



ISSN: 0976-3031

Available Online at <http://www.recentscientific.com>

CODEN: IJRSFP (USA)

International Journal of Recent Scientific Research
Vol. 10, Issue, 01(F), pp. 30652-30655, January, 2019

**International Journal of
Recent Scientific
Research**

DOI: 10.24327/IJRSR

Case Report

DIRECTION AND CONTROL OF STATE INSTITUTION IN INDIA

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DOI: <http://dx.doi.org/10.24327/ijrsr.2019.1001.3098>

ARTICLE INFO

Article History:

Received 12th October, 2018

Received in revised form 23rd

November, 2018

Accepted 7th December, 2018

Published online 28th January, 2019

Key Words:

Executive Head, Pardon Power,
Discretionary Power.

ABSTRACT

Indian constitution is a blend of federal as well as unitary features. It gave rise collision among the centre and states. Our constitution embodies the structure for the centre as well as state unlike the American constitution which is concerned with federal structure done Pandit Jawahar Lal Nehru was, however quite clear in his mind that the governor appointed must be acceptable to the government of the province, otherwise he could not be able to function there.

Governor is an important of the state legislature as the president is in the parliament Article 168(1) of the constitution provides that for every state, that shall be a legislature, which shall consists of the governor and two houses or one house as the case may be. He plays multifaceted role in the administration of the state even though he is not the member of the state legislature. He is the executive head of the state. All executive functions on the state are taken in his name. He is empowered to exercise his executive power either directly or through the officers subordinate to him. The constitution of India provides that there shall be a council of ministers with the chief minister as its head to aid and advise the governor in the exercise of his functions, except when he/she is required by the constitution to act in his discretion.¹

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INTRODUCTION

The word "Governor" in the oxford dictionary means- the executive head of a state in the U.S.A. a person charged with the direction or control of an institution, society etc, also called Governor-general; the representative of the crown, as in the common wealth nation. A ruler or chief magistrate appointed to crown a province, town, fort or the like. The constitution of India is a federal one and is embody of the British parliamentary system of government both of the centre and in the state.

The governor is not answerable to any court for the exercise of his power or performance of his duties regarding his office or any act done or purporting done by him in the exercise and performance of those powers and duties

He enjoys immunity against criminal proceedings what so ever shall be instituted or continued in any court during the term of his office. He is immune from the arrester imprisonment issue from any court during his term of office. No civil proceedings in which relief is claimed shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office of governor until the expiration of two months next after notice in writing has been served upon

his stating the nature of the proceedings, the cause of action, he name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.²

Although the Governor is not answerable to any court and is immune from criminal consequences.

For any act done during the performance of his functions, this does not restrict the right of any person to initiate appropriate proceedings against the governor to have declared such act as unconstitutional.

Governor's powers enshrined under Indian constitution:-

The governor is the head of State. He is the chief executive of the state. He enjoys the same position in the state as the president enjoys in the centre. However, in away his position is slightly better. Whereas the president as the nominal executive of union can rarely use any discretion in the exercise of his powers, the constitution grants some discretionary powers to the governor.

Method of Appointment

Constitution of India lays down for the office of the Governor of each state. However, one person can also function as a

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governor of two or one state.³ The president of India appoints the governor of each state and while doing so he acts upon the advice of the prime minister.

Two important practices regarding the appointment of a Governor.

The first practice is that the person being appointed as the governor is mostly not a resident of the state for which he is appointed.

Secondly before appointing a Governor, the union governments consult the concerned state government particularly the chief minister of the state. It is now the respected rule.

Along with these two healthy practices an unhealthy practice has also developed some times, 'defeated' or very old political leader are appointed as governors. Further, sometimes the unhealthy practice of whole sale transfer or removals of Governors takes place after change of government at the centre. Every person appointed as governor has to take the oath of his office. It has to be taken in the presence of the chief justice of the concerned state High Court.

Power and function of the governor

Executive powers: under article 154(1) bestow the governor with executive power of the state. He may exercise these powers directly or by the officers subordinate to him. Article 162 provides that executive power of the state extends to matters with respect to which legislates of the state has power to make laws. Article 166 requires that all executive actions of the Government of the state are expressed to be taken in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the state orders and other instruments made and executed in the name of the governor shall be authenticated shall not be called in question instrument.⁴

The narrative structure elucidated above makes it clear that the governor acts on the advice of the council of ministers of all states. He only authenticates the bills, except on some special circumstances, by affixing his seal and signature because all the democratic, constitutional, legislative as well statutory process has been dealt with the bill. Being constitutional head, the Governor is nothing to do with the enacting activities of the state which are exclusively the domain of political head, i.e. chief minister of the state.

