GUBERNATORIAL DISCRETION: THE OXYMORON IN THE STATE EXECUTIVE

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ABSTRACT
The Governor is the Constitutional Head of the State and it is under his name that all executive decisions are taken by the Council of Ministers. Although he is a nominal head, he is vested with a few ancillary powers, among which, the discretionary powers are the most important and influential ones that help him in effectively administering the constitutional machinery in the State. The Governor exercises these powers under his singular discretion, free from the influence of the Council of Ministers. This paper explains the purpose of conferring such powers to him through the thoughts expressed in the Constituent Assembly. The ambiguities in the powers exercised by the Governor with respect to his personal satisfaction and discretion is also analyzed and contrasted in this paper. Unfortunately, discretionary powers also have their downside as there are many instances of blatant misuse by the Governor. Thus, it is crucial to prevent such misuse to ensure his role as the guardian of the Constitution. This paper examines some of these instances, analyzes the reasons and motive behind such misuse and gives suggestions so that the exercise of discretionary powers are supervised and done effectively.

INTRODUCTION
The position of Governor owes its origin to the Government of India Act 1935, which allowed the retention of control over the Indian provincial governments through the Governor. He is appointed by the President for a period of five years. The primary function of a Governor is to preserve, protect and defend the Constitution and to devote himself to the service and well being of the State. The much decorated post of the Governor holds very negligible power and exists mainly for the emphasis of the Federal structure.

The powers conferred on the Governor include:
- Executive powers like appointment of Chief Minister and the Council of Ministers.
- Legislative powers like promulgating Ordinances.
- Judicial powers with respect to granting pardon, respite, remission, reprieve and commutation.

There are many notable powers of the Governor, the chief of them all being the discretionary powers. It is the most influential, useful and, at times, an abused power of the Governor conferred on him by the Constitution, whereby he need not act as per the advice of his Council of Ministers and has the freedom to decide what should be done in specific circumstances. It is misused either for malafide purposes or political exigencies. There are both express provisions of the Constitution and implied

Keywords: Discretion, Personal Satisfaction, Floor Test, State Emergency

1 Article 159, Constitution of India
2 Article 164, Constitution of India
3 Article 213, Constitution of India
4 Article 161, Constitution of India
interpretations of the Courts that empower the Governor to exercise his discretion effectively and efficiently.

**DISCRETIONARY POWERS OF THE GOVERNOR**

Discretion means a right conferred by law and discretionary power involves an alternative power to do or refrain from doing a certain act by free decision or choice within certain legal bounds.5

The discretionary powers of the Governor are explicitly mentioned in some Articles across the pages of the Constitution. Such powers exercised by the Governor in his sole discretion bestow absolute immunity on him.6 He can exercise his discretion under:

- Paragraph 9 of Sixth Schedule for any dispute arising out of share of royalties accruing from the licenses or leases for extraction of minerals
- Article 371, which may confer special responsibilities with respect to the States of Maharashtra and Gujarat for the establishment of separate Development Boards for Vidarbha, Marathwada, Saurashtra, Kutch and the rest of those States
- Other special provisions from Article 371A – 371H

Apart from these express provisions, the Governor can exercise his discretion for sanctioning prosecution on a Minister.7 He can even dissolve the Legislative Assembly and can request the President, by submitting a report, for proclamation of State Emergency under Article 356 whenever he is satisfied that the functions of the State cannot be carried on in accordance with the provisions of the Constitution and eventually, leading to a failure of constitutional machinery in the State.

The purpose of giving such discretionary powers to the Governor was pointed out by Pt. Thakur Das Bhargava8 and Shri Mahavir Tyagi9 in the Constituent Assembly, by stating that it is right that so far as the concept of a Constitutional Governor goes he will have to accept the advice of his ministers in many matters but there are other matters in which that advice will be unavailable or fails to bind the Governor to accept it. Moreover, the Governor, being the agent of the Centre is the only guarantee to integrate the various Provinces and see that the policy of the Central Government is sincerely carried out and thus, there should be no interference in his discretionary powers.10

It is a unique power given only to the Governor and it is not available even to the President. The cogent reasons to grant such an exclusive power was put before the Constituent Assembly by Dr. B.R. Ambedkar11, who had refused to confer such power to the President as the provincial Governments are required to work in subordination to the Centre, and therefore, in order to ensure that, the Governor will reserve certain things to provide the President an opportunity to see that the rules under

