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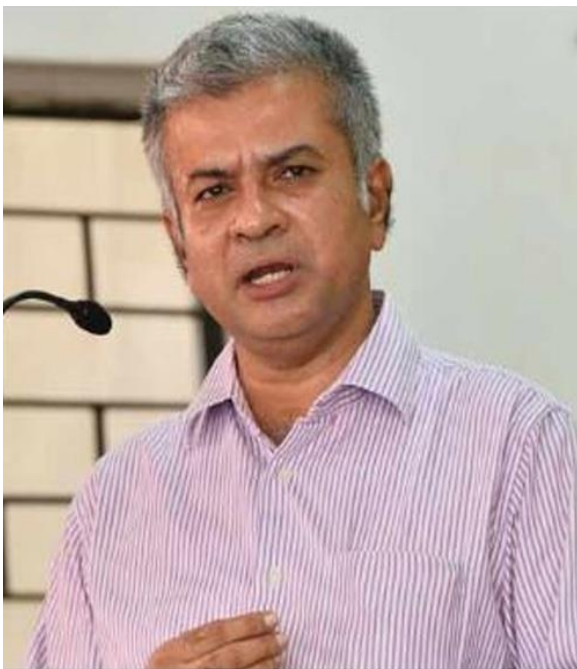
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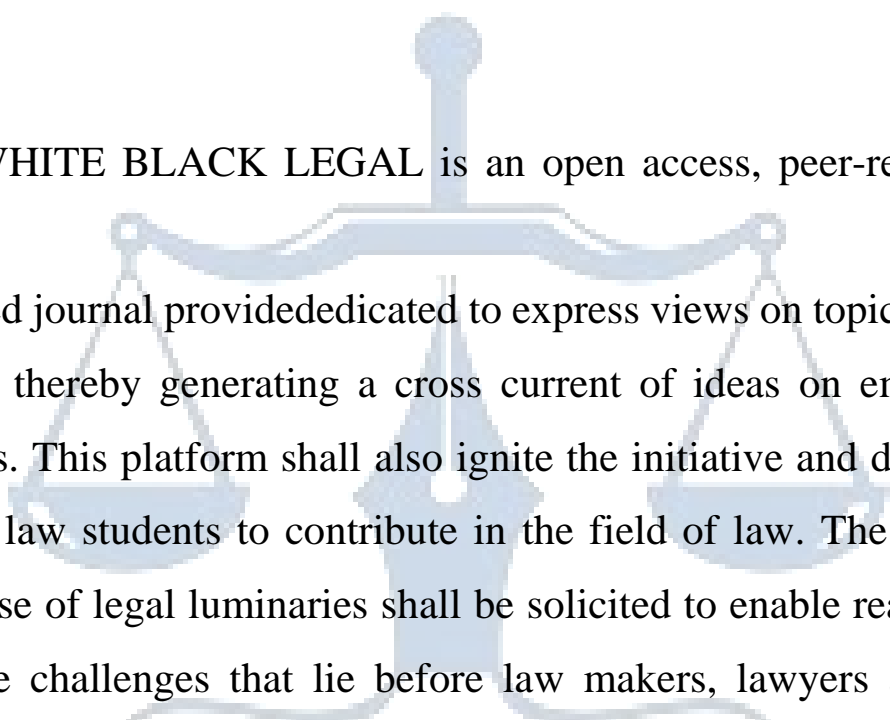


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With this thought, we hereby present to you

**“POWERS OF THE GOVERNOR IN THE CENTRE-  
STATE CONTEXT: LINKING CONSTITUTION  
ASSEMBLY DEBATES WITH PRESENT DAY  
SCENARIOS”**

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**ABSTRACT**

The federal intent of the Constituent Assembly was evident both in the legislature as well as the executive, with a clear demarcation between the central and the state government as well as legislatures. Importantly, it was decided that the president would be the representative of the central government and the governor would be the representative of the state government. While their conduct in such roles were primarily regulated by the Constitution, the president and the governor were conferred certain discretionary powers, to be exercised either by constitutional mandate or sheer necessity. It has been observed that the truly federal ideas put forward by the constituent assembly have been diluted by the conduct of governors in present times. This research paper attempts to link the constitutional concepts of the constituent assembly with the current political and constitutional crisis faced by certain states, analysing the extent of the powers of the governor.

