

**NATIONAL COMMISSION TO REVIEW THE
WORKING OF THE CONSTITUTION**

A
Consultation Paper*
on

***THE INSTITUTION OF GOVERNOR
UNDER THE CONSTITUTION***

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Introduction

This Paper deals with the appointment and functioning of the institution of Governor as well as the anomalies and problems surrounding the powers vested in them in the matter of granting assent to the Bills passed by the State Legislatures.

2. Article 153 of the Constitution requires that there shall be a Governor for each State. One person can be appointed as Governor for two or more States. Article 154 vests the executive power of the State in the Governor. Article 155 says that "The Governor of a State shall be appointed by the President by warrant under his hand and seal". Article 156 provides that "The Governor shall hold office during the pleasure of the President". The term of the Governor is prescribed as five years. The only qualifications for appointment as Governor are that he should be a citizen of India and must have completed the age of thirty-five years. Article 159 prescribes the oath, which a Governor has to take before entering upon his office. He has to swear in the name of God/solemnly affirm that he "will faithfully execute the office of Governor (or discharge the functions of the Governor) of.....(name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people.....(name of the State).".

3. According to Article 168, the Legislature of a State shall consist of the Governor and the Legislative Assembly. Where, however, the Legislature consists of two Houses, the upper House too is naturally a part of the Legislature.

4. Article 161 vests in the Governor the power to grant pardons, reprieves, etc. Article 164(1) says "The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and shall hold office during the pleasure of the Governor". All these provisions occur in Chapter II of Part VI of the Constitution dealing with "The Executive". It is relevant to mention that the grant or withholding assent is not dealt with in Chapter II but in Chapter III, which deals with "The State Legislature". We shall now turn to Chapter III.

5. Chapter III in Part VI is divided into several sub-headings. The one with which we are concerned here is "Legislative Procedure" comprising Articles 196 to 201. Coming to Articles 196 to 201, Article 196 describes the manner in which Bills are introduced and passed in the State Legislature. Article 197 specifies the restrictions on the powers of Legislative Council as to Bills other than Money Bills while Article 198 sets out special procedure in respect of Money Bills. The expression "Money Bills" is defined in Article 199. The next two relevant Articles, namely, Articles 200 and 201, may be set out in full having regard to their relevance to the issues raised herein.

"200. **Assent to Bills** – When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or

that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:

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

201. **Bills reserved for consideration** – When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom:

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration.”.

6. The following features of the aforementioned Articles need to be noted:

A. Governor:

While the President is elected by the representatives of the people, namely, the Members of Parliament and the Members of the State Legislatures, the Governor is merely appointed by the President which really means, by the Union Council of Ministers. Inasmuch as the Governor holds office during the pleasure of the President, there is no security of his tenure. He can be removed by the President at any time.

6.1 Though the Governor is the executive head of the State and a part of the State Legislature and the administration of the State is carried on in his name, the people of the State or their representatives have no say in the matter of his appointment. While the President is elected by the representatives of the people, namely, the Members of Parliament and the Members of the State Legislatures, the Governor is merely appointed by the President which really means, by the Union Council of Ministers. In as much as the Governor holds office during the pleasure of the President, there is no security of his tenure. He can be removed by the President at any time. There is no provision for impeaching the Governor by the State Legislature. Indeed, if the

Governor misbehaves or acts in a manner against the interests of the people of the State, as perceived by the State Legislature they cannot do anything except perhaps complain to the President. It may also be noticed that the Chief Minister is appointed by the Governor. Where one party gets a clear majority, the Governor may have no discretion or choice in the matter but where no single party or a pre-election group/coalition gets a clear majority, the Governor has to exercise his judgment in the matter of whom he should invite.

6.2 Today the situation is that different political parties are in power in different States. In other words, the situation obtaining between 1952 and 1967, when one party controlled both the Parliament and State Legislatures no longer continues. In such a situation and because the Governor owes his appointment and his continuation in the office to the Union Council of Ministers, in matters where the Central Government and the State Government do not see eye to eye, there is the apprehension that he is likely to act in accordance with the instructions, if any, received from the Union Council of Ministers rather than act on the advice of his Council of Ministers. Indeed, the Governors today are being pejoratively called the '**agents of the Centre**'. It is true that the Central Government is not expected to give any instructions which compromise the status and position of the Governor nor is it expected to remove him for not implementing the instructions given by it, the experience for the last several years belies this hope. As Seervai has pointed out in his commentary: "As the President acts on the advice of his Ministry, it may be contended that if the Governor takes action contrary to the policy of the Union Ministry, he would risk being removed from his post as Governor and therefore he is likely to follow the advice of the Union Ministry. It is submitted that a responsible Union Ministry would not advise, and would not be justified in advising, the removal of a Governor because, in the honest discharge of his duty, the Governor takes action which does not fall in line with the policy of the Union Ministry. The removal of the Governor under such circumstances would otherwise mean that the Union executive would effectively control the State executive, which is opposed to the basic scheme of our federal Constitution. Article 156(1) was designed to secure that if the Governor was pursuing policies which were detrimental to the State or to India, the President would remove the Governor from his office and appoint another Governor. This power takes the place of an impeachment which clearly is a power to be exercised in rare and exceptional circumstances". (page 3103, para 14, in Vol. III; Constitutional Law of India; Fourth Edition).

