CHAPTER V

RESERVATION OF BILLS BY GOVERNORS FOR PRESIDENT'S CONSIDERATION, AND PROMULGATION OF ORDINANCES

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CHAPTER V
RESERVATION OF BILLS BY GOVERNORS FOR PRESIDENTS CONSIDERATION AND PROMULGATION OF ORDINANCES

1. *INTRODUCTION*

5.1.01— The Constitution makes the Governor a component part of the State Legislature (Artcile 168). He cannot be a member of either House of that Legislature. In order to become an Act, every Bill passed by the State Legislature must receive his assent or, having been reserved by him for President's consideration, receive the assent of the President[1]. If the Governor or the President, as the case may be, with holds his assent, the Bill fails to become law.

Article 200

5.1.02 Article 200 provides that when a Bill passed by the State Legislature, is presented to the Governor, the Governor shall declare—

(a) that he assents to the Bill; or

(b) that he withholds assent therefrom; or

(c) that he reserves the Bill for the President's consideration; or

(d) the Governor may, as soon as possible, return the Bill (other than a Money Bill) with a message for re-consideration by the State Legislature. But, if the Bill is again passed by the Legislature with or without amendment, the Governor shall not withhold assent therefrom (First Proviso); or

(e) if in the opinion of the Governor, the Bill, if it became law, would so derogate from the powers of the High Court as to endanger its constitutional position, he shall not assent to but shall reserve it for the consideration of the President (Second Proviso).

5.1.03 If the Governor reserves a Bill for President's consideration, the enactment of the Bill then depends on the assent or refusal of assent by the President.

5.1.04 In the case of a reserved Bill, the President shall, under Article 201—, either declare his assent or withhold his assent thereto. Instead of following either of these courses, the President may (if the Bill is not a Money Bill) direct[2] the Governor to return the Bill together with a message to the State Legislature for reconsideration. The State Legislature shall then reconsider the Bill within 6 months of its receipt and, if it is again passed, it shall be presented again to the President for his consideration. In contrast with the power of the Governor regarding a reconsidered Bill, it is not obligatory for the President to give his assent to a reconsidered Bill.

5.1.05 State Bills reserved for Presidents's consideration under the Constitution, may be classified as follows:—

I. Bills which must be reserved for President's consideration

In this category come Bills—

(i) which so derogate from the powers of the High Court, as to endanger the position which that Court is by this Constitution designed to fill (Second Proviso to Article 200);

(ii) which relate to imposition of taxes on water or electricity in certain cases, and attract the provisions of Clause (2) of Article 288; and

(iii) which fall within clause (4) (a) (ii) of Article 360, during a Financial Emergency.

II. Bills which may be reserved for President's consideration and assent for specific purposes

(i) To secure immunity from operation of Articles 14 and 19. These are Bills for—

(a) acquisition of estates, etc. [First Proviso to Article 31A(I)];

(b) giving effect to Directive Principles of State Policy (Proviso to Article 31C).

(ii) A Bill relating to a subject enumerated in the Concurrent List, to ensure operation of its provisions despite their repugnancy to a Union law or an existing law, by securing President's assent in terms of Article 254(2).

(iii) Legislation imposing restrictions on trade and commerce requiring Presidential sanction under the Proviso to Article 304(b) read with Article 255.

III. Bills which may not specifically fall under any of the above categories, yet may be reserved by the Governor for President's consideration under Article 200.

2. *CRITICISMS AND SUGGESTIONS BY STATE GOVERNMENTS AND OTHERS*

5.2.01— Most State Governments, who have apprised the Commission of their view, are not in favour of making any change in the substantive provisions of Articles 200 and 201—. They are of the view that the object of these provisions is to ensure broad uniformity of legislation and conformity with the Constitution. This is chiefly necessary to avoid repugnancy to Union laws, of Bills relating to matters in the Concurrent List. According to them, these provisions also act as a safety-valve against hasty legislation, and by their operation enable the State Government and Legislature to have a second look at it. It is added that even otherwise, situations are conceivable where the State Government may think it prudent to bring the Bill to the notice of the Union Government. Two of them have emphasised that the Governor (under Article 200) and the Union Government (under Article 201—)should not exercise their discretion in an arbitrary manner. They recommend that guidelines for the exercise of such discretion should be laid down. One of them has stressed that the Union Government should not, by the use of its powers under Article 201—, try to dictate its policies to the State Government, unless the proposed Bill goes against the national interest or the provisions of the Constitution. Several States in this group, expressly or impliedly, complain of delays in the consideration of State Bills referred to the President. They have suggested the fixing of a time-limit for processing and securing President's orders on the reserved Bills. Some of them have given specific instances of such delays.

5.2.02 A different view has been propounded by some State Governments. They question the need for these provisions and ask for their deletion or substantial modification. It is argued that these provisions are subversive of the true federal principle. On this ground, one of them has suggested reformulation of these Articles to exclude the power of the Governor to reserve a Bill relating to a matter in the State List and the President's power to veto such a Bill Another State government maintains that these provisions are 'basically incosistent with the supremacy of the State Legislature, consisting of representatives of the people in whom the sovereignty of the State vests'. It is argued that the power of referring a State Bill for President's consideration operates to subordinate the State 'Legislature to the Union Executive. It is alleged that the power is not being exercised in conformity with the purpose and object of these provisions. There have been cases where Governors have reserved Bills contrary to the advice of the Council of Ministers. The legislative organ being independent of the executive, the Constitution should be amended so that only the Union Legislature—and not the Union Executive—may have power to approve or disapprove a repugnant State legislation in the Concurrent field. They have also asked for fixing a time-limit in Article 201— for completing consideration of the reserved Bills by the President. A State Government has susggested modification of clause (2) of Article 254 and addition of another proviso before the existing proviso to that clause, to the effect, that if the approval of the President to the Bill is not received within the period of one year from the date of its receipt it shall be deemed to have been approved by the President. Yet, another State Government has alleged that powers under Articles 200 and 201— are being misused to serve the partisan interests of the Union Council of Ministers. It has cited a recent example of a Bill to amend the law governing a University, reserved by the Governor in his discretion for the consideration of the President. It has urged for deletion of these two Articles. In the alternative, it has suggested modification of Article 200 so as to make it clear that, in the exercise of his functions under it, the Governor shall, in all cases, act on the advice of his Council of Ministers. It has also suggested providing of a time-limit of one month for the Governor to make up his mind for reservation of a Bill for President's consideration, and six months for consideration of such Bills at the level of the Union Executive. Another change suggested is that, if a reconsidered Bill is presented again to the President,' the latter shall not withhold assent therefrom. Thus, the power of the President in the case of reconsidered Bills is sought to be curtailed and made the same as that of the Governor. Another State Government has argued that, if this power is exercised otherwise than on the advice of the State Council of Ministers, it involves a major effective constraint on the States' legislative autonomy. It has therefore suggested that the existing Second Proviso to Article 200 be replaced to provide that the Governor shall exercise his functions under Article 200 in accordance with the advice of the State Council of Ministers.

5.2.03 One all-India Party complains that Bills have been reserved for consideration of the President in order to create difficulties for the State Governments. To prevent this alleged misuse, it suggests that

Article 200 should be so amended as to ensure that when a Bill relating to a subject in the State List, is presented to the Governor he shall not withhold assent therefrom or reserve it for consideration of the President. In their view, a time-limit of 3 months for consideration and orders of the President on a reserved Bill relating to a matter in the Concurrent List, should be presribed.

5.2.04 Another all-India Party has proposed that these provisions be amended to ensure that in reserving a Bill passed by the State Legislature, the Governor acts strictly on the advice of his Council of Ministers. It should be further provided, through a constitutional amendment, that the President shall complete consideration of the Bill within three months.

5.2.05 A third all-India Party has propounded the view that no Bill excepting a Bill falling within the purview of the second proviso to Article 200, should be reserved by the Governor for the consideration of the President. To ensure this, it has suggested that Article 200 should be suitably amended. If the Bill appears to violate the Constitution, then that is a matter to be left to the Judiciary and not to the political judgement or prejudices of the Union Government. The power of the President to veto a Bill (on this ground) should be taken away by repeal of Article 201—. In the alternative, they have asked for prescribing a time-limit for consideration of the reserved Bills by the President.

5.2.06 Another suggestion in regard to Bills which may appear to be unconstitutional, is that they may be referred to the Supreme Court by the President under Article 143 for its opinion.

5.2.07 One of the State Governments, which is of the view that the Governor should act in accordance with the advice of the Council of Ministers in seeking President's assent to State Bills, has observed that a Council of Ministers may not advise the Governor to reserve a Bill for President's assent under Article 254(2) or the First Proviso to Article 31A or the Proviso to Article 31C if they do not mind foregoing the Special protection for the validity of the particular legislation under the said Articles. They further consider that the President should be guided by the advice of the Inter-State Council and not that of the Union Council of Ministers in respect of Bills reserved under Article 31A or 31C.