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6 S. Dharmalingam v. Governor of Tamil Nadu, A.I.R. 1989 Mad. 48
8 Hon’ble Member of the Constituent Assembly
9 Id. At 8
10 Vol. VIII, Constituent Assembly Debates dated 1st June 1949
11 Hon’ble Member and Chairman, Drafting Committee of the Constituent Assembly
which the Provinces should act constitutionally or in subordination to the Union Government are observed.\textsuperscript{12}

Though the power appears to be vast, it is not unlimited. There are checks and balances when there is an apparent abuse or conspicuous exploitation of such powers by the Governor. There are certain areas where he has to rely on his personal satisfaction even though he has been vested with discretionary powers. There is often confusion between the terms “discretion” and “personal satisfaction” as it is used interchangeably and should be construed in a more specific manner. Though the terms may vary from case to case, a line of clear distinction has to be drawn which becomes necessary for clearly distinguishing and recognizing the real intent and purpose behind such a language and the practical reality followed by the Constitutional heads of the States.

**PERSONAL SATISFACTION v. DISCRETION**

In administrative context, personal satisfaction usually occurs when the authority is informed about the present scenarios and advised on the possible and effective courses of action, according to which he takes a sound decision to do or not to do an act.

Though the Governor, according to the plain texts of the Constitution, can take decisions as and when he is personally satisfied to do so, this view was completely turned down and substituted by a new interpretation by the Supreme Court, which became essential in all pertinent issues on the powers of the Governor. It was construed in Shamsher Singh v. State of Punjab\textsuperscript{13} that wherever the Constitution requires the satisfaction of the Governor for the exercise by him of any power or function, it is the satisfaction of Council of Ministers on whose aid and advice he generally exercises his powers and functions, and not his personal satisfaction.

On the other hand, discretion is the power of an authority to make decisions based on his opinion within general legal guidelines.\textsuperscript{14} It is a unique power that should be exercised only in emergency situations and in circumstances that warrant such action to be taken to address or resolve such exigencies. It is given to authorities and officials in the field to take immediate decisions without any recourse. The Governor need not seek the aid and advice of the Council of Ministers while exercising his discretionary powers. Such powers are mostly specific to the exigency present before him. Nevertheless, he can exercise it even under normal circumstances but only for those purposes and adhering to those norms and procedures explicitly mentioned in the Constitution.

Therefore, the difference between the terms “personal satisfaction” and “discretion” can be summed up by using the language of Andhra Pradesh High Court in Ganamani v. Governor of Andhra Pradesh\textsuperscript{15}, in which it was precisely stated that all the powers exercisable by the Governor can be done on the advice of the Council of Ministers except expressed by the Constitution or by necessary implication that he can exercise such powers in his individual discretion.

\textsuperscript{12} Supra. Note 10

\textsuperscript{13} Shamsher Singh v. State of Punjab, 1974 A.I.R. 2192

\textsuperscript{14} Law.com Legal Dictionary, https://dictionary.law.com

\textsuperscript{15} Ganamani v. Governor of Andhra Pradesh, A.I.R. 1954 A.P. 9
The discretionary powers of the Governor are expected to be exercised only to uphold the constitutional values of responsible government and federalism. But the bitter truth is that such powers are used according to his whims and fancies. There are some capricious instances that depict such depraved acts of the Governors that are often condemned by the courts.

**ABUSE OF DECISION MAKING AND DISCRETIONARY POWERS – SOME INSTANCES**

In the decades-old rich history of the Constitution of India, the Governor holds a significant position in Centre-State relations. It is said that the Governor is a bridge between the Centre and the States in such a way that he ensures the effective functioning of the constitutional machinery in the State and should be impartial and non-partisan to preserve and uphold the constitutional eminence as the Constitutional Head of the State. However, the real practice is, at times, in sharp contrast to those motives expressed and procedures mentioned in paper. The Governor has violated the legal position on his decisions according to his personal satisfaction, due to which the State has suffered many tribulations caused as a result of a wrong turn of events due to his flawed decisions. He had also misused his power of discretion, which is one of the most powerful and essential powers, for political pressures and malafide purposes and, at times, been warned by the Supreme Court about the wrong implications it would have on the constitutional functioning and dignity of the Office of the Governor. The country has seen and experienced disastrous instances where a blatant abuse of discretionary powers is done by the Governor, making the exercise of his Constitutional powers and authority a shame on the Constitution.

**INFRACTION OF THE GOVERNOR IN ARUNACHAL PRADESH**

The first and the most recent instance of such malfeasance happened in Arunachal Pradesh in 2015. The situation became so complex that even a layman can understand the material facts only if he had been made aware of the events that unfolded rightly and chronologically. It was in the case of *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, in which, the apex court had found blatant misuse of constitutional powers of the Governor that had caused the crisis, rather than paving the way for smooth functioning of the Constitutional machinery in the State.

