The Games the Governors Play

■ **Dr. M.N. Buch**

Of all the creations of the Constitution the strangest is the creature called a Governor of a State. He is neither human nor animal; neither fish nor fowl; neither mineral nor water. Every other office holder appointed to any office under the Constitution or as per the provisions of a law is required to have certain qualifications. Under Article 157 the only qualification that a Governor needs is to be a citizen of India and over thirty-five years of age. The President of the Union holds an elective office, the Members of the State Legislatures and Parliament all have to win an election to become a member, a Judge of the Supreme Court, the High Courts and of subordinate courts requires certain minimum educational qualifications and experience. A member of any of the Civil Services of the Union and the States have to fulfil the qualifications laid down in Article 309 of the Constitution. The Governor is not elected, he is not selected by a procedure prescribed by Chapter XIV of the Constitution, he is just appointed. Strangely enough Article 157 does not even state that the Governor has to be physically fit or mentally sane and yet he is the person without whom one of the constituent states of India cannot be complete because Article 153 provides that there will be a Governor for each State and Article 154 provides that the executive powers of the State will vest in the Governor. Under Article 155 the Governor is appointed by the President and under Article 156, subject to the pleasure of the President, he holds office for five years. Because the executive government vests in him, because under Article 168 the State Legislature consists of the Governor and the House or Houses in case of a bicameral legislature, because under Article 217 a Judge of the High Court is appointed by the President in consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court concerned and because under Article 233 the appointment of district judges and of judicial officers below that rank is made by the Governor in consultation with the High Court, the Governor straddles the Executive, the Legislature and the Judiciary. He is thus the Head of State for the State concerned, a State which is an integral constituent of the Union under Article 1 and a State which under List 2 and to a limited extent List 3 of the Seventh Schedule has exclusive or concurrent legislative power and, therefore, the Governor in a State is as much a Head of State as the President. He is the Lord High Panjandrum of the State. Within the four corners of Constitution he, like the Sovereign of the United Kingdom reigns, but the question is whether he also rules. Considering the way in which some Governors have behaved one might be tempted to believe that the Governor is both Sovereign and Ruler, whereas the fact is that he is no such a thing.

The remarks made in this paper, though restricted to the States, apply equally to the Union and, therefore, the President and should be read in that context. Let us begin by nailing one shibboleth which is that because the President appoints the Governor, who serves at the President's pleasure, he is an agent of the Central Government and the President. As already stated he is the Head of State of a constituent unit of our Union which may not be fully Sovereign but which has all the trappings of sovereignty within the constitutional mandate given to it. Under Article 163 the Governor acts on the aid and advice of his Council of Ministers and not on the directions given by the President. In fact the Constitution does not permit the President to give any directions whatsoever to the Governor and except in those matters in which the Constitution or any law requires the Governor to act at his own discretion, the Governor is bound by the aid and advice of his Council of Ministers. This, mutatis mutandis, is coterminous

with Article 74, which requires the President to act in accordance with the advice given to him by the Council of Ministers. This means that like the British Sovereign who is bound to act on the advice of his Council of Ministers, the Governor, too, in exercise of his powers, executive, legislative (in the matter of Ordinances issued under Article 213 of the Constitution) and judicial, that is, appointment of members of the State Judicial Service or the granting of pardon, suspension, remission or commutation of sentences in cases of an accused person who has been convicted of an offence, will also act only on the advice of the Council of Ministers. He has no independent authority in this behalf.

In what matters can the Governor act independently? Under Article 164, after a government has ceased to hold power and after a fresh election the Council of Ministers has to be constituted, the Governor does not have a Council to consult and, therefore, it is entirely within his discretion to invite a person to become Chief Minister and with his help constitute a Council of Ministers. This power, this discretion, is hedged in by the provisions of Article 164 (2) which states that the Council of Ministers shall be collectively responsible to the Legislative Assembly. If the Governor were to invite a person to be Chief Minister who, because he lacks the numbers to win a vote of confidence in the House, will be ousted by the Legislature in its very first session, the Governor is bound to invite only that person who is the nominee of the largest party in the Legislature. Under Article 174 the State Legislature must meet in such a way that not more than six months intervene between the previous session and the next one, which means that if the Chief Minister fails to advise the Governor to fix a date for the first sitting of the next session within this period, then the Governor can ask the Chief Minister to advise him and if he fails to do so he can himself fix the first sitting of the next session so that the intervening period between sessions does not exceed six months.