3. *ISSUES FOR CONSIDERATION*

5.3.01— Thus, the main issues that require consideration are:—

(a) Whether the provisions of Articles 200 and 201— are subversive of the federal principle and the supremacy of the State Legislature in the field demarcated for it by the Constitution, and should therefore be deleted, or materially modified.

(b) Whether the Governor has to exercise his functions under Article 200, in all cases, in accordance with the advice of his Council of Ministers or whether, in some exceptional circumstances, he can act in the exercise of his discretion. And, whether it is feasible, and desirable to lay down guidelines to regulate the exercise of this discretion.

(c) Whether there have been delays in the process of securing orders of the President on the reserved Bills. If so, what measures, including fixation of time-limits, are necessary to minimise such delays.

4. *LEGISLATIVE HISTORY OF ARTICLES* 200, 201— AND 254

5.4.01— For appreciating these issues in the proper perspective, it is necessary to have a short look at the historical background of these provisions. Article 200 uses the phraseology of Section 75 of the Government of India Act, 1935 but makes two main departures from it:—

(a) It omits the words 'in his discretion'.

(b) It adds at the end of the first proviso, the words 'and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom'.

In order to gauge the significance and effect of these departures, we must hark back to the Constitution-makers.

5.4.02 The provisions which finally emerged from the Constituent Assembly as Articles 200 and 201—, were, to start with, in the form of Clauses 147 and 148 of the Draft Constitution prepared by the Constitutional Adviser. These were renumbered by the Drafting Committee as Articles 175 and 176,

respectively. The first paragraph of the Draft Article 175 was substantially similar to that of the present Article 200. Thereunder, the Governor could assent to the Bill or withhold assent therefrom or reserve it for the consideration of the President. The proviso to this Draft Article provided that in the case of a Bill passed by a State Legislature having only one House, the Governor may in his discretion return the Bill with a message for reconsideration to it, but he shall not withhold his assent from a Bill which had been passed again by the Legislature with or without amendment. It is noteworthy that in discharging his functions under this proviso, the Governor was expressly authorised to act in the exercise of his discretion. The Second Proviso to Article 200 was not originally there in the Draft Article. It was added[3] by the Constituent Assembly at the final stage of the discussions.

5.4.03 Draft Article 176 was in *pari materia* with the present Article 201—.

5.4.04 We have noticed in the Chapter on the 'Role of the Governor'[4] that, after prolonged consideration, the Constituent Assembly decided to have nominated, instead of elected, Governors. Consequent upon this decision, they deleted[5] from the various provisions of the Constitution, including the Draft Article 175, all references to the discretionary powers of the Governor. However, the Constituent Assembly did not exclude the reference to the discretionary power of the Governor from the Draft Article 143 (later renumbered as Article 163 of the Constitution).

5.4.05 Some members of the Constituent Assembly[6] suggested to the Drafting Committee that the words which would enable the Governor to withhold assent from a Bill or reserve it for the consideration of the President or return the Bill for reconsideration, should be deleted from the Draft Article 175. The implication[7] of a further suggestion which one of the Members made, was that the President should not have the power under Draft Article 176 to withhold assent from a Bill reserved by the Governor for his consideration where such Bill having been returned to the State Legislature with a message for reconsideration in pursuance of directions of the President under that Article, was passed again with or without amendment.

5.4.06 In the context of these objections, the Constitutional Adviser submitted a Note to the Drafting Committee explaining the need for these provisions and the manner in which the functions conferred thereunder would be exercised by the Governor. The Note reads as follows:

> "Under Article 175, the power of the Governor to declare that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President will be exercised by him on the advice of his Ministers. Accordingly, there will be hardly any occasion to withhold assent from a Bill which has been passed by the Legislature. There is therefore no harm in retaining the provision with regard to the withholding of assent from a Bill in this article. There may be cases where it might be necessary for the Governor to exercise the power of withholding assent even on the advice of the Ministers. If after a Bill is passed by the Legislature, the Ministers resign before the Bill is assented to by the Governor, the new Ministry which would be formed might not want the Bill to be enacted and might advise the Governor to withhold assent from the Bill. But if the provision relating to the withholding of assent is omitted from this article, it will not be possible for the Governor to withhold it. There is thus a distinct advantage in retaining the provision relating to the withholding of assent in this Article.
>
> The provision regarding reservation of a Bill for the consideration of the President is also necessary in view of the provisions contained in clause (2) of Article 231."[8]

For[9] the reasons given by the Constitutional Adviser in his notes, including the one reproduced above, the suggestions of these Members for deletion of the clauses in question could not be accepted.

5.4.07 A suggestion was made by some members for deletion of clause (2) of the Draft Article 231 (corresponding to clause (2) of Article 254 of the Constitution). The Drafting Committee rejected it for reasons noted by them, as follows:—

> "If this amendment is accepted, then the Legislatures of the States will hardly have any power to make laws with respect to any matter enumerated in the Concurrent List with regard to which any provision exists in any earlier law made by Parliament or in any existing law with respect to that matter, as the expression "repugnant" has sometimes been construed very widely. This would unduly restrict the powers of the Legislatures of the States to make laws with respect to matters in the Concurrent List."[10]

5.4.08 The above survey of the Constitution-making process brings out clearly that the Governor should, as a rule, exercise his functions under Article 200 on the advice of his Council of Ministers. By saying that "there will be hardly any occasion" for the Governor to exercise these powers irrespective of the advice of his Ministers, the Constitution-makers were emphasising that in the context of Article 200, occasions for the exercise of his discretionary power by the Governor would be extremely rare. The process of exclusion and inclusion by which they fashioned and finalised the provisions of Article 200, reinforces this conclusion. Deliberately departing from the language of Section 75 of the Government of India Act, 1935, they omitted from the substantive part and the First Proviso of Article 200, the phrase "in his discretion" and added at the end of the First Proviso, words which expressly divest the Governor of the power to veto a reconsidered Bill whether passed in the original or amended form.

Utility and purpose of reservation under Articles 200 and 254

5.4.09 It was further clarified by the Constitution-makers that the power of reserving Bills for the consideration of the President conferred by the Article, was a ncesssary channel for references under Article 254(2) to save the competence of the State Legislatures from being unduly restricted by the operation of the rule of repugnancy embodied in clause (1) of that Article. The point sought to be made out was that since the power of reserving a Bill for President's consideration under Article 200 read with Article 254(2) was being conferred primarily for preserving the States' legislative competence in the Concurrent sphere, it would be exercised by the Governor on the advice of his Ministers.

5. *AMENDMENT OF ARTICLES* 200 *AND* 201— *NOT NECESSARY*

5.5.01— We will now consider the demand for the deletion of those clauses from Articles 200 and 201— which enable the Union Executive to control the exercise of the legislative power of the States. It is argued that these provisions are subversive of the federal principle and the supremacy of the State Legislatures in their demarcated sphere. The principle of Union supremacy in the legislative sphere which underlies Articles 246(1) and 254(1) is recognised by most constitutions which are admittedly 'Federal'. In the United States of America this principle is called the[11] 'key-stone of the arch of Federal power'. Our Constitution is not cast in a tight mould. It is *sui generis.* It harnesses the federal principle to the needs of a "Strong Centre". The various provisions of the Constitution which require State Bills relating to certain matters to be referred to the President for consideration or assent are a part and parcel of this scheme of checks and balances adopted by our Constitution.

5.5.02 The Constitution-makers noted that Articles 200 and 201— are also necessary in view of clause (2) of Article 254. This needs a little amplification. Matters enumerated in the Concurrent List are of common interest to the Union and the States. On the basic aspects of such matters legislative uniformity throughout the country is desirable. However, if Parliament occupies the field of a Concurrent subject, the power of the State Legislature to enact a law on that subject, in variance with the Union law, is practically taken away. This result is brought about by the operation of the rule of repugnancy containded in clause (1) of Article 254. Nonetheless, peculiar conditions, problems and practices relating to that subject in a State, may need regulations and remedies quite different from the one provided in the Union law. In such a situation, a legislation of the State Legislature making provisions suited to the peculiar conditions in the State, though inconsistent with the Union law, can be saved from invalidation on the ground of repugnancy, if, having been reserved by the Governor for President's consideration, it receives his assent. Thus, Articles 200 and 201— provided a necessary channel through which clause (2) of Article 254 operates to save the powers of the State Legislatures from being unduly abridged by the rule of repugnancy.

5.5.03 Sometimes, after a Bill is passed by the State Legislature, the Ministers resign before the Bill is assented to by the Governor and the new Ministry may not want the Bill to be enacted, and may advise the Governor to withhold assent therefrom. Cases are also conceivable where under popular pressure a State Legislature rushes through a Bill without fully considering its implications. Soon after it has been passed by the Legislature, the Council of Ministers, on second thought, may themselves discover defects in the Bill and decide that it should be further considered. In such a situation, Articles 200 and 201— afford them a way to get out of the predicament. They may advise the Governor to withhold assent from the Bill or return it for reconsideration of the Legislature or reserve it for the consideration of the President.