**Keywords:** Powers of the Governor, Federalism, Comparative Constitutional Analysis, Constitutional Assembly Debates, Centre-State relations.

## I. Introduction

India, as defined in the Constitution of India, is a Union of States.<sup>1</sup> Two levels of government operate: the central government for the entire territory of India, and the state government for individual state territories, respectively.<sup>2</sup> The President is regarded as the *de jure* representative of the centre, while the Governor represents the state government. The Governor of the states holds a crucial constitutional position and has often been regarded as the agent of the centre. It is only in recent times that the debate of a governor's power in the federal structure has come to light.<sup>3</sup>

### 1. *Identification of the Problem*

With the powers of a governor being questioned in recent times, it is important for the Courts and Legislative Assemblies to assess the constitutional spirit behind these powers. The power and extent of discretion of the governors was a deeply debated topic in the constituent assembly with B.R. Ambedkar, Rajendra Prasad and H.V. Kamath has contrary views. The authors use the theoretical foundation of the Constitution Assembly Debates and link the points raised in the debates to scrutinise the present incidents, to highlight certain gaps in the constitutional mandate.

### 2. *Objectives of the Research*

This paper seeks to reconcile and study whether the vision of the constituent assembly for the governor's powers is being implemented in the law which has evolved in recent times. To this end this paper discusses the following three aspects. First, an assessment of the constituent assembly debates on the role and powers of the governor. Second, an analysis of the recent decisions and practices interpreting the governor's power. Third, a comparative study is undertaken to assess whether the recent decisions on the governor's role and powers are in the same spirit as was contemplated by the constituent assembly. The authors maintain a strong focus on the core objective of the study which is the extent of governor's powers to interfere in state legislature.

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1 Article 1(1), Constitution of India; *Constituent Assembly Debates (CAD)*, Vol. VII, p. 48. 1999 reprint. Delhi: Lok Sabha Secretariat.

2 Mahendra Pal Singh, *V.N. Shukla's Constitution of India* (13th edn, Eastern Book Company 2016) 7

3 Apurva Vishwanath, 'Rajasthan Government Crisis Explained: When Can Governor Use Discretion' (*The Indian Express*, 29 July 2020) <<https://indianexpress.com/article/explained/rajasthan-govt-crisis-explained-when-can-governor-use-discretion-how-sc-ruled-6525917/>> accessed 2 April 2021.

## II. Revisiting the Founding Fathers: Analysing the Constituent Assembly Debates

### *1. Scrutinising the Debates*

As discussed earlier, before assessing the powers of the Governor in the present administrative arena – the discussion on what the powers of the governor were contemplated are of utmost importance. To this end, we see that the most authoritative literature to hint at the true intention behind the power of the Governors are the Constituent Assembly Debates.

While we recognize the nature of debates at the Constituent Assembly (*hereinafter 'The Assembly'*) surrounded the larger question of the Governor as a Federal Agent or a Unitary Figure,<sup>4</sup> We seek to draw inspiration from the larger question of Federalism and Unitary Power to address the true essence of the Governor's power. Our Assessment reflects a two-fold analysis of the Constituent Assembly Debates. First, we study the discussion and the debates surrounding the position of the Governor taking into consideration the various proposals. Second, we undertake a brief assessment of the conclusive position taken by The Assembly.

### **The Discussion, Debates and Proposals in The Assembly**

The Position of the Governor in Indian Democracy was subject to a lot of debate, with several reports and recommendations being proposed.<sup>5</sup> The spring of proposal was opened by the Memorandum of the Constitutional Advisor, B.N. Rau.<sup>6</sup> The underlying principle behind this proposal was that the role of the Governor would broaden the Federal belief in the Indian Government.<sup>7</sup> This proposal of B.N. Rau sprung a division in The Assembly, much akin to a boxing ring – with the Federalist on one corner and the Union Leaders on the other corner of the ring.