It all started when a notice of resolution to remove the Speaker and Deputy Speaker was moved by the Opposition Party, BJP, and the ruling party, Indian National Congress, respectively. The Chief Whip of the Congress Legislative Party also filed disqualification petitions against 14 MLAs of the Congress Party, on which the Speaker gave them a notice period of 14 days to reply for the same. Taking into account all the above events, the Governor of Arunachal Pradesh, Mr. Jyoti Prasad Rajkhowa, in exercise of his powers under Article 174(1), issued an order preponing the sixth session of the Legislative Assembly and ordered the House to meet at the Legislative Assembly Chamber at

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17 *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 S.C.C. 1
Naharlagun. He had also sent a message stating that the resolution for removal of Speaker shall be the first item on the agenda and the Deputy Speaker shall preside over the House on that resolution in accordance with provisions of Article 181(1). He further stated that until the session is prorogued, no Presiding Officer shall alter the party composition in the House.

He took this decision as he felt that it is his Constitutional obligation to ensure that the resolution for removal of Speaker is expeditiously placed before the House. Moreover, he had also stated that he may not be bound by the advice of the Council of Ministers, since this particular matter neither falls under the executive jurisdiction of the Chief Minister nor finds a mention in the Executive Business Rules thereby restricting the advisory role of the Chief Minister to the Governor, only to those matters for which the former is responsible under the Constitution of India.

As this issue of high prominence came before the Supreme Court, it had held, inter alia, that the order of the Governor preponing the sixth session of the Legislative Assembly and his message directing the manner of conducting proceedings in the House is violative of Article 163 read with Articles 174 and 175 of the Constitution and all steps and decisions taken by the House, pursuant to the order and message of the Governor are unsustainable.

The Court had carefully examined the powers of the Governor under Articles 163, 174 and 175 and had recorded its detailed findings and conclusions as under:

- **Article 163:**
  The apex Court had quoted the thoughts expressed by Dr. B.R. Ambedkar in the Constituent Assembly with respect to Article 163. He had stated that Article 163 will have to be read in conjunction with such other Articles which specifically reserve the powers to the Governor and he cannot completely disregard Ministerial advice in any matter he finds he ought to disregard. The Court had emphasized that that the framers of the Constitution desired to embody the basic principle, describing the extent and scope of the discretionary power of the Governor, in sub-article (1) of Article 163, and not in sub-article (2).

  The Court had relied on the observations of Justice M.M. Punchhi Commission\(^ {18} \), which stated that the scope of discretionary powers as provided in the exception in clauses (1) and (2) of Article 163 has been limited by its clear language. The first part of Article 163(1) requires the Governor to act on the advice of his Council of Ministers. However, the latter part is an exception in regard to matters where he can constitutionally function in his discretion. The expression "required" specifies that the Governor can exercise discretionary powers only if there is a compelling necessity to do so. It has to be strictly construed, effectively ruling out any apprehension that his discretionary area covers all of his constitutional functions. His choice of action in this limited area of discretion should not be arbitrary and must be dictated by reason.

\(^ {18} \) Report on Constitutional Governance and Management of Centre-State Relations by Justice M.M. Punchhi Commission, 2007
Therefore, the measure of discretionary power of the Governor is limited to the scope postulated under Article 163(1) and such power extends to situations either expressly stated or where such intent emerges from a legitimate and unequivocal interpretation of constitutional provisions. He can exercise his discretion only when there is an impermissibility to act according to the aid and advice of the Council of Ministers, which, when acted upon, would lead to conflict of interests. Moreover, any discretion exercised beyond the Governor's jurisdictional authority would certainly be subject to judicial review.

- **Article 174:**
  The Court had interpreted that the power to summon, prorogue and dissolve the State Legislature was postulated respectively under sub-clauses (a), (b) and (c) of draft Article 153(2), which was later renumbered as Article 174. The most significant feature of it was expressed in sub-article (3), wherein it was provided, that the functions of the Governor with reference to sub-clauses (a) and (c), “shall be exercised by him in his discretion”. But it was omitted, which became a matter of utmost significance for a purposeful confirmation of the correct intent of the particular Article. The only rightful inference is that the framers of the Constitution changed their initial contemplation and consciously decided not to vest discretion with the Governor in this regard. Therefore, the Governor can summon, prorogue and dissolve the House only on the aid and advice of the Council of Ministers, headed by the Chief Minister.