Under Article 200 when a Bill other than a Money Bill is presented to the Governor for his assent after the Legislature has passed it, the Governor may give his assent, reserve it for consideration of the President or, as soon as possible after the presentation of the Bill to the Governor, return the Bill to the Legislature with a message requiring the House to reconsider the Bill or any specified provision thereof. In doing so the Governor will obviously not consult the Council of Ministers, which is a party to the passing of the Bill. Here the Governor will use his discretion. This will apply to those Bills also which the Governor reserves for the President's consideration.

One question which remains open is whether advice rendered by a Chief Minister, who has lost a vote of confidence, to dissolve the House under Article 174 (2) (b) shall necessarily be honoured by the Governor. In Britain the convention is that the Sovereign must abide by the advice even of a Prime Minister who has lost a vote of confidence, but in India we do not strictly follow this convention. For example, in 1967 when some members of the M.P. Legislature defected and the government of Pandit D.P. Mishra became a minority, the Governor did not accept the Chief Minister's advice to dissolve the House and instead invited Govind Narain Singh who had formed the Samyukta Vidhayak Dal (SVD), to form the government. Here the Governor used his own discretion though some doubts remain whether this is strictly in accordance with the Constitution. There are certain other provisions of the Constitution where the Governor can exercise his own discretion, of which the most prominent is Article 356. If the Governor is satisfied that a situation exists in the State where the government cannot be carried out in accordance with the provisions of the Constitution, he may send a report in this behalf to the President, who may then assume the whole or part of the functions of the government of the

State. Obviously the Council of Ministers is hardly likely to advise the Governor to arrange for its own demise and, therefore, such a report is sent at his discretion by the Governor. Under Article 371 to Article 371-I there are certain special provisions giving discretionary powers to the Governor. A few examples can be given. Under Article 371 in the States of Maharashtra and Gujarat respectively there can be special development boards for Vidarbha, Marathwada and the rest of Maharashtra and Saurashtra, Kutch and the rest of Gujarat. The President can direct equitable distribution of development funds to these boards and can give special responsibility to the Governors of these two States, which may include discretionary powers. Under Article 371A in Nagaland the Governor has special responsibility for law and order, where the Governor, after consulting the Council of Ministers, is free to exercise his individual judgement on the action to be taken. Under Article 371 C the Governor has special responsibility for the proper functioning of any Hill Areas Committee constituted in the State. Under Article 371-F (g) the Governor of Sikkim acts at his own discretion in the matter of peace and the equitable social and economical advancement of different sections of the population of Sikkim. Other than these special provisions a Governor has no discretionary powers whatsoever and must act strictly in accordance with the aid and advice of his Council of Ministers. He reigns but does not rule.

The Constitution of India is designed for interlocking arrangements which are designed to maintain a delicate balance of power between the Executive, Legislature and the Judiciary. In this both the President and the Governor have a pivotal role, which is provided by Articles 60 and 159 of the Constitution. Under Article 60 the President, in the oath administered to him when he assumes office swears that he "will faithfully execute the office of the President of India and will … preserve, protect and defend the Constitution and the law …" Under Article 159 the Governor swears that he will to the best of his ability "preserve, protect and defend the Constitution and the law". The Governor is the guardian of the Constitution and if he finds that his Council of Ministers, while administering the State, is not acting in consonance with the spirit and the letter of the Constitution, he would advise the Chief Minister accordingly and, if necessary through Article 167(c), officially require the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a minister. The Chief Minister is bound to take the Governor's directive into consideration. As already stated, if the government is in violation of the Constitution the Governor can report accordingly to the President under Article 356 for such action as the President may deem fit. A Governor who is wise and a Chief Minister who is equally wise would maintain a dialogue and if the Governor gives any suggestions or makes any comments which are in the interest of the people of the State and of good governance, a Chief Minister would take such advice into consideration when deciding on a course of action. What the Governor cannot do, however, is to interfere directly in day-to-day administration or thwart the legislative decisions of the Legislature as has become a fairly common practice in India. It started with Giani Zail Singh who, as President, was opposed to the Postal Bill as passed by Parliament when Rajiv Gandhi was Prime Minister. The Bill sought to introduce a form of censorship of mail and Giani Zail Singh was rightly opposed to it. He used Articles 111 and 107 to ensure that the Bill never received his assent and died a natural death when the House was dissolved.

