CHAPTER V

RULE IN LEGISLATION

POWER TO ASSENT TO THE BILLS

The power to assent to the Bills, which is given generally to the Constitutional Head in a democratic setup, becomes a matter of utmost importance in the Indian political system after the general election in 1987. The problem was bound to arise because the language of the Constitution gives a large amount of discretion to the Governor to be used in this respect. Article 260 which is concerned with the Governor's power to assent to the Bill runs as follows:

When a Bill has been passed by the Legislative Assembly of a State or in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President.

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a request that the House or Houses will reconsider the Bill or any specified provision thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when the Bill is so returned, the House or Houses shall reconsider the Bill accordingly, 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.

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Provided further that the Governor shall not consent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it become law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.

After a careful reading of this provision, it appears that the Governor has four options before him. He shall either declare his assent to the Bill or he withholds his assent or he may return the Bill for reconsideration if it is not a money Bill or he may reserve it for the consideration of the President.

How the question is: Is the Governor's power to withhold his assent absolute? O.P. Beaumont says that if any Bill is brought in the Legislature which is in direct contravention of any of the Directive Principles, the President or the Governor, may refuse his assent to such Bill on that ground, though the judiciary may not declare the Act invalid, if it is enacted, 1

The view that the Governor can withhold his assent, is supported by the following facts:

Firstly, there are cases wherein the President and the Governors withheld their assent to the Bills passed by the Parliament and the State Legislatures. The Public Appropriation Bill was vetoed by the President which was presented to him on March 8, 1934. The Bill was passed by

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Parliament while the State was under President's rule under Article 356 and the Parliament had power to make laws in this respect. By the time, however, the Bill came for President's assent the Proclamation under Article 356 had been revoked. The President withheld his assent on the ground that on the date in question the power of Parliament to legislate in respect of Punjab had already lapsed. 2 The Governor of Andhra Pradesh, H.V. Patodkar, withheld his assent to the Land Revenue Nationalization Bill on the ground that there was every possibility that the Bill might be harmful for the smooth working of the administration. 3

Secondly, the Patna High Court decided that the Courts cannot question the constitutionality or propriety of either accepting or rejecting the Bills by the President or to reserve Bills under Article 201. 4 If the President can veto a Bill under Article 201, there is nothing to prevent him from withholding his assent under Article 111 because the only difference between the two is that under Article 111 the President cannot withhold his assent to a Bill which has been reconsidered and passed by the Parliament. Under Article 201 there is no such condition. It leads to its logical corollary that the Governor can also withhold his assent under Article

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200 because the power of the President and the Governor is similar in their respective spheres.

Thirdly, the view that the returning of a bill amounts to withholding of assent does not find favour, because under Article 200 the Governor cannot return the Money Bill for reconsideration. He is required to declare either that he assents to the Bill or that he withholds his assent.

Fourthly, the language of Article 200 is clear on this issue and the problem is that the Courts attach importance to the language of the Constitution rather than the intention of framers. ⁵

Fifthly, the revival of once-time absolute power of the King in England indicates that this power may be used by the Governor. R.R. Mishra also thinks along these lines. ⁶

Keeping in view the said arguments, it appears that the Governor has the absolute and exclusive power to veto a particular legislation, but it does not fall in line with the accepted principles of parliamentary democracy prevailing in the country both in the States and the Centre. The parliamentary democracy is not made of words only but the conventions also. We have modelled our democratic set-up on the basis of British pattern and the King’s veto power is considered

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as a closed chapter since Queen Anne refused her assent to the
Scottish Militia Bill in 1707. Hence it is not desirable to
arm the Governor with such a power. In 1912, it was argued
in some quarters that the Monarch could and should refuse to
accept the highly controversial Irish Home Rule Bill but this
would hardly seem to be practical politics today. Even in
Canada, for the last sixty years, the Governor-General has
not refused to give the royal assent to a legislation. It may
be recalled that the very first occasion on which a Governor-
General came into conflict with his Ministers and with Parlia-
ment over his own reserved salary bill, 1868, when he reserved
it for the King's pleasure. It was one of the three reserved
bills which failed to secure royal assent. Then Lieutenant-
Governor Bantano reserved a Bill passed by the Cashtzczasen
Legislature, that cession was repudiated by the Conservative
(Masenbizer) Government in Ottawa.10

7. Andre Methist, The British Political System (London,
1969), p. 263; B.J. Locke, Parliamentary Government in

Affairs, 1956-57, pp. 263-64; H. Curtis, Central
Government - An Introduction to British System (London,
1953), p. 293; V. Head Phillips, The Constitutional Law
of Great Britain and the Commonwealth (London, 1952),
p. 76.

9. R. Mc D. Cleckie, Canadian Government and Politics (New

10. J. Russell Hepings, Confederation at the Crossroads - The
The supporters of the Governor's power to veto the bill compare Sections 22 of the Government of India Act, 1935 with Article 290 of the Indian Constitution. But this comparison is out of place in the sense that there is a lot of difference between the two systems.11

The Governor being a component part of the legislature would have the power of slipping its wings if he is armed with such a weapon. It would lead to the conclusion that he is the "Supreme Liam" of legislature which is fundamentally wrong and basically absurd.

According to Article 297, Money Bill cannot be introduced without the prior consent of the Governor; therefore the question of withholding assent to such a bill does not arise. It would be absurd on the part of the Governor to veto a bill which has been introduced in the Assembly on his own recommendation. Moreover, the political power in a democratic set-up rests upon the power of purse which is considered to be the privilege of the popular chamber and if a nominated Governor puts his nose, that would be antithetical to the real concept of democracy.