  The recommendations of Justice Sarkaria Commission\(^{19}\) and Justice M.M.Punchhi Commission\(^{20}\) and the opinions of Mr. M.N Kaul and Mr. S.L. Shadkher rendered in Practice and Procedure of Parliament\(^{21}\) were accepted, as it is, by the Court, which summarized that as long as the Council of Ministers enjoys the confidence of the House, their aid and advice is binding on the Governor on the subject of summoning, proroguing or dissolving the Houses. Such advice sustains and subsists till the Government enjoys the confidence of the Legislature. The Council of Ministers lose their right to aid and advice the Governor on this matter when the issue of support to the Government by a majority of the members of the House has been rendered debatable. As and when the Chief Minister does not have the support of the Assembly, it is open to the Governor to act at his own, without any aid and advice.

  In this case, the Governor had neither called for a floor test nor had doubts on the confidence of the House enjoyed by the Council of Ministers. There was not even a no-confidence motion moved in the Assembly. Therefore, the Governor just could not have summoned the House, in his own discretion, by preponing the session of the Legislative Assembly as he neither had the jurisdiction nor the power to do so, sans aid and advice of the Council of Ministers.

- **Article 175:**

19 Report on Centre-State Relations by Justice Sarkaria Commission, 1983  
20 Supra Note 18  
The Court had observed that though Section 63 of the Government of India Act, 1935 was a precursor to Article 175, in which the discretion to send messages to the Legislature was clearly and precisely bestowed on the Governor, as he may consider appropriate in his own wisdom, Article 175 has no such or similar expression. The framers of the Constitution did not intend to follow the regimen and framed Article 175 by omitting the discretion vested with the Governor, in this matter, under the Government of India Act, 1935. This was because the Governor cannot be seen to have such powers and functions as would assign to him a dominating position over the State Executive and the State Legislature. As Article 175 does not expressly provide the Governor to exercise his functions “in his discretion”, his connectivity to the House in the matter of sending messages, must be deemed to be limited to the extent considered appropriate by the Council of Ministers.

The Court had expressed that the Governor has no express or implied role under Article 179 on the subject of removal of Speaker as it squarely rests under the jurisdictional authority of MLAs, who must determine the acceptance or rejection of such a resolution on their own. His messages with reference to such matters do not flow from the functions assigned to him. He cannot interfere in the activities of the House merely because any member is not functioning in consonance with the provisions of the Constitution or in the best interest of the State. In sum and substance, the Governor just cannot act as the Ombudsman of the State Legislature as it does not function under the Governor.

Therefore, the message of the Governor to the House was beyond the constitutional authority vested with the Governor as such messages must abide by the mandate contained in Article 163(1), i.e., the same can only be addressed to the State Legislature, on the aid and advice of the Council of Ministers, headed by the Chief Minister.

This had clearly manifested the perverse decisions of the Governor to encroach upon the field of the Legislature, completely extraneous to him, and the abuse of his powers that ran contrary to the principles of federal structure enshrined in the Constitution of India.

CONSTITUTIONAL CRISIS IN UTTARAKHAND

There was yet another such delinquency that happened in Uttarakhand in 2016, immediately after the constitutional crisis in Arunachal Pradesh, but this time, it was the High Court of Uttarakhand that had noticed the blatant infractions and perverse decisions taken by the Governor that had led to the proclamation of State Emergency under Article 356. Understanding of the material facts of the case becomes easier when it is read and observed in a chronological order, as it involves numerous letters and communications.22 The High Court was adjudicating the case of Harish Chandra Singh Rawat v. Union of India23 where there was high-voltage political drama revolving around Raj Bhavan and Vidhan Sabha which had shown not only the massive exodus of MLAs to the Office of the Governor questioning the confidence of the House enjoyed by the Council of Ministers.
but also the Governor’s abuse of power to recommend President Rule without any basis of authenticated materials but only on the basis of possible inferences of the prevailing political situations in the State.

The crisis began to crop up when the Opposition Party, BJP, along with few MLAs of the ruling Congress party, had asked for a division vote on the Appropriations Bill tabled during the Budget Session in the House. The Speaker refused to put the bill for it as the bill was passed through voice vote. Aggrieved by that decision, those MLAs met the Governor of Uttarakhand, Dr. K.K. Paul, and had given a joint memorandum stating that the Appropriations Bill was not properly passed and the government should be dismissed as it was reduced to a minority due to the Bill being opposed by majority of the members in the House, leading to a breakdown of Constitutional machinery in the State. Then, another lot of three Congress MLAs submitted a letter to the Governor for the same reason stated above. These events made the Governor to send a communication to the Chief Minister, Mr. Harish Chandra Singh Rawat, to prove his majority by conducting the floor test at the earliest, to which he had finally acceded. Then, a message to the House was sent by the Governor stating that the trust vote proceedings shall be conducted peacefully with the results declared soon thereafter and it shall also be recorded, the copy of which, along with the transcripts, will be sent to him. The reports of all these events were duly sent to the President by the Governor as and when they had arisen. One day, the Governor had sent a letter to the President wherein, among other things, he referred to the fact that a letter was received from another MLA in which a pen drive containing some audio-visual content, that tended to show the Chief Minister in conversation with another person, indicating monetary and other allurements to him, was attached. Then, a Cabinet note was prepared on that same day in the light of available materials and the political developments in the State. Based on the note, the Union Cabinet met at that same night and recommended the President for invocation of Article 356, which was duly approved by him to impose President Rule in the State with the entire Council of Ministers being relieved from the Government and the suspended animation of Uttarakhand Legislative Assembly.

