CHAPTER - V

THE GOVERNOR AND THE STATE LEGISLATURE

If presidential government is based on the principle of separation of powers between the executive and the legislative organs of the government, Parliamentary government is based on the fusion of executive and legislative organs of the government. According to Article 168 of the Constitution the State Legislature consists of the Governor, the Legislative Assembly and Legislative Council. The Governor, therefore, is an integral part of the State Legislature and as such plays quite a significant role.

The Governor has a right to summon the House or each House of the State Legislature (if it is a bi-cameral House) to meet at such time and place as he thinks fit, but more than six months shall not intervene between its last sitting and the sitting in the next session. He has also the power to prorogue the House or either House; and to dissolve the Legislative Assembly. Besides, the Governor has a right to address the Legislative Assembly (or joint House when the State is having a Legislative Council) every year and inform the Legislature of the causes of its summons. He can send messages from time to time with respect to a bill then pending in the Legislature or otherwise. The

1 Constitution of India, Art. 174(1).
2 Ibid., Art. 174 (2).
3 Ibid., Art. 176 (1).
Legislature is duty bound under the Constitution to allot time for discussion of the matters referred to in the address of the Governor or in special message.\(^4\) Besides, every Bill after it has been passed by the State Legislature, must receive the assent of the Governor and the latter may give or withhold his assent or even may reserve it for consideration of the President.\(^5\) He has also power to promulgate ordinances during the recess of the Legislature.\(^6\)

Constitutionally speaking, all these Articles make the Governor a pivotal figure in his State. If the principle of responsibility to the Legislature had not been embedded in the Constitution, he would virtually be a king. But that principle in reality transfers the powers and functions of the Governor to the Council of Ministers. It is the Council of Ministers that have the prerogative to advise the Governor. The Governor has to act on the advice of the ministers. He cannot exercise any power or function without advice except in regard to matters where he is by or under the Constitution required to exercise his functions in his discretion. The decision of the Governor in his discretion is final, and the validity of anything done by the Governor cannot be called in question on the ground that he ought or ought not to have acted in his discretion. Further, the question whether any, and if so what, advice was tendered by ministers to the Governor cannot be inquired into in any Court.\(^7\)

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\(^4\) Ibid., Art. 175 (2).
\(^5\) Ibid., Art. 200.
\(^6\) Ibid. Art. 213.
\(^7\) Ibid., Art. 163.
The present acrimonious debate centres round the use of discretionary powers by the Governors. Our Constitution has not defined the nature and scope of these powers. No rules have been framed to guide the Governors in the exercise of these powers. As a matter of fact, there has been no uniformity and consistency in using them and the Governors have followed different paths in identical circumstances. Nor have any healthy conventions been established so far so as to lay down any code of conduct for guiding the Governors. Perhaps, no necessity was ever felt as the same political party was ruling at the Centre and in the States and the Federal system was functioning more or less on the basis of unitary system. There was no question of conflict or clash of interests between the Centre and the States at the time. The Office of the Governor has come into limelight immediately after the fourth General Election, which is responsible for bringing into existence an era of coalition governments in our country. It would, therefore, be profitable for us to know the role that these Governors have played more specially in assenting the Bills, promulgating ordinances and dissolving the Legislative Assemblies.

**Governor's Power to Dissolve Legislative Assembly**

According to Article 174(2)(b), the Governor is empowered to dissolve the Legislative Assembly of the State. It is a fundamental and cardinal feature of the parliamentary form of government that the constitutional head is given the power of dissolution. According to M.V.Pylee, it is not a normal practice to dissolve a Legislature before it
has completed its prescribed period of life. Yet, dissolution at an earlier date with a view to appealing to the electorates and seeking to solve a situation of political instability, is an accepted principle of the parliamentary system of government.8 Thus, the dissolution of the Legislature is the democratic fulcrum of the entire process of adjusting power conflicts by making the electorate the ultimate determining factor. In the words of K.V. Rao, strictly speaking, if a Legislative Chamber is not to be dissolved before the expiry of its normal term, it loses one of the chief characteristics of Parliamentary democracy.9

Usually, as it happens, the Chief Minister of a State asks for dissolution even earlier than the end of five years, and the Governor agrees. In England and in the Dominions, as well as in India, it is conceded that a Chief Minister who enjoys a comfortable majority in the House has got privilege to choose the most favourable time for re-election and get the House dissolved and this privilege is conceded by all. In neither case cited above has the Governor any need for exercising his discretion.10

However, the often debated question is whether the Governor has the power to act on his discretion or whether he is bound to grant dissolution of the Assembly on the advice of a Chief Minister who lost

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his majority in the House or he possessed the discretion to reject it and 
explore the possibility of an alternative stable ministry. The 
Constitution neither lays down the written provisions nor there is any 
norm to regulate this power. And also there is no unanimity among 
writers, statesmen and jurists on these questions.

Herold Laski is of the opinion that the king has no discretion 
whatever in this matter. The king’s public acts must be of an automatic 
character; he must, in public view, accept the advice of his ministers. 
Further, he argues that independent exercise of the powers would bring 
him into the arena of party conflict and he would, therefore, cease to be 
a neutral head of State that a constitutional ruler should be.11 On the 
other hand, it has been contended by Kieth that the king retains for the 
benefit of his people discretion in the matter of dissolution. He may 
refuse to dissolve Parliament when advised and may urge his minister 
to resign or he may dismiss them if they refuse to do so. The Crown, in 
Keith’s view, is the guardian of the Constitution, the ultimate safeguard 
against all “rush and unlimited change”.12 M.C. Setalvad, an eminent 
jurist, supports this view. According to him, the President has certain 
discretionary powers, not in pursuance of his own ends but for the 
furtherance of Parliamentary democracy.13

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There was a debate on the options available to the President following the withdrawal of support by the BJP to the National Front Government led by V.P.Singh in the late 90s. To a question, should the President bound by the advice tendered by the Cabinet, or is he free to act according to his best lights of prudently blending the letter and spirit of the constitutional provisions? Raghavan answered, "The President may, under the proviso to Article 74(1) of the Constitution, require the Cabinet to reconsider such advice, either generally or otherwise; if the Cabinet were to reiterate its advice on reconsideration, the letter of the Constitution requires that he "shall act in accordance with the advice tendered after such reconsideration". K.K.Venugopal, constitutional layer and President of the Supreme Court Bar Association said, the President is not bound by the advice since the Prime Minister has lost the majority. Further, he pointed out that ordinarily the President would, in the wake of the fall of a government, explore all possibilities of installing a stable government. In case such efforts do not fructify, the President is left with no alternative but to direct the dissolution of Parliament. The short point is that it is the duty of the President to satisfy himself about the bona fides of the Cabinet's advice especially when it relates in such a matter of moment as dissolution, and more so, when it has not completed even one-fifth of the regular term. In other words, if the President is satisfied that the Prime Minister's or the Cabinet's advice proceeds from manifest bad

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faith or has been tendered (and reiterated) in circumstances which have robbed the government of its legitimacy or majority support, he does not need consider himself bound by the advice.\(^\text{16}\)

A similar situation arose when the United Front led by I.K. Gujral fell as the supporting Congress Party withdrew its backing in 1997. The Prime Minister has submitted his resignation but has not advised the President to dissolve the Lok Sabha. Under such a political turmoil the dissolution should be the last resort said P.P. Rao, Senior Supreme Court Lawyer. This is so if the Prime Minister is going out due to lack of majority in the House, or some of the members are about to withdraw support. If the request is made by a Prime Minister who enjoys undoubted support of a majority of members of the House, the President is bound to accept the advice, because non-acceptance of request of such a Prime Minister would inevitably result in a situation where the President cannot find any leader who can provide a viable and alternative government.\(^\text{17}\) Nitish Chakravarty holds similar view. He says, the head of the State should not refuse dissolution unless he feels that the existing Parliament is viable, and capable of doing its jobs, and a General Election is detrimental to the national economy, and another Prime Minister is available to run the government for a reasonable period. Further, he asserted that it is entirely for the President to decide whether to force a dissolution of the House or refuse to do it.\(^\text{18}\)

\(^\text{16}\) Raghavan, B.S., *op. cit.*


But P.A. Choudhury, former Andhra Pradesh High Court Judge does not agree while answering to the constitutional options available to the President if the government voted out, he said, the President must perform as per the advice of the Cabinet. If Cabinet calls for the dissolution of the House, the President has no option but to abide by its advice. To another question, if the Prime Minister loses majority and then asks for dissolution of the House? “I do not understand how the President can refuse it. Constitutional provisions (Article 74-75) as amended by the 44th Amendment, closes options of the President.

While supporting his contention, he argued, “democratically the Cabinet’s opinion is always more representative in relation to the President. He cannot disregard the Cabinet’s views which is representative of Lok Sabha.”

The Administrative Reforms Commission, on other hand recommended that “when a ministry is defeated in the Assembly on a major policy issue and if the outgoing Chief Minister advises the Governor to dissolve the Assembly with a view to obtaining the verdict of the electorate, the Governor should accept the advice. In other cases, he may exercise his discretion.” Report of the Governor’s Committee maintains that, if a ministry is not able to get the budget passed before seeking dissolution, the Governor could take steps to ascertain if it is possible to install another ministry, which is able to...
command the majority support and get the budget passed. In substance the Committee asks the Governor to explore the possibilities of forming an alternative government and after failing in it, the Governor should make a report to the President for dissolution. The Governor should not follow the advice of the outgoing Chief Minister for dissolution of the House.  

