, available at <http://indianexpress.com/article/opinion/columns/state-Governors-rule-article-356-emergency-uttarakhand-arunachal-pradesh-2964470/> (Last visited on May 16, 2017).

question the neutrality and transparency of this office. Despite the recent affirmation by the Supreme Court of a secure tenure for the Governor in *B.P. Singhal v. Union of India* ('B.P. Singhal'),⁸ contentious questions remain.⁹

In this paper, we attempt to identify the need to continue with the position of the Governor as the Centre-appointed Head of the state. In Part II of the paper, we undertake a brief overview of the Constituent Assembly Debates regarding the creation of this post. In Part III, we examine the controversies surrounding the exercise of 'gubernatorial discretion', and trace the trajectory of Supreme Court judgments regarding the limits to the same, so as to present a clearer picture of the jurisprudential developments in this discourse. In Part IV, we revisit the recommendations of the Sarkaria Commission and the Punchhi Commission on Centre-State Relations ('Punchhi Commission'),¹⁰ through the lens of the foregoing analysis in Parts II and III. The aim of this overview is to identify the strengths and lacunae imbricate in these recommendations, and to provide further recommendations conducive to upholding the apolitical mandate of the gubernatorial position, as was originally envisaged by the Founding Fathers of India, and as is manifested in the text of the Constitution. This analysis culminates in a discussion regarding the ultimate utility of retaining this position in the future, in light of recent political and legal developments. In Part V of the paper, we sum up our key conclusions and suggestions.

II. CONSTITUENT ASSEMBLY DEBATES REGARDING THE POST OF GOVERNOR

Any discussion regarding the position and responsibilities of the Governor would gain useful perspective by revisiting the Constituent Assembly Debates on this issue. An analysis of these debates illustrates how the Chamber was sharply divided on multifarious issues – from the appointment of the Governor, to the discretion available to her. They also underline the Assembly's reasoning behind retaining this position, which some criticised was a relic of a colonial past, and how the members differentiated the roles and responsibilities of the President from that of the Governor, both of which

⁸ *B.P. Singhal v. Union of India*, (2010) 6 SCC 331 (The Supreme Court held that although the Constitution empowers the Central Government, acting through the President, to remove a Governor without providing any cause, such a power cannot be exercised in an arbitrary, capricious or unreasonable manner, and any such decision providing for the removal of the Governor can be the subject of judicial review.); See generally PRS BLOG, *Removal of Governor: What Does the Law Say?*, available at <http://www.prsindia.org/theprsblog/?p=3286> (Last visited on April 8, 2017).

⁹ The Times of India, *supra* note 3.

¹⁰ PUNCHHI COMMISSION ON CENTRE-STATE RELATIONS, *Report on Constitutional Governance and the Management of Centre-State Relations*, Vol. 2 53-89 (March, 2010), available at <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume2.pdf> (Last visited on May 5, 2017) ('Punchhi Commission').

otherwise seem analogous in several respects upon a plain reading of the final adopted text of the Constitution.

Intense debate ensued within the Constituent Assembly on the subject of the Governor's position. Prominent parliamentarians rose to speak on this issue which was discussed in sufficient detail. Central to these discussions was the mode of appointment of the Provincial Governor – whether it was to be an elected post or a nominated one. While some contended that an 'elected' Head would be in consonance with the democratic ideals that the Constitution seeks to establish,¹¹ the majority were convinced that the position of the Governor needs to stand distinct from that of the Chief Minister, who would be the leader of the elected government in the state, and as such, be responsible for the running of the government.¹²

The Governor, nominated by the Centre, was envisaged to ensure cooperation between the Centre and the state; and though as per Draft Article 130, the executive authority would vest in him, he would stay distant from the regular governance of the state, leaving it to the elected representatives of the concerned legislative assembly and Council of Ministers to be the final arbiters on questions of policy.¹³

The other concern, which was contested to a far greater extent and invoked passionate argumentation from both sides, pertained to the

¹¹ CONSTITUENT ASSEMBLY DEBATES, May 31, 1949, Vol. VIII, *speech by B.R. AMBEDKAR*, ¶112, available at http://cadindia.clpr.org.in/article/AVsOrOp67SXahlyw4hQO--constituent-assembly-of-india-Vol.-viii?main_query=Governor%2Celection%20of%20Governor%2CAmbedkar&p=111 (Last visited on May 1, 2017) (Shibban Lal Saksena, Sardar Hukam Singh and Rohini Kumar Chaudhury, amongst others, spoke in favour of an elected Governor, though they differed on the question of modality of such election, viz. election through adult suffrage and election through a panel. B.R. Ambedkar himself was initially in favour of an elected Governor. However, after contemplating upon the extra cost to the exchequer this method would entail, he accepted the argument for nomination and stated:

“[...] if we are going to have a Governor, who is purely ornamental, is it necessary to have such a functionary elected at so much cost and so much trouble? It was because of this feeling that the Drafting Committee felt that they should suggest a second alternative [...]. If the Governor is a purely constitutional Governor with no more powers than what we contemplate expressly to give him in the Act, and has no power to interfere with the internal administration of a Provincial Ministry, I personally do not see any very fundamental objection to the principle of nomination.”

¹² CONSTITUENT ASSEMBLY DEBATES, May 31, 1949, Vol. VIII, *speech by K.M. MUNSHI*, ¶46, available at http://cadindia.clpr.org.in/article/AVsOrOp67SXahlyw4hQO--constituent-assembly-of-india-Vol.-viii?main_query=Governor%2Celection%20of%20Governor&p=62 (Last visited on May 25, 2017) (Jawaharlal Nehru, K.M. Munshi and others built the case for an 'appointed' Head of the state, borrowing the accepted practice in the majority of countries across the world. K.M. Munshi stated: “A very large number of members have come to the conclusion both from the constitutional point of view as well as from the point of view of the country as a whole that the Governor should be nominated person.”).

¹³ See CONSTITUENT ASSEMBLY DEBATES, May 31, 1949, Vol. VIII, *speech by P.K. SEN*, ¶12, available at <http://cadindia.clpr.org.in/constituent-assembly-debates/VIII/1949-05-31> (Last visited on May 2, 2017).

discretionary powers of the Governor, as enshrined in the draft Constitution. For instance, H.V. Kamath, S.L. Saxena, and Pt. Hriday Nath Kunzru raised numerous objections regarding the implications of such provisions.¹⁴ Kamath attempted to introduce an amendment to curtail the powers of the Governor by deleting the clause “except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion” from the wordings of the Draft Article 143,¹⁵ effectively making it binding upon the Governor to act strictly in accordance with the advice of the Council of Ministers.