When the dismissed Chief Minister approached the High Court, it had held that the Proclamation issued under Article 356 stands quashed and directed restoration of the Government as on the date of the Proclamation. But as it was restored status quo ante, the Court had ordered the dismissed Chief Minister to seek the vote of confidence as he was obliged to do so, as on the date of the Proclamation.

The Court had, first, clarified that the felicity of expression of the Governor, in his reports, may not be decisive in itself of the issue as to whether the President’s Rule is to be issued because the satisfaction under Article 356 is to be entered by the Central Government. But, the Court was unable to comprehend how the removal of a Minister and the Advocate General is a relevant material for the decision of imposing President Rule under Article 356 and it had no nexus to the satisfaction that the Government cannot be carried out in accordance with the Constitution. Moreover, the mere fact that the trust vote was not sought earlier cannot, by itself, be said to have a cogent reason to
invoke Article 356. In *Rameshwar Prasad (VI) vs. Union of India*\(^ {24} \) it was stated that that the common thread in all the emergency provisions is that it should be resorted to only in exceptional circumstances when there is a real and grave situation warranting for such drastic actions. Power under Article 356(1) is an emergency power but it is not an absolute power. It is conditional, requiring the formation of satisfaction of the President, which is the satisfaction of the Cabinet. These are not the matters of inferences and assumptions being made on the basis that there are no judicially manageable standards and, therefore, there cannot be any judicial review or scrutiny. These matters, particularly without cogent materials, are outside the purview of constitutional functionaries to arrive at the conclusion that a circumstance has arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution.

While pointing out the lack of veracity and genuineness of the materials placed by the Governor before the Union Cabinet, which cannot be relied upon to impose President Rule, the Court had also observed, by quoting the landmark case of *S.R. Bommai v. Union of India*\(^ {25} \), that even assuming that there was horse-trading going on or the support is claimed to have been withdrawn by some members, the correct and proper course of action for the Governor to adopt was to test the support on the floor of the House except in extraordinary situations where the Governor infers that a free vote cannot be made possible in the House due to all-pervasive violence. It is the only constitutionally ordained forum for seeking all such claims openly and objectively. When such a test is possible, it cannot be bypassed and relied upon the subjective satisfaction of the Governor. Such practices of private assessments are also an anathema to the rich democratic principles followed by this country for decades, apart from being subject to personal malafides.

The Court had stated, relying on the literature on Conventions of House of Commons, that the current constitutional practice requires a Government to resign or seek a dissolution following a defeat in Parliament only when it is clear on a confidence motion. This implies that the ability of a Government to carry on in office ultimately depends on maintaining the confidence of the House. A confidence motion is a device which directly tests that confidence. If the result demonstrates that the Government has lost the confidence of the House, it must resign or seek dissolution of Parliament. No other parliamentary event requires such an outcome. It is always for the Government to decide when and under what circumstances an issue of confidence arises for it to table such motion, unless its opponents choose to put down a motion of no-confidence in unambiguous terms.\(^ {26} \) Thus, a failure to pass a Money Bill by the Government does not amount to losing the majority support of the House to the Council of Ministers. Therefore, the Court had denied the presumption of the Governor that the failure of the Government to pass the Money Bill leads to minority

\(^{24}\) Rameshwar Prasad (VI) v. Union of India, (2006) 2 S.C.C. 1  
\(^{25}\) S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1  
\(^{26}\) Constitutional Practice relating to Confidence Motion, Para 2.3
support and failure of constitutional machinery in the State.

This vividly explains the mistakes that are conspicuous through his extraneous decisions and delinquent actions with his discretionary powers backing him up in every course of action, which fails to signify the role of the Governor as the Constitutional Head of the State and also as the guardian of Federalism enshrined in the Constitution.