If it is accepted that the Governor is free to resort to such a kind of mechanism it would open the floodgates of vetoes like those of the United States.12


Vishnu Sahay, an ex-Governor, says:

In the Winter of 1960, when I was appointed acting Governor of Assam in a short vacancy caused by the illness of the permanent incumbent, the Assamese of the Brahmaputra valley wanted Assamese to be the official language of the State. The considerable Bengali and Tribal minorities were opposed to this and the controversy had led to serious "language riots". The Assembly had passed a bill which made Assamese the official language and it was awaiting the Governor's formal approval. In the end, I found that there was no possibility of a compromise till time had brought a cooling-off of tempers and after having the controversial bill on my table for a few weeks, I had no choice but to approve it. 13

Moreover, Rajendra Prasad had to assent to the Bihar Zamindari Abolition Bill, which was declared by the Supreme Court as unconstitutional. Prasad was personally against it and raised some objections but consequentely he had to approve the Bill. 14

In this connection, Justice says that the "Parliamentary government in India would have disapproved before it was two years old. had the first attempt of Prasad to ignore constitutional restrictions not been foiled." 15

The Constitutional Amendment and the Governor's Assent

The question cries: Is the assent of the Governor essential for the amendments wherein the States are co-


partners? Article 368 requires only the ratification by the
Legislatures of not less than one-half of the States. Here,
the Governor does not come in the light. The Calcutta High
Court has decided that a resolution of a State Legislature
ratifying a Bill for amendment of the Constitution did not
require the assent of the Governor. "The first part of
Article 368 relates to Bill which has to be passed in a parti-
cular manner, and there is specific provision for the assent
of the President." So far as the State Legislatures are
concerned, "it requires that a "resolution" should be passed
ratifying the amendment while it expressly provides for the
assent of the President, it does not provide for the assent
of the Governor."16

The Governor and the Qualified Assent

It may, however, be asked: Can the Governor have
some reservations while giving assent to a Bill? The answer
seems to be in the affirmative. S.N. Jain and Alice Jacob
cite the cases wherein the President did not17 Assent to
Kysore Municipalities Bill, 1963, and Kerala Motor Vehicles
Taxation Bill, 1963, was given on the condition of exempting
the property of Central Government from tax. Assent to

16. Jatin Chakravarty v. Justice Himansu Kumar Bose, A.I.R.,
1954, Calcutta 500 (502).

17. S.N. Jain and Alice Jacob, "Presidential Veto Over State
Legislation", Report of the National Convention on Centre-
State relations. Convention Secretary, The Institute of
Constitutional and Parliamentary Studies, New Delhi, pp.
325-6,
Punjab Temporary Taxation Bill, 1962, was given on the condition that assurance be received from the State Government that exemption from levy of tax on carriage and sale of goods which were proved to be exported out of India would be given. Again, assent to Assam Tax (on goods carried by road or inland waterways) Act, 1961, was given on the condition that mineral ores, petroleum products, tea and other exportable goods be exempted from tax. Similar condition was imposed while giving assent to the Schenwinshire Tax on goods (carried by road) Bill, 1962. In this respect, the Governor's and President's powers are parallel; hence the Governor can also give his assent to Bills with certain reservations.

The Assent of the Governor and Tenure of the Legislative Assembly

Since the dissolution of the Assembly does not affect the Bill pending before the Governor, there is nothing to prevent him from giving his assent after the dissolution of a Legislative Assembly. The Kerala Agrarian Relations Bill may be cited as an instance. The Supreme Court declared that the Kerala Agrarian Relations Bill had not lapsed before the President gave his assent after the dissolution of the Assembly. This Bill was reserved by the Governor under Article 201 for the consideration of the President. The difference between Articles 201 and 206 is that the phrase

"as soon as possible" finds place only in Article 200 and not in Article 201. Besides, the President is not bound to give assent to the Bill which has been reconsidered by the State Legislature under Article 201 but the Governor cannot refuse to assent to the Bill under Article 200 after it has been reconsidered by the Legislature.

Declaration of the Assent

In K.C. Gajapati Narayana Deo and Others vs. State of Orissa, it was decided by the Orissa High Court that when used in a clause by the word 'declaration' was not anything by way of a public notification. To declare an assent was nothing more than assertion by the Governor or the President, as the case may be, that in fact he has assented. It did not involve any idea that assertion must be publicised in any particular form. The mere fact that the Head of the State was not present in the capital is in itself not enough to prove that his assent could not be obtained as there are other methods of obtaining his assent viz., by telephone, or by telegram or by sending a special messenger.

Returning of Bills

Article 200 does not prescribe any time-limit for the Governor to return the Bill for reconsideration. He is

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required to do so "as soon as possible". When President’s andGovernor’s power to assent to the Bill was being considered in the Constituent Assembly, R.R. Sandaker, the Chairman of theDrafting Committee, moved an amendment to substitute thewords "as soon as possible" for the words "not later than six weeks" as contained in the Draft Constitution. His amendment was carried.21 H.V. Kannath was very critical of thismove and said:

Nobody knows what they mean, what "as soon as" means. We know in the Legislative Assembly ministers are in the habit of answering questions by saying "as soon as possible". When we ask "when this thing be done?" the answer is "as soon as possible or very soon", but six months later, the same question is put, and the answer is again, "as soon as possible" or "very soon". This phrase is vague, purposeless and meaningless and it should not find a place in the Constitution, especially in an article of this nature where we specify that the President must do a thing within a certain period of time. 22

The Constitution uses the word "may" instead of "shall" which means that it is not obligatory on the part of the Governor to send the Bill for reconsideration. Moreover, there is nothing in the Constitution which binds the Governor to return a Bill vetoed by him. When a particular Bill is returned by the Governor, the Houses are required to reconsider it "accordingly", which means in the light of the amendments suggested by him. They cannot incorporate any fresh amendment.