Broadly, the concerns raised by the opponents of gubernatorial discretion were as follows.¹⁶ *First*, that the position of the Governor being ceremonial, as the nominated head of state, and not an elected one, the proposal of giving him powers beyond the ceremonial was ill-conceived.¹⁷ *Second*, while some felt that this was a mere duplication of the position of the Governor under the British Rule, and resented the continuance of the practice,¹⁸ others argued that since it is a nominated office, the Governor should not hold discretionary powers, especially in a set up where the President was given no similar powers to act autonomously.¹⁹ Further, and most importantly, the possibility of the Governor overstepping his limitations and conventional practices, while exercising his discretion, was too grave to ignore;²⁰ and it would be undemocratic to vest the Governor with the power to waive the advice of ministers, who are appointed through direct election by the people – the ultimate sovereign.²¹

In response to these queries, and especially in the context of the proposed amendment, T.T. Krishnamachari of the Drafting Committee stated

¹⁴ *Id.*

¹⁵ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by H.V. KAMATH*, available at <http://parliamentofindia.nic.in/ls/debates/vol8p13a.htm> (Last visited on May 2, 2017).

¹⁶ See CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, available at <http://cadindia.clpr.org.in/> (Last visited on May 2, 2017).

¹⁷ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by ROHINI CHAUDHURY* ¶64, available at http://cadindia.clpr.org.in/article/AVsOrHu07SXahIyw4fvv--constituent-assembly-of-india-Vol.-viii?main_query=Governor%20discretion&p=64 (Last visited on May 8, 2017).

¹⁸ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by SHIBBAN LAL SAKSENA*, ¶42, available at http://cadindia.clpr.org.in/article/AVsOrHu07SXahIyw4fvv--constituent-assembly-of-india-Vol.-viii?main_query=Governor%20discretion&p=52 (Last visited on May 11, 2017).

¹⁹ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by B.M. GUPTA*, ¶103, available at http://cadindia.clpr.org.in/article/AVsOrEnQ7SXahIyw4fDB--constituent-assembly-of-india-debates-proceedings-Vol.-xi?main_query=Governor%20discretion&p=103 (Last visited on April 15, 2017).

²⁰ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by H.V. KAMATH*, ¶25, available at http://cadindia.clpr.org.in/article/AVsOrHu07SXahIyw4fvv--constituent-assembly-of-india-Vol.-viii?main_query=Governor%20discretion&p=52 (Last visited on May 11, 2017).

²¹ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by Pt. HRIDAY NATH KUNZRU*, ¶38, available at http://cadindia.clpr.org.in/article/AVsOrHu07SXahIyw4fvv--constituent-assembly-of-india-Vol.-viii?main_query=Governor%20discretion&p=52 (Last visited on May 6, 2017).

that the scope of exercise of gubernatorial discretion was limited to specific circumstances, all of which were enumerated within other provisions of the Draft Constitution, especially under Articles 175 and 188.²² He also distinguished the role of the President from that of the Governor, indicating that the Governor's responsibilities, as the representative of the Centre in the state, were far more intrinsic to the effective functioning of the federal government.²³ Alladi Krishnaswamy Ayyar, another prominent member of the Drafting Committee, suggested that the Draft Article 143 be accepted verbatim, since there remained a number of circumstances where the role of the Governor assumed importance – especially during transition between governments, and in case of breakdown of the constitutional machinery in a state.²⁴

It is interesting to note in this context that the Draft Article which assigned discretionary powers to the Governor was reproduced without modification from §50 of the erstwhile Government of India Act, 1935.²⁵ The responsibilities of the Governor as envisaged by the Act of 1935, however, was sharply in contrast with what the Draft Article provided. This apparent anomaly was commented on by Brajeshwar Prasad, who argued that the exact reproduction of this provision paid unnecessary obeisance to the vestiges of a colonial past. Ironically, he, along with a number of other members such as Mahavir Tyagi, advocated for even broader powers to be granted to the Governor.²⁶ These members of the Constituent Assembly were of the opinion that since there is no debate over the creation of the position itself, the lack of sufficient powers

²² CONSTITUENT ASSEMBLY DEBATES, May 31, 1949 Vol. VIII, *speech by* T.T. KRISHNAMACHARI, ¶¶76-77, available at <http://cadindia.clpr.org.in/constituent-assembly-debates/VIII/1949-05-31> (Last visited on May 2, 2017). It is interesting to note that neither of these Articles were accepted unchanged in the final text of the Constitution. Draft Article 175 referred to the Governor's power to return a bill for reconsideration by the Assembly. This was amended by Dr. Ambedkar and incorporated as the present Article 200 of the Constitution, which allows the Governor to withhold his assent to a bill for consideration by the President. Draft Article 188, which allowed the Governor to assume control of the state government for a fortnight, in case of a 'grave emergency', was deleted. *See generally* SIBRANIAN CHATTERJEE, GOVERNOR'S ROLE IN THE INDIAN CONSTITUTION 48-49 (1992).

²³ *Id.*

²⁴ CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, June 1, 1949, *speech by* ALLADI KRISHNASWAMY AYYAR, ¶¶47-50, available at http://cadindia.clpr.org.in/article/AVsOrHu07SXahIyw4fvv--constituent-assembly-of-india-Vol.-viii?main_query=Governor%20discretion&p=52 (Last visited on May 27, 2015).

²⁵ The Government of India Act, 1935, §50. The said section provided that the Governor of each province was to act upon the advice of the ministers, except where the Act empowered him to act upon his discretion and such discretion was of substantial width. This apart, in case of dispute about whether or not a matter was the subject of the Governor's independent authority, his own decision would be final, and would be beyond any review. Thus, the aims and objects of §50, a portion of which was reproduced verbatim in the Draft Constitution, was to ensure that the Governor had overarching discretion in several administrative matters relating to the provinces, which was a far cry from the responsible exercise of discretion the Founding Fathers seemed to expect from his Indian counterpart.

²⁶ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, *speech by* BRAJESHWAR PRASAD, ¶¶34-36, available at <http://cadindia.clpr.org.in/constituent-assembly-debates/VIII/1949-06-01> (Last visited on May 2, 2017).

in this office would render the position of the Governor redundant. However, as indicated by Krishnamachari in his defence of the provisions, the Governor was to be tasked with the maintenance of a uniform chain of governance and was expected to be a crucial linkage between the Central and the provincial governments within the federal structure. Thus, the Governor was envisioned to act as the agent of the Centre in the states, so as to oversee the implementation of the Centre's policy objectives within his respective territorial jurisdiction.²⁷

In light of the above discussion, it is clear that the Founding Fathers were by no means of one mind with regard to the issue of gubernatorial discretion. However, naturally, these debates find little reflection in the final adopted text of the Constitution, which contains the provision for a nominated Head of the state acting as an agent of the Centre in the provinces, who has been reposed with considerable discretion of his own, albeit in certain defined spheres. Notwithstanding the intent to restrict the exercise of gubernatorial discretion, one has to look through the chequered development of these provisions to find evidence that some of the Assembly's prominent members had already foreseen the possibility of misuse of the powers vested in the Governor.