6.3 The role of Governors has come in for severe criticism – sometimes, bordering on condemnation – in the context of reports they submit under and within the meaning of Article 356. Many a Governor has not covered himself with glory in that behalf. Notwithstanding the recommendations guiding the discharge of their functions in the Sarkaria Commission Report (to which we shall presently refer) and the decisions of the Conference of Governors, many Governors continue to behave in a manner not consistent with true spirit of the Constitution. This would be evident from the decision of the Supreme Court in S.R.Bommai V. Union of India (AIR 1994 SC 1918). A few observations from the said judgment may be apposite. In his judgment delivered for himself and Kuldip Singh J., Sawant J. commented thus upon the conduct of the then Governor of Karnataka:

"it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier 19 letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators but had merely got the authenticity of the signatures verified through the legislature secretariat.... We are of the view that this is a case where all canons of propriety were thrown to winds and the undue haste made by the Governor in inviting the President to issue the proclamation under Article 356(1) smacked of mala fides.... The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more fairly, cautiously and circumspectly. Indeed it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly" (para 76).

While dealing with the conduct of then Governor of Meghalaya, the learned judge made similar observations and observed finally :

"the unflattering episode shows in unmistakable terms the Governor's unnecessary anxiety to dismiss the Ministry and dissolve the Assembly and also his failure as a constitutional functionary to realize the binding, legal consequences of and give effect to the orders of the court".

6.4 Similar observations were made by B.P. Jeevan Reddy J. in the judgment delivered by him for himself and S.C. Agarwal J. and with whose judgment S.R. Pandian J. agreed fully. (The opinions of Sawant, Jeevan Reddy and Pandian JJ. constitute the majority opinions in the said decision.)

B. Articles 200 and 201:

6.5 Now coming to Articles 200 and 201, the first thing to remind ourselves is that the power to grant assent or to withhold assent or to reserve a Bill for the consideration of the President is not dealt with under the heading "The Governor" in Chapter II of Part VI (i.e. as a power or as a function of the Governor) but in Chapter III dealing with State Legislature and under the sub-heading "Legislative Procedure".

C. Article 200:

6.6 According to Article 200, when a Bill passed by the Legislature of a State is presented to the Governor, he has four options, namely, (a) he assents to the Bill; (b) he withholds assent; (c) he reserves the Bill for the consideration of the President; or (d) he returns the Bill to the Legislature for reconsideration. The first proviso says that as soon as the Bill is presented to him, he may return the Bill to the Legislature (if it is not a Money Bill) together with a message requesting the Legislature to reconsider the Bill. He can also suggest the desirability of introducing such amendments or changes as he thinks appropriate. If, on such reconsideration, the Bill is passed again, with or without amendments, and is presented to the Governor for assent, he has to accord his assent. The second proviso says that if the Bill presented to him derogates, in the opinion of Governor, from the powers of the High Court so as to endanger the position which the High court is designed to fill by the Constitution, he is bound to reserve the Bill for the consideration of the President (also see para 88 in AIR 1983 SC 1019 at 1048, Hoechst Pharmaceuticals v. State of Bihar).

6.7 The following aspects of the Article need attention:

- 1) Article 200 (which is a reproduction of section 75 of the Government of India Act, 1935 with two small modifications) does not fix any time limit for granting the assent or for declaring that he is withholding his assent or for declaring that he is reserving it for the assent of the President. It has been held in Purshothaman v. State of Kerala (AIR 1962 SC 694) that there is no time limit for granting the assent. This decision lays down the following further propositions: (a) A Bill pending in the Legislature (either House) does not lapse on proroguing of Assembly, (b) A Bill pending before the Governor or the President for his assent does not lapse on dissolution of the Assembly and (c) Only the Legislative Assembly can be dissolved but not the Legislative Council.
- 2) The Constitution does not furnish any guidance to the Governor - in which matters he should accord his assent and in which matters he should withhold assent.
- 3) Except in matters governed by the second proviso to Article 200, that Article does not also lay down any guidelines in which matters should the Governor reserve the Bill for the consideration of the President. It has been held by the Supreme Court in Hoechst Pharmaceuticals v. State of Bihar (1983 SC 1019) that the Governor's power to reserve for the consideration of the President cannot be questioned in court. The following observations in the judgment, though made while dealing with a question posed from a different angle, are relevant:

"A Bill which attracts Art.254(2) or Art.304(b) where it is introduced or moved in the Legislative Assembly of a State without the previous sanction of the President or which attracted Art.31(3) as it was then in force, or falling under the second proviso to Art.200 has necessarily to be reserved for the consideration of the

President. There may also be a Bill passed by the State Legislature where there may be a genuine doubt about the applicability of any of the provisions of the Constitution which require the assent of the President to be given to it in order that it may be effective as an Act. In such a case, it is for the Governor to exercise his discretion and to decide whether he should assent to the Bill or should reserve it for consideration of the President to avoid any future complication. Even if it ultimately turns out that there was no necessity for the Governor to have reserved a Bill for the consideration of the President, still he having done so and obtained the assent of the President, the Act so passed cannot be held to be unconstitutional on the ground of want of proper assent. This aspect of the matter, as the law now stands, is not open to scrutiny by the courts.”

6.8 May be, this matter can also be deemed to be one covered by the prohibition contained in Article 212. (Article 212 declares that the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of irregularity of procedure. It is significant that the question of assent is not dealt with as a power or function of the Governor in Chapter II dealing with “The Executive – The Governor” but in Chapter III which deals with “The State Legislature”, under the sub-heading “Legislative Procedure”. It should also be remembered that according to Article 168, Governor is a part of the State Legislature.)

The power to withhold assent appears to be wide and unguided power. The Governor is an appointee of the President (Central Government). He is not elected by the people of the State or by their representatives. In such a situation, the legitimacy of this power, which empowers him to undo the will of the Legislature by just declaring that he is withholding his assent, is open to question.