Legislative activities of the Governor

The Governor summons the house of each house of the legislative of a state to meet at such time and place as he thinks fit. However, six months must not lapse between the last sitting in one session and the first in the next session. He may prorogue the house or either house and dissolve, the legislative assembly (article 174(1) and (2)). He has the right to address the state legislatures. No bill can become a law without the assent of the governor.

Assenting activities of the governor

Within the domain of article 200 of the Indian constitution, when a bill has been passed by the legislative assembly of a state or in the case of state having a legislative council has been passed by the both the houses of legislature of the state, it shall be presented to the Governor and Governor shall declare either

that he assents to the bill or that he withholds assent there from or that he reserves the bill for the consideration of the president provided that the Governor may, as soon as possible after the presentation to him of the bill for assent, return the bill if it is not a money bill together with message requesting that the house or houses well reconsider the bill or any specified provisions thereof and, in particular, well consider the desirability of introducing any such amendment as he may recommend in his message and, when a bill is returned, the House or Houses shall reconsider the bill, and if the bill is again passed by the House or House with or without amendment and presented to the governor for assent, the Governor shall not withhold assent there from provided further that the Governor shall not assent to, but shall reserve for the consideration of the president any bill which in the opinion of the Governor would if it become law, so derogate from the power of High Court as to endanger the position which that court is by this position designed to fill in the course of activities there are four courses open to Governor to whom a bill passed by assenting the state legislature is present for assent (i) the Governor assent the bill presented to him (ii) He may withhold the assent to the bill presented to him (iii) He may reserve the bill for consideration of the president (iv) He may return the bill, if it is not a money bill, for reconsideration.

Thus article 200 of the Indian constitution confers powers as the Governor of a state to reserve certain bill for the assent of the president of India to keep a watch on the nature and object of state legislative in pursuance of national perspective.

Ordinance making activities of the Governor

According to article 213(1) which is a pari material to article 123, the State Governor may promulgate such ordinance as the circumstances appear to him require when

1. State legislative assemble is not in session, or if the state of two Houses when on one of the house is not in session; and the Governor is satisfied that circumstances exists which render necessary for him to take immediate action. According to provision of Article 213(1), the Governor without instructions from president cannot promulgate any ordinance if.
 - a. A Bill to that effect would, under the constitution, have required the previous sanction of the president for its introduction into the state legislature; or
 - b. If the Governor would have deemed it necessary to reserve a bill to that effect for the president's consideration; or
 - c. An act to the state legislature to that effect would have been invalid under the constitution without receiving the president's assent.

The purpose of (c) mentioned above, is as follows when a state makes a law containing a provision inconsistent with a central law with respect to a matter in the concurrent list, the state law has to receive the assent of the president to be valid.

Thus the assent of the president is secured subsequently to the passage of the bill. If however, the ordinance is being made in the similar circumstances then the instruction from the president is a conditional precedent to the promulgation of the ordinance. An ordinance is to be laid down before the state

assembly and before the council as well if there is bicameral legislature one in the state. (Article 212 (2)(a)). An ordinance ceases to operate at the expiration of the six weeks from the reassembly of the legislature.

If the state has a bi-cameral legislature, and the two Houses assemble at different dates, the period of six weeks is to be counted from the later of the two dates. If the governor so desires it can in the meantime bring forth a bill. Incorporating the provisions contained in the ordinances and has it enacted. An ordinance ceases to operate earlier than six weeks if a resolution disapproving it is passed by the assembly and is agreed to by the council, if any (Art 213 (2)(a)]. An ordinance may be withdrawn by the Governor at any time. (Article 213(2) (b)] the above mentioned activity is also found to be used and misused by the Governor.