The Sarkaria Commission on Union-State Relations has recommended that "so long as the Council of Ministers enjoys the confidence of the Legislative Assembly, the advice of the Council of Ministers in dissolving the Assembly, if such advice is not patently unconstitutional, should be deemed as binding on the Governor. When the advice for dissolving the Assembly is made by a ministry which has lost or is likely to have lost the majority support he is not bound to accept the advice. Further, the Commission recommended that if ultimately a viable ministry fails to emerge, the Governor should first consider dissolving the Assembly and arranging for fresh elections after consulting the leaders of the political parties concerned and the Chief Election Commissioner."

The thorny issue of dissolution of Legislative Assembly came up for discussion in the Constituent Assembly when the present Constitution was being discussed by its makers. While discussing the

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Draft Article, Ambedkar, the Chairman of the Draft Committee said, "there is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister or his Cabinet. Under the Parliamentary system of the government, there are only two prerogatives which the Head of the State may exercise. One is the appointment of the Prime Minister and the other is the dissolution of the Parliament."

Again Ambedkar, while giving the reply at an amendment of the K.T.Shah, who wanted that the Prime Minister to give in writing the reasons for the dissolution of the House, made it clear on May 18, 1949 in context with the Draft Article 69 of the Draft Constitution that the right of dissolution would be properly observed by "the convention." In his opinion the House of people would generally be dissolved on the advice of the Prime Minister according to the conventions of the nation but the Head of the State was not necessarily bound to accept the advice of the Prime Minister who wanted a dissolution of Parliament in a situation when the Opposition leader was prepared to form a government, and he could take charge of the affairs of the administration with the same Parliament without being dissolved. The President would accept the advice of the Prime Minister for the dissolution of Parliament, if he found that there was no other alternative except the dissolution. There, he would act as a

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23 Constituent Assembly Debates, Vol. VIII, p. 1158.
24 Ibid., p. 100.
25 Ibid., p. 106.
26 Ibid., p. 107.
Ambedkar, therefore, did not consider the amendment of K.T. Shah suitable and left the matter for the consideration of the President saying that "he would trust the President to make a correct decision between the party leaders and the House as a whole".  

Kerala 1965

A very peculiar thing happened in Kerala after the election which was held in March, 1965. The Governor dissolved the Assembly without even calling its first meeting. After the election none of the parties got an absolute majority. The CPI (M) emerged as the single largest party and its leader E.M.S. Namboodiripad was keen to form the government. The Governor did not invite the leader of the single largest party and reported to the President that there was no possibility of forming a viable government in the State. As a result, the Legislative Assembly was dissolved before it had been summoned for the first time. In the Lok Sabha, H.V. Kamath described the dissolution of the Assembly as a fraud on the Constitution.

Ambedkar, the Chairman of the Drafting Committee, maintained in the Constituent Assembly that "the Parliament is not constituted unless the oath is taken by the members. The taking of oath is part and

\[27\] Ibid.


The members cannot take oath unless the Governor convenes its sitting under Article 174(1). Besides, according to Article 172, the life of the Assembly starts from its first sitting. Secondly, the life will run for five years from its first sitting, then can be dissolved sooner but that right has been given to the Governor under Article 174. Therefore, the Governor cannot dissolve the Assembly just after it is constituted. But the Kerala High Court upheld the action of the Governor saying that once the Assembly is constituted after the election, it becomes capable of being dissolved.

However, the problem of the dissolution became more acute in the Indian States after the General Elections of 1967 when the monolithic control of one party passed away from the Indian scene and multi-party coalition governments were installed in many States. As a result, most of the Governors of the States acted either according to their convenience or according to the directions of Centre.

**Madhya Pradesh 1967**

An interesting situation was created in July, 1967, when the fall of the Congress ministry headed by D.P. Mishra on the demands of grants on education brought to an end the unbroken rule of Congress Party in the State of Madhya Pradesh. A defection of about three dozen members of the Congress Party to the Opposition had changed the party...
position in the State Assembly. The Chief Minister who before this
event was the leader of a party which was in absolute majority in the
Assembly, found himself in the position of a leader of a minority
government. The Chief Minister forced the Governor, K.C. Reddy to
prorogue the Assembly and latter on he insisted on the dissolution of
the Assembly for fresh election in the State.\textsuperscript{33}

Rao believes that the action of the Governor, K.C. Reddy is not
conceding D.P. Mishra's demand for dissolution was unfortunate.\textsuperscript{34} He
maintained that the Chief Minister of a single party either anticipating
defeat or after a direct defeat has greater claim to get dissolution than
the Chief Minister of coalition government. To him the reason is
simple. The Chief Minister of a single party has been elected with a
definite mandate, and the people had reposed confidence in him and in
that party. If he has now lost his majority, that means either he had
deviated from the party mandate or the defectors had deviated. If it is
the latter case, normally, since the defectors also had been elected on
the same party ticket, the Governor should allow the Chief Minister's
demand for dissolution so that the electorate would be in a position to
decide which of them (the Chief Minister's group or that of the
defectors) they would like to support under the changed circumstances.
The reason given by Rao seems sound. Because, in Madhya Pradesh,
the Congress Party secured absolute majority in the General Election in

\textsuperscript{33} Misra, R.N., \textit{Governor and Dissolution of the Legislative Assembly}, in Grover, 
\textit{op. cit.}, pp. 371-72.

\textsuperscript{34} Rao, K.V., \textit{op. cit.}, p. 292.
1967. It means that the electorate wanted that the Congress should rule the State and the defections by some legislators did not mean that the people disapprove of the policies of the Congress Party. Therefore, D.P. Mishra had the constitutional right to advise the Governor to dissolve the Assembly so that the verdict of the electorate might be sought to know as to who should rule the State.

**Punjab 1967**

In Punjab, the Chief Minister of coalition government, Gurnam Singh resigned on November 22, 1967, before the defeat of his ministry in the Assembly and advised the Governor for dissolution of the House but his advice was turned down by the Governor, D.C. Pavate and an alternative ministry led by Lachman Singh Gill was installed in the State. But the same Governor accepted the demand of Prakash Singh Badal for dissolution of the Punjab Assembly when the Badal ministry was reduced to minority owing to the defection of 17 Legislators from the ruling government in 1971. There was a country-wide criticism about the action of the Governor on the ground that the Badal ministry had no right to advise the Governor.35

The Governor, while rejecting the advice of Gurunam Singh, said, "the suggestion came not from a Chief Minister but caretaker

Chief Minister”. He felt that elections were costly and the taxpayers should not be subject to the expense so frequently.

However, the outgoing Chief Minister insisted on his legal right and even wrote to the President of India stressing that the legal position was that the Governor was bound to accept his advice for the dissolution of the Assembly. The United Front, in a memorandum to the President of India said, “the Governor of Punjab acted undemocratically and unconstitutionally by refusing to accept the advice of the Chief Minister, Gurunam Singh, to order mid-term elections and in installing in office a ministry of defectors led by Lachhman Singh Gill.

Here, it is pertinent to note that the Centre had advised the Governor of Punjab to reject outgoing Chief Minister’s advice for mid-term poll. The Central government was of the view that the Governor should not accept the advice of a defeated Chief Minister. Surprisingly, in the case of Madhya Pradesh, the Home Ministry even also the Prime Minister supported the defeated Chief Minister, Mishra’s constitutional right to advise the Governor to dissolve the Assembly.

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38 Ibid.
40 Ibid., p. 152.
41 Singh, Dilip, *op. cit.*, p. 52.
It seems that the Centre defends the conduct of the Governors because it suits them.

**Uttar Pradesh 1968**

In Uttar Pradesh the Chief Minister, Charan Singh, resigned on February 17, 1968, owing to a split in the Samyukta Vidhayak Dal and advised the Governor to hold mid-term poll in the State. Gopal Reddy refused to heed his advice and recommended for the President's Rule in the State and the Assembly was kept in suspension with the view for forming an alternative government. The Governor has given his reason for not accepting the advice of the outgoing Chief Minister for the dissolution of the Assembly. "In his opinion, such a extreme situation had not developed. Given a reasonable time, a re-orientation of political affiliation might emerge in the State Assembly which might enable a stable government being formed". According to the Press report, the Central government was also unlikely to agree to the holding of a mid-term election in the State without first exploring the possibility of the formation of an alternative government. The State Legislative later on, was dissolved by the President on the recommendation of the Governor, when the latter realised that there was no possibility of an installation of an alternative ministry in the State. Thus, the Governor did not dissolve the Assembly on the advice of the outgoing Chief Minister.

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West Bengal 1971

In West Bengal on June 25, 1971, the Chief Minister, Ajoy Kumar Mukherjee, advised the Governor, S.S. Dhawan, to dissolve the Assembly under Article 174. The Chief Minister wrote to the Governor that in view of the influx of refugees on a large scale, “I shall not be able to carry on smoothly. Therefore, I think in these circumstances it is best for me to advise you to dissolve the Assembly to seek a fresh mandate.” The Governor dissolved the Assembly following the Chief Minister’s advice and defended his step on the ground that the “Chief Minister” continued to enjoy majority.

But this was not true. After the election, which was held in March, 1971, Ajoy Mukherjee formed a coalition government in April 1971, in which Congress was a major partner. The budget session of the Assembly was to begin on June 28. The Assembly was dissolved on the recommendation of Ajoy Mukherjee whose fall was imminent because of the “split in Bangla Congress plus possible disassociation of PSP MLAs.” In the Lok Sabha, Niren Ghosh mathematically proved that the Chief Minister had lost majority support.