If, on the other hand, for any reason, the power to withhold assent is treated as a matter within the discretion of the Governor, the position would be a totally unedifying one. In the absence of any guidance provided by the Constitution in which cases this power can be exercised and in view of the further fact that no court is entitled to go into the justification of such withholding, conferment of such power is bound to be inherently arbitrary and discriminatory.

6.9 The power to withhold assent appears to be wide and unguided power. The Governor is an appointee of the President (Central Government). He is not elected by the people of the State or by their representatives. In such a situation, the legitimacy of this power, which empowers him to undo the will of the Legislature by just declaring that he is withholding his assent, is open to question. Even if we proceed on the basis that this power has to be exercised by the Governor on the advice of his Council of Ministers - as it ought to be - no Council of Ministers, ordinarily speaking, would tender such an advice except where it is a successor government formed by a party which was in opposition when the Bill was passed and which has since come to power (of course, one cannot envisage all the situations wherein such an advice may be tendered by the Council of Ministers). Be that as it may, wherever such advice is tendered, it would be a suspect one; the

Council of Ministers cannot overturn the will of the Legislature. What can happen in such a situation is that the Governor may simply sit over the Bill and if he finds that a different party has come to power meanwhile, he may seek their advice. Such a course will not be conducive with the decorous regard a Governor is expected to the rules of the Constitutional game. Indeed, any such advice to withhold assent by the Council of Ministers to a Bill passed by the Legislature might amount to an act of impropriety. If, on the other hand, for any reason, the power to withhold assent is treated as a matter within the discretion of the Governor, the position would be a totally unedifying one. In the absence of any guidance provided by the Constitution in which cases this power can be exercised and in view of the further fact that no court is entitled to go into the justification of such withholding, conferment of such power is bound to be inherently arbitrary and discriminatory.

6.10 A reading of Article 201 shows that even a Money Bill can be reserved for the assent of the President. This would be evident from the following words in the proviso to Article 201: "Provided that where the Bill is not a Money Bill, the President may direct the Governor to return the Bill...." From the language employed in Articles 200 and 201, it cannot be said that a Money Bill cannot be reserved for the assent of the President. Such a course, if adopted by a Governor, can lead to serious dislocation of administrative business.

7 In support of the proposition that the power to accord or withhold assent and the power to return the Bill to the Legislature for reconsideration (with or without suggestions) as well as the power to reserve the Bill for the consideration of the President (except perhaps in situations where such reserving is obligatory by virtue of the provisions of the Constitution) has to be exercised by the Governor on the advice of his Council of Ministers and not in accordance with the instructions received by him from the Government of India and also to establish that these are not his discretionary powers, reference may be made to the law declared by the Supreme Court in Shamsher Singh v. State of Punjab (AIR 1974 SC 2192). The decision lays down the following propositions:

- (a) "We have extensively excerpted from various sources not for adopting 'quotational jurisprudence' but to establish that the only correct construction can be that in constitutional law the 'functions' of the President and Governor and the 'business' of Government belong to the Ministers and not to the head of State, that 'aid and advice' of ministers are terms of art which, in law mean, in the Cabinet context of our constitutional scheme, that the aider acts and the adviser decides in his own authority and not subject to the power of President to accept or reject such action or decision, except, in the case of Governors, to the limited extent that Article 163 permits and his discretion, remote controlled by the Centre, has play".
- (b) As rightly pointed out by Sri M.C. Setalvad, the first Attorney General of India, when consulted by Dr. Rajendra Prasad (in connection with the Hindu Code Bill controversy): "It (Art.74) applies to every function and power vested in the President, whether it relates to addressing the House or returning a Bill for reconsideration or assenting or withholding assent to the Bill".
- (c) "Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Article 74 has no discretionary powers; the latter too has none, save in the tiny strips covered by Articles 163(2), 371-A(1)(b) and (d), 371-A(2)(b) and (f), VI Schedule para 9(2) (and VI Schedule para 18(3), until omitted recently with effect from 21.1.1972). These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions. Again, a minimal area centering round reports to be despatched under Article 356 may not, in the nature of things, be amenable to ministerial advice. The practice of sending periodical reports to the Union Government is a pre-constitutional one and it is doubtful if a Governor could or should report behind the back of his Ministers. For a centrally appointed constitutional functionary to keep a dossier on his Ministers or to report against them or to take up public stances critical of Government policy settled by the Cabinet or to interfere in the administration directly – these are unconstitutional faux pas and run counter to parliamentary system. In all his constitutional 'functions' it is the Ministers who act; only in the narrow area specifically marked out for discretionary exercise by the Constitution, he is untrammelled by the State Ministers' acts and advice. Of course, a limited free-wheeling is available regarding choice of Chief Minister and dismissal of the Ministry, as in the English practice adapted to Indian conditions".
- (d) When deciding a dispute under Article 192(1), the Governor acts on the advice of the Election Commission and not on the advice of the Council of Ministers.

- (e) “The omnipotence of the President and of the Governor at State level is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power or functions is written into the Articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basics of our political architecture”.

In this connection, reference may also be made to the Constituent Assembly Debates, Vol.9. At page 61, the following extract from the speech of T.T. Krishnamachari may be noticed: “I would ask him (Dr. Shibanlal Saxena, a member of C.A.) to remember one particular point to which Dr. Ambedkar drew pointed attention, viz., that the Governor will not be exercising his discretion in the matter of referring a Bill back to the House with a message. That provision has gone out of the picture. The Governor is no longer with any discretion. If ... the Governor sends a Bill back for further consideration, he does so expressly on the advice of his Council of Ministers”. (The speech of Dr. Ambedkar referred to by T.T. Krishnamachari is at page 41 of the same volume.)