Nevertheless, it is imperative to bear in mind the tumultuous political atmosphere of the subcontinent in the wake of the Partition of India, in order to comprehend the rationale behind adopting a structure based on the centralisation of political control in the hands of the Union. In fact, this concern is a theme that permeates through most of the Constitutional provisions. The overwhelming urge to preserve the unity and integrity of the nation is an extrapolation of that sentiment alone, which would certainly have influenced many, if not all, the members of the Assembly.²⁸ In the words of Brajeshwar Prasad:

“Unless the Governor is vested with large powers it will be difficult to effect any improvement in the Provincial administration. Such a procedure may be undemocratic but such a procedure will be perfectly right in the interest of the country [...] I feel that at this juncture it is necessary that all powers should remain centralized in the hands of the Government of India.”²⁹

The tenor of these debates thus seems to indicate the Constituent Assembly's unstated preoccupation with the maintenance of the unity and

²⁷ *Id.*; See Livemint, *Governors in Indian States: A Colonial Imprint*, March 24, 2017, available at <http://www.livemint.com/Opinion/VcN0T1WVITs4STIW7Z9cuN/Governors-in-Indian-states-A-colonial-imprint.html> (Last visited on May 2, 2017).

²⁸ *Id.*

²⁹ CONSTITUENT ASSEMBLY DEBATES, June 1, 1949, Vol. VIII, *speech by BRAJESHWAR PRASAD*, ¶36, available at <http://cadindia.clpr.org.in/constituent-assembly-debates/VIII/1949-06-01> (Last visited on May 2, 2017).

integrity of a young nation, still reeling from the wounds of Partition. It cannot be forgotten that while imparting greater autonomy to the individual units is wholly welcome within a federal structure, history demonstrates that in India, it was not the states which came together to form a central government, as was the case with the United States of America. On the contrary, it was the Centre that took the initiative of consolidating and carving out separate identities for the states within the Union. The opportunity cost of allowing greater independence to the states was believed to be, at the time, an incentive to a demand for cessation. Thus, preservation of this unified nation was considered pre-eminent among the concerns in the early days of the Republic.³⁰

While such considerations would seem justified in the backdrop of a nascent republic, subsequent changes to the socio-political order mandate a relook into the issue of whether the position of the Governor, with its seemingly unfettered discretionary powers to destabilise elected state governments, should be retained in the Indian polity in the present times. Some of the issues which plagued the Constituent Assembly, charged with the monumental task of creating a lasting constitution for a diverse people, still continue to be at the epicentre of the controversy. Thus, the issues relating to the appointment of provincial Governors, the security of their tenure, and most importantly, the use of their discretion, need to be re-evaluated, which we seek to do in the next Part of this paper.

III. CONTROVERSIES RELATING TO THE GUBERNATORIAL DISCRETION

A. *THE THREE-PRONGED PROBLEM: APPOINTMENT, TENURE AND DISCRETION*

The discourse and deliberations surrounding the use of gubernatorial discretion have prevailed for decades. The Constitution, under Article 163, recognises the discretionary powers of the Governor. While the Governor is required to act in accordance with the aid and advice of the Council of Ministers, he is expressly exempt in cases requiring the exercise of his discretion. In this regard, his discretionary capacity stands at a higher pedestal than that of the

³⁰ *Id.*, ¶84 (Brajeshwar Prasad, B.H. Zaidi and others commented on the requirement for maintaining a strong Central control in order to curtail any separatist tendencies on part of the provinces. Zaidi warned against being ‘too democratic’ in approach and stated:

“What has been the trouble in our country in the past? Have we or have we not suffered from fissiparous tendencies? Have the various units not tried to break away from the Centre again and again? The greatest danger, as I dimly look into the future, may be, not that the Centre will interfere too much, but that the units may resent the guidance of the Centre. Of the two things, I do not believe that the President, will be inclined to depose Governors, but that Provinces may have mal-administration over a long period and may come to grief over it unchecked by the Centre.”)

President. The use of the President's powers are subject to the Government's consent; and beyond the ceremonial, these powers mostly emanate from constitutional conventions rather than constitutional provisions. Thus, under Article 74(1), the President is bound by the aid and advice of his ministers, which makes no allowances for the exercise of 'independent judgement'.³¹

In *Shamsher Singh v. State of Punjab*,³² Krishna Iyer J. observed:

"It is clear from A[rticle] 74(1) that it is the function of the Council of Ministers to advise the President over the whole of the Central field. Nothing is left to his discretion or excepted from that field by this article. By way of contrast, see A[rticle] 163 which is the corresponding provision for Governors and which expressly excepts certain matters in which the Governor is, by or under the constitution, required to act it (*sic.*) his discretion. There is no such exception in the case of the President."³³

Broadly speaking, the Governor is required to exercise his discretion in the following cases as envisaged by the Constitution³⁴ – in the appointment of the Chief Minister, and upon his advice, the Council of Ministers under Article 164(1); in referring a bill to the President for his consideration under Article 200; in granting pardons or commutation of sentences under Article 161; and in sending the Governor's report for imposition of emergency under Article 356. The most contentious issue relating to these powers of the Governor is the role of his office in the proclamation of state emergency or President's rule under Article 356.

The Governor, in pursuance of his powers under Article 356, submits a report to the President on the 'breakdown of constitutional machinery in the state', when convinced that the administration of a state cannot be carried out in accordance with the provisions of the Constitution. Upon receipt of this report, the President may then, on the aid and advice of the Council of Ministers, impose direct rule, *i.e.* President's Rule.³⁵ This proclamation must be ratified by both the Houses of the Parliament; otherwise, it automatically expires in two months. Once ratified, the proclamation continues for a period of six months.³⁶

³¹ Tejas Popat, *Article 74: Filling the Void*, LAW AND OTHER THINGS, October 8, 2016, available at <http://lawandotherthings.com/2016/10/article-74-filling-void/> (Last visited on May 2, 2017).

³² *Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831.

³³ *Id.*, at 981.

³⁴ SHUKLA, *supra* note 6, 131, 233.

³⁵ The Constitution of India, Art. 356.