5.5.04 The chief utility of the provisions in Articles 200 and 201— for reservation of State Bills for the consideration of the President, lies in the fact that they help ensure uniformity and harmony in the exercise of the legislative power of the Union and State Legislatures with respect to the basic aspects of a matter in the Concurrent List.

5.5.05 There are other provisions also in the Constitution which require reservation for President's consideration of certain kind of Bills. These have been classified in para 5.1.05 above. For reservation of such Bills also Article 200 is a necessary channel.

5.5.06 One of the State Governments who have objected to these provisions, has suggested that through suitable amendments of the Articles concerned, the power of control over the State legislation should be withdrawn from the Union Executive; and instead, given to Parliament. In our Parliamentary System of Government, the Union Council of Ministers remain in office so long as they command the confidence of Parliament. In practice, the fate of a Union Bill or measure depends on whether the Union Ministers support or oppose it. Therefore, this suggestion, if accepted, will, for all practical purposes, hardly make any difference. Rather, it will make the working of the provisions more cumbersome and dilatory.

5.5.07 We will now consider the suggestion that the existing Second Proviso to Article 200 be deleted and replaced by a Proviso making it obligatory for the Governor to exercise his functions in accordance with the advise of his Council of Ministers. This Proviso, as it stands, requires more as a matter of obligation rather than of discretion, that the Governor shall reserve a State Bill which, in his opinion, if it became law, would so derogate from the powers of the High Court as to endanger the position which it is designed to fill by the Constitution. Needless to emphasise that for the proper functioning of a two-tier democratic system, governed by rule of law, as envisaged by the Constitution, an independent judiciary is an integral and indispensable part of the Constitutional edifice.

5.5.08 For all these reasons, we do not support the proposals for deletion or amendment of Articles 200 and 201— of the Constitution.

6. *SCOPE OF GOVERNOR'S DISCRETION UNDER ARTICLE 200*

5.6.01— The next important question is whether the Governor has any discretion in discharging his functions under the substantive part of Article 200. If so, in what cirumstances can he act in the exercise of his discretion irrespective of the advice of his Ministers? Can any norms or guidelines be laid down in this matter?

5.6.02 There is some divergence of opinion on this point. One view is that the powers vested in the Governor under Article 200 are discretionary powers. Its protagonists maintain that on each occasion when a Bill is presented to the Governor for assent, it will be for him to decide whether as part of the Legislature he should or should not assent to it and, if he feels some doubt about the validity or propriety of any provision of the Bill, he may ask the Legislature to reconsider the whole or any part of it; and, if he thinks that the matter is of some importance, he may in his discretion, reserve it for the consideration of the President. The other view is that excepting in the case of Bills falling under the Second Proviso, the Governor has no discretion in the performance of his functions under Article 200.

5.6.03 The first view is too wide and general. Such a broad construction of the discretionary powers of the Governor would be repugnant to the Parliamentary System of Government envisaged by the Constitution. This view stands impliedly disapproved by the dictum of the Supreme Court in *Samsher Singh's case*, (AIR 1974 SC 2912). It was held there in that the Governor in our Constitution enjoys the status of a Constitutional head in a Cabinet type of Government—a few exceptions and marginal reservations apart. In the context of Article 200, only the Second Proviso of the Article was cited as an illustration of such an exception (Para 54, of the judgement).

5.6.04 Article 163(1) of the Constitution enjoins that, normally, in the discharge of his functions, the Governor has to abide by the advice of his Council of Ministers, “except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion”. The words “by or under” restrict the scope of the discretionary power of the Governor. The emphasise that the Governor may exercise his discretion only where he is 'required' expressly or by necessary implication by the Constitution to act in the exercise of his discretion.

Article 200 does not confer a general discretion on Governor

5.6.05 We have already notice while reviewing the proceedings of the Constitution-framing process, that the Note of the Drafting Committee read in the light of the circumstances, *viz*. (i) the omission from the Draft Article 175 of any express reference to the discretionary power of the Governor, and (ii) the addition at the end of the (First) Proviso, words that prohibit the Governor from withholding assent to a reconsidered Bill,—emphasise the extremely limited scope for the Governor's discretionary power under Article 200.

5.6.06 We are of the opinion that Article 200 does no invest the Governor, expressly or by necessary implication, with a general discretion in the performance of his functions thereunder, including reservation of a Bill for the consideration of the President.

5.6.07 We now consider the view that in exercising his functions under Article 200 (save under its Second Proviso) the Governor has absolutely no discretion, but must abide by the advice of his Ministers under all circumstances. It appears to proceed on an extremely restricted interpretation of the Note of the Drafting Committee (extracted in Para 5.4.06 above). Evidently, it has construed literally the words "there will hardly be any occasion for the Governor", in this Note as conveying that "there will absolutely be no occasion" for the Governor to exercise his discretion. Firstly, it is to be noted that these words were used in the context of the Governor's power "to withhold assent from a Bill which has been passed by the State Legislature". Secondly, this Note cannot be read in isolation from that part of the Draft Article 143 [corresponding to the present Article 163(2)] whereunder the question whether any matter is such as respects which the Governor is by or under the Constitution required to act in his discretion, is to be determined by the Governor himself in his discretion and his decision on that question shall be final.

Discretionary power for reservation under Article 200 may be exercised only in rare case

5.6.08 Unconstitutionality of a Bill may arise on various grounds. The Bill may *ex-facie* relate to a matter in List I and not in List II or List III and, as such, may be beyond the legislative competence of the State Legislature. The provisions of the Bill may clearly violate Fundamental Rights or transgress other constitutional limitations. The provisions of the Bill may *manifestly* derogate from the scheme and frame work of the Constitution so as to endanger the sovereignty, unity and integrity of the nation.

5.6.09 In all cases of *patent* unconstitutionality, the Governor may—in the exercise of his discretion, reserve it for the consideration of the President. Save in such exceptional cases, the Governor must in the discharge of his functions under Article 200, abide by the advice of his Ministers. He should not act contrary to their advice merely because he personally does not like the policy embodied in the Bill.

Exhaustive guidelines neither feasible nor Desirable

5.6.10 We have noted in the Chapter on Governor that it is neither[12] possible to lay down exhaustive guidelines, nor desirable to imprison the discretionary powers of the Governor within the straitjacket of rigid norms. The point that needs to be re-emphasised is that the Governor should act in his discretion only in *rare and exceptional* case of the kind mentioned above, where he is compelled by the dictates of good conscience and duty to uphold the Constitution. In so acting, he should bear in mind that the Constitution is founded on the fundamental principles of Parliamentary democracy and division of powers. In an overwhelming area of his functions, the Governor can best defend and uphold the Constitution "not by denying its spiritual essence of Cabinet responsibility but by accepting as his Constitutional function what his 'responsible' Ministers have decided".[13]

A.R.C.'s View

5.6.11 The Administrative Reforms Commission (Study Team) observed[14] that, if the Provisions of Article 200 are given a very wide interpretation, it would lead to a large number of Bills being reserved for the consideration of the President, contrary to the federal spirit of the Constitution. They also pointed out that this Article must be interpreted as enabling Presidential intervention only in special circumstances, such as those in which there is a clear violation of fundamental rights or a patent unconstitutionality on some other ground or where the legitimate interests of another State or its people are affected. It further observed that this article also provides an opportunity for Presidential intervention in the event of a clash with a Union law.

5.6.12 We are in agreement with the above observations. These observations are applicable, as far as may be, to the consideration by the President (*i.e.* the Union Executive) of the Bills reserved by the Governor in the exercise of his discretion under Article 200.

5.6.13 We are, therefore, of the view that:

(i) Normally, in the discharge of the functions under Article 200, the Governor must abide by the advice of his Council of Ministers. However, in *rare and exceptional* case, he may act in the exercise of his discretion, where he is of opinion that the provisions of the Bill are *patently* unconstitutional, such as, where the subject-matter of the Bill is *ex-facie* beyond the legislative competence of the State Legislature, or where its provisions *manifestly* derogate from the scheme and framework of the Constitution so as to endanger the sovereignty, unity and integrity of the nation; or *clearly* violate Fundamental Rights or transgress other constitutional limitations and provisions.

(ii) In dealing with a State Bill presented to him under Article 200, the Governor should not act contrary to the advice of his Council of Ministers merely because, personally, he does not like the policy embodied in the Bill.

7. *ARTICLE* 254

5.7.01— We now consider some other provisions which require or necessitate reservation of certain kinds of Bills for assent or consideration of the President. The most important of such provisions is contained in Article 254(2). Our survey shows that approximately, 75 per cent of the total number of Bills reserved by the Governors for President's consideration, relate to matters in the Concurrent List. They were purportedly reserved under Article 254 (2) or the advice of the Council of Ministers. It is, therefore, necessary to examine the provisions of Article 254.