8. What has been happening in fact all these years is that Governors generally act according to the instructions of the Home Ministry at the Centre. If the party/group in power at the Centre is a different from the one in the State (whose Legislature has passed the particular Bill) and more particularly where the party in power at the Centre is in opposition in the State Legislature and had opposed the said Bill, or for any other reason, the Home Ministry may instruct the Governor either to withhold his assent or reserve it for the consideration of the President – or return the Bill in case the party position in the Legislature has, in the meanwhile, undergone a change. If any such instructions are received by the Governor, most likely, he would act according to them, notwithstanding the advice of his Council of Ministers to the contrary. This is clearly an undemocratic exercise of power by the Governor. To wit, the Governor is a part of the State Legislature and the Council of Ministers is to advise him in the matter of exercise of his powers. *The people or the Legislature have no, absolutely no, remedy against any arbitrary withholding of assent, inordinate delay in granting assent or unwarranted and unjustified reservation of a Bill for the consideration of the President.* Whenever the Governor acts according to the instructions of the Central Government and contrary to the advice tendered by the Council of Ministers of the State, friction arises between the Centre and the State which is not conducive to a fruitful cooperation between them. The Legislature can't even impeach the Governor since there is no such provision in the Constitution. Maybe the power to withhold assent is understandable in the case of the President (Article 111) who is elected by the Members of the Parliament and the State Legislatures and can therefore claim a certain amount of legitimacy but not in the case of the Governor who is a mere appointee.

9. One way of reducing the rigor, and arbitrariness inherent in this clause, may be to read the powers in the main limb of clause (1) of Article 200 consistent with and subject to the first proviso. The first proviso requires the Governor to return the Bill for reconsideration “as soon as possible after the presentation to him of the Bill for assent”. If this provision is taken as a guide, as an indicator, the element of urgency in it may govern not only the case of return of Bill, but also grant or withholding of assent as well as to reservation of the Bill for the consideration of the President. But so far no court has taken this view; it is only a possible interpretation. The fact remains that there are no express words in the Constitution to support such a view. On the contrary, the use of expression “as soon as possible” only in the case of return of the Bill and not in other cases (assenting, withholding of assent and reserving for the consideration of the President) can be said to be indicative of the fact that the element of urgency was not intended to be infused in these other matters. On a literal interpretation, the first proviso applies only to a case of return of the Bill and not to other three situations and this is precisely the view expressed by the Supreme Court in Purushothaman's case, referred to hereinbefore. This is not a happy situation.

D. Article 201:

where a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom. The President is also empowered to “direct the Governor to return the Bill to the House ... together with such a message as is mentioned in the first proviso to Article 200....” Here again no time limit is fixed within which the President should take a decision. There have been instances where Bills have been pending with the President for periods up to six years or more.

10. Coming to Article 201, it says that where a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom. The President is also empowered to “direct the Governor to return the Bill to the House ... together with such a message as is mentioned in the first proviso to Article 200....” Here again no time limit is fixed within which the President should take a decision. There have been instances where Bills have been pending with the President for periods up to six years or more. (See the Table appended to Chapter V of Sarkaria Commission Report position up to 1987). In the matter of return of Bill for reconsideration to the Legislature, it is relevant to notice, the words “as soon as possible after the presentation to him of the Bill for assent” occurring in the first proviso to Article 200, do not find place in the proviso to Article 201 though both the provisos are of cognate nature.

Yet another feature of Article 201 is that where the President directs the Governor to return the Bill to the Legislature and the Legislature passes the Bill again (with or without amendments) and when it is presented to the President again for consideration, the Article does not say that the President is bound to grant his assent, as it is said in the case of the Governor by the first proviso to Article 201. It is rather surprising that even after the Legislature reconsiders the Bill, passes it again and presents it to the President for consideration, it can be stalled, if he so chooses, by not assenting to it and by ‘cold storing’ it, if we can use that expression. Inasmuch as the President would be guided by the Union Council of Ministers in this behalf, it may quite happen (indeed, as it has already happened) that where a different party or group is in power at the Centre, it can easily neutralize and nullify the will of the State Legislature by advising the President to withhold his assent or cold-storage it even after the Bill is presented to the President after reconsideration of the Bill.

11. Yet another feature of Article 201 is that where the President directs the Governor to return the Bill to the Legislature and the Legislature passes the Bill again (with or without amendments) and when it is presented to the President again for consideration, the Article does not say that the President is bound to grant his assent, as it is said in the case of the Governor by the first proviso to Article 200. It is rather surprising that even after the Legislature reconsiders the Bill, passes it again and presents it to the President for consideration, it can be stalled, if he so chooses, by not assenting to it and by ‘cold storing’ it, if we can use that expression. Inasmuch as the President would be guided by the Union Council of Ministers in

this behalf, it may quite happen (indeed, as it has already happened) that where a different party or group is in power at the Centre, it can easily neutralize and nullify the will of the State Legislature by advising the President to withhold his assent or cold-storage it even after the Bill is presented to the President after reconsideration of the Bill. A more undemocratic and undesirable situation cannot be imagined. Indeed, one may go to the extent of suggesting the very deletion of the provision for reserving the Bill for the consideration of the President, except in a situation contemplated by the second proviso to Article 200 or any other provision of the Constitution.