³⁶ *Id.*

Naturally, the possibility, and indeed the practice, of misusing this report as a means for dismissing popularly elected governments in the states, has led to substantial differences regarding the propriety of such a provision. While the states argue that such a practice undermines the integrity of the federal structure, the Union Government considers the same as a check on the functioning of the state governments, which is necessary to ensure compliance with constitutional principles by the states.³⁷

The related issue of appointment of Governors has also witnessed highly polarised debates. While the Governors are formally appointed by the President, the alleged politicisation of this process, owing to their selection at the behest of the Centre, has been widely criticised.³⁸ Past trends indicate that these positions are frequently allocated to ex-politicians with strong ties to the Central Government, which consequently makes these Heads of the states beholden to their political masters.³⁹ The friction between the Central and the state governments, which has become the order of the day since the inception of coalition politics and the rise of regional political parties, is disturbingly 'resolved', on more than a few occasions, by the dismissal of state governments through the application of Article 356.⁴⁰ Thus, the role and independence of the office of the Governor is called into question several times, especially due to the proliferation of political appointees.⁴¹

The independence of Governors is further compromised due to the lack of a secure tenure. The Governor holds office upon the 'pleasure of the President',⁴² which implies that he may be removed from office wilfully by the Cabinet which can easily prevail upon the President, who is bound by its advice. Such a framework therefore incentivises pliant conduct on the part of even apolitical Governors, as they strive to preserve their positions.⁴³

Attempts to define the limits of gubernatorial discretion were made by the Supreme Court in a number of celebrated judgements. An analysis of this body of jurisprudence helps in gaining a holistic view of the myriad developments in this discourse, and in examining the relevance of the Governor's role in the contemporary era.

³⁷ See generally The Hindu, *Governor More Than a Symbol*, July 20, 2004, available at <http://www.thehindu.com/op/2004/07/20/stories/2004072000121600.htm> (Last visited on March 5, 2017); DNA India, *Governor's Role under Discussion at ISC Standing Council Meet*, April 9, 2017, available at <http://www.dnaindia.com/india/report-guvs-role-under-discussion-at-isc-standing-committee-meet-2391663> (Last visited on March 5, 2017); See also GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: THE CORNERSTONE OF A NATION* 145 (1996) (gives a historical analysis of the general dissatisfaction of states).

³⁸ Hindustan Times, *supra* note 5.

³⁹ *Id.*

⁴⁰ Livemint, *supra* note 27.

⁴¹ *Id.*

⁴² The Constitution of India, Art. 156(1).

⁴³ *Supra* note 3.

B. MAPPING THE TRAJECTORY OF THE SUPREME COURT'S DECISIONS PERTAINING TO THE LIMITS OF GUBERNATORIAL DISCRETION

Constitutional proprieties were largely respected in the Nehruvian era, although several significant lapses set bad precedents for the future. An instance of such malpractice was the imposition of the President's rule on June 16, 1951 in Punjab. The then Prime Minister, Pandit Jawaharlal Nehru, simply intimated the then President, Dr. Rajendra Prasad, that the erstwhile Chief Minister of Punjab, Dr. Gopichand Bhargava, would have to resign due to differences between the two men.⁴⁴ Similarly, the dismissal of the E.M.S. Namboodiripad Government in Kerala in 1957 was another disturbing occurrence, which was yet again based on the report of the Governor.⁴⁵ This did little to bolster the credibility of the Union in the eyes of the states, despite the former being led by one of the chief architects of the Indian Constitution itself.

The darkest hour of the Indian Republic came with the imposition of the National Emergency in 1975 by Pandit Nehru's daughter, then Prime Minister Indira Gandhi. When the emergency was lifted and elections were declared, the ruling Congress party lost the people's mandate and an alliance led by the Janata Party ascended to power.⁴⁶ Ironically, the high-handed approach of the previous regime continued when the newly appointed Home Minister sent a letter to the governments of nine states, still ruled by Congress governments, asking them to resign in view of the popular sentiment that had swept the nation.⁴⁷

The constitutionality of this directive was challenged before the Supreme Court in *State of Rajasthan v. Union of India* ('State of Rajasthan').⁴⁸

⁴⁴ The Tribune, *Revisiting Past Elections*, October 30, 2016, available at <http://www.tribuneindia.com/news/spectrum/revisiting-past-elections/316070.html> (Last visited on May 5, 2017); VALMIKI CHOUDHARY, *PRESIDENT AND THE INDIAN CONSTITUTION* 80 (1985) (The President, Dr Rajendra Prasad, noted in his diary:

"I abhor the idea of suspending the constitution and taking over the administration of a state in this manner. The ministry in the state had the confidence of the assembly and it could have continued to rule the state if the congress parliamentary board had not forced it to resign... the question arises whether the government could be run through persons authorised by the constitution or on the advice of the congress which had no locus standi. It would be a dangerous precedent to run a government on the advice of extra-constitutional authority when the constitutional apparatus was in existence.".)

⁴⁵ Sandeep Bharadwaj, *Kerala Crisis (1957-1959): First Litmus Test of Indian Democracy*, available at <https://revisitingindia.com/2012/11/22/kerala-crisis-1957-1959-first-litmus-test-of-indian-democracy/> (Last visited on May 5, 2017).

⁴⁶ India Today, 1977: *People's Victory*, July 7, 2007, available at <http://indiatoday.intoday.in/story/1977-country-got-its-first-non-congress-government-in-30-years/1/155599.html> (Last visited on May 5, 2017).

⁴⁷ AUSTIN, *supra* note 39, 441.

⁴⁸ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

The question before the Court was whether judicial review of the ‘subjective satisfaction’⁴⁹ of the President is permissible. While answering this question in the negative, the Court opined that despite the political nature of the decision to impose emergency under Article 356, it is not immune from judicial review, if questions of constitutional determination are raised.⁵⁰ Justice Bhagwati, in his opinion, further stated that if the ‘subjective satisfaction’ was obtained through *mala fide* or wholly irrelevant factors, the Court would have the competence to examine it on merits.⁵¹

However, the watershed moment in regulating such unfettered discretion came through the Supreme Court’s decision in *S.R. Bommai v. Union of India* (‘Bommai’).⁵² The unfair dismissal of the Karnataka Government led by then Chief Minister, S.R. Bommai, was challenged before the Supreme Court. The Court, while accepting that the satisfaction formed by the President upon receiving the Governor’s report is indeed subjective, emphasised on the right to judicial review of the material forming the basis for reaching such satisfaction.⁵³ It held that if the grounds on which the decision was taken was, in the opinion of the Court, tainted with *mala fide*, the Court had the power to judge the materials on the basis of which such advice has been rendered to the President by the Cabinet, including the Governor’s report. The Court also emphasised that it had the power to invalidate the dismissal of a legislative assembly if such decision is reached before gaining appropriate Parliamentary ratification; to revive the state government and its legislative assembly, if a *prima facie* investigation suggests that the order is *mala fide* and unconstitutional; and to grant interim relief by way of preventing fresh elections to the assembly, thereby enabling the aggrieved party to challenge the imposition of such emergency.⁵⁴ Every Chief Minister involved, who had been dismissed under Article 356, was thus given an opportunity to approach the respective High Court to claim any of these remedies. By offering such an option, the Supreme Court safeguarded the interests of the state governments, and upheld the importance of federalism as underlying the Indian Constitution. Further, the Governor’s discretionary

⁴⁹ The Constitution of India, Art. 356 (“Provisions in case of failure of constitutional machinery in state:

- (1) If the President, on receipt of report from the Governor of the state or otherwise, is satisfied that a situation has arisen in which the Government of the state cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation
 - (a) assume to himself all or any of the functions of the Government of the state and all or any of the powers vested in or exercisable by the Governor or any body or authority in the state other than the Legislature of the state;”

This satisfaction is a subjective satisfaction, as noted in the Bommai judgment, and is beyond the scope of judicial scrutiny)

⁵⁰ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

⁵¹ TARUN CHANDRA BOSE, *INDIAN FEDERALISM PROBLEMS AND ISSUES* 153 (1989).