Under Article 111 when a Bill other than a Money Bill is presented for his assent after being passed by Parliament, the President may either give his assent or return the Bill to Parliament with a message requesting reconsideration of the Bill or of any specified provisions thereof. The relevant words of Article 111 state that in case the President withholds his assent he may "as soon as possible after the presentation to him of a Bill for assent, return the Bill …"

There is a similar provision in Article 200 vis-à-vis the Governor. Unfortunately the definition of the words, “as soon as possible” is given nowhere in the Constitution and Giani Zail Singh interpreted them to make indefinite deferment of consideration by the President a justified course of action. That was never the intention of the framers of the Constitution. Under Section 7 of Article 1 of the Constitution of the United States of America, when a Bill is presented to the President for his assent he must either give such assent or within ten days of presentation, Sunday excepted, return it to the Legislature for reconsideration. If within ten days the Bill is not returned it shall become law as if the President has given his assent. Following in the footsteps of Giani Zail Singh and especially in the case where the Governor belongs to the ruling party at the centre and the State is governed by some other party, Governors have started emulating Giani Zail Singh. In Madhya Pradesh at the time that NDA was in power at the centre Bhai Mahavir was the Governor and Digvijay Singh of the Congress Party was the Chief Minister. The Governor sat over a Bill relating to the powers of the Chancellor of an university till such time as the House was dissolved. The Bill lapsed. A similar thing happened in Gujarat though here it is reference to the President of the Gujarat Control of Organised Crime Bill which ensured that it was killed by the centre. Under the scheme of things in our democratic polity the power to legislate lies within the exclusive domain of the Legislature. The President or the Governor as the case may be has been given the authority to ask the Legislature to reconsider a Bill if he feels that the Bill merits it, but he does not have the power to negate the legislative competence of the Legislature through an endless delay in the matter of assent or return of a Bill.

The malaise is so deep that recently in Madhya Pradesh the Governor tried to delay his assent to the Appropriation Bill on the third supplementary grants which had been passed by the Legislative Assembly. This was carrying things too far because any Money Bill, which includes the Appropriation Bill or other Finance Bill, cannot be moved in the Legislature except on the recommendations of the Governor. In the Legislature, under Article 204 such a Bill cannot be amended by the Legislature by varying or altering either the destination or amount of an approved grant. A Bill introduced with the prior approval of the government, which cannot be amended by the Legislature after grants have been approved and which under Article 200 cannot be returned to the Legislature, has to be assented to immediately on presentation to the Governor. He has no discretion whatsoever in the matter, but despite this an attempt was made to embarrass government by some delay in giving assent.

We need certain changes in the Constitution in the matter of Governors so that they can no longer play games. Both in the case of Articles 111 and 200 we need a more precise definition of the period within which the President or the Governor can assent to a Bill or return it to the Legislature. The United States Constitution provides ten days. Perhaps we can make this a fortnight or a maximum of one month (thirty days). If an amendment is not agreed to then the Supreme Court should be approached to give a ruling under Article 141 specifying what the words “as soon as possible” mean by prescribing a specified time limit for consideration by the President and, mutatis mutandis, under Article 200 by the Governor. Under the Prevention of Corruption Act the Supreme Court, I believe, ruled that when a decision on whether to permit prosecution of a government servant is required from the appointing authority, if within three months no decision is taken then the courts will deem it that permission has been given. Perhaps such an interpretation could be given with regard to the words “as soon as possible”, which would amount to a law declared by the Supreme Court under Article 141.