(Hereinafter referred to as C.A.D.)

22. Ibid., p. 195.
If the Houses, in addition to the amendments suggested by the Governor, introduce any new amendment, he is not bound to assent to the Bill. This is obligatory on his part only in case the Bill is passed in the same form or in the light of his own amendments.

Another ticklish problem is whether the Governor is bound to assent to the Bill which was returned by him on the ground that it was unconstitutional? The answer seems to be in the affirmative. There are cases where the Bill was returned on this very ground. In this respect, it is important to note that the advisory opinion of the Court

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23. The Kerala Education Bill was returned by the President for reconsideration after seeking the opinion of the Supreme Court. Giving its opinion on the constitutional validity of some of the clauses, on May 03, 1962, the Supreme Court held that Clause 3(5) of the Bill relating to establishment and recognition of schools violated Article 30(1) of the Constitution. The amendments were accepted by the Assembly. The Indian Affairs Record, vol. IV, no. 5, June 1962, p. 112; see also K.N. Jain, n. 2, p. 71. The Kerala Ayyapper Relations Bill also returned by the President to the Assembly for reconsideration. On October 18, 1960, as amended in the light of the President’s recommendations was passed by the Assembly. It then received the assent of the President on January 21, 1961, A.I.R., 1962, 5, C. 694 (697). These two Bills were passed by the State Legislature. Though the President gave his assent to both the Bills yet he was not bound to do so under Article 201, but under such circumstances, if the Parliament passes the Bill in the same form, the President cannot withhold his assent under Article 311. Such is the case with the Governor under Article 200.
cannot be considered as a substitute for its judicial pronouncement. When a particular case comes before the Court in the actual form, it can change its decision. Therefore, it seems that the Governor is bound to assent to even an unconstitutional Bill if it has been passed by the Assembly twice in the same form. There are cases where the Constitutional Head had to give his assent to such a Bill even in the first instance. Rajendra Prasad, the first President of the Indian Republic, gave his assent to the Bihar Zaminari Abolition Bill, which was declared by the Supreme Court as unconstitutional. Even in the United States, in 1965, President Eisenhower gave his assent to an Appropriation Bill by ignoring certain provisions which he held to be unconstitutional.

It may, however, be asked: Can the Governor send a Bill for reconsideration to the successor House? Since the dissolution of the Assembly does not affect the powers of the Governor and the position of the Bill pending for his assent, there is nothing to prevent the Governor from sending it to the successor House. The Kerala Agraman Relations Bill 1964, was passed by the Kerala Assembly on June 10, 1964.

24. See the statement of the former Speaker of the Uttar Pradesh Legislative Assembly in The Times of India (New Delhi), October 2, 1964.


It was then reserved by the Governor for the consideration of the President. Meanwhile, on July 31, 1959, the President issued a proclamation under Article 356 and the Assembly was dissolved. In February 1960 mid-term elections took place. On July 27, 1960 the President (for whose assent the Bill was pending) sent the Bill back with his message requesting the Legislative Assembly to reconsider the Bill in the light of the specific amendments suggested by him. Then this case before the Supreme Court, it decided that if the Bill was passed again, the Governor would not withhold his assent thereafter on the ground that it did not postulate the existence of the same House which passed it. It was true to say that the Bill had been passed again because in fact it had been passed on an earlier occasion. Therefore, the validity of the Karala Agrarian Relations Act could not be challenged on the ground that it was reconsidered by the successor House.

Article 260 and the Advice of the Council of Ministers

The most controversial problem relating to Article 260 is whether the Governor is bound by the advice of the Council of Ministers? According to Article 163, "there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, 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 Madras High Court has decided that unless a particular article expressly says that the Governor is to act in his discretion, he is required to act on the advice of the Council of Ministers. 22 There is no such thing in Article 200 which empowers the Governor to act in his discretion; hence it appears that he is bound by the advice of the Council of Ministers.

In Ali Sibib Ram Joysya Kepoor vs. State of Punjab, the Supreme Court has decided that the parliamentary democracy in our country reduces the Governor and the President to the position of Constitutional Heads. Thus Governor's position is similar to that of the King in England. 23 As it has already been mentioned that the King has not disregarded the advice of the Council of Ministers, the question of using discretion by the Governor in respect of returning or withholding assent from bills without advice of the Council of Ministers does not arise.

On August 15, 1943, Prasad wrote a letter to B.N. Ban, the Constitutional Adviser, and asked: Could the Governor use his discretion in giving assent to a bill? The answer was in the negative. 24 It is also important to mention that

the practice of issuing instrument of Instructions to the Governor was dropped by the framers of the Constitution so that healthy conventions may develop and the real powers should be vested in the Council of Ministers responsible to the electorate through the legislature. Moreover, when this provision was being debated in the Constituent, the framers assumed that the President and the Governor would be bound by the advice of the Council of Ministers.31

When the controversy arose over the Hindu Code Bill 1951, in response to the letter of Jawaharlal Nehru, the then Attorney-General of India, N.C. Godse, and A.K. Ayyer are believed to have communicated to him that article 74(1) the President was required to act in all matters with the aid and advice of his Council of Ministers and innumerable constitutional authorities were cited to prove this point. The note was sent to Nehru on September 24, 1951 and among his authorities were assertion and silence.32 P.N. Masalges also supports this view.33