12. Before we proceed further, it would not be out of place to quote certain observations of Dr. Ambedkar, though made in the context of Article 355. He said:

“I think it is agreed that our Constitution, notwithstanding the many provisions which are contained in it, whereby the Centre has been given powers to override the Provinces, none-the-less is a Federal Constitution and when we say that Constitution is a Federal Constitution, it means this, that the Provinces are as sovereign in their field which is left to them by the Constitution as the Centre is in the field which is assigned to it. In other words, barring the provisions which permit the Centre to override any legislation that may be passed by the Provinces, the Provinces have a plenary authority to make any law for the peace, order and good Government of that Province. Now, when once the Constitution makes the Province sovereign and gives them plenary powers to make any law for the peace, order and good Government of the Province, really speaking, the intervention of the Centre or any other authority must be deemed to be barred, because that would be an invasion of the sovereign authority of the Province. That is a fundamental proposition which, I think, we must accept by reason of the fact that we have a Federal Constitution.”

Recommendations of Sarkaria Commission:

13. A Commission headed by Justice R.S. Sarkaria, a former Judge of the Supreme Court (and who is now a Member of the present Commission), was constituted to “examine and review the working of the existing arrangements between the Union and States in regard to powers, functions and responsibilities in all spheres and recommend such changes or other measures as may be appropriate”. The notification dated June 9, 1983 appointing the Commission stated further that “In examining and reviewing the working of the existing arrangements between the Union and States and making recommendations as to the changes and measures needed, the Commission will keep in view the social and economic developments that have taken place over the years and have due regard to the scheme and framework of the Constitution which the founding fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance for promoting the welfare of the people”. In their report submitted in the year 1987-88, the Commission have dealt with the “Role of the Governor” in Chapter IV and “Reservation of Bills by Governors for President’s Consideration, and Promulgation of Ordinances” in Chapter V.

14. In Chapter IV, the Commission first examined the historical background to the institution of Governor, the constitutional provisions concerning the Governor and the scope of these provisions and then pointed out the three main facets of Governor’s role. The three facets so pointed out are: (a) as the constitutional head of the State operating normally under a system of Parliamentary democracy; (b) as a vital link between the Union Government and the State Government; and (c) as an agent of the Union Government in a few specific areas during normal times [e.g. Article 239(2)] and in a number of areas during abnormal situations [e.g. Article 356(1)]. Pausing here, we must say that really speaking, the Constitution did not envisage the Governor as an agent of the Centre. By making reports under Article 356, the Governor does not become an agent of the Central Government. Such a report has to be made by the Governor as required by his oath which obliges him to “preserve, protect and defend the Constitution” and to devote himself “to the service of well-being of the people” of that State. If he is honestly satisfied, in a given situation that the government of that State cannot be carried on in accordance with the provisions of the Constitution, it becomes his duty to make a report to that effect to the President. This he does as the Governor of the State and in the interest of the State and not as “the agent of the Centre”. It is another matter that because of the conduct and actions of some over the last several decades, they have earned this notoriety and the pejorative appellation of an agent.

15. Coming back to the Sarkaria Commission, it took note of the criticism with respect to the role of the Governor and also set out the matters in which the Governor has to act in his discretion. The matters in which the Governor, according to the Commission, is expected to use his discretion are:-

- (i) In Choosing the Chief Minister
- (ii) In testing majority of the government in office
- (iii) In the matter of dismissal of a Chief Minister
- (iv) In dissolving the Legislative Assembly
- (v) In recommending President's rule
- (vi) In reserving Bills for President's Consideration.

16. The Commission then referred to the suggestions received by it with respect to the institution and role of Governor which *inter alia* established out that this office is of vital importance having multi-faceted role, that Governor is linchpin of constitutional apparatus, that Governor's office assures continuity of Government and that it should not be dispensed with. The Commission proceeded to discuss the manner of selection of Governors, the term of their office, their eligibility for further offices after the expiry of their term and the retirement benefits available to them. The Commission then discussed the areas in which the Governor has to act in his discretion and the need for such discretionary powers. Finally, the Commission set out its recommendations in paragraphs 4.16.01 to 4.16.24.

17. The Commission also discussed the issue of laying down guidelines for the Governors in Paras 4.15.01 to 4.15.06 under the heading "Guidelines for Governors". The Commission observed that laying down such guidelines is a difficult task and that they should be evolved in course of time embodying accepted conventions. It pointed out that the draft Constitution had provided that in choosing Chief Ministers and in his relations with them, the Governor would be guided by the Instructions set out in the Schedule (viz. the Fourth Schedule). However, this Schedule was subsequently deleted by the Constituent Assembly on the reasoning that inasmuch as the Governor has to act on the advice of his Ministers and further because the areas in which he has to act in his discretion are very meagre, the matter be left to be governed by conventions. The Commission pointed out that the Administrative Reforms Commission Study Team on Central State Relationships (1967) had emphasized the need for the formulation of a national policy to which the Union and States subscribed, which gave recognition to the role of the Governor and guided the responses of the Union, the States and the Opposition parties to any actions taken in discharge of it. The Commission opined that such a national policy should spell out the implications of the Governor's role in the form of conventions and practices, keeping in view the national objectives of defending the Constitution and the protection of democracy. The Commission referred to the fact that the Administrative Reforms Commission had also recommended in 1969 that the Inter State Council should formulate the guidelines governing the discretionary powers by the Governors and that after their acceptance by the Union Government such guidelines should be issued in the name of the President. The Government of India, however, did not accept this recommendation saying that the matter should best be left to the conventions which may be established or which may be evolved in that behalf. In this state of affairs, the Sarkaria Commission concluded that it is not possible to lay down any guidelines governing the functions and duties of the Governors, partly because it is not possible to foresee all the situations which may develop calling for the exercise of discretion by the Governor. Now, coming to the recommendations of the Sarkaria Commission in regard to the institution of Governor, they are briefly the following:-