5.7.02 Clause (1) of Article 254 lays down that a valid law of the Union, with respect to a matter in the Concurrent List, shall prevail over a valid law of the State with respect to the same matter, to the extend of repugnancy. Clause (2) of the Article is an exception to this rule. It provides:

> "Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List, contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received has assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

5.7.03 Resort to clause (2) is necessitated in the case of those legislations only which are affected by the operation of the rule of repugnancy contained in clause (1). Clause (1) applies only where the Union and the State Legislatures acting in the exercise of their powers, have passed mutually inconsistent law with respect to the same matter in the Concurrent List. If there is no Union Law or an existing law with respect to a Concurrent subject to which the State Law relates, this clause does not become operative. In such a situation the State legislation upon that Concurrent subject will prevail *proprio vigore* and the question of reserving it for consideration and assent of the President under clause (2) of the Article does not arise.

5.7.04 Further, Article 254 is not attracted if the State law in its pith and substance relates to a subject in List II, notwithstanding the fact that it incidentally trenches upon an Entry in the Concurrent List.

Scope of Article 254 (2)

5.7.05 In sum, clause (2) of Article 254 is applicable only where these two conditions are cumulatively satisfied:

(a) There is a valid Union law or an existing law on the same subject-matter occupying the same field in the Concurrent List to which the State legislation relates.

(b) The State legislation is repugnant to the Union law. That is to say,

(i) there is direct conflict between the provisions of the two laws, or

(ii) the Union law is intended to be an exhaustive code on the Concurrent List subject.

If either of these conditions is not satisfied, the reservation of the Bill for Presidential consideration, will fall outside the scope of Article 254(2). The Union cannot, in terms of the Constitution, require that all Bills on Concurrent List subjects passed by the State Legislatures, be referred for the consideration of the President. Even in cases where the reference is made in pursuance of Article 254(2), it is necessary that the reference should clearly identify the repugnant provisions of the State legislation with respect to which the assent of the President is sought.

Article 254(1) was conceived to save States' Legislative Competence under List III

5.7.06 The provisions of Article 254(2) have been conceived to save the power of the State Legislatures to make laws with respect to matters in the Concurrent List from being unnecessarily superseded by the operation of the rule of repugnancy. It is, therefore, reasonable to assume that the Council of Ministers would themselves advise the Governor to reserve a Bill under this Article if any of its provisions are repugnant to a Union law or an existing law and that the Governor would invariably act according to such advice. Indeed, the survey made by us, confirms this position.

5.7.07 President's assent to a State Bill has been withheld on certain occasions on the ground that the Union is contemplating a more comprehensive legislation with respect to that subject. If the contemplated legislation is not already on the anvil of Parliament, this may be misconstrued by the State Government concerned as an excuse to delay or defeat its measure. If the State Government thinks that the measure is one of urgency and insists on an early order of the President on its Bill, and the Bill does not suffer from any patent unconstitutionality, it will perhaps be better for the Union Government to secure the President's assent to the Bill rather than allow it to drift indefinitely till the Union in its own time considers and enacts a law. No irremediable harm will be done if the President in order to avoid undue delay accords assent to such Bills. President's assent does not confer irrevocable immunity on the State Legislation from the operation of the rule of repugnancy. Parliament has always the power to amend, vary or repeal such a State law either directly, or indirectly by passing a subsequent law inconsistent therewith. This position is clear from a plain reading of the Proviso to Article 254(2).

5.7.08 We recommend that President's assent should not be ordinarily withheld on the ground that the Union is contemplating a comprehensive law in future on the same subject, and no irremediable harm will be done if President's assent is accorded to avoid undue delay.

5.7.09 As regards the suggestion that President's approval should be deemed to have been received if the same is not formally given within a period of one year from the date of receipt of the Bill, we consider that our suggestions for time-limits as contained in paragraph 5.16.03 hereinafter and the recommendation in paragraph 5.7.08 to the effect that no irremediable harm will be done if President's assent is accorded to avoid undue delay, will ensure that no case of a Bill pertaining to a Concurrent List subject will be delayed. We do not, therefore, consider that any amendment to Article 254 in this context is called for.

8. *ARTICLES* 31*A AND* 31*C*

5.8.01— Article 31A(1) provides that any law in regard to acquisition of estates, etc. shall not be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or 19. A State Bill under this Article acquires this immunity only if it had been reserved for consideration of the President and received his assent (First Proviso). The First Proviso to Article 31A has been criticised on the ground that it makes an invidious distinction between the laws of the Union and those of the States.

5.8.02 The Proviso enables the Union Executive to control and oversee the exercise of the power of the State Legislatures in making laws with respect to any of the matters and purposes specified in Article 31A(1). The necessity for providing this check is obvious. The operative part of clause (1) of this Article enables the Union and the State Legislature to take away Fundamental Rights guaranteed under Articles 14 and 19 by passing a law, within their competence, falling under any of the categories specified in its sub-clauses (a), (b) (c), (d) and (e). A law of this kind renders inoperative a wide spectrum of Fundamental Rights guaranteed under Articles 14 and 19. It is, therefore, necessary to have a look at these Articles.

5.8.03 Article 14 enjoins upon the State not to deny any person equality before the law or the equal protection of the laws within the territory of India. 'Equal protection' within the contemplation of this Article means right to equal treatment in similar circumstances both with respect to rights and privileges conferred and liabilities imposed. Article 19(1) guarantees to all citizens the right:

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

* * * * * *

(g) to practise any profession, or to carry on any occupation, trade or business.

5.8.04 It is noteworthy that the protection of the guarantees in Articles 14 and 19 extends to all persons or citizens throughout the territory of India. In principle, therefore, if these rights are to be curtailed by certain types of laws, then there should be a degree of uniformity both with regard to the extend of the curtailment and the purpose for which this is done. The Proviso in question enables the Union to ensure such uniformity, in principle. We are, therefore, not persuaded that there is any invidious distinction between the laws made by Parliament or those made by a State Legislature. Indeed, as explained above, this Proviso is necessary.

5.8.05 Taken together, the Fundamental Rights conferred under Articles 14 and 19 constitute a substantial part of all such rights guaranteed in Part III of the Constitution. The operation of Article 31A(1) has a constricting effect on Articles 13, 32 and 226 also. In result, this whittles down the scope of judicial review on the grounds of Articles 14 and 19. This loss of judicial review has, to some extent, been compensated in another form by the Proviso which enables the Union Executive to ensure—(i) that its legislative power has not been exercised by a State for a purpose extraneous or collateral to the purposes specified in the sub-clauses of Article 31A(1); and (ii) that the legislation in question does not operate to abridge the Fundamental Rights under Articles 14 and 19 more than what is genuinely necessary for protection of the legislation.

Object of Article 31A(1) First Proviso

5.8.06 Properly invoked, Article 31A(1) operates as a very beneficent instrument for protection of agrarian reforms and social welfare legislations against frustrating litigation. Nonetheless, its potential for harm to or subversion of the constitutional system through misuse of legislative power cannot be under estimated. Article 355 imposes on the Union a duty *inter alia* to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. If the State legislation by reason of its unduly excessive and indiscriminate abridging effect on Fundamental Rights, or otherwise, clearly tends to subvert the constitutional system of the State, the Union Government may, consistently with this obligation, advise the President to withhold assent to the Bill and thus prevent it from taking legal effect.

Article 31C Proviso

5.8.07 The same criticism has been levelled against the Proviso to Article 31C. For the same reasons which we have given in the preceding paragraphs it is not possible to subscribe to the suggestion for its deletion.

9. *ARTICLES* 304 *AND* 288

5.9.01— Two State Governments have asked for the deletion of the Proviso to Article 304(b). The Proviso requires that no Bill or amendment for the purpose of imposing reasonable restrictions on freedom of trade, commerce or intercourse with or within a State as may be required in the public interest, shall be introduced or moved in the legislature of a State without the previous sanction of the President. In the absence of such prior sanction, the defect can be cured in terms of Article 255 if assent to the legislation is obtained subsequently by making a reference through the Governor. It has been argued by one of the State Governments that, as there is already a built-in restraint on the State Government, *viz*. that the restrictions

contemplated in the Bill should be 'reasonable' and 'in the public interest', the Proviso imposes an unjustifiable constraint on the legislative autonomy of the States.

5.9.02 We have dealt with this issue in the Chapter on 'Legislative Relations'[15] and need not repeat all that we have said there. Parliament's responsibility for imposition of restrictions on freedom of trade, commerce or intercourse extends both to inter-State and intra-State trade. Suffice it to say that the Proviso enables the Union Government to ensure that the economic and social unity is not disrupted and the freedom of trade, commerce and intercourse throughout the territory of India is not hampered through the parochial use of its legislative power by a State.

5.9.03 A Bill imposing or authorising the imposition of a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority, established by any existing law or a law made by Parliament for regulating or developing any inter-State river or river-valley, must be reserved for President's consideration and assent to ensure its validity and effect [Article 288(2)]. No specific criticism has been levelled by any State Government against this provision.