Besides, the practice prevailing in India for the last twenty years shows that in spite of the major changes

31. C.A.D. vol. VIII, p. 194. See also vol. IX, p. 64.
32. Granville Austin, n. 15, pp. 140-41.
in political situation resulting from general elections, none
of the Governors in the states and the President in the Centre
dared to ignore the advice of the Council of Ministers. Even
the assent to the佩拉 Appropriation Bill was withheld by
the President on the advice of the Council of Ministers and
not in his own discretion. Had President Rajendra Prasad
withheld his assent to the Hindu Code Bill 1951, against the
wishes of the Prime Minister, he would have to face the heat
from the blue in the sense that in 1952 General Elections,
Nehru again thundered in the Parliament with a thumping
majority. Under such circumstances the position of the Constitu-
tional Head is bound to be undermined.

In the light of the said arguments, it appears sound
to observe that the Governor is normally bound by the advice
of the Council of Ministers. He is not the real head of the
executive but merely a Constitutional Head, which means that
if the Council of Ministers is inclined to disrupt the demo-
cratic set-up by dubious methods and is not acting in conso-
ance with the spirit of the Constitution and the principles
of the Cabinet Government, the Governor may reject the advice
for the welfare and the betterment of the electorate, but in
doing so he should stand on very firm ground.

The Governor and the Reservation of Bill

Article 260 empowers the Governor to reserve a bill for the consideration of the President. But in some cases the reservation is compulsory and the Governor cannot give assent to a bill which, if it becomes law, would derogate from the powers of the High Court as to endanger the position which that Court occupies under this Constitution. However, if an act is passed during the pendency of a case which affects the rights of the parties, it cannot be said that there has been any infringement of the powers of the High Court.

The Governor is free to reserve any bill but normally he reserves a bill which is either unconstitutional or

35. Articles 30, 31-A and 233 fall under this category.


38. The Kerala Education Bill 1987, the Kerala Agrarian Relations Bill 1961, 343, n. 23. The Punjab Temporary Taxation Bill 1982, was reserved and examined to see whether its provisions were discriminative and violative of Article 14. On scrutiny it was found that the Bill could not be held to be violative of Article 14. S.M. Jeth and Alice Jacob, n. 17, p. 341.
contrary to the Directive Principles or the matter falls within the jurisdiction of the Centre, or there is already a Central Legislation in existence; or it does not comply with the Central Statutory Requirements.

Here, it is important to say that 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 the 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 his assent, prevail in that

39. The Madhya Pradesh Panchayat Raj Bill 1960, falls under this category. The disputed article in the Bill was Article 108 providing for the nomination of the first Jumpad Panchayats to be established under the Bill. The M.P. Government is understood to have argued that the procedure of nomination as provided for in the Bill was only due to the fact that M.P. was a backward State with a very high ratio of illiteracy. The Constitution of the Panchayats for the purposes of Village Administration is a State subject under the exclusive jurisdiction of the State Government. However, the Central Government had been of the strong opinion that whatever the condition prevailing in M.P., the system of nomination to the Panchayats was a negation of the concept of Panchayat Raj, thereby suggesting that the body should be elective one from the very beginning. R.P. Pandey, "The Presidential Veto over State Legislation", in S.A.B. Baqri ed., Union-State Relations in India (Newdelhi, 1967), pp. 95-100.

40. Punish Sales Tax (Amendment) Bill 1965 which had a provision for research and seizure affecting the working of the Post Office a matter over which the States had no power.


42. The Mysore Village Officers Abolition Bill 1961.
state. 43 But there is nothing to prevent the Parliament from amending, varying or repealing the law so made by the Legislature of the State. 44 In this connection, it is difficult to understand how the President can give his assent to a reserved State Bill concerned with a concurrent subject containing a provision repugnant to the provisions of a law already made by Parliament. The Parliament is always dominated by the Council of Ministers and no law can be passed without its support. Under such circumstances, it is wild to imagine that a Council of Ministers will advise the President to assent to a reserved State Bill which is contrary to that made by the Parliament earlier. No Council of Ministers would like that a State law may prevail over a central legislation.

The application of this power of reservation of State Bills for President's assent shows that the Union Government can freely disturb the autonomy of the States. It is likely to be done when the party in power in the Centre is opposed to that in the State. Since the Governors are appointed by the Central Government there is every possibility that through the instrumentality of this office this power may be used to protect the interests of the party in control of the

43. Article 261(2).
44. Proviso to Article 262(2).
Central Government. 45 If the men in conservative thinking happen to be in the Central Government, there is no possibility of the implementation of the radical policies of leftist parties. Neoboodhrapad had to face such a fate when he became Chief Minister of Kerala. He could not implement those policies on which he assured the verdict of the electorate in 1957. If the Central Government, however, becomes an impediment in the way of the implementation of a programme adopted by a party in control of the State Government it may be characterised as the violation of the mandate given by the electorate and the doom of party government, which is the cornerstone of the parliamentary democracy.

It is also important to say that in a country like India where the centrifugal tendencies are gaining ground, some sort of check is essential over the States. Otherwise the fifth columnist would destroy the unity of the country, as feared by the framers of the Constitution. 46 But this power of reservation should be used in the interests of the nation and not to serve the interests of the ruling party at the Centre.

45. From 1950 to 1964, out of the 46 Governors, 24 belonged to the Congress Party. In most of the cases the burnt-out politicians, defeated candidates of the Congress and favourite boys of the Central Government are appointed Governors. Under such circumstances, they cannot go against the policies of the Centre. See Chapter II.