The Federalist which constituted the Provincial representatives hoped for a larger role of the provinces in the governance of the country.<sup>8</sup> Their main chant was for the Governor to have a larger role of autonomy and discretion to run the functions of the government. On the other end of the spectrum, we could find the Union Leaders, with an ideology to create a strong centre

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4 Pankaj AK, "Governor in Indian Federal Constitution—I: Constituent Assembly Debates Revisited." (2015) 61 Indian Journal of Public Administration 613.

5 Austin G, *The Indian Experience: Working a Democratic Constitution* (Oxford University Press 2000).

6 *Constituent Assembly Debates (CAD)*, Vol. V, Book I. 1999 reprint. Delhi: Lok Sabha Secretariat.

7 Chakrabarty B, *Constitutionalizing India: an ideational project* (Oxford University Press 2018).

8 *Constituent Assembly Debates (CAD)*, Vol. VIII, Book 3. 1999 reprint. Delhi: Lok Sabha Secretariat.

and to only allow the contours of federalism to creep in to maintain a *status quo* in the diversity of the country.<sup>9</sup> In Rau’s own words, “*the Memorandum was an instrument which would cater to the needs of the Federalist*”.<sup>10</sup> The Memorandum created the position of the Governor to govern all matters barring the foreign relations, defences and other aspects of national security, thereby giving the governor a wide array of discretion. This was un-welcomed by the Union Leaders who hoped to bring a change in the philosophy catered to by the Memorandum.

At this time, the larger indicator of the Role of the Governor was seen through the lens of his appointment or election. The Assembly in general swayed in favour of a direct election.<sup>11</sup> However, despite strict opposition by the Provincial Representatives, the assembly took the route of direct elections. To this end, the second proposal of The Assembly comes into play- The Electoral College sub-committee consisting of B.G. Kher and K.N. Katju recommended that the electoral college for the direct election with the adult voters electing the Governor.<sup>12</sup>

The Assembly to then deal with this philosophy decided to have a proposed Provincial Constitution. In the provincial constitution draft submitted on 23<sup>rd</sup> June, 1947,<sup>13</sup> it was seen that the position of the Governor was largely Federal in nature for the following features.

Feature	Explanation
<b>Election of the Governor</b>	A direct election of the Governor by the adult voters of the Province.
<b>Role of Council of Ministers</b>	The Governor was to act at the aid and advice of the Council of Ministers, However, under clauses 15-22 the Governor was given a larger discretionary power
<b>Government Responsibility</b>	The Council of Ministers were appointed by the Governor and they were responsible to the Governor and enjoyed their appointment
<b>Special Responsibility</b>	The Governor under Cl. 15(1) was to report to the President of the Federation for special responsibilities for maintaining the peace and tranquility.

9 Agrawal A, “Judicial Review of Power of Governor and the President in India” [2012] SSRN Electronic Journal.

10 *Constituent Assembly Debates (CAD)*, Vol. IX, Book 4. 1999 reprint. Delhi: Lok Sabha Secretariat.

11 Ramnath K, “We the People” [2017] *The Indian Constituent Assembly* 181.

12 *Rules of Procedure: Constituent Assembly, India* (Manager, Government of India Press 1947).

13 *Constituent Assembly Debates (CAD)*, Vol. VIII, Book 3. 1999 reprint. Delhi: Lok Sabha Secretariat.