In the case of *DC Wadhwa V/s State of Bihar*⁵ furnished a glaring example of the abuse of the ordinances making power by the executive. The petitioner a professor who carried a detailed research in the matter, challenging the practice of state of Bihar in promulgating and re-promulgating ordinances on a large scale without enacting them into Acts of the legislative and keeping them alive for an indefinite period time. He pointed out that governor of Bihar promulgated 267 ordinances between 1967 and 1981 and all these were kept alive for a period ranging from one to fourteen years by re-promulgating from time to time. Out of these 256, 69 were re promulgated several times and kept alive with the prior permission of the president of India.

The five judges bench of the court held that such a practice was a “subversion of the democratic processes” and colorable exercise of power and amounted to fraud upon the constitution and, therefore, unconstitutional, The court called it usurpation by the executive power of the law making functions of the legislature. The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to preserve political ends.

The observation of the supreme court in the above mentioned case bring forth the facts that the provisions relating to Governor in the constitution are being transgressed by the executive to achieve the political ends. The provisions are used in a twisted manner in the case elucidated above. The judgment of the court will go a long way in preventing the governments manipulative practice of circumventing the provisions of the constitution relating to Governor. It is submitted that Governors of the states indulge in this sort of affairs only after being prompted by the centre, inviting deteriorated image of this office of repute. It will not be out of the way to mention here that the gospel verdicts of the upper judiciary are not in a position to put a check on the misuse of constitutional provisions by the constitutional functionaries to the desired effect as the pronouncements are much more of jurisprudential significance.

Power with respect to disqualification of members

Governor decides on the question of disqualification of members of the state legislative in consultation with the election commission reports laid by Governor in state legislature, lays the reports of the state finance commission and

the comptroller and Auditor- General relating to the accounts of the states before the state legislature financial powers money bills in the state legislature cannot be introduced without prior recommendation of the Governor. Governor ensures that the budget of the state is laid before the assembly every year. The “contingency fund of the state” is maintained and administered by the government of the state. Governor can advance money out of it for meeting unforeseen expenditures, but the money has to be recuperated with the authority of state legislature. The governor of the state can receive the report of the states auditor general pertaining to the accounts of legislature and parts it before the state legislature.

Judicial powers

President of India consults the Governor while appointing the chief Justice and other judges of the high Courts of the states president has powers can grant pardon, reprieve, respite or remission of punishment to persons convicted of the an offence against the an law relating to matter to which the executive power of state extends. Further he cannot pardon a person awarded capital punishment, although he can convert the same into other kind of punishment. Further governor has no powers to pardon with respect to sentence in court of martial.

Discretionary powers

When governor acts against the advice of his council of ministers in relation to a matter involving his ‘special responsibilities’, he exercised his individual judgments. A question has arisen whether the constitution of India deploys the term “discretion” in the same technical sense.

The supreme court in *Sameth Singh V/s state of Punjab*⁶ has cleared the confusion of vision regarding the meaning of ‘discretion’ by impliedly stating that the word does not have the technical meaning given to it under the government of India Act, 1935. The court referred to Article 200 and 350 of the constitution as illustrative of function to be discharged by the governor in his discretion. Under Article 200 the governor may act irrespective of any advice from the council of ministers and refer a bill to the president for consideration in a making a report under Article 356 the Governor will be justified in exercise his discretion even against the aid and advice of his council of minister.

One analyst has observed that thought the Supreme court of observed that a Governor acts in his discretion when necessity arises under Article 200 or 356, it would be more correct to that governor acts directly under those Articles rather than in his discretion. Article 154 (1) of the constitution state that the executive power of the state shall be vested in the Governor and shall be exercised by him in accordance with the constitution. This article vests the governor with the power to act directly even when he does not act with the aid and advice of his ministers. The distinction between acting directly and acting in his discretion was not noticed by the Supreme Court. The situations of function required by the constitution to be exercised by a Governor in his discretion are.

1. The powers of governor of Assam, Meghalaya, Tripura and Mizoram under para 9(2) of the sixth schedule to decide the share of royalties payable to district council in the above mentioned states.