46. Prakash Singh Badal, the former Chief Minister of Punjab, is reported to have threatened to secede from the Indian Union, see The Tribune (Chandigarh), August 30, 1971.
POWER TO PROMULGATE ORDINANCE

The Governor's power to promulgate ordinances, a hangover of the Act of 1835, is considered as one of the vexed and perennial problems in the Indian system for the simple reason that the executive is inclined to resort to this mechanism very often, not for the welfare and betterment of the people but for its own convenience. Under the British regime, this power was to be used mainly to suppress national movements. Being so, it got a matching criticism in the Constituent Assembly.

H.R. Gokhale comparing this power with that of the Governor-General under the Government of India Act said:

Such a procedure was understandable in the circumstances in which that Act was passed... We have now a responsible ministry. There is no reason, therefore, why the process laid down in the Government of India Act 1835, should be sought to be copied in the new Constitution....

N.V. Patanker described the Ordinance making power as obnoxious to democracy; and Sibani Lal Saxena wanted to eliminate this provision. B. Pocker Sahib was afraid of the eventuality that this power might be used to deprive the citizens of their elementary right.

49. LAL., vol. VIII, p. 208. In this connection, the assumption of Pocker was right in the sense that the Governments both in the Centre and the States have used this power in such way. The Preventive Detention Act may be cited as an instance.
S.R. Abedkar, the main architect of the Constitution and Chairman of the Drafting Committee, tried to the best of his ability to allay the fears expressed by the members, and compared this provision with the provisions contained in the British Emergency Act 1939 under which the King could issue decrees by proclamation. Under such circumstances, the executive issued regulations relating to any matter when the Parliament was not in session. But this comparison is not convincing. H.M. Asherjee, during a debate in February 1951 in Lok Sabha, said:

Such powers in England are entirely statutory and the regulations are to be made subject to the regulations and conditions imposed by the Act. If the Act of 1930 and they are liable to be set aside by the Court, if they are ultra vires... and our Courts have no power to question the jurisdiction either as to the occasion or the purpose, or the subject matter of an ordinance, even if the ordinance is not made in good faith. 81

Answering to the criticism levelled by Kunaru, S.R. Abedkar said:

It seems to me that my friend Pt. Kunaru has not borne in mind that there are in the Government of India Act 1935, two different provisions. One set of provisions is contained in Section 42 of the Government of India Act and the other is contained in Section 43. The provisions contained in Section 43 conferred upon the Governor-General the power to promulgate ordinance which is felt necessary to discharge the functions that were imposed upon him by the Constitution and which he was

required to discharge in his discretion and
individual judgement... The other point is
this, that the Ordinances could be promulgated
by him under Section 43 even when the legisla-
ture was in session... It would be seen that the
present Article 102 does not contain any of the
provisions which were contained in Section 43
of the Government of India Act. The President,
therefore, does not possess an independent power
possessed by the Governor-General under Section
43... All that we are doing is to continue the
powers given under Section 43 to the Governor-
General, to the President under the provisions
of Article 102. They relate to such periods when
the legislature is in recess, not in session, 62

Article 102 of the Draft Constitution in Article 123
of the present Constitution which is a duplicate copy of
Article 213 concerned with the Governor's power to promulgate
an Ordinance. Article 213 runs as follows:

If at any time, except when the Legislative
Assembly of a state is in session, or where
there is a Legislative Council in a state,
except when both houses of the Legislature
are in session, the Governor is satisfied that
circumstances exist which render it necessary
for him to take immediate action, he may
promulgate such ordinances as the circumstances
appear to him to require:

Provided that the Governor shall not, without
instructions from the President, promulgate any
such ordinance if -

(a) a Bill containing the same provisions would
under this 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 con-
taining the same provisions would under this

Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such ordinance -

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council, and

(b) may be withdrawn at any time by the Governor.

(3) 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:

Provided that for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of the Parliament or an existing law with respect to matters connected in the Concurrent List, an Ordinance promulgated under this Article in pursuance of the instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

As a matter of fact this provision may be described as antithetical to the real concept of democracy by any definition. According to Orlando, "the Ordinance is the expression of the will of executive power as law is the expression of the will
of the legislative power. 53

How the question to be examined is as to whether the word 'Governor' in Article 212 implies the Council of Ministers headed by the Chief Minister? Constitutional experts have expressed different opinions on this problem. D.D. Basu says that this is not a discretionary power and must be exercised on the advice of the Council of Ministers. 54 But J. Akbar Ansari also does not agree with this view and says that the Ordinance making power of the President is a legislative power outside the ambit of Article 74(1) and "satisfaction" literally means that the President is personally satisfied. 55 The President's and Governor's power is similar in their respective spheres; therefore, the same can be applied in case of the Governor.