⁵² *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

⁵³ *Id.*, ¶¶39-46.

⁵⁴ H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY* 413 (3rd ed., 2005).

power was curtailed to a considerable extent through the strategic expansion of the Court's power of judicial review.⁵⁵

The judgment, among other things, stated that although Article 74(2) barred the Court from scrutinising the advice tendered by the Council of Ministers to the President, it did not restrict the Court from adjudicating upon the rationality of the "material on the basis of which the President had arrived at his satisfaction", including the Governor's report. Therefore, the Governor's report could directly be scrutinised by the High Courts and the Supreme Court. The Governor was thus obligated to appear *bona fide* in his actions and functioning.⁵⁶

Most significantly, the Supreme Court construed the crucial test prescribed by Article 356 – 'breakdown of constitutional machinery' in the state – to mean virtual impossibility, and not just difficulty, in carrying on the governance of a state in accordance with the provisions of the Constitution.⁵⁷ Through the adoption of the Sarkaria Commission's recommendations enlisting the grounds for such a collapse of constitutional governance,⁵⁸ the Court effectively imposed an objective criterion for such determination, thereby replacing the pre-existing subjective standards.⁵⁹

In the subsequent case of *Rameshwar Prasad v. Union of India*,⁶⁰ the erstwhile Governor of Bihar made a report asserting that the political parties in the state were resorting to unethical practices to secure political majority in an otherwise hung assembly. He, therefore, recommended fresh elections for the formation of a stable government, which would be free from corruption and horse-trading. In this regard, the Governor also made out a case for the imposition of President's rule until the next elections. Rameshwar Prasad challenged this report of the Governor, as being *mala fide* and not based on objective evidence.

Upon reviewing the report of the Governor, the Court found the report to be thoroughly arbitrary and *per se mala fide*.⁶¹ It ruled that a political party may seek the support of other political parties and/or MLAs in their attempt to form a stable government. The Governor has no authority in such cases to override the majority's claim solely because of his subjective assessment of the majority being patched together by illegal and unethical means. The Court stated:

⁵⁵ GOVIND RAO & NIRVIKAR SINGH, THE POLITICAL ECONOMY OF FEDERALISM IN INDIA 49 (2005).

⁵⁶ S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶134.

⁵⁷ *Id.*, ¶¶60, 75, 215, 228.

⁵⁸ These recommendations are discussed in detail in the next Part.

⁵⁹ A.G. NOORANI, CONSTITUTIONAL QUESTIONS IN INDIA: THE PRESIDENT, PARLIAMENT AND THE STATES 271 (2001).

⁶⁰ Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.

⁶¹ *Id.*, ¶¶141, 144, 145.

“Minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if satisfied that the party or the group staking claim would not be able to provide to the state a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still not opt to take a step which may lead to the fall of the Government for various reasons, including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.”⁶²

The Court noted that the primary role of the Governor is to ensure that the Constitution is upheld in the working of a state; and that this did not entail acting as an agent of the Union to disrupt the autonomy of the state.⁶³ In this case, following the humiliation caused to his office owing to the Supreme Court’s invalidation of the dissolution of the Assembly, the Governor was forced to resign. More significantly, this decision also led to a greater scrutiny of the scope of gubernatorial discretion, and brought attention to the urgent need for infusing an objective standard into the exercise of the same, in line with the Bommai decision.⁶⁴

This was followed by the case of B.P. Singhal,⁶⁵ which concerned the validity of the contemporary Central Government’s decision to remove the Governors of Uttar Pradesh, Gujarat, Haryana and Goa, after assuming power in the general elections of 2004. On hearing this matter, the Supreme Court ruled that the President, *i.e.* the Central Government, has absolute power to remove the Governor of a state at any point in time, without having to offer the Governor any ground for dismissal, and/or opportunity to be heard.⁶⁶ It however observed that such power cannot be exercised arbitrarily and unreasonably.⁶⁷ The same must be exercised only in rare circumstances, when compelling reasons require that such a course of action should be adopted.⁶⁸ Further, the Court stated that the fact that the Governor is not predisposed to the policies of the newly elected Central Government can in no way be interpreted as a sufficient ground to remove him.⁶⁹ The Court observed that the Central Government

⁶² *Id.*, ¶129.

⁶³ *Id.*, ¶266.

⁶⁴ V. Venkatesan, *Governor’s Choice*, FRONTLINE (New Delhi) November 3-16, 2007, available at <http://www.frontline.in/static/html/fl2422/stories/20071116501201400.htm> (Last visited on May 2, 2017).

⁶⁵ B.P. Singhal v. Union of India, (2010) 6 SCC 331.

⁶⁶ *Id.*, ¶¶34, 83.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*, ¶¶46, 83.

cannot choose to dismiss the existing Governors only to replace them with favourable persons.⁷⁰

Lastly, the Court held that a decision to remove a Governor may be challenged in a court of law; however, the onus shall lie on the petitioner to make a *prima facie* case of *mala fides* and arbitrariness against the Central Government.⁷¹ Once *mala fide* has been established, the Central Government may be required by the court to produce evidence establishing compelling reasons requiring such drastic action on its part.⁷² In other words, the Central Government does have the power to remove the Governors of various states, provided such removal is due to compelling reasons and not mere political convenience – its decision must be *bona fide*, and not arbitrary, or borne out of malice. This ensures that the Governor is no longer reduced to a political stooge of the Central Government, and has reasonable security of tenure.⁷³ Thus, the B.P. Singhal decision reaffirms the status of the Governor as a facilitator of governance according to Constitutional norms, without the requirement to act as an agent of the Union such that the very functioning of the elected state government is disrupted.