2. The power of governor of Nagaland to frame rules for a regional council of Tuensang District. Article 371 A (1) (D).
3. The power of governor of Nagaland in all matters relating to Tuensang district. Article 371 A(1) (F).
4. The power of governor of Nagaland for equitable allocation of money provided by the govt. of India between the Tuensang district and the rest of the state of Nagaland 371 A (2) (b)

The governor of state, on being appointed by the president as the administrator of an adjoining union territory, has to exercise his function as administrator independently of his council of minister. Article 239 (2). Beside, the governor of Sikkim, Nagaland and Arunachal Pradesh have some special responsibility under the constitution such as maintenance of peace, equitable arrangement for ensuring the social and economic advancement and administration of law and order in a state. With the commencement of the constitution only explicit provision over mentioned for Governor to act as per his discretion such as para 9 and 18 of the sixth schedule and article 239 (2).

The discretionary power of governor in state are much more extensive in comparison of the president in India. For example article 163 of the constitution says that there shall be a council of ministers in the state with the chief minister of the head to aid and advice the governor in exercise his functions, except those which are required to be done by the governor on his/her discretion. The constitution further mentions that if any question arises whether a matter falls within the governor's discretion or not, decision of the governor shall be final, and the validating of anything done by the governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Moreover, what advice was tendered by the governor to the ministry cannot be inquired into a court.

Some discretionary powers are as follows Governor can dissolve the legislative assembly of the chief ministry advises him to do following a vote of no confidence: Now, it is up to the Governor what he/she would like to do : Governor, on his/her discretion can recommended the president about the failure of the constitutional machinery in the state on his/her discretion the Governor can reserve a bill passed by the state legislature for president's assent. If there is no political party with a clear cut majority in the assembly, governor on his/her discretion can appoint anybody as chief minister Governor determines the amount payable by the government of Assam, Meghalaya, Tripura and Mizoram to an autonomous Tribal District council as royalty accruing from licenses for mineral exploration. Governor can seek information from the chief minister with regard to the administrative and legislative matters of the state Governor has discretion to refuse to sign to an ordinary bill passed by the state legislature. Thus though the governor is made the constitutional head of the state like president of India, yet there is a thin line in the constitution empowers the Governor to act without the advice of the chief minister and his council and can use discretion on certain matter. Special responsibilities of Governor the constitution has also placed some special powers and functions of Governor in certain states which need to be exercised in consultation with the council of ministers in state. These include establishment of

separate development board of Vidarbha and Marathwada in Maharashtra. Establishment of separate development board for Saurashtra and Kutch in Gujarat Governor Nagaland has special responsibility with respect to law and order in the state of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills- Tuensang Area immediately before the formation of that state continues. There are special powers with respect to administration of tribal areas in Assam, Manipur, Sikkim and with respect to law and order in Arunachal Pradesh. But the occasions to exercise discretionary power are few and far Madras high court in the case of S. Dharmalingam Vs governor of Tamilnadu⁷ held that certain powers are available to the governor under article 163 which he would exercise in his sole discretion. The immunity of the governor is absolute, when he acts in his own discretion. In Pratap Singh Rajrao Rane Vs governor of Goa⁸ court held that the governor is not answerable to the court even respect of charge of malafide.

CONCLUSION

The constitution of India itself gives some discretionary power to the governor, so that he can fulfill his responsibility in an effective manner. The constitutional function of governor is normally expected to be discharged on the aid and advice of the council of minister headed by the Chief Minister. When the chief minister enjoys the confidence of the majority in the state legislative, then the Governor's capacity to exercise his discretionary power is reduced. It is under special circumstances that the governor may act without the advice of the council of minister. In other words, circumstantial powers are exercised by him in his own discretion.

There are lot many rumors regarding the powers of governor. It is true that the governor is appointed by the president and remain on the post till the pleasure of the president. As the president acts in accordance with the advice of the union cabinet, it is assumed that the governor is an agent as well as employee of centre and should consult the union government before taking decisions even in matters where governor has discretionary matters⁹ generally, governor fulfills his obligation imposed in him by the constitution governor before entering in his offices promises to preserve, protect and defend the constitution and the law and the well being of the people of the state.¹⁰

Foot Notes

1. Article 163(1), Constitution of India.
2. Proviso to article 153 inserted by the constitution seventh amendment act 1950.
3. (Proviso article 153 inserted by the constitution seventh amendment act 1950)
4. (Article 154(1) of the constitution).
5. AIR SC (1986)238
6. AIR 1974, SC 2192
7. AIR 1989 mad 45
8. AIR 1990 Bamb 53
9. Frontline vol 18 issue 13 June 23 – July 06, 2001
10. Article 159 Constitution of India.