Although the contention of Akbar Ansari, which is immediately contrary to that of Orlando, seems to be right to some extent in the sense that this power occurs in a separate Chapter yet the plea that this is a legislative power is not convincing. It cannot be considered as an original legislation for the simple reason that it is subject to the approval of some other body — the Parliament or the Legislature. It can


be regarded as a subordinate legislation. Making distinction between supreme legislation and subordinate legislation, Salmond, an eminent jurist, observed:

Legislation is either supreme or subordinate. The former is that which proceeds from the Supreme or Sovereign power in the State which is not therefore capable of being repealed, rescinded or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power and is dependent for its continued existence and validity on some superior or supreme authority. 56

Moreover, Article 213(2) clearly indicates that an ordinance promulgated by the Governor, shall have the same force and effect as an Act of Legislature. The phrase "same force and effect" does not mean the "same value" which is attached to an Act of Legislature. Therefore, it appears right to observe that the ordinance-making power cannot be said to be a legislative power. It falls somewhere between the terminal point of parliamentary sovereignty and executive dictatorship. K. V. Rao says that this power is laid down in a separate chapter by itself, and so, if this contention is accepted, the President or the Governor, as the case may be, can alone issue them. "But this is not a serious argument as this is not a question of legal quibbles, but one of practical politics." 57

56. For detailed study see R.K. Mishra, n. 6, p. 103.

Keeping in view the practice so far adopted both in the States and the Centre, the principles and conventions of Parliamentary Democracy and Cabinet Government, the spirit of the Constitution, the intention of the framers and the judicial interpretations, it appears that the actual power belong to the Council of Ministers and the Governor is simply its mouthpiece. When Draft Article 102 which is Article 123 of the present Constitution was being discussed in the Constituent, Habib Singh wanted it to be clearly stated that this power would be used on the advice of the Council of Ministers. 58 But, V.R., Ambedkar said:

I am very grateful to you for reminding me about this. The point is that that amendment is unnecessary because the President could not act and will not act except on the advice of the Ministers. 59

In Hari Cakib Ram Jomaya Kapoor vs. State of Punjab, the Supreme Court decided

In India as in England, the executive has to act subject to the control of the legislature, but in what way is this control exercised by the Legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister as the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or Cabinet. The same provision obtains in regard to the Government of States; the Governor or the

59. Ibid., p. 215. See also the dialogue between Ambedkar and Rajendra Prasad, Ibid., pp. 215-16.
Rajpramukh, as the case may be, occupied the position of the head of the executive in the state but it is virtually the Council of Ministers in each state that carries on the executive government.\textsuperscript{60}

Although the Courts have declared in some of the cases that the speeches delivered in the Constituent Assembly have no relevance to the interpretation of the Constitution,\textsuperscript{61} yet in U.M.R. Reo vs. Indira Gandhi, it showed the Attorney-General for having supplied compilations containing extracts from the debates in the Constituent Assembly.\textsuperscript{62}

When in Punjab, the Akali-led coalition headed by Parkash Singh Badal advised the Governor to issue an ordinance for the appointment of the legislators to the membership of the Board and Corporations, the Governor, D.C. Pervaiz, sent the Ordinance back to the Council of Ministers and asked as to what was the urgency and necessity of such a move?\textsuperscript{63} The experts of the Central Government are believed to have expressed the view that the Governor was bound by the advice of the Council of Ministers and consequently the Governor had to act according to the advice of the Council of Ministers.\textsuperscript{64}

\textsuperscript{60} \textit{I.L.R.}, 1955, S.C. 549 (660).


\textsuperscript{63} \textit{The Tribune} (Chandigarh), July 8, 1970, p. 1.

\textsuperscript{64} The controversy arose when Gurnam Singh, the leader of the parallel Akali Dal strongly protested to the Governor against this step of the government on the ground that it was being done simply to create posts for the legislators who could not be given place in the Council of Ministers. \textit{Ibid.}
gist of the problem is that had D.C. Parsa not issued the Ordinance on the advice of the Council of Ministers, it's immediate resignation would have created the problem in the sense that there was no other party which could have formed the Government. Keeping in view the said facts, it appears right to say that the Governor is to act on the advice of the Council of Ministers.

Conditions for Proclaiming Ordinance

According to Article 213, both the Houses of the State Legislature should not be in session. If any Ordinance is issued before the prorogation of the Legislature, it shall be void.68 But there are cases where this power was used when one of the two Houses was in session. The Essential Services Maintenance Ordinance was proclaimed in 1957 when the House of People was in session. The preamble of the Ordinance says:

Whereas a Bill to provide for maintenance of certain essential services and the normal life of the community has been passed by the House of People and the Council of States is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action to give effect to the Bill, 69

Even the Allahabad High Court has decided that an ordinance can be issued when one of the two Houses has been prorogued.67

Moreover, the framers of the Constitution were also inclined to this view. It is also interesting to note that an ordinance can be given retrospective effect even from the date on which both the Houses were in session. Even the Governor can prorogue the session for the very purpose of promulgating an ordinance. The Governor of Punjab, D.C. Pande, did so; and when it was challenged in the Court, while reversing the decision of the Punjab and Haryana High Court, the Supreme Court decided:

Article 174(2) which empowers the Governor to prorogue the Legislature does not indicate any restriction on this power. Hence the Legislature is in session and in the midst of its legislative work, the motives of the Governor may conceivably be questioned on the ground of alleged want of good faith and abuse of constitutional powers. The power is untrammeled by the Constitution and when an emergency arises the action is perfectly understandable. There is thus no abuse of power by him, nor can his motives be described as malafide.