One of the most recent instances wherein the scope and limits of gubernatorial discretion was re-examined by the Supreme Court is *Nabam Rebia v. Dy. Speaker, Arunachal Pradesh Legislative Assembly* ('Nabam Rebia').⁷⁴ Here, the Governor of Arunachal Pradesh, Nabam Rebia, arbitrarily decided to reschedule the Arunachal Pradesh Legislative Assembly's session a month earlier, because of which the Chief Minister, Nabam Tuki, failed to prove his majority on the floor of the House. The Governor then dissolved the Assembly and asked for the imposition of President's rule in the state. The facts of this case highlight the risks involved in reposing unrestrained discretionary powers in the Governor, whose actions are usually guided by the interests of the Centre, and which frequently run antithetical to the autonomy of the states. In the present case, the Governor's actions were challenged before the Supreme Court on the ground that they were tainted with *mala fide*, and denigrated the constitutional ethos of federalism.

Upon perusing the facts, the Supreme Court ruled that it would be incorrect to literally interpret Article 163(2) of the Constitution which grants the Governor his discretionary powers.⁷⁵ Such an interpretation would lead to the improper conclusion that the Governor's exercise of discretion is not subject

⁷⁰ *Id.*

⁷¹ *Id.*, ¶83.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Nabam Rebia v. Dy. Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1.

⁷⁵ *Id.*, ¶155.

to any sort of judicial scrutiny.⁷⁶ Article 163(2) merely grants the Governor the power to make use of the discretionary power bestowed on him by the Constitution – not to convert his office into an “all-pervading super constitutional authority.”⁷⁷ Relying on the Sarkaria and Punchhi Commission Reports on Centre-State relations,⁷⁸ the Court ruled that the Governor’s exercise of discretion must be tested upon the touchstone of objectivity, and by no stretch of imagination can it be stated that the Governor has unlimited discretion.⁷⁹

Having made the above observations, the Court held Nabam Rebia’s exercise of discretion was fraught with *mala fide*.⁸⁰ The dissolution of the Assembly was therefore invalidated, and the reinstatement of the erstwhile government ordered. The Court stressed that the arbitrary and *mala fide* exercise of discretionary power by the Governor in this case was not just an embarrassment to his office, but also “a thrashing given to the Constitution and a spanking to governance.”⁸¹

Revisiting the trajectory of cases from State of Rajasthan to Nabam Rebia, it becomes evident that the Supreme Court has attempted to curtail the arbitrary exercise of gubernatorial discretion in a progressive manner. The opinions of the Court suggest that the Governor must exercise his discretion in accordance with objective standards of rationality, and not subjective standards of individual determination. The Governor’s position within the Indian federal structure is unique, insofar as he acts as a link between the Centre and the state, and is entrusted with the task of ensuring the smooth conduct of the affairs of the state, in consonance with constitutional ethos and principles. The wide array of powers bestowed upon him sometimes place him at a pedestal higher than the President, as the latter is bound by the advice of the Council of Ministers. It therefore becomes even more imperative for the Governor to act according to constitutional norms, irrespective of what the Central Government desires.

The extant jurisprudence also demonstrates that the Centre too can no longer revoke the Governor’s appointment for arbitrary reasons, shrouded in political mystery. The Supreme Court has greatly curtailed the scope of abuse of powers in this domain. Especially, since the pronouncement of the B.P. Singhal case, the Supreme Court has infused into the office of the Governor a sense of impartiality and independence, thereby allowing the Governor to act

⁷⁶ Legally India, *Legally Explained: Has SCOI Averted a Crisis in Arunachal Pradesh or was It Mostly Academic?*, July 17, 2016, available at <http://www.legallyindia.com/supreme-court/legally-explained-has-scoi-averted-a-crisis-in-arunachal-pradesh-or-was-it-mostly-academic-20160717-7841> (Last visited on May 2, 2017).

⁷⁷ Nabam Rebia v. Dy. Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1, ¶148.

⁷⁸ These reports are discussed in detail in the following Part.

⁷⁹ Nabam Rebia v. Dy. Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1, ¶155.

⁸⁰ *Id.*

⁸¹ *Id.*, ¶380.

as per the apolitical constitutional mandate originally conceived for this post. Although the issue of appointing career politicians as Governors is yet to be wholly resolved, their security of tenure, and right against arbitrary removal – as reiterated in these decisions – may serve as a crucial step towards ensuring transparency in the functioning of this office.

IV. SARKARIA AND PUNCHHI COMMISSION RECOMMENDATIONS

In the decisions of the Supreme Court analysed above, it is evident that the recommendations of the Sarkaria and Punchhi Commissions on the role of the Governor have been recapitulated and emphasised on numerous times. Both Commissions recognised the vital importance of the position of the Governor in acting as the link between the Central and the state provincial governments within the Indian federal polity. Accordingly, a large portion of these recommendations were directed at reforming the position of the Governor, and providing him with greater independence in the exercise of his constitutional functions in order to insulate his office from arbitrary actions of the Central Government.

Appointed in 1983, the Sarkaria Commission was tasked with evaluating the power imbalances between the Centre and the states, which permeate the federal structure. Chief amongst its mandate was the examination of the position, powers and responsibilities of the Governor, his mode of appointment and the regulation of the vast areas of gubernatorial discretion.⁸² In a voluminous report of 1600 pages,⁸³ this Commission made several recommendations in this regard. Unfortunately, little attempt has been made to ensure its implementation thereafter.⁸⁴

The Sarkaria Commission believed that there remained a need for retaining the position of the Governor, and argued against the abolition of the office.⁸⁵ On the issue of appointment, this Commission was opposed to the idea of a Governor being selected from a shortlist of candidates provided by the state.⁸⁶ Instead, it recommended a greater degree of involvement of the state government and the Chief Minister.⁸⁷ It believed that such a measure could potentially remedy the growing distrust between these two constitutional functionaries, the seeds for which were sown by the existing mode of the Centre's

⁸² Sarkaria Commission, *supra* note 4.

⁸³ Inter-State Council Secretariat, *Sarkaria Commission*, available at <http://interstatecouncil.nic.in/sarkaria-commission/> (Last visited on May 5, 2017).

⁸⁴ Lawrence Saez, *The Sarkaria Commission and India's Struggle for Federalism*, 8(1) CONTEMPORARY SOUTH ASIA 58-62 (1999).

⁸⁵ Sarkaria Commission, *supra* note 4, ¶¶4.5.02-4.5.07.

⁸⁶ *Id.*, ¶¶4.6.11-4.6.33.