The feature of the Provincial Constitution was such that the Governor was to be considered as the *be all and end all* in matters of governance giving him wide discretionary powers under the then proposed cl. 15 of the Provincial Constitution. The Governor's power to appoint the Council of Ministers and placing him to be the head of the assemblies was an indicator of the wide powers placed under his ambit. However, in light of material changes such as accessions and secessions, the philosophy of The Assembly changed largely.<sup>14</sup>

### **The Conclusive Position**

With the Partition and the several accessions and secessions taking place, the Assembly recognized the need to have a strong center to prevent any secessions from taking place.<sup>15</sup> Therefore, the Assembly adopted a new approach with the draft Constitution. The approach which the assembly took in the draft constitution was that which was in line with the Union Philosophy of the constitution, giving lesser discretionary powers to the Governor and having a focus on the Governor as an agent of the Center. The propagator of a philosophy of lesser discretionary powers was Dr. B.R. Ambedkar and Rajendra Prasad.<sup>16</sup>

Opposing their view was the view of H.V. Kamath who was of the opinion that while the pro Union approach is to be taken, the discretion of the Governor is to be given a wider meaning so as to ensure that he has a stronger role as an Agent of the Center.<sup>17</sup> Ultimately, it was the view of Ambedkar and Prasad which prevailed and set up the following features of the role of the Governor.<sup>18</sup>

It is through this functioning of the Draft Constitution, that it can be seen that the role and responsibility of a Governor has been reduced from that of having a high discretionary power to have little power mostly, being a figurative agent of the President in the State. Further, the status of the reduced autonomy given to Governor has reduced the Federal nature of his position and has made him a unitary agent. Therefore, falling in light with the spirit of the Constitution being "*Federal in Nature and Unitary in Spirit*".<sup>19</sup>

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14 NewIndianXpress, "What the Constituent Assembly Debates Tell Us about Governor's Role" (*The New Indian Express*, 19 November 2017) <<https://www.newindianexpress.com/states/tamil-nadu/2017/nov/19/what-the-constituent-assembly-debates-tell-us-about-governors-role-1705053.html>> accessed April 3, 2021.

15 Mishra D, *Political Behavior of Indian State Governors: a Study of the Role of Governor in Orissa* (Kalinga Publications 2002).

16 *Constituent Assembly Debates (CAD)*, Vol. VIII, Book 3. 1999 reprint. Delhi: Lok Sabha Secretariat

17 *Constituent Assembly Debates (CAD)*, Vol. IX, Book 4. 1999 reprint. Delhi: Lok Sabha Secretariat.

18 Harman Singh, "The Constituent Assembly Decides" [2015] Mahatma Gandhi and the Indian Constitution 84.

19 Daljit Singh. "The Position Of A State Governor In India." [1961] 22(3) *The Indian Journal of Political Science*, 232-238.

Feature	Explanation
<b>Appointment of the Governor</b>	An appointment of the Governor by the President of Union
<b>Governor's Discretion</b>	Reducing the scope of the Governor's discretion as was showcased in the Provincial Constitution, the Draft Constitution gave the Governor lesser discretion, and he was to only follow the convention and the policy set out by the center even in cases of the appointment of the Council of Minister and the appointment of the Chief Minister of the State.
<b>Special Responsibility Abdicated</b>	The Special Powers which were given to the Governor under the Provincial Constitution were all taken away and given to the President of the Union which were then called 'Emergency Powers'

## 2. Present Constitutional Provisions

The Governor is not elected directly or indirectly, as he is appointed by the President of India according to Article 155<sup>20</sup> and enjoys office at the pleasure of the President, thereby conferring upon the President the power to dismiss the Governor.<sup>21</sup> The makers of the Constitution foresaw the aspect of state elections, which would lead to the leader of the majority taking oath as Chief Minister of the state, and the Council of Ministers appointed by the Governor, upon the advice of the Chief Minister. This leads us to the most crucial aspect of the powers of the Governor, contained in Article 163, which is titled 'Council of Ministers to aid and advise the Governor'.

Under Article 163, the Governor is obliged to act according to the aid and advice of the Council of Ministers unless the Constitution requires him to act in his discretion.<sup>22</sup> Further, the exercise of discretion by the governor can be subject to judicial review.<sup>23</sup> Hence, where the Governor has to act according to the advice tendered by the Council of Ministers, there is no scope of judicial review according to Article 163(3).<sup>24</sup> However, the main issue lies in the

<sup>20</sup> Article 155, The Constitution of India

<sup>21</sup> Article 156, The Constitution of India.