In this connection, it is also important to mention that it is not necessary that the order of the Governor for prorogation of the legislature must reach each and every member. The


Secretary of the Legislative Council or Assembly is the most appropriate person to be informed of the order or prorogation.\(^72\)

Before issuing an ordinance, the Governor must be satisfied that the circumstances warrant for its promulgation. This is the subjective satisfaction of the Governor and the Court cannot go into the question of its validity.\(^73\) In Ratan Nayar v. the State of Bihar, Justice Ghose and Sajjan Prasad took the view that the clause did not require that the ordinance to be promulgated by the Governor had to state in any words that the Governor was "satisfied" as to a certain state of affairs as mentioned in Clause (1). On the other hand, Nevedith C.J. held that for a valid ordinance two conditions were necessary under Clause (1) of Article 213: (1) that the Governor was satisfied that circumstances existed which required immediate action, and (2) that in his opinion the circumstances required such an ordinance. The ordinance would be void if it did not satisfy the conditions laid down in Article 213(1) of the Constitution. Whenever a legislature uses the word 'satisfied' it must mean reasonably satisfied. It is, therefore, obvious that if it is found on the very surface of an ordinance that it is an irrational and


an unreasonable piece of legislation a Court of Law would be entitled to hold that the legislation is invalid.\textsuperscript{74} But the Governor can issue an Ordinance to circumvent the decisions of the Courts.\textsuperscript{75} He can do so with retrospective effect also.\textsuperscript{76} During the debate in Parliament, R.C. Mukherjee criticised and condemned the government for having resorted to such mechanisms of circumventing the judicial decisions. He referred the case of Janu Prasad vs. Province of West Bengal particularly, wherein the judges also condemned the move.\textsuperscript{77}

In Uttar Pradesh the coalition government headed by Chhren Singh promulgated an Ordinance to save a Janu Singh from being disqualified through a judgement of Justice G.D. Singh of the Lucknow Bench of Allahabad High Court. The Ordinance was issued on October 20, 1967, but on finding that it had flaws and did not cover the objections raised in the High Court judgement, the State Government sent another ordinance to Government Press for publication.\textsuperscript{78} C.B. Gupta,

\textsuperscript{74} C.L. Ansari, a. i., p. 334.


\textsuperscript{76} Janu Prasad v. Province of West Bengal, 1968, 63 C.V., 57 (72), F.B.


\textsuperscript{78} National Herald (Lucknow), November 6, 1967.
the then leader of the Opposition in the Assembly, called it as the "immoral and partisan action". Even the Hindustan Times, while commenting on the ordinance, said that there was "hardly any excuse with the Chief Minister to defend it." Chhena Singh, the Chief Minister, reminded C.D. Gupta that seven ordinances retrospectively amending the law on legislators' disqualifications had come into force during the Congress regime between 1960 and 1967 and that they had certain individuals in view and had the effect of benefitting or designed to benefit them and them alone. Here, it must be noted that the resignation of the Chhena Singh Ministry was demanded on the ground that the Legislative Assembly refused to grant permission to the Minister for Agriculture, Jai Ram Verma, to introduce the "Removal of the State Legislators Disqualification Bill." (144 voting against the Government and 123 for it). K.V. Rao cites other instances of such a nature—ordinances to declare annual charge to be part of capital charge which was declared by the Supreme Court as unconstitutional on May 26, 1960, and an ordinance nullifying the judgment.

of the Supreme Court regarding the Income Tax Tribunal in 1964. Both the Ordinances had to come in for with retrospective effect. In Uttar Pradesh this power was used to validate 2204-terminated appointments (1963) and in Rajasthan to validate the appointment of Vice-Chancellor and Syndicate of the Rajasthan University (1964) both declared invalid previously by the Courts. In 1962, the Union Government by an Ordinance virtually made a judgement of the Supreme Court as a clause of the Land Acquisition Act of 1964, imperative. Besides, in January 1960, barely four weeks before the re-assemble of Parliament, the President promulgated an Ordinance nationalizing Life Insurance Business with immediate effect. Conceding an overwhelming majority in the Parliament as the present Government does and in the absence of a powerful lobby of Life Insurance Companies, the Cabinet had nothing to fear from the Parliament. 84 The Ordinance pertaining to the nationalization of fourteen major banks was promulgated by the President only 3 days before the beginning of the session of Parliament. 85

In certain cases, the Governor cannot issue an Ordinance without obtaining the previous instructions from the President. 86 If the Governor promulgates an Ordinance without

85. The Ordinance was declared as unconstitutional by the Supreme Court.
instructions from the President, that would be invalid. It is also important to note that where an Ordinance has been promulgated by the Governor in pursuance of instructions from the President, its further reservation for the consent of the President under Article 254(3) is not required.

**Limitations on the Ordinance-making power**

Article 213(3) says that 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. It is clear from a careful reading of Article 213 that the Ordinance making power of the Governor is co-extensive with the Legislature's power of making law. The legislative powers of the Legislature have been defined by Articles 243 and 246 read with the seventh schedule. It leads to the conclusion that the Legislature can make laws on the subjects contained in the State List and Concurrent List, if there is no law of Parliament. If there is no such law, he can do so even without the previous instructions. Besides, there are some exceptions to the Governor's Ordinance-making power with regard to the State List also. The Governor cannot promulgate an Ordinance pertaining to Articles 189(3) and 210. These matters are

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required to be dealt with by the Legislature of the State by law.

**Duration of the Ordinance**

Every Ordinance promulgated by the Governor is to be laid before the Legislature of the State for approval. This provision is directory and not mandatory. The only consequence of the non-compliance with this requirement is that the Ordinance shall cease to operate within six weeks from the re-assembly of the Legislature. It means that the maximum life of an Ordinance is six weeks plus six months. This is so because the Legislature must be summoned not later than six months after its prorogation. The refusal to lease to introduce the Bill repealing the Ordinance does not amount to its expiry. The Ordinance will lapse after six weeks from the re-assembly of Legislature in such a situation also. If, in case the term of the Ordinance has expired before the meeting of the Legislature, is it still obligatory to place the Ordinance before the Legislature? Precedents exist when such Ordinances were placed before Parliament which met subsequent to the expiry of the Ordinance. For example, in 1964, the President promulgated an Ordinance imposing a pilgrim tax on

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91. Article 174(1).
the pilgrim visiting Amulha Malia held that year. Both the duration of the fair as well as the Ordinance expired before the next meeting of the Parliament. This Ordinance was nevertheless placed on the Table of the House not with a view to seeking its approval but in order to inform it of the promulgation of Ordinance,93

In this respect, it is also interesting to note that no Ordinance can be revised; it means that there is no time limit. It can lead to the usurpation of the legislative power by the executive in case it is inclined to use this power with retrospective effect and particularly with regard to the ordinance disapproved by the Legislature.