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45 Ibid., Col. 194.
46 Siwach, J.R., in Grover, op. cit., p. 258.
47 Lok Sabha Debate, op. cit. Col.206.
Gujarat 1971

In Gujarat on May 11, 1971, on the other hand, when the Chief Minister, Hitendra Desai advised the Governor, Sriman Narayan to dissolve the House owing to defections of twelve legislators from its party. But the Governor rejected the same and said that the Chief Minister had lost the majority support his advice was not binding. He also said that the budget was to be passed by the end of July and fresh elections could not be held before November, 1971.48 The Governor later on recommended for the dissolution of the House and the imposition of the President's Rule in the State.49 It would have been better had the Governor allowed the Chief Minister to present the deeds of defectors before the voters.

Orissa 1971

The constitutional crisis relating to the dissolution of the Assembly also developed in Orissa in January, 1971, following the withdrawal of the support of Jan Congress from the Swatantra led coalition government. The then Chief Minister, R.N.Singh Deo tendered his resignation to the Governor, S.S.Ansari on January 9, 1971 and recommended for dissolution of the Assembly. The Governor accepted his resignation but rejected his advice that the Assembly be dissolved in the State. The surprising thing is that despite the fact that

49 Gehlot, M.S., *op. cit.*, p. 121.
both partners in the government and certain other parties were in favour of dissolution, the Governor tried to explore the possibility for another government. When a clear cut majority was in favour of the dissolution of the Assembly, it was not proper on the part of the Governor to explore the possibility for an alternative government. It seems that the Governor was inclined to encourage defections.\textsuperscript{50} The Governor later on recommended to the President for the dissolution of the Assembly. Accordingly, the Assembly was dissolved on January 22, 1971.

\textbf{Bihar 1971}

In Bihar, the Samyukta Vidhayak Dal government headed by Karpoori Thakur faced a crisis when there was a lot of defection of the members from its support. The Chief Minister demanded the Governor, D.K. Barooah to dissolve the Assembly especially when the no-confidence motion was pending in the Assembly and the budget session was to begin. The Governor rejected the demand of the outgoing Chief Minister for the dissolution of the Assembly and installed the new coalition ministry head by Bhola Paswan.\textsuperscript{51} When the same coalition government of Bhola Paswan, lost majority when the CPI withdrew support following the budget session, the Governor dissolved the Assembly on December 29, 1971, on the advice of the Chief Minister.\textsuperscript{52}

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\textsuperscript{50} Dahiya, M.S., \textit{op. cit.}, p. 158.  \\
\textsuperscript{51} Gehlot, M.S., \textit{op. cit.}, p. 122.  \\
\textsuperscript{52} Siwach, J.R., in Grover, \textit{op. cit.}, p. 259.
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Kerala 1982

In Kerala, when Lonappan Nambadam gave in writing to the Governor, on March 15, 1982, that he has crossed the floor, the ministry of Karunakaran was reduced to a minority during the session. At that time, E.K.Nayanar claimed the support of 71 in a House 110 and requested the Governor to invite him to form the government. But Jyoti Venkatachellum, the Governor, dissolved the Assembly on March 19, 1982. The dissolution was defended by the Congress (I) government in the Centre.

Assam 1982

In Assam, the 65-day old minority Congress (I) ministry of Keshab Chandra Gogoi resigned on March 19, 1982 and the Assembly was adjourned sine die. K.C.Gogoi got a full two months to consolidate and would, perhaps, have got more had the budget session not been due. The Governor, Prakash Mehrotra accepted the recommendation of the minority Gogoi ministry to dissolve the Assembly and later the Governor reported to the Centre that “He had come to the conclusion that it would not be possible to have a stable alternative ministry and as such a spell of Central rule and dissolution of the Assembly was the only way out”.

54 Fadia, Babulal, State Politics in India, Radiant Publisher, New Delhi, 1984, pp. 227-28.
But the fact was that; the Left and Democratic Front, led by former Chief Minister, Chandra Sinha, was ready to form the government.\textsuperscript{55} The Governor had come under scathing criticism from the Opposition all over. The Opposition sent a joint memorandum to the President seeking his dismissal.

Even Congress (I) supporters did not deny that the Governor acted clearly in a partisan manner in installing Gogoi when he had made a public announcement that he would not install a minority government. He did exactly that. He kept on putting off Surat Chandra Sinha, the leader of Left and Democratic Front, on one pretext or another till the Congress (I) could not sort out its leadership issue and offer Gogoi the post.\textsuperscript{56} Only it could be said in his defence that he was a political appointee and had to function on the directions from the Centre.

\textbf{Goa 2002}

The Chief Minister of Goa, Manohar Parrikar, recommended dissolution of the Goa Legislative Assembly on February 27, 2002. He convinced the Governor, Mohammed Fazal that he wanted to face the electorate and returned with a “decisive” mandate for the BJP. The House was just halfway through its five-year term. The Governor dissolved the Assembly on the recommendation of the Chief Minister.\textsuperscript{57}

\textsuperscript{55} \textit{Ibid.}
\textsuperscript{56} \textit{Ibid.}
\textsuperscript{57} \textit{Deccan Herald, March 3, 2002.}
Lusinho Faleiro, Opposition leader of the Congress (I) and Congress Spokesman, Jitendra Deshprobhu, while challenging the dissolution of the State Assembly before the Panjim Bench of the Bombay High Court, asked that the House be reinstated or alternatively, the Governor be directed to recommend President’s Rule in Goa.58

The hearing has been set for April 3, 2002. This in effect means that the issue of clearing the appropriation of funds after March 31 rests once again with the Governor, Fazal who has faced a great deal of public criticism over his “instantaneous” approval of Parrikar’s recommendation to dissolve the Assembly midway through its term.

Describing Parrikar’s decision to dissolve the Assembly just 14 days before the budget session as “reckless, whimsical and purely for personal benefit”, Congress Counsel Sanghi argued that the decision had imposed all “constitutional impasse” on the State.59 Andhyarujina, former Solicitor General said, it was “a naked exercise of power for patently malafide consideration. He pointed out that there was no precedent of a government in power seeking dissolution purely to strengthen his hold”. This was all done to save his skin and to prevent possible defections.60 The lawyers held that the Governor could not claim immunity under Article 361, and that his decision could be reviewed by the Courts. There was a split in the judgement of Panjim.

59 Ibid.
60 Ibid.
Bench of Bombay High Court, which consists of two judges. While the senior judge Justice A.S. Aguiar quashed and set aside the dissolution as being ‘unconstitutional’ and an abuse of power. Justice Hardas dissented with the order and dismissed the petitioner’s claim.61

In his ruling, Justice Aguiar said the Governor’s order “suffered from legal *mala fides* and based on advice to dissolve the House for a purpose not authorised by law. The order is an abuse of power and therefore, unconstitutional. He also held that “Consequently, the order continuing the Chief Minister is hereby set aside and quashed”.62

Though the Chief Minister argued that a dissenting judgement reduced the case to a level of “academic interest”. However, the Opposition said, “the government should be sent home and President’s Rule should be imposed in the State”. They also demanded the recall of Governor, Fazal.63

The NCP leader, Wilfred Desouza said that “the judgement shows that the Governor made a terrible mistake in not applying his mind to the Chief Minister’s advice to dissolve the House and he should be recalled for it.64 Now the matter is before the Chief Justice of Bombay High Court.

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61 *Deccan Herald*, May 9, 2002.
62 Ibid.
63 Ibid.
64 Ibid.
We, thus, find that the Governors of various States exercised the implied discretionary power differently in refusing/granting the dissolution of the Assemblies of the States.

It is, therefore, felt that there should be clear-cut guidelines for the impartial role of the Governor in the matter of dissolution so that his impartiality may not be undermined by the compulsion of the existing circumstances in the State. The following suggestions, if implemented, would certainly help in maintaining the neutrality of the Governors:

1. Ordinarily the Assembly should not be dissolved immediately after the elections. If none of the parties has a majority in the Assembly when the elections are held, the largest party or the largest front (formed before the elections) should be given a chance to form the government.\(^{65}\)

2. So long as the Council of Ministers enjoy the confidence of the Legislative Assembly, the advice of the Council of Ministers in dissolving the Legislative Assembly if such advice is not patently unconstitutional, should be deemed as binding on the Governor.\(^{66}\)

3. When a ministry is defeated in the Assembly on a major policy issue and if the outgoing Chief Minister advises the Governor to dissolve the Assembly with a view to obtain the verdict of the electorate, the Governor should accept the advice.\(^{67}\)

4. If a ministry is not able to get the budget passed before seeking dissolution, the Governor could take steps to ascertain if it is...

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\(^{66}\) Sarkaria Commission Report, Athre (ed.), *op. cit.*

\(^{67}\) Administrative Reforms Commission, 1969, p. 30.
possible to install another ministry which is able to command the majority support and get the budget passed. After failing in it, the Governor should make a report to the President for dissolution. 68

5. It is only after repeated elections and inability to get a ministry at all that President's Rule should be clamped; and that to a short period. 69

6. The only time the Governor could *suo moto* dissolve the Assembly when after sufficient attempt it is clear to him that no government (ministry) at all is possible and he has reason to believe that a fresh election would help. 70

To sum up, the power of dissocation is said to be a power of electorate. It is an appeal from the legal sovereign to the political sovereign to secure a mandate from the electorate. The Governor is called upon to be more judicious in the exercise of this power so that the chances of its misuse may be reduced to the minimum. The power of dissolution is a most valuable and most powerful instrument which ought to be used except in extreme cases and with a certainty of success. The position of the Governor is that of an umpire who has to see that the game is played not according to the rules but also in correct spirit.

69 Ibid.
70 Ibid.
Governor's Power to Assent the Bills

Under Article 168 of the Indian Constitution, the Governor is a component part of the State Legislature. It is a well recognised convention of the parliamentary democracy that every Bill passed by the Legislature of the State, presented to the head of the State for his signature, for no Bill comes into operation till it obtains the assent of the head of the State. Since we have modelled our democratic federation on the basis of British pattern. The Governor of the State under Article 200 enjoys the right to assent the Bill approved by the Legislative Assembly of the State.