UNPRECEDENTED POLITICAL TWISTS AND TURNS IN MAHARASHTRA

The people of Maharashtra had witnessed a thrilling political stunt in 2019 which was highly dynamic with minute-by-minute changes becoming conspicuous in its political environment. A chronological record of the events that unfolded is helpful for having a clear picture of the facts of the case.27 All eyes were on the Office of the Governor of Maharashtra, from where all attempts were made to form a stable government after the Assembly Elections in Maharashtra. As no party was able to stake claim to form Government, the Governor had recommended the Centre to invoke Article 356 and impose President Rule in the State. The sudden turnout of events in the State startled and took all political parties in the State by shock and had made everyone wonder the expeditious moves of the Governor all the way from communicating to the President to revoke the President Rule to inviting the incumbent Chief Minister to take oath and assume office again, all these being made possible and done in the wee hours of the day. Such an incident still stays fresh and lingers in the minds of all MLAs, politicians and people of the State. These were the events in Maharashtra that led the Supreme Court to adjudicate the case of Shiv Sena v. Union of India28.

There existed an alliance between BJP and Shiv Sena, who jointly contested the 14th Maharashtra Legislative Assembly elections. The results have shown that no single party had the requisite majority in the House. The Governor, Mr. Bhagat Singh Koshyari, called upon the BJP, being the single largest party, to indicate its willingness to form Government. It did not materialize successfully though it was willing to do so. Then, the efforts of the Governor to seek the willingness of NCP to stake claim to form Government also went in vain. Ultimately, the Governor recommended President Rule, which was imposed by a Presidential Proclamation, Shiv Sena, NCP and the Congress Party were in discussion to form a coalition government during this period. One day, at 5:47 a.m., the President Rule was revoked in exercise of powers conferred under Article 356(2) of the Constitution. Thereafter, the Governor invited the BJP, who had the sudden support of MLAs of NCP to form Government, which was successfully executed and done by the BJP in the early hours of the day.

When the Supreme Court was approached, it had felt necessary and expedient to conduct

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28 Shiv Sena v. Union of India, AIROnline 2019 S.C. 1535
The floor test as soon as possible to determine whether the Chief Minister has the support of the majority or not, and had ordered accordingly. It had also specified the manner in which the floor test should be held and also ordered that a pro-tem Speaker be appointed by the Governor solely for conducting it immediately.

The apex Court had observed, by quoting the most significant case of **S.R. Bommai v. Union of India** that whenever a doubt arises or where the Governor is satisfied that the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House through a vote and he should ask the Chief Minister to do so within the shortest possible time. The same was the expression made by the Sarkaria Commission and even by the Committee of five Governors constituted by the President of India. Similar orders have been passed by the Court in **Jagdambika Pal v. Union of India** and **Anil Kumar Jha v. Union of India** where a floor test was essential to prove the confidence of the House and the appointment of a pro tem Speaker was necessary to conduct it according to Constitutional Rules and Conventions. The procedure laid down by the Court for the floor test was backed up with similar cases like **Chandrakant Kavlekar v. Union of India** and **G. Parmeshwara v. Union of India** by observing that such sensitive and contentious issues could be resolved by a simple direction requiring holding of the floor test at the earliest, thereby removing all possible ambiguities and would result in giving the required credibility to the democratic process.

The Court had opined that in **Shrimanth Balasaheb Patil v. Hon’ble Speaker, Karnataka Legislative Assembly** it had emphasized the requirement of imbibing constitutional morality by constitutional functionaries to curtail undemocratic practices in the political arena. It had also stated, by quoting its holding in **Union of India v. Harish Chandra Singh Rawat** that the Court, being the sentinel on the qui vive of the Constitution is obligated to see that democracy prevails and not gets hollowed by individuals, only for the purpose of strengthening democratic values and norms. The collective trust in the Legislature is founded on the bedrock of the constitutional trust.

This clearly shows that the Governor cannot be a person above political pressures and he can also abuse his power for malafide purposes. Due to political exigencies, he fails to be a person of dignity and nobility and offends his Office of Governor through his delinquent decisions.