<sup>22</sup> Article 163, The Constitution of India.

<sup>23</sup> *Nabam Rebia & Bamang Felix v Dy. Speaker, Arunachal Pradesh Legislative Assembly*, [2016] 8 SCC 1 159-160.

<sup>24</sup> SS Upadhyay, *The Governors' Guide*, 139 (LexisNexis, Gurgaon, India, 2017).

areas where the Governor can use his discretionary powers, both under the Constitution and through implication or necessity. The following functions can be performed by the Governor in exercise of his discretion, without the aid and advice of the Council of Ministers:

- i. Appointment of Chief Minister;
- ii. Dismissal of Ministry which has lost confidence of Legislative Assembly;
- iii. Dissolution of Legislative Assembly.<sup>25</sup>

From the above points, we recognise that one of the most important discretionary powers of the Governor is the selection of the Chief Minister, who is the head of the state government. This aspect assumes heightened importance in the event of a fractured mandate or a hung assembly. It is through the constitutional provisions itself that the Governor has the authority to dissolve the legislative assembly under Article 174(2). However, in the *Nabam Rebia* case, the constitution bench of the Supreme Court held that a “governor can summon, prorogue and dissolve the House, only on the aid and advice of the council of ministers”<sup>26</sup> Hence, even this aspect of discretion has been tightened to come under the purview of the advice of the Council of Ministers.

### **III. From 1950 till Present: Distilling Federal Principles through Judgments and Reports**

The crucial questions about the extent of powers are recognised here. To what extent can the Governor interfere in the conduct of the state legislature? Further, how does the Governor use his discretionary power to appoint the head of the government in a situation of hung assembly? Multiple challenges have been filed to the power of the Governor, especially relating to the aspect of whom should the Governor call to form the State Government, in a hung assembly.<sup>27</sup> The Supreme Court has emphasised on the literal interpretation of the Constitution, advocating that the discretion conferred to the Governor is extremely narrow and limited, and he must exercise his power according to the constitution and on the aid and advice of the Council of Ministers.<sup>28</sup> Further, high-powered commissions which were setup to extensively deal with the role of governors in the federal system have also significantly elaborated upon the Governor’s position to appoint the leader of the government, and in effect reject another political party’s

<sup>25</sup> M.P. Singh, ‘Governor’s Power to Dismiss Ministers or Council of Ministers – An Empirical Study’ [1971] 13 JILI 612.

<sup>26</sup> *Nabam Rebia & Bamang Felix v Dy. Speaker, Arunachal Pradesh Legislative Assembly*, [2016] 8 SCC 1 159-160.

<sup>27</sup> Chatterjee, D. *Presidential discretions*. (New Delhi: Oxford University Press 2016)

<sup>28</sup> *State of Gujarat v R.A. Mehta*, [2013] 3 SCC 1 [37].

stake to form the government.<sup>29</sup>

### 1. Case Laws and Precedents

In the case of *Shamsher Singh v. State of Punjab*, the Supreme Court laid down that the Governor cannot refuse to act on the aid and advice of the Council of Ministers, as it would be antithetical to the government and the Constitution.<sup>30</sup>

The most recent and landmark ruling of the Supreme Court in this regard is the case of *Nabam Rebia & Bamang Felix v Dy. Speaker, Arunachal Pradesh Legislative Assembly*,<sup>31</sup> which is crucial for this study and has also been referred to above. The Constitution Bench in the *Nabam Rebia* case deliberated upon the scope of discretionary powers of the Governor under Article 163 and the extent of such discretion to the matters of the State Legislature. The Bench also took into consideration the various commission reports discussed hereunder, and held that (i) the discretionary power of the Governor is limited in scope, (ii) the discretion is limited to situations where the Constitution expressly requires so, (iii) such scope is not open to wider construction and (iv) its exercise is not immune from judicial review.