According to Article 200 a Bill passed by the State Legislature is presented to the Governor for his assent. He may take one of the following measures as under:

a. Assent a Bill; or
b. Withhold assent to a Bill; or
c. Return a Bill, except money Bill to the Legislature for reconsideration; or
d. Reserve a Bill for the consideration of the President.

a. Assent to Bill

So far as assenting a Bill is concerned, the Governor may declare his assent to the Bill and thereby completes the Legislative process. The Bill then becomes a law (Act) and it put on the Statute book. To declare an assent is nothing more than an assertion by the Governor.
that in fact he has assented. It did not involve any idea that assertion must be published in a 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.

However, the Governor shall not assent a Bill which affects the power of the High Court and reserve it for the consideration of the President. The use of the word 'shall not' does not leave any option or discretion with him. The practice is that where the constitutional obligation has to be complied with, the minister concerned advises the Governor to reserve the Bill for the consideration of the President. It is not so much a matter of exercise of discretion as of a constitutional obligation.

b. Withhold Assent

As regard to withholding the assent, the pertinent questions here are how far a Governor is logically competent to withhold an assent and also can he withhold a Bill indefinitely, and thus implications veto it, because the question does not provide any time limit for the Governor.

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72 Raja Hari Singh and others vs. State of Rajasthan and others, AIR, 1954, Rajasthan, 117(12).
to take any course for a Bill pending for his assent. The Constitution
also does not impose any time limit which the Governor should make
any of these declarations and there is no means to compel him to come
to a declaration if he simply keeps a Bill pending before him
indefinitely. 75

Jinnings is of the opinion that Queen would be justified in
refusing to give her asset to a policy which subvert the democratic
basis of the Constitution. 76 D.D. Basu 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
Bills on the ground, though the judiciary may not declare the Act
invalid, if it is enacted. 77 K.M. Munshi observed, if a Bill submitted to
him for instance, violates a Fundamental Right or the prescribed ambit
of State powers, he is bound, consistently with oath, to exercise one of
the two vetoes, otherwise he would be guilty of a failure to protect the
Constitution. 78

Singh, while narrating his own experience, when he was
Governor of Assam and North-Eastern State, said, "the State
Legislature had passed a Bill dealing with inter-State migration, which
falls in Union List, I felt that in assenting to the Bill might be violating

1968, p. 412.
78 Munshi, K.M., The President Under the Constitution, Bharatiya Vidya Bhavan, Bombay,
1962, p. 43.
my oath of office – ‘to protect, preserve and defend the Constitution’ – and in reserving it for the assent of the President, if advised by the Council of Ministers not to do so, I would be departing from a healthy convention which I was anxious to respect. The Chief Minister, helped me out by leaving me free to reserve it for the assent of the President’. In another case, “I was asked to approve Draft Regulations purporting to have been framed under the proviso to Article 320(3), which went beyond the scope of the proviso, and were violative not only of statutory rule but also the certain Fundamental Rights. I returned the papers with the observation that a Governor ought not to be required to append his signature, even by way of acquiescence, to proposals which were clearly violative of the Constitution and the law”.

He took the decision in these two cases because it involve basic question: to what extent could a Governor, guided by his oath of office, refuse to agree to a course proposed by the ministry. According to him, ‘in marginal or doubtful cases the Governor should act on the advice of the ministry, and it is only when obviously an infringement of the Constitution is involved, and he failed to persuade the ministry to give up its proposals, then he should withhold his approval’.

Govind Narain, Governor of Karnataka from 1977 to 1983 stated the facts of a real case in one of the State when both the House of Legislature passed a Bill raising the emoluments and allowances, under

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80 Ibid.
various categories, of all the members of both the Houses along with Speaker, Deputy Speaker, Chairman and Deputy Chairman. When the Bill came for asset, the Governor studied and obtained corresponding figures of emoluments and allowances from Parliament and Legislatures of various States. The Bill provided for enhancement to levels higher than those members of Parliament and other State Legislatures. The enactment of such a law would certainly have been against public policy, besides causing an unnecessary drain on the State exchequer. The Governor, therefore, kept the Bill pending.  

The Governor of Andhra Pradesh, Kumud Ben Joshi pigeon-holed several important legislative measures commended for her assent, compelling the government to adopt alternative methods. For instance, the government referred the Andhra Pradesh Mandal Praja Parishads Bill to the Governor. She gave her assent only after a public outcry.

The Governor of Uttar Pradesh, Romesh Bhandari and Ssuraj Bhan withheld their assent to the Uttar Pradesh State University (Amendment) Bill 1998 on the ground that it hampers the autonomy of the State Universities. The Governor of Kerala, B. Rama Krishna Rao withheld his assent to the Kerala Education Bill passed on September 2, 1957 by the State Assembly. He reserved the Bill for consideration of the President on the ground that some of the provisions of the Bill were

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contrary to the principles of Indian Constitution. But by following this
course he has to show the reason for withholding his assent therefrom
to the Bill and convince the ministry about the rationality of
withholding his assent.

Contrary to this, the Governor of Assam, Vishnu Sahai did not
act, when the Bill for the Assamese Official Language approved by the
State Assembly was presented for the assent of the Governor in 1960.
The Governor being aware of the implications and likely consequences
and the Bengalis and tribal minority’s opposition to the particular Bill,
had assented it and consequently this controversy led to serious
language riots in the State. The Governor observed that he had “no
choice but to approve it”.83

The supporters of the Governor’s power to veto the Bill compare
Section 32 of the Government of India Act, 1935 with Article 200 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.84

When Article 175 came up for discussion in Constituent
Assembly on June 30, 1949, B.R. Ambedkar moved a new proviso to
Article 175 in place of the one in the Draft whereby inter alia the
words “in his discretion” were omitted. He said, “it was felt that in the
responsible government there can be no room for the Governor acting

83 Vishnu Sahai, Governor’s Role in Administration, The Indian Journal of Public
on the discretion. Therefore, the new proviso deletes the word in his discretion.\textsuperscript{83} This proves that the author of the Constitution did not contemplate that the Governor would have any discretionary power under Article 200.

The Sarkaria Commission, in his Report, while recommending says, "The Governor dealing with a State Bill presented to him under Article 200, 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. However, the Commission says, in rare and exceptional cases, he may act in the exercise of his discretion, where he is of the opinion that the provisions of the Bill are patently unconstitutional, such as, where the subject matter of the Bill is \textit{prima 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 limitation and provisions.\textsuperscript{86}

Surely this statement of the law applies as much to the President \textit{vis-a-vis} Bill passed by the Parliament as it does to Governors. No head of State in a parliamentary system is bound to assent to legislation which is manifestly subversive of the Constitution. But this power.

indeed, duty to withhold assent, exists as much in the President as in the Governor. He has, however, no right or power in such a case to refer it to the President. His powers of reference are exercisable only on the advice of the Council of Ministers save where the High Court’s independence is affected.87

According to Parliamentary convention the head of a State acts on the advice of the Council of Ministers. In this respect, the Governor has no right to veto a Bill passed by the Legislature of the State. Legislature is the sole law-making body pertaining to the subjects specified within its parameters of the State. In Great Britain the right to veto of the Crown is dead owing to its long disuse. The sovereign did not exercise this power since Queen Anne vetoed the Scottish Militia Bill in 1707.88 It may be said that the veto power of the Sovereign has fallen into disuse as a consequence of ministerial responsibility.89 Herald Laski observes that the Crown’s prerogative to veto a Bill is now obsolete for two hundred years. The king in no circumstances can justify his action in vetoing a Bill, for it would undermine the existence of the monarchy itself.90

During the discussion in the Constituent Assembly, Brajeshwar Prasad and Saxena were in favour of giving the veto power to the

Governor of the States, but it was opposed on the ground that under responsible government, the Governor being the head of the State, has to play his role in consultation with the ministerial advice.\textsuperscript{91} The Governor, therefore, in no circumstances can veto a Bill independently. He can, of course, exercise his veto at the pleasure of the ministry. But no ministry would like to advise the Governor to veto since it faced all the difficulties for the passage of a Bill in the Legislative Assembly. Moreover, the exercise of the veto power by the Governor without the advice of his Council of Ministers, would lead to the resignation of the ministry. This will create a constitutional crisis in the State and will also undermine the prestige and the dignity of the Governor.\textsuperscript{92}

According to Article 207, 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 pokes his nose, that would be antithetical to the real concept of democracy.\textsuperscript{93}

\textsuperscript{91} C.A.D., Vol. IX, 1949, pp. 59-60.
\textsuperscript{92} Gehlot, N.S., \textit{op.cit.}, p. 133.
\textsuperscript{93} Dahiya, M.S., \textit{op. cit.}, p.190.
c. Return a Bill for Recommendation

It is provided in this Article that the Governor may return a Bill, except Money Bills, for the consideration to the House or Houses as the case may be with a message that the Bill be considered or modified in the light of his suggestion. The proviso further adds that when a Bill is returned "The House shall reconsider the Bill accordingly". The use of the words "shall and accordingly" means that it shall be the duty of the Legislature to reconsider the Bill in the light of the suggestions or amendments proposed by the Governor of the State. But the Legislature is not bound to accept these suggestions. They may or may not accept such proposal, and when passed again and submit to him, the Governor shall not withhold his assent therefrom. Thus it becomes obligatory on the party of the Governor to affix his signature to the Bill.