10. *SCOPE OF UNION EXECUTIVE'S DISCRETION UNDER ARTICLE* 201—

5.10.01— An incidental question—but no less important that remains for consideration is about the scope and manner in which the President (in effect, the Union Council of Ministers) should exercise this power with respect to a State Bill. Most authorities are agreed that once a Bill is reserved for the consideration and assent of the President, the Union Executive entitled to examine it from all angles such as, whether it is in conformity with the legislative policy and provisions of any Union law, whether it is in harmony with the scheme and provisions of the Constitution, whether it is *ultra vires* any existing Union regulation, whether procedural safeguards are provided for the aggrieved party, etc. A study of the information available to us shows that the Union Executive also examines a State Bill from the point whether or not it conforms with the policy of the Union Government.

Scope of Union's Power under Article 201— to withhold Assent on Ground of Non-Conformity with its Policy

5.10.02 While we agree that the scrutiny by the Union Government need not be confined to the general constitutionality of the Bill or conformity with constitutional provisions under which the Bill has been reserved, we would sound a note of caution that non-conformity of a State Bill to the policy of the Union Government is not always a safe ground for withholding Presidential assent from it. In this connection it is necessary to bear in mind the general principles that underlie the division of legislative powers between the Union and the States with reference to Lists I, II and III of the Seventh Schedule. All matters in the Concurrent List are manifestly of common interest to the Union and the States. The supervisory powers conferred on the Union under Articles 201— and 254(2) enable it to secure a broad uniformity in the main principles of the laws on Concurrent List subjects throughout the country.

5.10.03 From a functional angle, all matters in List II cannot be said to be exclusively of State or local concern. Several Entries in List II are either expressly subject to certain entries in List I or overlap to some extent matters in List I or List III. Securing uniformity and coordinating policy on the basic aspects of such matters in List II, having an interface with those in List I, cannot be extraneous to the functions exercised by the President in considering State Bills, under Article 201.

5.10.04 Articles 31A(1), 31C, 288(2) and 304(b) provide for reservation of certain types of State Bills for the consideration and assent of the President. These provisions, read with Article 201—, enable the Union Executive to ensure, on the basic aspects of these special matters, a certain degree of uniformity in the interests of the social and economic unity of the country. Examination of the State Bills of this special category, from the point of their compatibility with the settled policy of the Union, therefore, does not involve any impropriety.

President should not withhold assent merely on consideration of policy differences with respect to matters in List II

5.10.05 Apart from all such matters on which a measure of uniform coordinated policy is desirable, there remains in List II and area which is purely of local or domestic concern to the States. It is with respect to Bills falling within this area of exclusive State concern that utmost caution, circumspection and restraint on the

part of the Union Executive is required in the exercise of its supervisory powers under Article 201—. This is all the more necessary if the Bill has been reserved by the Governor in the exercise of his discretion, contrary to the advice of his Ministers. It may not be prudent to veto such a Bill merely on the ground that the legislative policy of the Bill, though otherwise constitutional, does not conform with what the Union Government thinks should be its policy with respect to the subject-matter of the Bill.

5.10.06 We recommend that as a matter of convention, the President should not withhold assent only on the consideration of policy differences on matters relating, in pith and substance, to the State List, except on the grounds of patent unconstitutionality such as those indicated in para 5.6.13 above.

5.10.07 We now consider the suggestion that the President may seek the opinion of the Supreme Court under Article 143 in respect of Bills which may be deemed to be unconstitutional. Article 143 provides for reference by President to the Supreme Court in respect of matters of public importance where he is of the view that it would be expedient to obtain the opinion of that court. We consider that there is no need for making any specific prescription in this regard as the President can always make such a reference in appropriate cases.

5.10.08 We agree with the view expressed by one of the State Governments that it is not obligatory to reserve all Bills attracting the provisions of Articles 254(2), 31-A and 31-C for President's consideration. We have already stated in paragraph 5.1.05-II that the Bills under these articles may be reserved for President's consideration.

5.10.09 The suggestion that, in regard to Bills under Articles 31-A and 31-C, the President should be guided by the advice of the Inter-State Council instead of that of the Union Council of Ministers, is apparently based on a misconception of the scheme of the Constitution. Firstly, the President is bound under Article 74(1) to act in accordance with the advice of the Council of Ministers in the exercise of his functions. The suggestion is contrary to this basic principle. Further, there is no justification for treating Bills relatable to Articles 31-A and 31-C alone in a manner different from other Bills which may be reserved for President's consideration under other provisions. In paragraph 5.8.06, we have already pointed out that a specific duty has been cast on the Union in this regard and this can be discharged only by the Union Executive, which is accountable to Parliament. The Inter-State Council being a high-level body (not accountable to Parliament), with members subscribing to widely different; political views, cannot be the appropriate forum for referring such matters. We are therefore unable to support this suggestion.

11. *CONDITIONAL ASSENT BY THE PRESIDENT NOT PROPER*

5.11.01— A case study relating to the period 1956—67 conducted under the auspices of the Indian Law Institute concluded that 'the Centre does try to dictate its policies to the States' by attaching certain conditions to the Presidential assent. It expressed a doubt with regard to the propriety and constitutional validity of such conditional assent. A study of the available material on the subject shows that conditional assent as such is not given to State Bills referred for President's consideration. However, in some cases, the State Governments are persuaded to undertake amendments to the Bill through an Ordinance or an amending legislation to meet the changes in the Bill considered necessary by the Union. Simultaneously, assent to the Bill as already reserved, is accorded. This procedure does not appear to be quite in accord with the provisions of the Constitution. The Proviso to Article 201—, *inter alia,* enables the President to direct the Governor to return the Bill (if it is not a Money Bill) to the State Legislature, with a message for reconsideration within a period of 6 months. It is open to the President to suggest changes considered necessary by the Union Government, and return the Bill for reconsideration. The State Legislature may or may not accept the suggestions made. It is equally not binding on the part of the President to assent to the Bill presented to him again after reconsideration, if the Bill has not been amended as suggested or even if the suggestions made have only been partially accepted by the State Legislatures. Depending upon the importance and significance of the suggestions made, the President may then either accord assent to the Bill or withhold assent.

5.11.02 We recommend that in cases where the Union Government considers that some amendments to a State Bill are essential before it becomes law, the President may return the Bill through the Governor in terms of the Proviso to Article 201— for reconsideration, with an appropriate message, indicating the suggested amendments. The practice of obtaining the so-called 'conditional assent' should be not followed when a constitutional remedy is available.

12. *STATISTICAL INFORMATION*

5.12.01— The Union Government has informed us that during the period from 1977 to November, 1985, 1130 State Bills were reserved for the consideration of the President. Out of these, 1039 Bills were assented to by the President. The assent was withheld only in 31 cases; five cases were returned for reconsideration with President's message and 55 were still pending on November 22, 1985. Our analysis of the information furnished by the States shows that approximately 75 per cent of the Bills reserved for consideration of the President relate to matters in the Concurrent List and were reserved by the Governor for President's consideration under Article 254(2) on the advice of his Council of Ministers. Our survey also shows that a very small number of Bills during the last 35 years were reserved by the Governors in the exercise of their discretion.

13. *RATIONALE OF SYSTEM OF RESERVING BILLS*

5.13.01— In the light of the foregoing discussion, we are of opinion that the shceme of the Constitution and the various Articles, providing for reservation of State legislations for the consideration and assent of the President are intended to subserve the broad purpose of co-operative federalism in the realm of Union-State legislative relations. They are designed to make our system strong, viable, effective and responsive to the challenges of a changing social order. They are necessary means and tools for evolving cohesive, integrated policies on basic issues of national significance. Even from the federal stand-point, the reservation of State Bills, if made sparingly in proper cases, *e.g.* where the Bill relates to a matter falling clearly within the Union List, serves a useful purpose. But, as aptly cautioned by D.D. Basu, "its use cannot be extended to such an extent as to install the Union Executive over the head of the States Legislature in matters legislative."[16]

14. *DELAYS IN DISPOSAL OF STATE BILLS*

5.14.01— Much of the criticism has been directed against delay that takes place in securing the assent of the President. Specific instances of State Bills that remained pending consideration of the Union Government for more than two years have been brought out in evidence. Such delays cause unnecessary misgivings and irritations in Union-State relations. Once State Government has observed that it is not the small number but the kind of Bills, vetoed by the President which causes irritations in Union-State relations. Almost all the State Governments and political parties unanimously demand that a time-limit should be prescribed for completing consideration of such Bills by the Union Executive.

5.14.02 A large number of Bills are being reserved for con-sideration of the President and this could lead to delays. As mentioned above, during the period from 1977 to 1985, no less than 1130 State Bills were reserved for consideration of the President. It requires extraordinary effort and time to cope with such abnormal inflow of work. An examination of the material collected by us shows that delays in disposal of such Bills have largely occurred due to differences between the Union and States on policy issues reflected in the legislations. By way of example, a list of some of the Bills which were delayed for more than a year and a half is given in Annexure V.1.