Further, it was held that the Governor cannot interfere in matters of the legislature, the Governor has to compulsorily act in accordance with the aid and advice of the Council of Ministers, unless the Assembly has lost faith in the government, where in such a situation the Governor must act on his own discretion. The Bench emphatically reiterated the principles of the landmark judgment of *S.R. Bommai* case.<sup>32</sup> (Emphasis supplied.)

### 2. Commission Reports

Two respected Commissions have extensively deliberated upon the aspect of Centre-State relations generally, and on the role of the Governor and his powers particularly. The first Commission on Centre-State Relations was chaired by Justice R.S. Sarkaria, often called as the Sarkaria Commission. It dealt with, among others, on the topic of the discretionary power of the Governor while selecting the head of government (chief minister) of a hung assembly. When the election gives a clear mandate to a political party with clear majority, there is no

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<sup>29</sup> Shukla, M. *Governor in democracy*. (New Delhi: Regal. 288, 2008).

<sup>30</sup> *Shamsher Singh v State of Punjab*, [1975] SCR (1) 814.

<sup>31</sup> *Supra* at [26].

<sup>32</sup> *S.R. Bommai v Union of India*, [1994] AIR 1918.

discretion in this regard. When there is no party with a clear majority, the Governor must go ahead with choosing a chief minister who commands the widest support of his party or coalition in the Legislative Assembly.<sup>33</sup> The Sarkaria Commission also propounded a hierarchical structure which can be followed by the Governor in this regard:

- i. Pre-election Coalition of parties
- ii. Single Largest party
- iii. Post-election coalition of parties<sup>34</sup>

The second commission was the Puncchi Commission,<sup>35</sup> headed by Justice M.M. Puncchi, upon which the Bench in *Nabam Rebia* relied upon extensively. The Commission said that while discussing Article 163, we must keep in mind that the normal rule of exercise of power by the Governor is on the aid and advise of the Council of Ministers, with personal discretion being an 'exception'.<sup>36</sup> However, only a select few of these recommendations of the aforementioned reports have been implemented by parties and Governors in office at the centre and state levels.<sup>37</sup>

#### **IV. The Present-Day Crisis: A Comparative Case Study of 3 States**

It has been observed lately that the power of the Governor to appoint the Chief Minister, who in effect is the leader of the government in the assembly, has been misused to favour the political party in power at the central level. The authors give a concise description of such misuse of power by Governors, and then suggest a novel constitutional solution.

##### *1. Karnataka*

The Bhartiya Janata Party (BJP) won the most number of seats to the Karnataka Legislative Assembly, however, the Congress and Janata Dal (Secular) formed a post-election coalition government. The Governor of Karnataka, Vajubhai Vala invited the single-largest party BJP instead of inviting the Congress-JDS coalition which had greater majority in the Assembly, and administered the oath to B.S. Yediyurappa. The BJP government could not prove its majority in the Assembly, and the sworn in Chief Minister B.S. Yediyurappa had to resign. Thereafter,

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33 Government of India. (1988). Commission on Centre–State Relations, Report, Part I. Nasik: Government of India Press.

34 *Id.*

35 M.M. Puncchi Commission [2010] Commission on centre state relations report (Vol. II). New Delhi, India: Constitutional Governance and the Management of Centre-State Relations.

36 *M.P. Special Police Establishment v. State of M.P.* [2004] 8 SCC 788.

37 MP Singh. 'Discretionary Powers of the President and Governors in India in Constitution and Practice'. [2017] 63(3) Indian Journal of Public Administration vii-xviii.