However, there are differences of opinion on the question. What will the Governor do in case the Legislative Assembly in addition to this amendment incorporates new changes in the Bill? Gehlot is of the opinion it is not obligatory on the part of the Governor to affix his signature. The Governor may treat the Bill to be a new one. Similar view is expressed by Dahiya. He says, in such case the Governor 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

\[94\] Gehlot, N.S., op. cit., p. 135.
amendments. Elaborating the word “accordingly” in this proviso, Siwach argued that “though this word suggests that the House will only consider the suggestions made by the Governor but it is not a fact because the proviso of Article 200 says that the House or Houses, in particular, will consider the desirability of introducing any such amendment as he may recommend in his message”. This means that besides considering the amendments and suggestions made by the Governor, the House can consider and accept other amendments as well and the Governor should not refuse to assent the Bill. In his opinion, “a Bill once introduced does not become a new Bill simply because some amendments have been made to it”.

There is another question, whether the Governor should return the Bill for the reconsideration of the Assembly in his discretion or on the advice of the Council of Ministers. Banerjee opines that the Governor should always follow the advice of his ministry in this matter because the phrase ‘in his discretion’ was deleted from the original Article 175 of the Draft Constitution. But it should be noted that the objective of Ambedkar in deleting the words ‘in his discretion’ was that he did not want that the Governor should be empowered to use his veto over the State Legislation, because the existence of these words in Article 200 might have made the Governor more than a constitutional head and he would have been able to exercise his veto in his discretion.

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95 Dahiya, M.S. p. 194.
96 Siwach, J.R., op. cit.
even in the normal days of his State affairs. As a matter of fact, this change was made in the Draft Article 175 as a safeguard against the hasty legislation. T.T. Krishnamachari, therefore, described it as "saving clause" in order to enable the ministry to meet the popular opinion outside the Assembly. Although this power of the Governor can be made use of by the ministry as a safeguard against hasty legislation, it appears to be of little significance if its use is restricted to this purpose only. In fact, under the parliamentary system, almost every Bill that is presented to the Governor for his assent is the result of policy decisions taken at Cabinet level and detailed consideration in the Legislature. It is unlikely that such legislative enactment would be sent back for reconsideration at the instance of the Cabinet. This should lead us to the conclusion that the Governor, in his discretion, may return a Bill for reconsideration and suggest suitable amendments although the occasions for the exercise of such a power seems to be rare.

Article 200 does not prescribe any time limit for the Governor to return the Bill for reconsideration. He is required to return to do so "as soon as possible". When President's and Governor's power to assent to the Bill was being considered in the Constituent Assembly, Ambedkar, the Chairman of the Draft Committee, moved an amendment to substitute the words "as soon as possible" for the words "not later than 98

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99 Pylee, M.V., op. cit.
six weeks" as contained in the Draft Constitution. His amendment was carried.\textsuperscript{100}

It may be further asked whether the Governor is entitled to send a Bill back for its reconsideration to the successor House. In this regard, the Court held that the dissolution of the Legislative Assembly does not prevent the exercise of power by the Governor under Articles 200 and 201 with respect to a Bill which has been presented for his assent prior to the dissolution.\textsuperscript{101} Thus, there is nothing in the Constitution to direct that the assent of the Governor or the President must be given during the life time of the Assembly which passed the Bill.\textsuperscript{102}

\textbf{d. Reservation of Bill}

Article 200 empowers the Governor to reserve a Bill for the consideration of the President. But in some cases the reservation is compulsory\textsuperscript{103} 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 the Constitution. The Governor while exercising power to reserve a Bill for the President's pleasure may act in his discretion to preserve the independence, dignity and status of the State judiciary.\textsuperscript{104} If the

\textsuperscript{100} C.A.D., Vol. VII, pp. 192-96.
\textsuperscript{101} Purshotam vs. State of Kerala, AIR, 1962, SC 694.
\textsuperscript{102} Tirumalpad vs. State of Kerala, AIR, 1961, Ker. 324.
\textsuperscript{103} Articles 30, 30, 31-A and 288 fall under this category.
\textsuperscript{104} Basu, D.D., op. cit., p. 326.
Governor gives assent to such a Bill it can be challenged in the Court of Law.\footnote{105}

Seervai opines that Article 200 does not expressly provide that the Governor should exercise his discretion, yet the Governor is to exercise his discretion, by necessary implication under Article 200 of the Constitution. Further, he says that it will be 'his duty' to reserve the Bill affecting the independence of the State judiciary, for the consideration of the President irrespective of the advice of his Council of Ministers, otherwise Article 200 would be “a dead letter”.\footnote{106}

The Administrative Reforms Commission opined that “a large number of Bills being reserved for the President’s consideration would be contrary to the federal spirit of the Constitution”.\footnote{107} Now the pertinent question is what are the norms and criteria that a Governor should follow in reserving the Bill for consideration of the President? If a Governor started reserving for presidential consideration, there would be a serious difficulty in conducting the Legislative business of State. Besides, the question whether the Bill is constitutional or otherwise is for the Courts to determine. Issues of unconstitutionality of statutes are not as easy as they appear at first blush, and it is the sobering experience of many constitutional lawyers that statutes which

\footnote{105} Siwach, J.R., op. cit.


appear to be unconstitutional for more than one reason have been upheld by the Supreme Court after full discussion and argument.108

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

The Sarkaria Commission while recommending on the reservation of Bills, suggests that “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 31C,

b. to give a Bill on a concurrent list subject from being invalidated on the ground of repugnancy to the provision 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 Union law, vide Article 288(2), and

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

Further, the Commission recommended that 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. However, in exceptional circumstances, as adopt, in the exercise of his discretion, any other course open to him under Article 200, he should do so within a period of not exceeding one month from the date on which the Bill is presented to him.\textsuperscript{109}

In this connection it is to be noted that the Governor of Kerala, B. Rama Krishna Rao, reserved the Kerala Education Bill 1957, for the consideration of the President when he himself satisfied that the Bill would fall contrary to the provisions of the constitutional law. The Governor of Madhya Pradesh also reserved the “Madhya Pradesh Panchayat Raj Bill, 1960” for the consideration of the President because the system of nomination as referred under Article 106 of the Bill was a negation of the concept of Panchyat Raj under the Directive Principles of State policy. The Punjab Governor reserved the Punjab 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 State had no power.

The Centre may even refuse to the Bill if in its view the policy behind the Bill is not sound or its provisions are considered to be too

\textsuperscript{109} Summary of Recommendation of Sarkaria Commission, \textit{op. cit.}, IX.
drastic or if the Bill is likely to have repercussion in other State or over-ride the fundamental rights guaranteed under Part-III of the Constitution even in the State list.\textsuperscript{110}

A Maharashtra Bill providing for compulsory sterilisation was not approved because, "it was decided there could be no question of any compulsion in the matter of family planning". A Haryana measure offering medical facilities to those who have been ministers, speakers, or deputy speakers for a period of two years and more and also to their family members for their life was considered to be too drastic. The Centre felt that the "Bill would have repercussion in other States and create a large number of privileged persons entitled to free medical aid at the expense of the government".\textsuperscript{111}

The main purpose of Articles 200 and 201, under which President can either accord or refuse assent or return it for reconsideration, is that the Centre want to keep watch on the activities of the State. As pointed out by Ambedkar in the Constituent Assembly 'because provincial governments are required to work in subordination to the Central Government and therefore, the Governor will reserve certain things in order to give President the opportunity to see that the rules under which the Provincial Governments are supposed to act according to the Constitution or in subordination of the Central Government\textsuperscript{112}


\textsuperscript{111} \textit{Ibid.}

\textsuperscript{112} C.A.D., Vol. VIII, p. 502.
Unfortunately, Governors have used these Articles in most of the cases to serve the interests of the ruling party at the Centre which lead to a good deal of controversy. Several examples can be cited in this regard. The Punjab Temporary Taxation Bill 1962, was reserved and examined to see whether its provisions were discriminating and violative of Article 14 of the Indian Constitution. On scrutiny it was found that the Bill could not be held to be violative of Article 14.\(^{113}\)

It is worth to mention here that Jayaprakash Narayan suggested that the words “or that the Governor reserves the Bill for consideration of the President” be deleted. B.N.Rau, the Assembly’s Constitutional advisor, cited two reasons for retaining them. “The provisions regarding reservation of a Bill for the consideration of the President is necessary in view of the provision contained in Clause (2) of Article 231. Further, the Drafting Committee has recommended that a provision for reservation by the Governor of Bills affecting the powers of the High Courts for the consideration of the President should be included in the Draft. He had no other reason in mind for retention of the provisions for the President’s assent to State Bills.\(^{114}\)

The application of this power of reservation of State Bill for President’s asset shows that the Union government can freely disturb the autonomy of the States. It is likely to be done when the party in


\(^{114}\) Noorani, A.G., *op. cit.*
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 Central government. If the Central government, becomes an impediment in the way of the implementation of a programme adopted by a party in control 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 corner-stone of the parliamentary democracy.115

Recently, it has been revealed that as many as 35 State Bills were pending for the President’s assent out of a total of 64. One of them has been pending since July 25, 1980.116 Contrary to this, the Union Home Ministry’s annual reports unfailingly suppress all mention of the number of Bills pending and the time taken to accord assent to the ones which managed to pass master. Further, the report says, “approximately” 75 per cent of the Bills reserved “for President’s consideration” related to matters in the concurrent list and were referred to on the advice of the Council of Ministers. “Our survey also shows that a very small number of Bills during the last 35 years were reserved by the Governor in the exercise of their discretion”. This is none too illuminating. The sad truth is that what is quantified as “a very small number” reflected a patently unconstitutional practice.117 As

117 Noorani, A.G., op. cit.
a matter of fact, the Constitution of India does not confer on the Union government the power of disallowance over the State Legislation as is enjoyed by the Union in Canada. The President's assent was not intended to confer an arbitrary veto on the Centre.\footnote{Gani, A.G., \textit{Governor in the Indian Constitution}, Ajanta Publication, Delhi, 1990, p. 84.}