5.14.03 In our opinion, delays in the process of securing President's assent can be minimised, if not eliminated, by—

(i) streamlining the existing procedures both in making the reference by the State Government and its consideration by the Government of India;

(ii) prior consultation at the stage of the drafting of the Bill itself; and

(iii) prescribing time-limits for disposal.

5.14.04 The evidence before us has left us with a feeling that most, if not all, Bills relating to matters in the Concurrent List are being reserved for President's consideration without adequate examination as to whether or not they fall within the purview of Article 254(2). This results in unncessary increase in the work-load of the Union Government.

5.14.05 Needless reservations should, therefore, be avoided specially where it is not required under some special provisions such as Articles 31A(1), 31(C), 254(2), 288(2) and 304(b).

15. *STREAMLINING PROCEDURES*

5.15.01— To facilitate its speedy examination by the Union Executive, every reference of a State Bill from the State should be self-contained, setting out precisely the material facts, points for consideration and the ground on which reference has been made. It should contain information on the following points:

(i) The relevant provisions of the Constitution attracted or applicable, with reasons.

(ii) If the reference is made under Article 254(2), clear identification of the provisions of the Bill which are considered repugnant to, or inconsistent with, the specific provisions of a Union law or an existing law.

(iii) Urgency, if any, of passing the law within a certain time-limit.

(iv) A clear statement that the Bill is being reserved as per the advice of the Council of Ministers, or in the exercise of his discretion by the Governor, with reasons for the same.

(v) A lucid explanatory note on the intended policy behind the legislation instead of merely referring to the objects and reasons of the Bill.

(vi) An indication whether the Bill was sent for prior scrutiny of the Union Government, and if so, deviations, if any, from the prior reference.

5.15.02 There is evidence before us that as a matter of practice, State Governments often consult the Government of India at the drafting stage of a Bill. Generally, high-level officers of the State Government hold discussions on the provisions of the draft Bill with their counterparts at the Union. This is a healthy practice and should continue. This will also help cut short delays in consideration of the Bill by the Union Executive if, at the post-legislation stage, it is again referred by the Governor under the Constitution for Presidential consideration and assent.

16. *TIME-LIMITS*

5.16.01— Several State Governments and political parties have suggested that time-limits be incorporated in Article 201—, itself. Some have, however, suggested that this can be done by making it a rule of practice or convention. The proposal of prescribing a time-limit under the Constitution is not new. Article 201— itself prescribes that when a Bill is returned by the President to the House or the Houses of the State Legislature, it shall reconsider it within a period of 6 months from the date of receipt of the President's message. The Constitution Act of Canada prescribes time-limits for the disposal of Bills by the Lt. Governor and the Governor-General.

5.16.02 If, as proposed in the preceding paras, the procedures for reserving a Bill for President's consideration are streamlined, high-level discussions are held whenever necessary between the Union and the State Governments at the drafting stage of the Bill, and procedural delays at the level of the Union Government are eliminated, the time taken to process Bills reserved for President's consideration will get effectively reduced. It has come to our notice that the Ministry of Home Affairs issued instructions, as early as in 1952, which were reiterated in 1978, that the Bills received from the States should be very expeditiously considered by the concerned Ministries and returned to them within a few days. It appears that these instructions are not being strictly followed. The Ministry of Home Affairs are now making all-out efforts to speed up the disposal of such State Bills. We are, therefore, of the opinion that it is not necessary to amend the Constitution for prescribing a time-limit. However, the Union and State Governments should adopt definite periods within which to process Bills and dispose of related references.

5.16.03 We recommend that—

(i) As a matter of salutary convention, a reference should be disposed of by the President within a period of 4 months from the date on which the reference is received by the Union Government.

(ii) If, however, it is considered necessary to seek clarification from the State Government or to return the Bill for consideration by the State Legislature under the Proviso to Article 201—, this should be done within two months of the date on which the original reference was received by the Union Government.

(iii) Any communication for seeking clarification should be selfcontained. Seeking clarification piecemeal should be avoided.

(iv) On receipt of the clarification or the reconsidered Bill from the State under the Proviso to Article 201—, the matter should be disposed of by the President within 4 months of the date of receipt of

the clarifica-tion or the back reference on the reconsidered Bill, as the case may be, from the State Government.

5.16.04 Normally, when a Bill passed by the State Legislature is presented to the Governor with the advice of the Council of Ministers that it be reserved for the consideration of the President, then the Governor should do so forthwith. In exceptional circumstances, as indicated earlier, if the Governor thinks it necessary to act and adopt, in the exercise of his discretion, any other course open to him under Article 200, in respect of any Bill, he should do so within a period not exceeding one month from the date on which the Bill is presented to him. These rules of practice should be firmly adhered to and seldom departed from.

17. *WITHHOLDING OF ASSENT*

5.17.01— In cases where the Union Executive proposes to withhold assent from a Bill, it has been its practice to make an effort to convince the State concerned of the Union's point of view. In some cases, the views of the State Government were sought with respect to the grounds on which the assent was proposed to be withheld by the President, and the State's comments, if any, were considered before a final decision was taken by the Union Executive. We recommend that, wherever possible, the reasons for withholding assent from a State Bill should be communicated to the State Government.

18. *STATE ORDINANCES*

5.18.01— During a recess of the State Legislature, circumstances may exist which are considered by the State Government to necessitate immediate legislative action. To meet such an urgency, Article 213 empowers the Governor to promulgate an Ordinance with respect to any matter within the legislative competence of the State Legislature, if necessary, after obtaining instructions from the President. This power has to be exercised by him with the aid and advice of his Council of Ministers and not in his discretion. Its exercise is further subject to the following condition precedent:

(a) The Governor (in reality, the Council of Ministers) must be satisfied “that circumstances exist which render it necessary for him to take immediate action”.

(b) The Legislative Assembly is not in session, or where there is also a Legislative Council in the State, both Houses of the Legislature are not in session.

5.18.02 Clause (2)(a) of the Article requires that the Ordinance “shall be laid” before the State Legislature when it reassembles. The clause further make it clear that the Ordinance shall have only a limited life. Its imperative is that the Ordinance shall cease to operate at the expiration of six weeks from the reassembly of the Legislature unless disapproved earlier by resolution of the Legislature or withdrawn earlier by the Governor.

5.18.03 As a safeguard against circumvention of the other provisions of the Constitution requiring that certain types of Bills cannot be introduced in a State Legislature without the previous sanction of the President, or take legal effect without consideration and assent of the President, the Proviso to Article 231(1) enjoins on the Governor not to promulgate any Ordinance without instructions from the President, if—

(a) a Bill containing the same provisions would under the Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under the Constitution have been invalid unless having been reserved for the con-sideration of the President, it had received his assent.

5.18.04 In tune with the prohibition in (c) is the provision contained in clause (3) of the Article. This clause provides:

“If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void.”

An analogue of the principle in Article 254(2) underlies the Proviso[17] to clause (3) of Article 213.

5.18.05 When a law containing a provision repugnant to a Union law or an existing law relating to a matter in the Concurrent List, has to be legislated by a State, the type of procedure to be adopted for ensuring the operational validity of that provision depends on whether it is contained in a Bill or in an Ordinance. The only difference between the two procedures is that, under Article 254(2), assent of the President is required *subsequent* to the passing of the Bill by the State Legislature, while, under the Proviso to Article 213(3), the instructions from the President under Article 213(1) are a condition *precedent* to the promulgation of the Ordinance.

5.18.06 The Proviso to Article 213(3) will not be attracted unless any provision of the Ordinance proposed to be promulgated is, in fact, repugnant to the provision of a Union law or an existing law relating to a matter in the Concurrent List. If there is no such repugnancy, the Ordinance would be valid even if it was promulgated without the previous instructions from the President, provided such instructions are not required on a ground other than that of repugnancy.

5.18.07 No Ordinance promulgated in any State by a Governor was re-promulgated till the year 1967. Thereafter, however, some State Governments have by successive repro-mulgation of the same Ordinance continued it in force for an indefinite period of time without attempting to get it replaced by an Act of the Legislature. In one State, the persistence and magnitude of this mode of 'law-making' by executive fiat, in preference to enactments by the Legislature, had assumed abnormal proportions. The Governor of that State promulgated 256 Ordinances during 1967-81 and all these Ordinances were kept alive for periods ranging between 1 to 14 years by repro-mulgation from time to time. Out of these 256, as many as 69 were repeatedly promulgated with the prior instructions of the President.

5.18.08 Eminent public men and scholars including those who have communicated their views to us, have voiced concern at the growth of this 'reprehensible' practice which poses a threat to Parliamentary democracy. In December, 1983, the Opposition in Parliament demanded an assurances from the Union Government not to accord permission for repromulga-tion of Ordinances which were never laid before the State Legislature for conversion into Acts. The Union Law Minister is reported[18] to have replied that while the Centre did not wish to withhold permission for repromulgation of an Ordinance, it had advised the concerned State to convert it into an Act.