The person to be appointed as a Governor –

- (i) should be an eminent person;
- (ii) must be a person from outside the State;
- (iii) must not have participated in active politics at least for some time before his appointment;
- (iv) he should be a detached person and not too intimately connected with the local politics of the State;
- (v) he should be appointed in consultation with the Chief Minister of the State, Vice-President of India and the Speaker of the Lok Sabha;

- (vi) His tenure of office must be guaranteed and should not be disturbed except for extremely compelling reasons and if any action is to be taken against him he must be given a reasonable opportunity for showing cause against the grounds on which he is sought to be removed. In case of such termination or resignation by the Governor, the Government should lay before both the Houses of Parliament a statement explaining the circumstances leading to such removal or resignation, as the case may be;
- (vii) After demitting his office, the person appointed as Governor should not be eligible for any other appointment or office of profit under the Union or a State Government except for a second term as Governor or election as Vice-President or President of India, as the case may be; and
- (viii) At the end of his tenure, reasonable post-retirement benefits should be provided.

18. Sarkaria Commission further recommended that in choosing a Chief Minister, the Governor should be guided by the following principles, viz.:

- (i) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the government.
- (ii) The Governor's task is to see that a government is formed and not to try to form a government which pursue policies which he approves.
- (iii) If there is a single party having an absolute majority in the Assembly, the leader of the party should automatically be asked to become the Chief Minister.
- (iv) If there is no such party, the Governor should select a Chief Minister from among the following parties or groups of parties by sounding them, in turn, in the order of preference indicated below:
 - (i) an alliance of parties that was formed prior to the Elections.
 - (ii) the largest single party staking a claim to form the government with the support of others, including 'independents'.
 - (iii) a post-electoral coalition of parties, with all the partners in the coalition joining the government.
 - (iv) a post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including 'independents' supporting the government from outside.
 - (v) The Governor while going through the process described above should select a leader who in his (Governor's) judgment is most likely to command a majority in the Assembly.

19. It was also recommended that a Chief Minister, unless he is the leader of a party which has absolute majority in the Assembly, should seek a vote of confidence in the Assembly within 30 days of taking over. This practice should be religiously adhered to with the sanctity of a rule of law.

20. The other recommendations made by the Sarkaria Commission are that the issue of majority support should be allowed/directed to be tested only on the floor of the House and nowhere else and that in the matter of summoning and proroguing the Legislative Assembly, he must normally go by the advice of Council of Ministers but where a no confidence motion is moved and the Chief Minister advises proroguing the Assembly, he should not accept it straightaway and advise him to face the House.

21. The Report also recommended certain measures in the matter of dissolution of the Assembly. The Report recommended that while sending *ad hoc* or fortnightly reports to the President, the Governor should normally take his Chief Minister into confidence, unless there are overriding reasons to the contrary. The discretionary power of the Governor as provided in Article 163, it was recommended, should be left untouched. The recommendations towards the end of Chapter IV are set out Annexure I to this paper.

Sarkaria Commission on Articles 200 and 201 :

22. The Sarkaria Commission examined these articles in Chapter V of its Report. We may briefly note the contents of this chapter. In the first instance, the criticisms and suggestions by the State Governments and certain other persons with respect to the said Articles were noticed and thereafter the legislative history of Articles 200, 201 and 254. The Commission opined that amendment of Articles 200 and 201 is not called for. The Commission examined the scope of Governor's discretion under Article 200 (in the matter of granting or withholding assent and in the matter of reserving the Bills for the consideration of the President) and then pointed out the provisions of the Constitution whereunder reservation for President's consideration is obligatory upon the Governor viz., (i) second proviso to Article 200; (ii) Clause (2) of Article 288; (iii) Clause (4)(a)(ii) of Article 360 and (iv) Article 360 (4)(a)(ii). The Commission also pointed out the matters in which the Bills may be reserved for the President's consideration and assent for specific purposes. They are:

- (i) To secure immunity from the operation of Articles 14 and 19, namely, Bills for acquisition of estates, etc and for giving effect to Directive Principles of State Policy (Proviso to Article 31C).
- (ii) a Bill relating to the subjects enumerated in the Concurrent List, to ensure operation of its provisions despite their repugnancy to a Union law or existing law, by securing President's assent in terms of Article 254(2).
- (iii) Legislation imposing restrictions on trade and commerce requiring Presidential sanction under the proviso to Article 304 (b) read with Article 255.

23. The Commission pointed out specifically that the above situations do not exhaust the situations in which the Bill may be reserved for the consideration of the President that there may be other matters as well in which the Governor may in his discretion think it proper to reserve a Bill for the consideration of the President.