Legislation by Ordinance

It may, however, be asked as to how far is it possible on the part of the Governor to spend money through Ordinance? Articles 265, 266 and 267 make it clear that no money can be spent or collected except by authority of law. As the matters which can be dealt with by law may be regulated by an Ordinance, one is bound to draw conclusions that the money can be spent or collected through the mechanism of Ordinance also. The Governor of Punjab, Dr. P. Parsa, passed two Appropriation Bills through the Ordinance and in State of

94. This ruling was given by the Court in Amul Chand v. Dainik Nayak, A.I.R., 1933, Calcutta 272; cited in I.V. Rao, n. 57, p. 66.
Punjab v. Satyapal Dugga and others, the Supreme Court declared the action as constitutional. The other instances are ordinances to amend Income Tax Act (1950), to levy tax in Bengal (1963). In 1954 the taxes were levied on the pilgrims to Kushna Mela. In Lok Sabha, while criticising the move, A. Krishna Gauri said:

Did the Government suddenly make the discovery some time during the cold month of January that Kushna was to take place on the 3rd February 1961 and hence be a fruitful source of revenue to tax? Was this discovery so sudden, so urgent that it could not have been made when we were in session in November? By the time we have met the Kushna is over. The Government has no need to bring even a ratifying Bill. The test of emergency Mr. Speaker, in the case of fiscal ordinances should be much greater than in the case of other ordinances. Above all, in the case of fiscal measures it is the Parliament and the House of People that is sovereign authority to vote and raise tax and to direct how the money shall be spent.

John Lel says:

In no democracy, does the executive branch of the Government possess the power of raising and spending money without the express and prior approval of the legislature. The authority of the legislature, the responsibility of the executive, all hinge upon the power of the purse that must belong to the Parliament alone. The raising and spending of money shapes and could the economic structure of the society, and where money is raised or spent by an Ordinance, though Parliament or Assembly may

96. [V. Rec, n. 87, p. 87.
disapprove such action of the President it cannot
demand the refund of the taxes or revenues raised,
recall the money spent. 98

Now the question arises: Is it possible on the part
of the Governor to pass the Budget through the Ordinance? The
answer seems to be in the affirmative, As a matter of fact
there is no difference between the Money Bill and the Budget.
The more we can say is that the Budget can be considered as
a 'special kind of money Bill'. Beyond this, there is no
difference between the two. On February 24, 1961, in Orissa,
the Governor passed the Budget of more than four crores for
the years 1960-61 and the President's Rule was imposed on
February 25, 1961. 99 In the Lok Sabha, L. B. Chandra Shekari
said:

then the Ordinance was promulgated by the
Governor, there was consultation among our
officials as well as with the Law Ministry.
The Governor took this action in consultation
with the Chief Secretary and the Law Depart-
ment of the State Government. He felt that
some action was necessary in order to incur
expenditure on the administration. But as I
said, when the Ordinance was passed and it came
to our notice, the Home Secretary immediately
consulted the Prime Minister, and later on matter
was referred to the Law Ministry. The Law
Ministry's opinion is that the Ordinance promul-
gated by the Governor is not valid under the
Constitution, we immediately informed the
Governor about this. Therefore, no action is
being taken since then under the Ordinance. 100

98, Mohan Lal, In 84, pp. 224-5; see also N.C. Chatterjee,

is said to have taken this step in view of the sudden
resignation of the Council of Ministers during the Budget
Session.

100, Ibid., col. 2931. It was only the opinion of the Law
Ministry and not the decision of any Court.
Though the opinion of the Law Ministry seems to be sound yet the problem is that such a kind of eventualities may arise at the Centre and it appears that there is no remedy except to use this device to spend money to avoid development retardation in the administration.

After having been made the analysis of Article 215, it seems sound to observe that it can be misused to a large extent and both the Central and the State Governments actually did so. Sometimes the legislators had to demand the attention of the Governor to such an abuse of power. A delegation of the Haryana Janata Congress consisting of M.S. Malik, H. C. Goel and Shiv Ram Verma called on the Governor, B.S. Chawla, and demanded the summoning of the session on the ground that the Governor was misusing the power by imposing taxes through Ordinance. 101 A. P. Jain cites a very interesting case:

I know of a case in the key-days of Governorship in early fifties when a top politician of all-India status occupying the position of the Governor of a major State was made to sign an Ordinance by the Chief Minister after its publication in the State Gazette on the previous night. The refusal would have created a major political scandal and one would sympathise with the Governor for having suppressed the conscience. I have little doubt that the fault lies less with men but more with situations. 102

101. The Hindustan Times (New Delhi), July 6, 1969.

The framers of the Constitution adopted this provision for special contingencies but it is being used as a daily-diet which is a dangerous factor for the maintenance of our infant parliamentary democracy. It is abused when the Government is in a slender majority and afraid of facing the legislature. This practice should be avoided because it is the negation of parliamentary democracy as conceived by the framers, interpreted by the jurists and defined by the scholars of Political Science.