⁸⁷ *Id.*

unilateral selection of Governors in various states.⁸⁸ Further, where the Centre and the state are ruled by different political parties, the Commission recommended that the Governor should not belong to the ruling party at the Centre, or be a part of active politics immediately prior to such appointment.⁸⁹ In order to maintain the impartiality of the office, the Sarkaria Commission suggested that the Governor should not be eligible to hold any office of profit under the Central Government upon his retirement from the post.⁹⁰

Furthermore, the Commission opined that the grounds for the removal of the Governor, who serves at the pleasure of the President, should be restricted to issues relating to breach of morality, dignity or constitutional propriety.⁹¹ This particular issue has been finally put to rest the Supreme Court through its decision in B.P. Singhal. With regard to the crucial issue of exercise of discretion under Article 356, the Sarkaria Commission recommended that this clause should be invoked as a last resort, and the material facts on which the proclamation is based should be clearly stated in the text of the proclamation itself.⁹²

The undoing of the Sarkaria Commission's report lay in its marked predisposition towards maintaining the status *quo*. While acknowledging the existence of grey areas in the functioning and selection of Governors, its recommendations hardly sought to cure the defects identified. It made no attempt to change the constitutional structure or the dynamics between the different authorities involved, and was satisfied in continuing with the existing constitutional scheme, subject to incremental changes. For instance, the Sarkaria Commission completely dismissed the possibility of a shortlist of candidates curated by the state government, which seems to be a logical option to minimise the friction between the Centre and the states. Such a stance appears to be ill-conceived, especially in light of the close proximity that the Governor's office shares with the state administration.⁹³

Further, the requirement of 'effective consultation' with the Chief Minister in selecting the Governor, as recommended by the Sarkaria Commission, does little to clarify whether such consultation implies concurrence.⁹⁴ If the two concepts possess similar implications, this would effectively do away with the constitutionally guaranteed discretion of the President in selecting the Governor, thus exacerbating the existing set of problems. The Chief

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*, ¶¶4.8.01-4.8.09.

⁹² *Id.*, ¶¶4.11.01-4.11.39.

⁹³ Outlook India, *Key Recommendations of the Sarkaria Commission*, July, 2000, available at <http://www.outlookindia.com/magazine/story/key-recommendations-of-the-sarkaria-commission/209702> (Last visited on May 2, 2017).

⁹⁴ *Id.*

Minister would assume the *de facto* role as the appointing authority, thus leading to perpetuation of the tradition of political appointees adorning the high office, by merely substituting a Centre's nominee with a state appointed head. In contrast, if 'effective consultation' connotes mere consultation, without any requirement for unanimity, the process would be reduced to the formality of informing the Chief Minister of the person chosen by the Centre, despite his possible objections to the same, thus effectively restoring the *status quo*.

With regard to the suggestions for invocation of Article 356, although the Sarkaria Commission attempted to instil some transparency in the process, the recommendations do not satisfactorily prevent the possibility of misuse. If a Governor's report including all material facts is made public, and is contested as inappropriate or excessive by the state, it would still be impossible to prevent the imposition of President's rule, as is evident from the Supreme Court's decision in Bommai, where reviving the wrongly dismissed State Government was considered impractical due to the passage of time between the constitutional challenge and the final disposal of the matter by the Court.

Some of these issues were sought to be addressed by the Punchhi Commission, set up by the erstwhile United Progressive Alliance (UPA) government in 2007, under the chairmanship of Justice Madan Mohan Punchhi.⁹⁵ On a number of key issues, the Punchhi Commission concurred with its predecessor and reiterated certain recommendations provided by the Sarkaria Commission. For instance, it suggested that all nominees for the post of the Governor must be removed from active politics for at least two years prior to being considered for appointment; that eminent persons should be appointed as Governors for states other than their home states; and that the appointment of the Governor should be made in consultation with the Chief Minister of the state.⁹⁶

Perhaps the foremost contribution of the Punchhi Commission was in crystallising the idea of a 'localised emergency'.⁹⁷ On the application of Articles 355 and 356, the Punchhi Commission recommended that it would be more appropriate to direct such action only in the district or area where the unrest originates, instead of placing the entire state under direct control of the Governor through the imposition of President's rule.⁹⁸ Further, it was recommended that such a directive should not continue to operate for more than three months without seeking an extension from the Parliament.⁹⁹ The purpose

⁹⁵ Punchhi Commission, *supra* note 10.

⁹⁶ *Id.*

⁹⁷ *Id.*, ¶5.4.21.

⁹⁸ *Id.*; See also Business Standard, *Narendra Modi Keen to Implement Justice Punchhi Commission's Recommendations*, July 16, 2016, available at http://www.business-standard.com/article/current-affairs/narendra-modi-keen-to-implement-justice-punchhi-commission-s-recommendations-116071700005_1.html (Last visited on May 2, 2017).

⁹⁹ *Id.*

behind such a recommendation was to curb the effect of the arbitrary exercise of gubernatorial discretion.¹⁰⁰

The Punchhi Commission also recommended codifying the order of precedence by which the Governor must bind himself in selecting the Chief Minister, in case the elections result in a hung assembly. With codified principles in operation, the discretion of the Governor is reduced substantially. The order of precedence suggested by the Punchhi Commission in this respect is as follows – the party/pre-poll alliance commanding the largest number, the single largest party with support of others, the post-electoral coalition with all parties joining the Government, and finally, the post-electoral alliance with some parties joining the government and the remaining, including independents, supporting from outside.¹⁰¹

On the issue of arbitrary dismissal of Governors, the Punchhi Commission observed that the practice of treating Governors as “political footballs” must stop.¹⁰² To ensure their security of tenure, it recommended an amendment to the Constitution that would fix a term of five years for the Governors, which could be prematurely terminated only through impeachment by the concerned state legislative assembly.¹⁰³

The Punchhi Commission also suggested amending the wording of Article 163(2) to limit the vast scope of discretion available to the Governor.¹⁰⁴ The Commission recommended that in the event that the Governor withholds his assent to a bill passed by the state legislative assembly, or relating to other areas where he enjoys discretion, he should have an upper limit of four months to act on it.¹⁰⁵

On an analysis of the recommendations proffered by the Punchhi Commission, it is evident that this Commission traversed further than its predecessor in finding a solution to the malaise in Article 356, through its suggestion pertaining to ‘localised emergency’. Further, in enlisting grounds for dismissal, and codifying the order of preference when appointing the Chief Minister, it rightly attempted to loosen the Centre’s grip over the Governor, whilst simultaneously limiting the scope of Governor’s (mis)use of discretion.

Although many of these recommendations are indeed laudable, the Punchhi Commission’s report was not bereft of infirmities. Its report devoted little attention to the injustice wrought in the aftermath of the Bommai

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, ¶11.7.04.

¹⁰² *Id.*, ¶4.4.16.

¹⁰³ *Id.*, ¶11.6.06.

¹⁰⁴ *Id.*, ¶4.2.15.

¹⁰⁵ *Id.*, ¶4.5.01.

situation, wherein despite the fact that a properly elected and legitimate State Government was dismissed on *mala fide* grounds, the Supreme Court upheld the *status quo*, and the original Government was never revived.¹⁰⁶ Thus, even though these recommendations might have been the only practical option at the time, they are clearly insufficient, for they fail to prevent the possibility of wrongful dismissal of a rightfully elected Government, even in the future, and are a classic study in the infructuous nature of delayed justice.