24. Dealing with the rationale of system of reserving Bills, the following statement occurs in para 5.13.01 of the Report:-

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

25. After considering the relevant matters, final recommendations of the Commission are set out in paragraphs 5.19.01 to 5.19.17 which are appended to this paper as **Annexure II**. Broadly speaking, the recommendations are to the following effect:

In the matter of granting or withholding his assent or in the matter of reserving a Bill for the consideration of the President, the Governor must act according to the advice tendered by his Council of Ministers except in rare and exceptional cases, for example, where the provisions of the Bill are patently unconstitutional or are beyond the legislative competence of the State Legislature or where they derogate from the scheme and framework of the Constitution so as to endanger the sovereignty, unity and integrity of the nation or where they clearly violate Fundamental Rights or other constitutional

limitations. The practice of reserving Bills for the consideration of the President may be stopped except where it is required by one or the other provisions of the Constitution or to meet some other constitutional purpose. A reference of the Bill to the President must also contain the material facts, the points for consideration and the grounds upon which the reference has been made. A convention must be established whereunder the President should dispose of a Bill sent to him for his consideration within four months. The President should not withhold his assent except on the ground of patent unconstitutionality, etc. as pointed out hereinabove. In matters where his assent is required by the constitutional provisions, he shall keep in mind the constitutional provisions and the interests of the nation and the State for granting or refusing his assent. The Commission, however, recommended that the Constitution itself should not prescribe any time limit either for the Governor or the President and that the matter should be allowed to be governed by conventions and good sense of the relevant persons.

Recommendations proposed :

26. We respectfully agree with all the recommendations contained in Chapter IV (relating to Governors) in the Sarkaria Commission Report subject to the following:

(1) We agree that Article 155 of the Constitution requires to be amended. The Sarkaria Commission recommends that Article 155 should be amended to include consultation with the Chief Minister of the State for which the Governor is to be selected and appointed. But so far as consultation with the Vice-President of India and Speaker of the Lok Sabha is concerned, the Sarkaria Commission does not say that such consultation should be provided for expressly in amended Article 155. On the contrary, it says that such consultation should be "confidential and informal and should not be a matter of constitutional obligation". It is suggested that this consultation may be made by the Prime Minister while selecting a Governor. We, however, think that the experience gained over the last 14 years since the Sarkaria Commission Report may call for a more specific amendment in Article 155. It would be appropriate to suggest a committee comprising the Prime Minister of India, the Home Minister of India, the Speaker of the Lok Sabha and the Chief Minister of the State concerned to select a Governor. (This committee may also include the Vice President of India if it is thought appropriate.) Instead of 'confidential and informal consultations', it is better that the process of selection is transparent and unambiguous.

(2) Another suggestion which we wish to make in this behalf is to provide that where a pre-election coalition enters the general-elections' fray as such, it should be treated as one political party/grouping and if one such coalition /grouping obtains a majority, the leader of such coalition/grouping (elected or indicated, as the case may be) shall be called to form the Ministry. Indeed, recommendations to this effect have already been made by the present Commission in another context. It has been recommended that such pre-poll alliance/coalition should be treated as one political party for the purpose of the Tenth Schedule to the Constitution of India (law relating to defections). So far as post-electoral coalition of parties is concerned, the recommendations made by the Sarkaria Commission are quite appropriate. We endorse them.

(3) We are of the opinion that the practice of sending "*ad hoc* or fortnightly reports to the President" is not a healthy one. Instead of recommending the stoppage of such practice, the Sarkaria Commission has recommended that while sending such reports, the Governor should take the Chief Minister into confidence unless there are overriding reasons to the contrary. But this suggestion has evidently fallen on deaf ears. Having regard to the manner in which the Governors are appointed and the constant control exercised at present by the Central Government over them, it perhaps appears more appropriate that this practice should altogether be stopped except where the Governor

feels that consistent with his oath and in the interest of the people of the State, a report should be made to the President as contemplated by and within the meaning of Article 356 of the Constitution. Since the Governor has taken oath 'to preserve, protect and defend the Constitution and the law' and also 'to devote himself to the service and well-being of the people' of that State, it becomes incumbent upon him, wherever he is honestly satisfied that a situation has arisen where it is not possible to carry on the government of the State in accordance with the provisions of the Constitution (as adumbrated in the decisions of the Supreme Court [in particular in the latest decision in S.R. Bommai v. Union of India (AIR 1994 SC 1918)], he should make a report to the President. Such a report should not be made either because he has been instructed by the Central Government to do so or for any other reason. It should also not be with an eye upon exercising real power in the sense that once the Ministry is dismissed, the governance of the State effectively passes into his hands, no doubt assisted by the advisers who are normally appointed by the Central Government.

Accordingly, we recommend that Articles 155 and 156 of the Constitution be amended to provide for the following: -

- (a) the appointment of the Governor should be entrusted to a committee comprising the Prime Minister of India, Union Minister for Home Affairs, the Speaker of the Lok Sabha and the Chief Minister of the concerned State. (Of course, the composition of the committee is a matter of detail which can always be settled once the principal idea is accepted);
- (b) the term of office, viz., five years, should be made a fixed tenure;
- (c) the provision that the Governor holds office "during the pleasure of the President" be deleted;
- (d) provision be made for the impeachment of the Governor by the State Legislature on the same lines as the impeachment of the President by the Parliament. (The procedure for impeachment of the President is set out in Article 61.) Of course, where there is no Upper House of Legislature in any State, appropriate changes may have to be made in the proposed Article since Article 61 is premised upon the existence of two Houses of Parliament; and
- (e) In the matter of selection, the matters mentioned in paras 4.16.01 and 4.16.02 of the Sarkaria Commission Report (Annexure - I) should be kept in mind.

27. If the above changes are brought about, not only the oath taken by the Governor would not remain a mere formality, but the office of the Governor would be invested with requisite dignity and integrity. We may point out that this change would in no way reflect upon the duties and functions of the Governor even in the matter of making a report under Article 356. To reiterate, having taken an oath to "preserve, protect and defend the Constitution and the law", the Governor is bound, wherever he finds that "a situation has arisen in which government of the State cannot be carried out in accordance with the provisions of (this) Constitution", to send a report to the President to that effect. The ultimate loyalty of the Governor should be to the Constitution.