H.D. Kumaraswamy, of the Congress-JDS coalition, was sworn in as CM. Eventually, due to many MLAs resigning from the coalition and coming into the BJP, the BJP was able to prove its majority and form the government.<sup>38</sup>

## 2. Maharashtra

In October 2019, the Maharashtra Assembly elections threw up a fractured mandate, and President's Rule was imposed under Article 356 due to the inability of parties to form a government. Then, all of a sudden in November, the chief ministerial candidate of the BJP, Devendra Fadnavis, was sworn in as the Chief Minister by the Governor. Subsequently, the minority parties which were working out a coalition challenged the decision in the Supreme Court, and the SC directed the coalition to prove its majority in a floor test, subsequent to which the Chief Minister Fadnavis resigned.<sup>39</sup>

## 3. Rajasthan

Rajasthan Chief Minister Ashok Gehlot, belonging to the Indian National Congress, had a clear majority in the Rajasthan State Assembly, with 102 MLAs out of the total Assembly strength of 200. He sought the Governor Kalraj Mishra to convene an Assembly session, however, the Governor even after repeated requests, kept delaying the summoning of the Assembly. The Chief Minister, and the Council of Ministers have been demanding to summon the session of the State Assembly, to which the Governor is either not responding or delaying the same.<sup>40</sup>

## V. Analysis of Constitutional Provisions considering Present Events

It is amply clear through the provisions of Article 163(1) that the Governor must act in accordance with the aid and advice tendered by the Council of Ministers. Further, Article 174 clarifies that the Governor can summon and dissolve the Assembly, however, the SC held in *Nabam Rebia* case that such power can only be exercised according to the advice of the council of ministers. Hence, we can prima facie recognise that Rajasthan Governor is incorrect in delaying the summoning of the Assembly, even after repeated requests by the Chief Minister and Council of Ministers.

38 Krishnadas Rajagopal, 'Legal experts divided over Karnataka Governor's invitation to Yeddyurappa to form government' (*The Hindu*, 16 May 2018) <<https://www.thehindu.com/elections/karnataka-2018/let-karnataka-governor-explore-all-alternatives/article23905846.ece>> accessed 31 March 2021.

39 K Venkataraman, 'What is the Governor's role if elections produce fractured verdicts?' (*The Hindu*, 01 December 2019) <<https://www.thehindu.com/news/national/what-is-the-governors-role-if-elections-produce-fractured-verdicts/article30124436.ece>> accessed 31 March 2021.

40 Varghese George, 'Why are Questions being raised about the actions of Rajasthan Governor Kalraj Mishra' (*The Hindu*, 02 August 2020) <<https://www.thehindu.com/news/national/the-hindu-explains-why-are-questions-being->

We must first flesh out certain similar threads running across the aforementioned events and controversies. First, in all of the above situations, there is a fractured mandate, with the BJP being one of the largest parties, but not reaching the ‘magic figure’ of a clear majority in the Assembly. Secondly, it can be observed that the persons holding the position of the governor in all the three cases, were seasoned and veteran politicians belonging either to the RSS or the BJP. Empirically, more than 50 percent of the governors holding office since Independence have been politicians,<sup>41</sup> which is against the presumption accepted by the Constituent Assembly, which assumed the Governor to be an impartial, non-partisan office, discharging its functions without favouring any political party. It is crucial to remember that the Governor is a constitutional functionary, and not a political functionary.<sup>42</sup>

In the case where the majority is to be tested on the floor of the House, the SC laid down that the governor can only fix the date for the Chief Minister to prove his majority. In the judgement of *Rameshwar Prasad & Ors. v. Union of India*,<sup>43</sup> the Apex Court reiterated the point put forward in the landmark constitutional case of *S.R. Bommai v. Union of India*,<sup>44</sup> which held that the Governor must invite such Chief Minister who can prima facie demonstrate that he enjoys the confidence of the House. The Bench in *S.R. Bommai* also lamented that this provision was being diluted with the increased partisanship of the Governors, who invite leaders of a party or coalition not having a clear majority.<sup>45</sup>

This aspect is observed in the situations in Karnataka and Maharashtra, where the Governors, presumably because of partisan politics, invited the BJP even though it was not in a position to demonstrate the clear majority in the House. Further, the Governor cannot take part in the political fight that ensues after a hung assembly, which can be observed in the case of Maharashtra and Karnataka, where the Governor gave the reason of ‘horse-trading’ and ‘bribing’ to swiftly swear-in the government. Chief Justice Khehar in *Nabam Rebia* held that the Governor must remain aloof from what goes on in the House or in the political scenario. The Governor must only be clear of whether or not the head of government has the backing of a clear majority in a floor test of the House. If that is not so, then the Governor must immediately call for a floor test by summoning the Assembly.