5.18.09 A Professor in the Gokhale Institute of Politics and Economics, Pune, made an intensive study of the practice adopted by one State in promulgating and repromulgating Ordinances from time to time without enacting them into Acts of the Legislature. Thereafter, he and three others filed Writ Petitions in the Supreme Court challenging the Constitutional validity of three repromulgated Ordinances. On merits, the principal questions for consideration before the Court, was: can the Governor mechanically go on repromulgating an Ordinance for an indefinite period of time and thus take over to himself the power of the Legislature to legislate, though that power is conferred on him under Article 213, only for the purpose of enabling him to take immediate action at a time when the House or Houses of the State Legislature, as the case may be, are not in session? Answering this question in the negative, the Court enunciated that the power conferred under Article 213 on the Governor, is in the nature of an emergency power, which is to be exercised where, in the public interest, immediate action becomes necessary at a time when the Legislature is not in session. It was pointed out that the primary law-making authority under the Constitution is the Legislature and not the Executive. It was further stressed that an Ordinance issued by a Governor in exercise of such an emergency power must necessarily have a limited life. It was emphasised:

".....every Ordinance promulgated by the Governor must be placed before the Legislature and it would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any... Since Article 174 enjoins that the Legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session and an Ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the Legislature, it is obvious that the maximum life of an Ordinance cannot exceed seven and a half months unless it is replaced by an Act of the Legislature or disapproved by the resolution of the Legislature before the expiry of that period.... The Constitution-makers expected that if the provisions of the Ordinance are to be continued in force, this time should be sufficient

for the Legislature to pass the necessary Act. But if within this time, the Legislature does not pass such an Act, the Ordinance must come to an end. The Executive cannot continue the provisions of the Ordinance in force without going to the Legislature".

5.18.10 The Court, however, conceded that "there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular session or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the Ordinance. Where such is the case, repromulgate of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation". In this context, it further observed:

> "It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision".

5.18.11 It may be noted that there were several telling facts in that case which highlighted the unconstitutionality and impropriety of the practice of keeping Ordinances alive for several years by repeated repromulgation without ever bringing them before the Legislature. The *modus operandi* of repromulgation of Ordinances was vividly revealed by a circular letter which used to be sent by the Special Secretary to the Government in its Department of Parliamentary Affairs, immediately at the conclusion of each session of the State Legislature to all the Commissioners, Secretaries, Additional Secretaries and Heads of Departments. By this circular letter, the addressees were informed that the session of the Legislature had been 'got prorogued' on such and such date and that, under Article 213(2) (a) of the Constitution, all the Ordinances would cease to be in force after six weeks of the date of reassembly of the Legislature if not repromulgated before that date. The letter further directed those officers to get in touch with the Law Department and initiate immediate action to get "all the concerned Ordinances repromulgated" before the date of their expiry. The letter also used to advise the officers that if the old Ordinances were repromulgated in their original form without any amendment, the approval of the Council of Ministers would not be necessary. In view of these "startling facts" the Court held that the Executive in that State "has almost taken over the role of the Legislature in making laws, not for a limited period, but for years together in disregard of the Constitutional limitations. This is clearly contrary to the Constitutional Scheme and it must be held to be improper and invalid".

5.18.12 In consonance with this pronouncement of the Supreme Court, we hope and trust that State Governments will eschew the wrong practice of mechanical and repeated repromulgation of an Ordinance without caring to get it replaced by an Act of the Legislature.

5.18.13 The Supreme Court has observed that there is not a single instance in which the President of India, in exercise of his power to issue an Ordinance under Article 123, has repromulgated any Ordinance after its expiry.

5.18.14 We recommend that, in due regard to the requirement of clause (2) of Article 213, every State Government should adopt a practice similar to that of the Union Government: that is to say, when the provisions of an Ordinance have to be continued beyond the period for which it can remain in force, the State Government should ensure, by scheduling suitably the legislative business of the State Legislature, enactment of an Act containing those provisions in the next ensuing session. The occasions should be extremely rare when a State Government finds that it is compelled to repromulgate an Ordinance because the State Legislature has too much legislative business in the current session or the time at the disposal of the Legislature in that session is short. In any case, the question of re-promulgating an Ordinance for a second time should never arise.

5.18.15 We further recommend that a decision to promulgate or repromulgate an Ordinance should be taken only on the basis of stated facts necessitating immediate action, and that too by the State Council of Ministers, collectively.

5.18.16 When an Ordinance proposed to be re-promulgated is sent by the Governor, under the proviso to Article 213(1), to the Union Government for instructions from the President, withholding of such

instructions may create Union-State friction. It is necessary to evolve suitable conventions so as to avoid needless controversies in this regard.

5.18.17 We recommend that the President may not withhold instructions in respect of the first re-promulgation of an Ordinance, the provisions of which are otherwise in order, but could not be got enacted in an Act because the Legislature did not have time to consider its provisions in that session. While conveying the instructions, the Union Government should make it clear to the State Government that another re-promulgation of the same Ordinance may not be approved by the President, and if it is considered necessary to continue the provisions of the Ordinance for a further period, the State Government should take steps well in time to have the necessary Bill containing those provisions passed by the State Legislature, and if necessary, to obtain the assent of the President to the Bill so passed.

5.18.18 One State Government has suggested that "some provision like the provision of Article 255 of the Constitution should be incorporated in Article 213 so that the Governor can exercise power in utmost urgency to promulgate Ordinance without instruction from the President".

5.18.19 It may be noted that the proviso to Article 213(1) enjoins on the Governor not to promulgate any Ordinance in cases falling under any of its sub-clauses (a), (b) and (c), without instructions from the President. It follows that the instruction from the President are not necessary to enable the Governor to promulgate an Ordinance in a case not covered by this proviso.

5.18.20 Article 255 so far as material for our purpose, reads:

> "No Act.....of the Legislature of a State, and no such provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—
>
> (a) *** *** ***
>
> (b) *** *** ***
>
> (c) where the recommendation or previous sanction required was that of the President, by the President."

Clause (c) of this Article substantially corresponds to sub-clause (a) of the proviso to Article 213(1). There is no reference in Article 255 to the constitutional requirements mentioned in sub-clause (b) and (c) of the proviso to Article 213(1). It is obvious, therefore, that in the context of a State legislation, subsequent assent of the President cures only that invalidity which arises from non-compliance with a Constitutional provision requiring the previous sanction of the President to the introduction of a certain type of Bill in the Legislature of a state. Article 304(b) is a typical example of such a provision. Article 255 does not encompass or cure an invalidity due to non-compliance with the Constitutional requirements mentioned in sub-clauses (b) and (c) of the Proviso to Article 213(1).

5.18.21 Extention of the principle of Article 255 to the Ordinances so as to leave the non-compliance with the Constitutional requirements in all or any of the cases mentioned in sub-clauses (a), (b) and (c) of the Proviso to Article 213(1), to be cured, by a subsequent, albeit uncertain, assent of the President, will tend to subvert the normal democratic process of legislation and encourage misuse of this emergency power at the cost of the primary law-making authority which, under our Constitution is the Legislature and not the Executive. It may be recalled that the instruction from the President is a necessary safeguard against circumvention of the Constitutional scheme of checks and balances which requires that certain types of Bills shall not be introduced in a State Legislature without the previous sanction of the President, or take legal effect without consideration or consent of the President.

5.18.22 For all these reasons, it is not possible to accept this suggestion of the State Government. Nevertheless, we would emphasise the desirability of diposing of a reference made by the Governor for seeking instructions from the President under the Proviso to Article 213(1), with utmost despatch.

5.18.23 The various recommendations made by us in this Chapter in regard to reservation of State Bills will apply *mutatis mutandis* to the seeking of instructions from the President for the promulgation of a State Ordinance. In regard to time-limits, however, we recommend, keeping in view the urgent nature of an Ordinance, that a proposed Ordinance referred by the Governor to the President for instructions under the

Proviso to Article 213(1), should be disposed of by the President urgently and, in any case, within a fortnight.

19. *RECOMMENDATIONS*

5.19.01— Normally, in the discharge of the functions under Article 200, the Governor must abide by the advice of his Council of Ministers. Article 200 does not invest the Governor, expressly or by necessary implication, with a general discretion in the performance of his functions thereunder, including reservation of a Bill for the consideration of the President. However, *in rare and exceptional* cases, he may act in the exercise of his discretion, where he is of opinion that the provisions of the Bill are *patently* unconstitutional, such as, where the subject-matter of the Bill is *ex-facie* beyond the legislative competence of the State Legislature, or where its provisions *manifestly* derogate from the scheme and framework of the Constitution so as to endanger the sovereignty, unity and integrity of the nation, or *clearly* violate Fundamental Rights or transgress other constitutional limitations and provisions.