**CONSTITUTIONAL VIOLATION IN THE PRETEXT OF LEGAL**

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29 Supra Note 25
30 Supra Note 19
31 Rajmunnar Committee Report, 1969
32 Report of five-member Committee of Governors, 1970
34 Anil Kumar Jha v. Union of India, (2005) 3 S.C.C. 150
35 Chandrakant Kavlekar v. Union of India, (2017) 3 S.C.C. 758
37 Shrimanth Balasaheb Patil v. Hon’ble Speaker, Karnataka Legislative Assembly, 2019 SCCOnline S.C. 1454
IMPOSSIBILITY IN MADHYA PRADESH
Yet another instance of violation of the rules and norms of the Constitution can be seen in Madhya Pradesh in 2020. It had happened soon after the sudden change of Government with 17 legislators withdrawing their support to the Government and the incumbent Chief Minister from the Congress Party, Mr. Kamal Nath, succumbing to the political drama and resigning from the post ahead of the floor test to prove his majority in the House. The government was taken over by BJP and Mr. Kamal Nath was succeeded by Mr. Shivraj Singh Chouhan in just 15 months of the term of the Madhya Pradesh Legislative Assembly.

The global outbreak of COVID-19 has turned on to a disastrous turn of events, with the WHO declaring it as a pandemic and urging nations to take immediate measures at war footing. Due to this, a complete lockdown was enforced all over the country, saving only essential industries to operate. The new government headed by Mr. Shivraj Singh Chouhan was all tied up to its work of COVID-19 prevention and lockdown measures. Consequently, it was not able to table and pass the Budget as there were no possible ways to summon the House. To exacerbate the situation, the Government was running without the Council of Ministers and the Chief Minister was present only to facilitate administration of the Government. Therefore, as it was not in a position to withdraw money from the Consolidated Fund of the State for its yearly expenditure, it had resorted to the Ordinance route to make the financial allocations and appropriations that are necessary for its day-to-day functioning and administration. It had advised the Governor, Mr. Lalji Tandon, to pass an Ordinance to which he had acted in consonance with the advice tendered and promulgated two Ordinances, namely, the Madhya Pradesh Finance Ordinance, 2020 and the Madhya Pradesh Appropriation (Vote on Account) Ordinance, 2020.

- An analysis of this conundrum becomes necessary to re-examine the limited legislative powers of the Governor. It is an indisputable fact that the Governor can promulgate Ordinances whenever the House is not in session and such legislative powers are vested in him under Article 213. He can exercise such powers even to pass a whole Budget of the State, to which the Supreme Court has duly approved in State of Punjab vs. Satya Pal Dang, by stating that the action of the Governor promulgating an Ordinance on the Budget and Financial Appropriations of the State was completely valid and eminently healthy as there was no other motive than to set right the constitutional machinery of the State. The power of legislation by Ordinance is as wide as the power of State Legislature itself. The House should not hibernate when its financial business and the constitutional machinery itself were wrecked. Due to the time-consuming nature of the Business and the scarcity of time at that point, the Ordinance

was promulgated to create a law for the speedy disposal of financial business. It is very well known that an Ordinance cannot be promulgated unless the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action. As seen earlier, such a satisfaction stated in the Constitution is not his personal satisfaction but the subjective satisfaction of the Council of Ministers.\textsuperscript{43} But, in the present situation, the competency of the Governor to promulgate an Ordinance without the aid and advice, or more so, without the Council of Ministers itself is an issue that should be resolved expeditiously. It also casts a doubt on the validity of the Ordinance passed in such a manner. There is a chance to presume that the Governor had acted in his discretion as the Constitution empowers him to do so whenever he thinks fit. But he cannot possibly exercise his discretion in promulgating Ordinances as he is bound to act according to the aid and advice of Council of Ministers for that matter and the Constitution has not allowed him to exercise his discretion on the same. The Supreme Court had analyzed the circumstances under which the Governor may exercise his discretion in \textit{Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly}\textsuperscript{44} by stating that the Governor is not at liberty to determine when and in which situation, he should take a decision in his own discretion, without the aid and advice of Council of Ministers as it is limited to expressly stated and unequivocally interpreted situations in the Constitution. It had also clarified that the function exercised by the Governor under Article 213 is, undisputedly, on the aid and advice of Council of Ministers.

Thus, it is clear that satisfaction under Article 213 has to be arrived at, only with the aid and advice of the Council of Ministers and it does not qualify as discretionary power as envisaged under Article 163(1). Essentially, the Council of Ministers has to exist in the very first place, for rendering such aid and advice to the Governor, which is missing in the present case. It also shows the blatant failure of constitutional obligation on the part of the Chief Minister to advice the Governor to appoint his Council of Ministers. Thus, relying on Article 213 to promulgate the above Ordinances in the absence of Council of Ministers is unconstitutional since the Governor could not have gone ahead by passing the entire Budget for the State, sans aid and advice of Council of Ministers. This had clearly manifested the conspicuous infractions of the Governor in exercising his functions and the failure on the part of the Governor to fulfill his Constitutional obligations by misusing the powers vested on him by the Constitution.