Perhaps, the reason is that Article 201 has not provided any guidelines as regard to the time the President must take in order to dispose of the State matters referred to him under normal constitutional procedure. Noorani opines, \textquotedblleft it is sheer abuse of the power under Article 201 for the Government of India not to advise the President expeditiously and let the State know the decision fairly soon is it to unduly restrict the powers of the Legislature of the States to make laws with respect to matters in the concurrent list and exercise a veto power which does not belong to the Centre.\footnote{Noorani, A.G., \textit{op. cit.}}

The Sarkaria Commission had made suggestions for the guidance of the Centre and States on the Governor's power to refer State Bills to the President for his assent. The Commission recommends that assent should not be withheld merely on policy differences in matters relating to the State list and concurrent list and reasons for withholding assent should be communicated to the States. A Bill reserved for consideration of the President should be disposed of by the President.
within a period of four months from the date of which it is received by the Union government.120

**Governor's Power to Promulgate Ordinance**

The Governor's power to promulgate Ordinance under Article 213 of the Constitution, which is a hangover from the Act of 1935, is considered 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 convenience. Speaking about the Ordinance making power, Krishna Iyer said, "Our British heritage, our founding fathers adopt the Ordinance making precedent".121 Similar view is expressed by Srinivas, "What is curious is that even the founding fathers of our Constitution fell into the trap of blindly carrying over into our Constitution, this imperialistic weapon to strangulate the constitutional aspiration of Indians".122

The Ordinance making power met a scathing criticism in the Constituent Assembly. H.N.Kunzru 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...

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therefore, why the process laid down in the Government of India Act 1935, should be sought to be copied in the new Constitution”.¹²³

H.V. Pataskar described the Ordinance making power as obnoxious to democracy and Siban Lal Saxena wanted to eliminate this provision.¹²⁴ Poker Saheb was afraid of the eventuality that this power might be used to deprive the citizens of their elementary right.¹²⁵

Justifying this step Ambedkar observed, “It is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The executive must have the power to issue an Ordinance as the executive cannot deal with the situation by resorting to the ordinary process of law because the Legislature is not in session”.¹²⁶

Some members of the Constituent Assembly expressed their apprehension that the executive might postpone the reassembling of the Legislature for an indefinite period by resorting to Ordinance-making power. Ambedkar assured the Assembly that there was no ground for such apprehension as the exigencies of the government would not permit such an action and that even if the Legislature was prorogued and an Ordinance was promulgated, the Legislature had to be summoned soon as six months should not intervene between the last day

¹²³ C.A.D., Vol. VIII, pp. 204-16.
¹²⁴ Ibid., pp. 882-83.
¹²⁵ Ibid., p. 203.
¹²⁶ Ibid.
of the sitting in one session and the date appointed for its first sitting in the next session.\textsuperscript{127}

The Legislative Assembly is the appropriate instrumentality for enactment of legislation under our constitutional scheme. The separation of powers, not its rigid formulation but subject to marginal relaxation, govern our system. The power of the Governor to promulgate Ordinance during the recess of the State Legislature is an extraordinary exception to meet unforeseen emergencies, so that the rule of justice may not collapse for want of rule of law.

Thus, Article 231(1) of the Constitution provides that the Governor of the State will issue Ordinance when he is satisfied that circumstances exist which render it necessary for him to take immediate action. The Governor's powers to legislate by an Ordinance is subject to certain conditions and limitations.

Article 213(1) of the Constitution empowers the Governor to promulgate an Ordinance only when the Assembly is not in session. Secondly, the Governor must be satisfied that circumstances exist rendering it necessary for him to take immediate action. If President's assent is needed for the Bill the Ordinance shall not issue without the previous sanction of the President.\textsuperscript{128} The Ordinance should not make any provision on which the State Assembly would not be competent to

\textsuperscript{127} Ibid.
\textsuperscript{128} Clauses (a), (b) and (c) of Article 213(1).
enact the Bill under the Constitution. Moreover, there is constitutional scepticism about potential abuse by the Cabinet and so Article 213(2) ordains that the Ordinance shall be laid before the Legislative Assembly and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature.

The Legislature in Session

Article 213 enjoins upon the Governor that the State Legislature should not be in session at the time when the Ordinance is issued. If the Ordinance is issued at a time when both Houses of the State Legislature are in session or where there is only one House in the State Legislature, the Legislative Assembly in session, the Ordinance would be null and void. The expression that 'the State Legislature should not be in session' only means that it should not be in session at the time the Ordinance is actually issued.

The Patna High Court has held that 'the Bihar Maintenance of Public Order Ordinance, 1949, issued under Section 88 of the Government of India Act, 1935, on June 3, 1949, was ultra vires and invalid, as the same had been issued when the Houses of Legislature were in session. In this case the Houses of Legislature were prorogued only on June 6, while according to Section 88, the Governor could issue an Ordinance only when the Legislature was not in session.'

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129 Bidya Choudhary vs. Province of Bihar, AIR, 1950, Patna, 19.
If the Ordinance is promulgated before the order of prorogation of either of the Houses or of the Legislative Assembly, where there is only one House, it will be unconstitutional. This is so because when the State Legislature is in session, the constitutional machinery for the passing of the laws exists and there cannot be any justification for the exercise of this power.

Whenever the State legislature is in session and if the Governor feels that a particular law is immediately needed, which is not likely to be passed by the State Legislature immediately because of procedural formalities, the Governor may prorogue either of the two House or the Legislative Assembly, if there is a unicameral Legislature and issue an Ordinance.

The Governor of Madras prorogued the Madras Legislature on August 2, 1949 and promulgated an Ordinance on August 11, 1949. The Ordinance was challenged by a petition before the Madras High Court. It was urged that the Ordinance was promulgated by the Governor by fraudulent exercise of the power vested in him as the Governor who intentionally prorogued the Legislature while in session with a view to clothe himself with the power of issuing the Ordinance.

The Madras High Court held as follows:

"It is open to the Governor to prorogue the Legislature at any time he pleases. We do not see anything wrong in the Governor proroguing the Assembly and the Council with a view to enable himself..."
to issue an Ordinance. ... It was a well-known fact that the legislature which is democratically constituted is very slow to move in the matter of legislation, having regard to the rule of procedure laid down in that behalf and if urgent action is necessary, at any rate, when the Governor has reason to believe that immediate action is necessary it will be more expedient to have resorted to the power of issuing an Ordinance rather than approach the Legislature for the necessary legislation.  

The Governor of Uttar Pradesh prorogued the Legislative Council on March 24, 1956 and promulgated an Ordinance on March 31, 1956. The Ordinance was challenged by a petition before Allahabad High Court. The Court observed that "Under Article 174 the Governor was authorised to prorogue the Council at any time that he thought fit and by proroguing the Council the Governor acted within this jurisdiction and the mere fact the Ordinance was promulgated on March 31, could not lead to the necessary inference that the action of the Governor in proroguing the Council a few days earlier was actuated the power to promulgate the Ordinance".

In another case the Allahabad High Court has also held that the action of the Governor in proroguing the Legislature simply for the purpose of making an Ordinance could not be challenged.

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130 Veerabhadraya, AIR, 1950, Mad. 243.
131 Viswanath vs. State of Uttar Pradesh, AIR, 1956, All. 337.
The Governor's Satisfaction

Further, Article 213(1) reads that the Governor will promulgate an Ordinance only when he is “satisfied”. The satisfaction of the Governor which is a pre-condition for promulgating an Ordinance is the subjective satisfaction of the Governor and the expression “satisfied” himself should mean that the Governor rationally is satisfied before promulgating an Ordinance on the advice of the Council of Ministers.\textsuperscript{133}

The West Bengal Security Act (Amendment) Ordinance VIII of 1948 was challenged and the Calcutta High Court held that the satisfaction contemplated by Section 88 of Government of India Act, 1935, was the satisfaction of the Governor. Further, it added that the Court could not question the sufficiency of the grounds upon which the Governor was satisfied that the urgent legislation was necessary. It would be difficult for any Court to say that the Ordinance was not passed in good faith.\textsuperscript{134} On the same question, the Patna High Court has held that the “satisfaction” within the meaning of Section 88(1) of the Government of India Act must be the satisfaction of the Governor and his direction could not be questioned in any Court. Further, the Court was not concerned with policies or politics; it was only concerned with the question whether the Ordinance was within the constitutional power of the Governor, and if so whether the Ordinance

\textsuperscript{133} Gehlot, N.S., op. cit., p. 145.
\textsuperscript{134} Jnan Prasanna vs. The Province of West Bengal, 1949, 53, CWN, 27, AIR, 1949, Cal.1.
was in whole or part a valid exercise of the power.\textsuperscript{135} Again the Patna High Court held that Article 213(1) did not require that the Ordinance to promulgate by the Governor had to state in so many words that the Governor was satisfied as to a certain state of affairs.\textsuperscript{136} The Calcutta High Court has also held that it was the satisfaction of the Governor as to the existence of circumstances for promulgating an Ordinance that was necessary and such satisfaction was conclusive.\textsuperscript{137} Similarly, the Allahabad High Court held that the satisfaction was not of Court or any other person. It was subjective satisfaction and the Court was, therefore, not entitled to enquire into the reasons for that satisfaction or into the sufficiency of those reasons.\textsuperscript{138}

Thus, the Courts have no jurisdiction for asking the Governor affirmative to prove that a state of emergency actually existed there at a time when the Ordinance was promulgated by him. And also, the Courts have no power to control the discretion of the Governor. D.D. Basu is of the opinion that the Governor himself is the sole judge to examine the existing circumstances of the State which enable him to promulgate an Ordinance. The Courts have no jurisdiction to examine his satisfaction.\textsuperscript{139}

But in the opinion of Krishna Iyer, though the satisfaction of the Governor or President is beyond judicial autopsy but not out of judicial

\textsuperscript{135} Bhunath vs. The Province of Bihar, AIR, 1950, Part-35.
\textsuperscript{136} Ratan Ray vs. State of Bihar, AIR, 1950, Patna, 322.
\textsuperscript{137} Haran Chandra vs. The State of West Bengal, AIR, 1952, Cal. 902.
\textsuperscript{138} Viswanath vs. State of Uttar Pradesh, 1956, All, 447.
\textsuperscript{139} Basu, D.D., \textit{op. cit.}, p. 339.
scrutiny. He states that the Constitution (38th Amendment) Act, 1975, which declared that the satisfaction of the Governor shall be “final and conclusive and shall not be questioned in any Court on any ground” was deleted by the (44th Amendment) Act 1978.