There are two other issues which we need more clarity. The Governor is not elected, nor is appointed by a procedure in which selection is done according to norms. A Vice Chancellor of an university is appointed on the basis of the recommendation of a Search Committee. An officer of the Indian Administrative Service is appointed by a selection process in which there is a tough competitive examination. Even in the matter of admission to an Indian Institute of Technology students have to go through a process of a joint entrance examination. To become a Panch, a Municipal Councillor, a MLA or MP the candidate has to pass through a process of election in which the electorate decides its preference. The concept of a Public Service Commission is to ensure that appointment of government servants will be done on prescribed merit and not through whims, fancies and nepotism. In the matter of appointment of a Governor the totally arbitrary decision of the Central Government determines who will become the Head of State in a constituent State of the Union. Therefore, we have partisan Governors, Governors who are so politically aligned that they can only act according to whims and in total violation of the Constitution. Because there is no accountability, no responsibility to a Legislature or any other body to call the Governor to account against his arbitrary actions, there is hardly any remedy except to approach the High Court or the Supreme Court by invoking their writ jurisdiction.

In appointment of Governors, generally speaking, the following factors seem to apply: (1) Party hacks who for years have been serving party leaders in various capacities have an expectation that when their party comes to power they will be given some sine cure post, including a Governorship, Chairmanship of some important public sector corporation, etc. (2) Aged, failed politicians with the correct political leanings who are in requirement of advanced medical attendance, for whom a Raj Bhawan is ideally suited because of the perquisites and privileges attached to the post, are eligible for appointment (3) In those States which are under opposition rule and where the Centre wants to commit mischief a Governor capable of intrigue and dirty tricks would be sent (4) In States where the Central and State Governments belong to the same party the Chief Minister would naturally be consulted on whom he wants elevated as Governor (5) In some troublesome States where there is a serious law and order problem retired Civil Servants, Police Officers and Army Officers are sometimes selected as Governor. Jammu & Kashmir, Nagaland, Mizoram, Manipur and now Chhattisgarh and Andhra Pradesh have been given Civil Service, Police or Army governors.

What should one look for in a Governor? A Governor must be experienced, should have shown success in a career of his choice, should be apolitical and nonpartisan and willing to help the State Government to function effectively. He should not be a person with one foot in the grave. He should lead rather than command, he should have powers of persuasion, but he should be acutely aware of the fact that ultimately the responsibility of government vests in the elected legislators and the Council of Ministers, He can advise, he can persuade, he can guide but he cannot adopt a confrontational attitude. Regarding his appointment, if the National Judicial Commission is to be constituted for appointment of Judges, if Director of CBI is to be selected by a committee headed by the Prime Minister and the Leader of the Opposition as members, surely a Governor must also be appointed by consultation in which the Prime Minister, the Union Home Minister, the Chief Minister of the State and the Leader of the Opposition in Parliament must be partners. The committee should function by consensus, but no member other than the Prime Minister should have a veto power. If there is a conscious decision to appoint experienced but nonpartisan Governors we should be able to have in place Governors who genuinely function as constitutional Heads of State.

One last point. Even a chaprassi cannot be dismissed arbitrarily. Surely in removing a Governor there should be a fair and open process in which there must be specific charges against the Governor and the Chief Justice of the Supreme Court of India as Chairman, the Chairman of the Union Public Service Commission and Chairman of the National Human Rights Commission should form a tribunal to recommend whether a Governor is fit to continue in office or not. On this basis the President can then withdraw his pleasure and the Governor will have to go. The dignity of the Governor's office require at least this much protection for the holder of the post. Strange, is it not, that the Supreme Court is a knight on a white charger to protect the autonomy of a police officer, but seems to be indifferent to the quality, effectiveness and independence of the Head of State, the Governor?

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