\textbf{EXPRESS INTERPRETATION OF DISCRETIONARY POWERS OF GOVERNOR IN THE CONSTITUTION-A NECESSARY APPROACH}

The Governor basically assumes two domains: Executive Domain and Administrative Domain. In the former, he acts as a mere nominal head of the State executing his functions by being bound by the aid and advice of Council of Ministers and doing such things as advised by them accordingly. It also involves his personal satisfaction which is clearly the subjective satisfaction of the Council of Ministers. But in the latter, he acts as an administrator who ensures the smooth functioning of the constitutional machinery in the State. He may

\textsuperscript{43} Supra Note 13

\textsuperscript{44} Supra Note 17
not be bound by the advice tendered by the Council of Ministers and, at times, he can exercise his discretion to decide and act effectively. It allows him to make decisions at his will in situations where the Council of Ministers have lost the competence to advice the Governor or the advice tendered by it is incompatible with the provisions of the Constitution. But there are some vague constitutional provisions which are exploited and such powers need to be expressly stated or rectified so as to stop its misuse.

It is very well known that the basic principle of Parliamentary system of Government is that the President and Governors are Constitutional Heads and the real executive powers are vested in the Council of Ministers. Article 163 obligates the Council of Ministers to aid and advice the Governor in his functions, except under such circumstances that requires him to exercise his functions in his discretion. It is a common practice that the Governor always abides by the advice tendered to him. It should be observed that the discretion under Article 163(1) must be exercised only to such functions covered by that Article and the scope of discretion by the Governor is also limited to it. This practically means that his discretion is limited to those matters on which the executive power extends. In reality, there won’t be any matter left to his discretion as all executive powers are given to the Council of Ministers, whose advice binds the Governor and all such matters are solely dealt by them. This would also make the conferment of discretionary powers meaningless, implying the same with or without such a discretionary clause. To handle such predicaments in future, he should be given such matters, apart from or not including the express discretionary powers mentioned in the special provisions of the Constitution, on which he can effectively exercise his discretion. He should be given powers on such matters which should be expressly defined in such a way that he neither completely vetoes the advice given by the Council of Ministers nor will he be bestowed with plenary powers with much plenitude.

Article 174 gives the Governor the power to summon, prorogue and dissolve the House. It is a known fact that the Governor exercises his power under article 174 as and when the Council of Ministers require him to do so. But sometimes, due to political reasons, the ruling party would fail to advice for summoning the Assembly. Therefore, the Governor should be given sufficient powers to be exercised in his discretion to ensure that the Assembly is summoned every six months, though it is the Council of Ministers who come up with the business required to be done in that session. It is also the case that most of the States have witnessed many Chief Ministers advising early dissolution of the State Assembly, when they already enjoy the full confidence of the House. In such matters, the Governor must never accept such advice from the Council of Ministers as such advices are coloured mainly in political goals of ruling party and it is also against the mandate of the electorate and that of the Constitution. This clear rule in this regard must be expressly included in the Constitution.

Article 175 involves the power of the Governor to send messages to the House. This power should be adapted to those situations in which a floor test on a no-confidence motion is deliberately delayed by the ruling party for peevish political

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46 Supra Note 17
purposes. He should be empowered to send messages to the House as he is obligated to ensure and place a stable government that enjoys the complete confidence of the House and to smoothly conduct the constitutional machinery in the State.

There is no ambiguity in the expressly stated discretionary powers of the Governor and his significant role as an administrator of President Rule in the State under Article 356. His discretion in appointment of Chief Minister is guided by proper legal interpretations and guidelines that make it clear enough for the Governor to bring the constitutional machinery of the State back in place. But the above stated ambiguities must be clarified by clear cut grounds and express interpretations which should be incorporated through proper amendments to the Constitution. This ensures that the Governor has a more active role in administrative matters, which is essential to balance and preserve the federal structure enshrined in the Constitution.

CONCLUSION
Discretionary powers of the Governor, even though the most influential and powerful of the lot, is mostly misused. It should be used, ideally, in emergency situations and only when the circumstances warrant such action to be taken to address or resolve such exigencies. But in reality, it often leads to perverse and delinquent decisions and thus, results in conspicuous misuse of his discretionary powers. The use of discretionary powers is subject to significant variations on a case to case basis. We can infer its dynamic nature from the above mentioned instances. Prone to misuse and dynamism, there is an urgent need for a legal framework overseeing such discretionary powers. The existent law on the matter is insufficient and lacks clarity. The Constitution of India is known for how it adapts itself to the ever dynamic needs of a society. It is in the best interest of India and its federal structure that clear cut guidelines be given on the nature and related know-how of the discretionary powers of the Governor.

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