The felt need to confer finality and conclusiveness clearly suggests that without the 38th Amendment, there was no such finality, no immunity from judicial scrutiny. The true legal position is what Justice P.N.Bhagwati has stated in the Rajasthan Assembly dissolution case:

“But one thing is certain that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter in which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 356, Clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid ... But this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case, it is not the satisfaction arrived at by the President which is challenged, the existence of the satisfaction itself. Take for example, a case where the President gives the reason for

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140 Krishna Iyer, *op. cit.*
taking action under Article 356, Clause (1) and say that he is doing so.
because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so-called satisfaction of the President in such a case not be challenged, on the ground that is absurd or preserve or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all".  

What applies to Article 356 holds good to Articles 123 and 213 if the alleged ‘satisfaction’ is, say, because the House may defeat the Bill or the Chief Minister hates dissenting notes of the Opposition! Although the power to issue Ordinance is Legislative and not executive, where the exercise of power is conditional and the conditions are absent, no vaccination against judicial inspection is patent”.  

However, Justice Ray, made a meaningful observation, “The only way in which the exercise of power by the President can be challenged is by establishing bad faith or mala fide and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He should affirm the state of the facts. He is not only to allege the same but also prove it”. The process of the Legislature is part of the basic structure of

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142 Quoted in Krishna Iyer, op. cit.
143 Ibid.
the Constitution. Whatever diminishes this power imperils our Republic.

Now the question to be examined is as to whether the word “Governor” in Article 213 implies the Council of Ministers headed by the Chief Minister? 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. In Samsher Singh vs. State of Punjab, the Court held that “the Article lays down that the Governor will promulgate an Ordinance only when he is satisfied. It does not, however, mean the personal satisfaction of the Governor but that of his Council of Ministers on whose advice he is to act as a constitutional head.”

But M.M. Ismail did not agree with this. He says, “Simply as a matter of language the Constitution says, ‘if the President is satisfied’. Therefore, it is only the satisfaction of the President that is contemplated and required by the Constitution. Certainly, this satisfaction of the President can be arrived at only by the application of his own mind to a given situation and may involve the President coming to a conclusion different from that of his Council of Ministers. To accept that the satisfaction of the President referred to in the Articles [123(1), 352, 256] of the Constitution means ‘Satisfaction of the Council of Ministers’ is to make the President merely a benami or alias for the Council of Ministers and certainly the Constitution does not

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146 AIR, 1975, SC, 2192.
contemplate a status for the President. The President’s and Governor’s power is similar in their respective sphere, therefore, the same can be applied in case of the Governor. In the opinion of Siwach, since under Article 213, the Governor is to be personally satisfied, therefore, it seems that in this respect he is not bound to go by the advice of the Council of Ministers because it is a discretionary power and this power cannot be delegated to anybody else. In Jayanti Lai vs. F.N.Rama, the Supreme Court observed, 'the power of the President to issue an Ordinance under Article 123 is a constitutional power and hence it cannot be delegated to anybody and therefore, the President or the Governor is not bound by the advice of the ministry in this respect.

Keeping in view the practice so far adopted both in the States and at 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 powers belong to the Council of Ministers and the Governor is simply its mouthpiece. When Draft Article 102 which is Article 124 of the present Constitution was being discussed in the Constituent Assembly, Hukam Singh wanted it to be clearly stated that this power would be used on the advice of the Council of Ministers. But,

149 AIR, 1964, SC. 648.
B.R. Ambedkar said, "I am very grateful to you for reminding me about this. The point is, that amendment is unnecessary because the President could not act and will not act except on the advice of the ministers".\(^{151}\)

On December 30, 1948, when the issue of 'discretionary powers' of a head of State was raised, Ambedkar told the Constituent Assembly, "the position of the Governor is exactly the same as the position of the President".

When in Punjab, the Akali led coalition head by Prakash 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. Pavate, sent the Ordinance back to the Council of Ministers and asked as to what was the urgency and necessity of such move.\(^{152}\) There were also instances where initially the Governor was reluctant to clear Ordinance but later yielded to pressures. For example, Kumud Ben Joshi, Governor of Andhra Pradesh withheld an Ordinance concerning the popular single window scheme nearly a month in December 1986. She gave her assent only after a public outcry.\(^{153}\) After almost ten days of the dilly dallying, Madhya Pradesh Governor, Bhai Mahavir, finally gave his assent to the Ordinance conferring land ownership right on the slum dwellers of the State. At a press conference on June 23, he said there was no 'willful delay' on his

\(^{151}\) Ibid., p. 215.
\(^{152}\) Dahiya, M.S., op. cit., p. 206.
part in signing the Ordinance. He said that he had reservations about certain provisions in the Ordinance and had conveyed them to the government. "Now that I have received the reply, the road to giving my assent to the Ordinance is clear." There is little doubt that the entire episode has entailed considerable discomfiture for the Governor. He had to give his nod to the Ordinance in its original form in the face of growing pressure mounted by the organisation of slum dwellers and Congress. The government refused to entertain the 'objection' raised by him except for a vague promise to consider assigning some role to the municipal bodies in the implementation of the scheme.

It, however, remains a fact that ordinarily this power is exercised by the Governor on the advice of the Chief Minister. If, however, a Governor refuses to issue an Ordinance on the advice of the Chief Minister, the Chief Minister has no alternative but to lie low unless he is prepared to create a constitutional deadlock by resigning or at the most he may request the Centre to withdraw him and the Centre may or may not oblige.

Scope of Ordinance Making Power

The scope of the Ordinance making power of the Governor is co-extensive with the legislative power of the State Legislature; but it shall be confined to the subjects in Lists II and III of Schedule VII of

155 Ibid.
the Constitution. Proviso (3) of Article 213 gives validity to an Ordinance issued by the Governor in respect to a matter in the Concurrent List, which is not repugnant to a Union law. In case of a conflict over any matter enumerated in the Concurrent List, the State law would be void if it is repugnant to an Act of Parliament, or the existing law of Union.

In certain cases, the Governor cannot issue an Ordinance without obtaining the previous instructions from the President. If the Governor promulgates an Ordinance without instruction from the President, that would be invalid. It is also important to note that when an Ordinance has been promulgated by the Governor in pursuance of instructions from the President, its further reservation for the assent of the President under Article 254(2) is not required. 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 required to be dealt with by the Legislature of the State by law. It should also be noted that no Ordinance could be issued on the matters on which State Legislature is to pass a resolution for their approval or disapproval. For instance, under Article 368 the State Legislatures are to rectify the constitutional Amendments by resolution and the Governor cannot rectify it by an Ordinance under Article 213.

156 Article 213(1).
158 Laxmibai vs. State of MP, AIR, 2951, Nagpur, 94.
shows that the Governor can issue an Ordinance only in respect of those matters on which State Legislature can make laws and not on matters which are to be rectified by passing the resolution.¹⁵⁹

(a) A Bill containing the same provisions would have required the previous sanction of the President for its introduction in the Legislature.

(b) He would have deemed it necessary to reserve a Bill for the consideration of the President.

(c) An Act of the Legislature containing the same provisions would have been invalid without the assent of the President.

The legislative power conferred on the Governor under Article 213 is very wide and the Ordinance is as effective as an enactment of the State Legislature. It is well settled that an Ordinance can amend an Act of the Legislature and also an Ordinance may amend an Ordinance already issued.

It was argued in Jnan Prasanna vs. Province of West Bengal¹⁶⁰ that an Ordinance could not directly repeal or amend a Provincial Act unless the provisions in that Act were repugnant to existing provincial legislation. But the Court did not agree with this argument and it held that an Ordinance could directly repeal or amend an existing legislation.

¹⁵⁹ Siwach, J.R., op. cit., p. 240.
¹⁶⁰ Jnan Prasanna vs. Province of West Bengal, C.W.N., 27, AIR, Cal. 1.
The Governor of Uttar Pradesh also promulgated an Ordinance in November, 1967 for Public Men's Inquiry on the advice of the Chief Minister, Charan Singh for taking action against ministers, legislators and other employees of the government. But within a fortnight after issuing it, the Governor issued another Ordinance nullifying the good effect created by the former Ordinance. The basic aim of the former Ordinance was to remove disqualification and lacuna against which a writ was failed in the State High Court. The action of the Governor was termed as “a glaring misuse of the Ordinance making power”, though the Governor was constitutionally right under Article 213(2)(6) of the Constitution.161

The Governor can issue an Ordinance to circumvent the decisions of the Courts. He can do so with retrospective effect also.