(Paras 5.6.06 & 5.6.13(i))

5.19.02 In dealing with a State Bill presented to him under Article 200, the Governor should not act contrary to the advice of his Council of Ministers merely because, personally, he does not like the policy embodied in the Bill.

(Paras 5.6.09 & 5.6.13(ii))

5.19.03 Needless reservation of Bills for President's consideration should be avoided. Bills should be reserved only if required for specific purposes, such as:—

(a) to secure immunity from the operation of Articles 14 and 19 *vide* the First Proviso to Article 31A(1) and the Proviso to Article 31C;

(b) to save a Bill on a Concurrent List subject from being invalidated on the ground of repugnancy to the provisions of a law made by Parliament or an existing law *vide* Article 254 (2);

(c) to ensure validity and effect for a State legislation imposing tax on water or electricity stored, generated, consumed, distributed or sold by an authority established under a Union law, *vide* Article 288 (2);

(d) a Bill imposing restrictions on trade or commerce, in respect of which previous sanction of the President had not been obtained, *vide*—Article 304(b) read with Article 255.

(Para 5.14.05)

5.19.04 Normally, when a Bill passed by the State Legislature is presented to the Governor with the advice of the Council of Ministers that it be reserved for the consideration of the President, then the Governor should do so forthwith. If, in exceptional circumstances, as indicated in para 5.19.01— above, the Governor thinks it necessary to act and adopt, in the exercise of his discretion, any other course open to him under Article 200, he should do so within a period not exceeding one month from the date on which the Bill is presented to him.

(Para 5.16.04)

5.19.05 (a) Every reference of a State Bill from the State should be self-contained, setting out precisely the material facts, points for consideration and the ground on which the reference has been made. The relevant provisions of the Constitution should also be indicated.

(b) If the reference is made under Article 254(2), the provisions of the Bill which are considered repugnant to or inconsistent with the specific provisions of a Union law or an existing law, should be clearly identified.

(Para 5.15.01—(i) &(ii))

5.19.06 State Governments often consult the Government of India at the drafting stage of a Bill. Generally, high-level officers of the State Government hold discussions on the provisions of the draft Bill with their counterparts at the Union This is a healthy practice and should continue.

(Para 5.15.02)

5.19.07 (a) As a matter of salutary convention, a Bill reserved for consideration of the President should be disposed of by the President within a period of 4 months from the date on which it is received by the Union Government.

(b) If, however, it is considered necessary to seek clarification from the State Government or to return the Bill for consideration by the State Legislature under the proviso to Article 201—, this should be done within two months of the date on which the original reference was received by the Union Government.

(c) Any communication for seeking clarification should be self-contained. Seeking clarification piecemeal should be avoided.

(d) On receipt of the clarification or the reconsidered Bill from the State under the proviso to Article 201—, the matter should be disposed of by the President within 4 months of the date of receipt of the clarification or the back reference on the reconsidered Bill, as the case may be, from the State Government.

(e) It is not necessary to incorporate these or any other time-limits in the Constitution.

(Paras 5.16.03 & 5.7.09)

5.19.08 (a) As a matter of convention, the President should not withhold assent only on the consideration of policy differences on matters relating, in pith and substance, to the State List, except on grounds of patent unconstitutionality such as those indicated in the recommendation in paragraph 5.19.01— above.

(Para 5.10.06)

(b) President's assent should not ordinarily be withheld on the ground that the Union is contemplating a comprehensive law in future on the same subject.

(Para 5.7.08)

5.19.09 If a State Bill reserved for the consideration of the President under the First Proviso to Article 31A(1) or the Proviso to Article 31C clearly tends to subvert the constitutional system of the State, by reason of its unduly excessive and indiscriminate abridging effect on Fundamental Rights or otherwise, then, consistently with its duty under Article 355 to ensure that the government of every State is carried on in accordance with the provisions of the Constitution, the Union Government may advise the President to withhold assent to the Bill.

(Paras 5.8.06 and 5.8.07)

5.19.10 In cases where the Union Government considers that some amendments to a State Bill are essential before it becomes law, the President may return the Bill through the Governor in terms of the Proviso to Article 201— for reconsideration, with an appropriate message, indicating the suggested amendments. The practice of obtaining the so-called 'conditional assent' should not be followed when a constitutional remedy is available.

(Para 5.11.02)

5.19.11 To the extent feasible, the reasons for withholding assent should be communicated to the State Government.

(Para. 5.17.01—)

5.19.12 State Government should eschew the wrong practice of mechanical and repeated re-promulgation of an Ordinance without caring to get it replaced by an Act of the Legislature.

(Para 5.18.12)

5.19.13 In due regard to the requirement of clause (2) of Article 213, whenever the provisions of an Ordinance have to be continued beyond the period for which it can remain in force, the State Government should ensure, by scheduling suitably the legislative business of the State Legislature, enactment of a law containing those provisions in the next ensuing session. The occasions should be extremely rare when a State Government finds that it is compelled to repromulgate an Ordinance because the State Legislature has too much legislative business in the current session or the time at the disposal of the Legislature in that

session is short. In any case, the question of re-promulgating an Ordinance for a second time should never arise.

(Para 5.18.14)

5.19.14 A decision to promulgate or re-promulgate an Ordinace should be taken only on the basis of stated facts necessitating immediate action, and that too, by the State Council of Ministers, collectively.

(Para 5.18.15)

5.19.15 Suitable conventions should be evolved in the matter of dealing with an Ordinance which is to be re-promulgated by the Governor and which is received by the President for instructions under the Proviso to Article 213(1).

(Para 5.18.16)

5.19.16 The President may not withhold instructions in respect of the first re-promulgation of an Ordinance, the provisions of which are otherwise in order, but could not be got enancted in an Act because the Legislature did not have time to consider its provisions in that session. While conveying the instructions, the Union Government should make it clear to the State Government that another re-promulgation of the same Ordinance may not be approved by the President, and, if it is considered necessary to continue the provisions of the Ordinance for a further period, the State Government should take steps well in time to have the necessary Bill containing those provisions passed by the State Legislature, and if necessary, to obtain the Assent of the President to the Bill so passed.

(Para 5.18.17)

5.19.17 The recommendations in para 5.19.01— to 5.19.11 will apply *mutatis mutandis* to the seeking of instructions from the President for the promulgation of a State Ordinance. However, keeping in view the urgent nature of an Ordinance, a proposed Ordinance referred by the Government to the President for instructions under the Proviso to Article 213 (1), should be disposed of by the President urgently and, in any case, within a fortnight.

(Para 5.18.23)

ANNEXURE V.1

Examples of State Bills reserved for President's consideration, orders on which were passed after one and a half years

Sl. No.	Name of Bill	Name of State	Date of reference	Date of disposal	Remarks
(1)	(2)	(3)	(4)	(5)	(6)
	Orders passed after 1-1/2 years				
1.	The Andhra Pradesh (Telengana Area) Abolition of Inams (Amendment) Bill, 1983.	Andhra Pradesh	7-6-84	17-12-85	Assented to
2.	The West Bengal Motor Vehicles Tax (Amendment) Bill, 1983.	West Bengal	8-4-83	27-1-85	Assented to
3.	Kerala Headload Workers' Bill, 1977	Kerala	27-11-78	28-9-80	Assented to
4.	The Orissa Estates Abolition (Amendment) Bill, 1977	Orissa	16-11-77	25-4-80	Assent withheld
5.	The West Bengal Estate Acquisition (Amendment) Bill, 1977	West Bengal	13-9-77	24-4-80	Assented to
6.	The Madhya Pradesh Lokayukta Evam Uplokayukta Vidheyak, 1974.	Madhya Pradesh	3-5-75	5-4-78	Assent withheld
	Orders passed after 3 years				
7.	Sikkim Urban Land (Ceiling and Regulation) Bill, 1976	Sikkim	18-10-76	25-4-80	Assent withheld
8.	The Notaries (Amendment) Bill, 1977 (Jammu & Kashmir) (Bill No. 13 of 1977)	Jammu & Kashmir	1-12-77	19-6-81	Assented to
9.	The Land Acquisition (Maharashtra Amendment) Bill, 1977	Maharashtra	24-11-77	25-8-81	Assent withheld
10.	The Bihar Urban Property (Ceiling) Bill, 1972	Bihar	13-7-72	2-8-76	Assent withheld
11.	The Kerala Land Reforms (Amendment) Bill, 1980	Kerala	30-4-80	28-2-85	Assent withheld
	Orders passed after 6 years				
12.	Karnataka Civil Service Bill, 1978	Karnataka	29-6-79	12-7-85	Assented to
13.	The Public Property (Prevention of Destruction & Loss) Bill, 1978.	Kerala	3-10-78	22-3-85	Assent withheld
14.	The Essential Commodities (Karnataka Amendment) Bill, 1976.	Karnataka	28-6-76	16-8-84	Assent withheld
	Orders passed after 12 years				
15.	The Trade Unions (West Bengal Amendment) Bill, 1969	West Bengal	10-11-69	22-9-82	Assent withheld