In light of this, we suggest that a two-fold measure should have been included. *First*, upon the invocation of President's Rule in a state, the state legislative assembly, instead of being dissolved, should be kept in suspended animation, pending a fast-track judicial verdict by a direct application before the Supreme Court. The Court should reach a decision in no longer than four months from the date of application. *Second*, if the Court concludes that the material circumstances on the basis of which the Governor made his report were 'insufficient or false' and hence the report itself was *mala fide*, it should result in the removal of the Governor. If such recourse is not explicitly delineated, cases of blatant misuse of gubernatorial discretion shall go both unpunished and remediless. Ordinarily, Governors are not answerable for their actions, nor can they be sued for decisions taken while holding office. Hence, the possibility of removal upon producing a biased report to please the political masters could be the only way to ensure compliance with constitutional norms.

Another issue which was touched upon by both the reports was regarding the appointment of Governors. As stated above, both the reports concurred on the need for the nominee to have been removed from active politics for a period of at least two years prior to appointment. This suggestion was incorporated so as to eliminate overt political motivations from the appointment process, as a retired politician is less likely to harbour such affiliations than those who are still actively involved in politics. However, it must be noted that at best, this is a half-measure. The recommendation overlooks the case of 'career politicians', who have spent a large part of their lives devoted to a particular ideology and who may not have lost touch with their political beliefs or motives simply upon ceasing to hold political office.

One possible remedy in such cases is to prohibit career politicians from being nominated. Indeed, the Founding Fathers such as Pandit Nehru favoured the appointment of non-partisan persons of eminence in sciences or arts, rather than political appointees.¹⁰⁷ This could ensure that the person appointed would not be overtly political, and hence, would be less likely to be

¹⁰⁶ The justification for such a move, as discussed above, was primarily the long pendency of the case.

¹⁰⁷ Kuldip Nayar, *Governors or Puppets of the Center?*, April 21, 2016, available at <http://caravan-daily.com/portal/Governors-or-puppets-of-the-center-kuldip-nayar/> (Last visited on May 25, 2017).

influenced by political pressures emanating from either the Central or the state governments. The disturbing possibility of creating an intelligentsia bent on currying political favours, however, continues to remain.

The ideas expressed through the recommendations of the Sarkaria and Punchhi Commissions, which are similar on several fronts, have been reiterated by the Apex Court in its various judgements. However, without the legislative will to enforce the suggestions contained in these reports, the dormancy which pervades through this essential aspect of our federal structure would remain unaltered. Thus, while some of these recommendations may be insufficient in addressing the issues at hand, their effective implementation could certainly begin the move towards ushering greater transparency in the working of the federal system in India.

V. CONCLUSION

The continued relevance and necessity of the position of Governor is often understated. While commentators and regional political satraps have since long argued for the abolition of the post, one cannot deny that it continues to serve essential constitutional functions. In times of constitutional crises in states, it is the figurehead of the Governor which ensures the continuance of the state, even when no government has ascended to power, and/or is incapable to govern effectively. The Governor also serves as a neutral mediator in case of informal dispute settlements within the various state organs, and continues to be perceived by many as the conscience of the community within the state, despite the political trappings of this office.

The perception of the Governor as an agent of the Centre, devoid of any autonomy or interest in the state's affairs, has incited protests against this post. While the suspicion with which the states have viewed this position is warranted, given that it has sometimes served as a gateway to interference by the Centre in their internal functioning, a relook at the relevant Constitutional Assembly Debates shows us that the position was in fact created to ensure that the states are governed in accordance with constitutional principles. Without the Governor at the helm of the executive, the umbilical cord attaching the Centre to its provinces would stand severed. The motivation for bestowing the Governor with even greater discretionary powers than the President stems from the resolution to protect the sanctity of the federal structure proposed under the Constitution.

As discussed above, the three issues of appointment and removal, tenure and discretion, which are at the heart of this debate, were addressed quite substantially in the Sarkaria and Punchhi Commission reports. However, pending the implementation of these recommendations, little progress can be achieved in this regard. We believe that a partial solution may lie in prohibiting

career politicians from being nominated as Governors, which would help to reduce their complicity with political interference by the Centre in the affairs of the states. While appointing eminent individuals from fields apart from politics might lead to the birth of a generation of political stooges amongst the intelligentsia, we suggest that it would still be more preferable to take that risk, as opposed to appointing candidates who have spent their careers wedded to a particular political party or ideology.

Thus, the immediate implementation of the recommendations of the Sarkaria and Punchhi Commissions, coupled with the security of tenure which the B. P. Singhal case now guarantees, can go a long way in ensuring transparency in the exercise of gubernatorial discretion.

Furthermore, it is the invocation of Article 356 of the Constitution which has instigated the strongest protests from the states. The Governor has been granted very wide powers in deciding whether to allow an elected legislative assembly to continue, or to dissolve it altogether. While the Punchhi Commission's suggestion relating to 'localised emergency' is certainly innovative, we recommend that in such cases, the recourse adopted should be two-fold – the suspension of the House for a specified period, and reestablishment of the same government in case the Court finds patent illegality or lack of proportionality in the report of the Governor. This would not only entail a full investigation of material facts by the Courts within a short period, but would also ensure that the injustice of the Bommai situation could be undone, where, despite winning the case, the state government that was wrongfully dismissed could not be reinstated. We also propose that if the Governor provides a 'false, illegal or disproportionate' report in such a situation, then this should serve as an additional ground for his removal, so as to ensure that the Governor is fully aware of the repercussions of providing a biased report.

The chequered history of misuse of gubernatorial discretion in India indicates that such chaos has often resulted from the inaction or misdemeanour of the figurehead. To prevent this unfettered exercise of discretion of questionable intent, an effective framework of checks-and-balances needs to be put in place. While the task may be arduous and challenging, both the Sarkaria and Punchhi Commissions have attempted to arrive at an appropriate blueprint for the same, though their recommendations have mostly fallen on deaf ears.

Therefore, despite what its detractors might suggest, we do not believe that the remedy lies in the abolition of the post of the Governor. Both the Supreme Court and the Sarkaria and Punchhi Commissions have agreed on continuing with the post, and have highlighted the necessity and merits of retaining the same. Tracing the trajectory of the Supreme Court's decisions on this issue reveals that while the Court has called for regulating the exercise of discretionary powers by the Governor, the decisions underlined the need for

continuing with gubernatorial discretion, but within constitutional limits. We believe that implementing this key guiding principle will help in restoring the apolitical mandate of the Governor, as originally conceived in our Constitution.