In Uttar Pradesh the coalition government headed by Charan Singh promulgated an Ordinance to save a Jana Sangh MLA from being disqualified through a judgement of Justice C.D. Sahgal at 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.162

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161 Gehlot, N.S., op. cit., p. 150.
162 Dahiya, M.S., op. cit., p. 209.
K.V. Rao cites other instances of such a nature - Ordinance to declare Annual Charge to be part of Capital Charge which was declared by the Supreme Court as unconstitutional on May 26, 1950, and an Ordinance nullifying the judgement of the Supreme Court regarding the Income Tax Tribunal in 1954. Both the Ordinances had to come in retrospective effect. In Uttar Pradesh this power was used to validate Zilla Parishad Appointments, 1963, and in Rajasthan to validate the appointments of Vice-Chancellor and Syndicate of the Rajasthan University, 1964, both declared invalid previously by the Courts.

It is interesting to mention here that the Governor can raise and spend money by an Ordinance. Both raising and spending of money are specially stated to be done by ‘law’ in our Constitution; and our governments at the Centre and in the States have already used this power in this direction. Although in 1961 it was considered in Orissa that the budget could not be passed by an Ordinance, only recently the Assam Governor resorted to an Ordinance for raising funds to be charged on the Consolidated Fund of India has given rise to a bitter controversy in this regard.

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164 Dahiya, M.S., *op. cit.*
165 Rao, K.V., *op. cit.*
Duration of an Ordinance

Article 213(2)(a) provides that an Ordinance promulgated by the Governor shall be laid down before the Legislative Assembly of the State and shall cease to operate at an expiration of six weeks from the re-assembling of the State Legislature. 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. An Ordinance may be disapproved by the Legislature by passing a resolution to that effect. A resolution for the disapproval of an Ordinance has to be approved by both Houses in the case of States which have two houses. The resolution is moved first in the Legislative Assembly and after it is approved, it is transmitted to the Legislative Council for its agreement. If the Legislative Council also agree with resolution, the Ordinance will cease to operate.

If the government wants provisions to an Ordinance to be continued then they have to bring a Bill to replace the Ordinance. The refusal to leave to introduce the Bill replacing the Ordinance does not amount to its expiry. In such a case, the Ordinance will lapse after six weeks from the re-assembly of the Legislature. The Ordinance also be withdrawn at any time by the Governor by an order. It may not be

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168 Bhupendra vs. State of Orissa, AIR, 1960, Orissa, 46.
necessary to issue an Ordinance to repeal an Ordinance. In fact, the actual period or duration of an Ordinance depends upon the re-assembling of the Assembly. If on re-assembling an Ordinance is repudiated by the Assembly, the Ordinance will cease to operate from the date. If it is not repudiated by the Assembly, it shall continue for six weeks from the date of re-assembling of the Assembly. Where the Houses of Legislature of a State (i.e., where there is Legislative Council) are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates. In other words, the maximum life an Ordinance is six weeks plus six months.

In this respect, it is also interesting to note that an Ordinance can be reissued. It means that there is no limit. It can be 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.

D.C. Wadhwa, in his well documented book *Re-promulgation of Ordinance: A Fraud on the Constitution of India*, 1983, demonstrated that Bihar had terribly abused the Ordinance making power. Hundreds of Ordinances have been issued by the Governor at the instance of a Cabinet and a far worse malady – re-promulgate them many times. Imagine an Ordinance, whose life tenure cannot ordinarily exceed six months, repeating itself and prolonging its longevity up to

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169 Tabarak Khan vs. Province of Bihar, AIR, 1950, Raj. 228.

13 to 14 years. Perhaps, it is the only State where small matters like appointments and dismissals of public servants are done through Ordinances. For instance, a Director of the A.N. Sinha Institute of Social Sciences was dismissed through an Ordinance and his successor appointed by the same Ordinance. But even the successor had to quit soon and the Ordinance was amended for this purpose.\footnote{Paramanand, op. cit.}

The procedure followed by the successive Bihar governments was quite simple. The government would promulgate an Ordinance when the Assembly was not in session. Around the time the Ordinance was due to expire, the concerned departments put together the relevant files for its re-promulgation. These files accompanied by an endorsement from the law departments would be sent to the Governor who would repeal the earlier Ordinance and promulgate a fresh one containing exactly the same provisions as before. So, while on paper a new Ordinance was issued, in reality the same Ordinance was being perpetuated.

Re-promulgating Ordinances was also routinely practised in Andhra Pradesh, Uttar Pradesh, Karnataka and Kerala. In 1982, there was but one Ordinance pending replacement in Kerala. But it swelled into 34 in July, 1998, a few of them re-promulgated 11 or 12 times.
The allure of easy legislation, noisy sessions and noxious discussions, perhaps, induced the syndrome of governance by Ordinance.\textsuperscript{172}

By following this practice the governments were effectively circumventing two important constitutional principles; one, that the executive cannot make laws and two, that Ordinance must only be promulgated in an emergency.\textsuperscript{173}

In 1972 and 1974, writ petitions were filed in the Patna High Court, challenging the custom. In the first case, the Court rejected the petition. And in 1974, the Court, while agreeing that the practice was illegal, refused to pass strictures against the Governor for giving his assent to re-promulgate Ordinance.\textsuperscript{174}

The Uttar Pradesh Hindi Sahitya Sammelan filed a similar petition in the Allahabad High Court (Lucknow Bench) against the re-promulgation of Ordinance in Uttar Pradesh. In April, 1984, the Court held that the practice of re-promulgating Ordinance was unconstitutional. Echoing his sentiment, Justice K.M.Mishra maintained in the same judgement that “it would be an act of fraud on the Constitution if the government ventures to rule by repeated Ordinances without taking courage to face to elected representatives of the people in the House by bringing a Bill replacing the Ordinance.”\textsuperscript{175}

\textsuperscript{172} Krishna Iyer, \textit{op. cit.}
\textsuperscript{173} Amrita Shah, \textit{op. cit.}
\textsuperscript{174} Ibid.
\textsuperscript{175} Ibid.
The Supreme Court in Wadhwa vs. State of Bihar has finally settled this issue by holding that the promulgation of Ordinances without placing them before the Legislature as required by Article 213(2)(a), in a routine manner, would be fraud on the Constitution and a such re-promulgated Ordinance would be struck down. Of course, a re-promulgation may be justified in extreme cases when owing to the pressure of Legislative business, the Legislature may be unable to enact a statute in place of Ordinance. But to resort to it as a matter of usual practice would constitute usurpation by the executive of the law making function of the Legislature.\textsuperscript{176}

Again in July 1954, Mavalankar wrote, “If this Ordinance issuing is not limited by convention only to extreme and very urgent cases the result may be that in future the government may go on issuing Ordinances giving Lok Sabha no option but to rubber-stamp”. Prime Minister Nehru replied, “Of course, this power like any other power may be abused and Parliament will be the ultimate judge as to whether the use of this power has been right or wrong”.\textsuperscript{177}

V.M.Sudheeran, the Speaker of Kerala Legislative Assembly, denounced the State government for abusing the power to make Ordinances, “it is an extremely unhealthy tendency to convert the provision for the promulgation of Ordinances envisaged in the Constitution, to be used in exceptional and extreme circumstances, into

\textsuperscript{176} AIR, 1987, SC, 579.
\textsuperscript{177} For these letters, see, Hanumanthappa, \textit{op. cit.}
a permanent style of legislative business”, he ruled in September 1985. This approach will in effect deprive the Legislature’s right and opportunities to make legislation. We cannot, on any account afford to make the Legislature a rubber-stamp.¹⁷⁸

Law making is one of the main functions of the Legislature and it also provides the Legislature a device to control the executive. Ordinance making power, on the other hand, is a device in the hands of the executive by using which it succeeds in avoiding the Legislature to the extent it wants. This power virtually amounts to bypassing Legislature, though for a limited period. Needless to say in this manner parliamentary democracy is pooh-poohed and the very concept of representative democracy becomes a victim. It puts the very system under strain.

As all has not been well with the Ordinance promulgating power from the very beginning, critical bayonets have continued to be raised from the outset. The first Speaker of the Lok Sabha, G.V. Mavalankar took the matter very seriously and in a letter to the then Minister for Parliamentary Affairs on November 25, 1950 inter alia wrote, “The procedure of the promulgation of Ordinances is inherently undemocratic. Whatever an Ordinance is justifiable or not, the issue of a large number of Ordinances has psychologically a bad effect. The people carry on the impression that the government is carried on by

¹⁷⁸ Amrita Shah, *op. cit.*
Ordinance". Prime Minister, Nehru, who personally intervened, wrote to Mavalankar on December 13, 1950: "I think all of my colleagues will agree with you that the issue of Ordinances is normally not desirable and should be avoided except on special and urgent occasions."

In February, 1954, some members of the Lok Sabha suggested that a Parliamentary Committee could be constituted so that government could consult it before an Ordinance was issued or review an Ordinance which had been issued. But the government did not accept the suggestion.

Assuming that the Ordinance making power is necessary evil under the Constitution, it may not be out of place here to make suggestions to minimise the evils of Ordinances.

1. It will be better to limit the maximum period of six weeks of its lapse after the assembly of Parliament to a fortnight or at most one month.

2. Provision should be made in the Constitution to make it obligatory on the part of the government to summon the Parliament at the most after one month of the promulgation of an Ordinance.

3. Provisions should be made for discussions on the reasons for the promulgation of Ordinances.179

179 Paramanand, op. cit.
4. 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.

5. A decision to promulgate or re-promulgate 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.

6. The occasions should be extremely rare when a State government finds that it is compelled to re-promulgate 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 case, the question of re-promulgation of an Ordinance for second time should never arise.

7. Suitable convention 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 proviso to Article 213(1).\textsuperscript{180}

\textsuperscript{180} Summary of Recommendations of the Sarkaria Commission, \textit{op. cit.}, pp. 18-19.