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41 Pankaj A. ‘Governor in Indian Federalism—II: Hiatus between Constitutional Intents and Practices’ (2017) 63(1) Indian Journal of Public Administration 13-40.

42 *Rameshwar Prasad & Ors. v Union of India*, AIR [2006] SC 980.

43 *Id.*

44 *S.R. Bommai v Union of India*, [1994] AIR 1918.

45 *Supra* at [42].

In paragraph 161 of *Nabam Rebia*, the SC held: *The **Governor cannot likewise interfere in the activities of the Assembly, for the reason that the Chief Minister, or the entire Council of Ministers**, or an individual Minister in the Cabinet, or for that matter even an individual MLA, are not functioning in consonance with the provisions of the Constitution, or in the best interest of the State. **The state legislature does not function under the Governor**.* (emphasis supplied)

The above paragraph shows the interpretation of the SC in the aspect of the Governor and legislative assembly. A clear demarcation must be followed to ensure constitutional use of power. The Governor only has to invite the leader of the party/coalition which can prove the majority in an immediate floor test. Further, if such leader is not able to do so, as the Council of Ministers enjoys office at the pleasure of the Governor according to Article 164, the Governor can dismiss the Council of Ministers who are not able to prove majority and then invite the other leader who is able to prove the majority.<sup>46</sup> There must be no delay in summoning the legislative assembly for the floor test. Therefore, though the Governor is an agent of the Centre, he must be above partisan politics and remain, first and foremost a constitutional functionary.<sup>47</sup> This was the original intent of the Constituent Assembly.

## VI. Conclusion and Suggestions

The article dealt extensively with the aspect of the discretionary powers of the Governor, and the conduct of the Governor in the case of a hung assembly. The discretion of the governor has been narrowed further by the Apex Court in *Nabam Rebia* and has reiterated the position that the Governor is an agent of the centre, and must remain impartial in his conduct of constitutional affairs. The governor has to act on the aid and advice of the Council of Ministers, and only in rare cases where the Council of Ministers has been dismissed for want of majority, can the Governor take a decision at his own discretion as expressly provided in the Constitution.

However, the Constitution does not expressly provide directions to the Governor in case of a hung assembly. This has caused much anguish to citizens due to delay in government formation, and the centre-state relations have been affected. The authors propose a novel solution to minimise delay, by limiting the discretion of the Governor. The solution advocates incorporating the hierarchy of invitation to the parties, as put forward by the Sarkaria

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<sup>46</sup> Government of India. (1988). Commission on Centre–State Relations, Report, Part I. Nasik: Government of India Press.

<sup>47</sup> *Ram Jawaya Kapur v State of Punjab*, AIR 1955 SC 549.

Commission.

### Proposal

1	Pre-election Coalition of parties
2	Single Largest party
3	Post-election coalition of parties forming the government
4	Post-election coalition of parties with some forming government, and other supporting it from outside

The above table encapsulates the proposal put forward by the authors. A constitutional amendment to this effect can be incorporated in Article 164, which prescribes the Council of Ministers in the state. It is critical that a set framework be laid down for the invitation of the party which is able to prove its majority in the floor test. This proposed amendment would not affect the constitutional validity of the discretion of the Governor in appointing the Chief Minister under Article 164,<sup>48</sup> as the proposed amendment only prescribes the hierarchy of invitation of leaders of party according to their majority on the floor of the House. The recommendations by the Sarkaria Commission have not been followed or implemented even after thirty years, and incorporating them into the Constitution would affirm the constitutional trend of limiting Governor's discretion, and also provide certainty to political parties, representatives and citizen-voters.

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<sup>48</sup> *Supra* at [44].