28. We are equally of the opinion that the changes suggested above would make the Governor an independent and fair arbiter whenever a dispute arises whether the Chief Minister/Council of Ministers has lost the confidence of the House – an area where many a Governor has not covered himself with glory. He would rather insist upon a floor test or allow the matter to be fought out on the floor of the Assembly. He would not resort to counting of heads in the Raj Bhavan. Even in the matter of selection of Chief Minister, where no single party had obtained a clear majority, he would fairly follow the conventions established in this behalf and not be led away by any instructions from the Centre. It has become essential, in the interest of our constitutional system, to retrieve and restore the glory and dignity of this office.

29. In so far as the recommendations contained in Chapter V of the Sarkaria Commission Report are concerned, we are of the opinion that in the light of the experience gained, we should go beyond the recommendations of the Sarkaria Commission. As we have mentioned hereinbefore, the Governor is not

elected by the people of the State nor by their representatives. He is merely a nominee of the Central Government and even if Article 155 is amended as recommended in the preceding paragraph, even then he remains and continues to be a nominee. We have already pointed out hereinbefore that the legitimacy which attaches to the President (because the President is elected by the representatives of the People in the Centre and the States) does not attach to the Governor. Hence the legitimacy of the Governor to participate in the governance of the State is very much suspect except perhaps in matters mentioned in the Fifth and Sixth Schedules to the Constitution. This comment and approach apply equally to his powers under Article 200. We have hereinbefore pointed out the main features of Articles 200 and 201. We are of the opinion that Articles 200 and 201 be amended to provide for the following matters:

- (a) prescribe a time-limit - say a period of four months - within which the Governor should take a decision whether to grant assent or to reserve it for the consideration of the President;
- (b) delete the words "or that he withholds assent therefrom". In other words, the power to withhold assent, conferred upon the Governor, by Article 200 should be done away with;
- (c) if the Bill is reserved for the consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under Article 143 (as it happened in the case of Kerala Education Bill in 1958);
- (d) when the State Legislature reconsiders and passes the Bill (with or without amendments) after it is returned by the Governor pursuant to the direction of the President, the President should be bound to grant his assent;
- (e) to provide that a "Money Bill" cannot be reserved by the Governor for the consideration of the President;
- (f) or perhaps it may be more advisable to delete altogether the words in Article 200 empowering the Governor to reserve a Bill for the consideration of the President except in the case contemplated by the second proviso to Article 200 and in cases where the Constitution requires him to do so. Such a course would not only strengthen the federal principle but would also do away with the anomalous situation, whereunder a Bill passed by the State Legislature can be 'killed' by the Union Council of Ministers by advising the President to withhold his assent thereto or just by 'cold-storing' it.

These suggestions need to be examined carefully.

30. We must however hasten to add that in suggesting the aforementioned changes in Articles 200 and 201, we should not be understood as belittling the institution of Governor. We recognize that among Governors there have been many fair and independent persons – persons of great standing, reputation and learning. But, by and large, the picture has not been an inspiring one. This is because very often active politicians, politicians defeated at the polls and men lacking in integrity and fairness and individuals not possessing an understanding of the constitutional system – persons who were more interested in their personal career rather than public good – were chosen for this office. It is their conduct, by and large, which has induced us to make the aforementioned suggestions; it is not that we take any pleasure in running down the institution of Governors. As we have said earlier, there have been and there are certain very remarkable and excellent individuals holding this office and whose fairness, independence and commitment to public good has been, and is, beyond question.

It is necessary to invest the office of the Governor with the requisite independence of action and to rid them of the bane of 'instructions' from the Central Government. It is necessary to make him the Governor of the State in its full and proper sense and to enable him to live up to his oath truthfully. His loyalty must be to the Constitution and to none else and his commitment to the well-being of the people of his State. He must command respect by his conduct.

31. The changes suggested by us in Articles 200 and 201 seem essential if the arbitrary action on the part of the Governors is to be checked. It is necessary to invest the office of the Governor with the requisite independence of action and to rid them of the bane of 'instructions' from the Central Government. It is necessary to make him the Governor of the State in its full and proper sense and to enable him to live up to his oath truthfully. His loyalty must be to the Constitution and to none else and his commitment to the well-being of the people of his State. He must command respect by his

conduct. Only then any advice given by him will be respected by the Council of Ministers and the Legislature. Where he finds that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution, he must report the same to the President as contemplated by Article 356. This is also a requirement of the oath taken by him viz., to "preserve, protect and defend the Constitution". The Central Government should also desist from undue interference with the State Governments and should indeed respect the powers of the States. The State's powers, few they are, should not be whittled down further. On the contrary, the effort should be to preserve the federal nature of our Constitution. The interest of our nation is in "cooperative federalism" and not in confrontational politics or politics of domination.

ANNEXURE – I

EXTRACTS FROM CHAPTER IV OF THE REPORT OF THE COMMISSION ON CENTRE-STATE RELATIONS (SARKARIA COMMISSION REPORT PART – I)

RECOMMENDATIONS

- 4.16.01 A person to be appointed as a Governor should satisfy the following criteria :
- (i) He should be eminent in some walk of life.
 - (ii) He should be a person from outside the State.
 - (iii) He should be detached figure and not too intimately connected with the local politics of the State; and
 - (iv) He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.
- In selecting a Governor in accordance with the above criteria, persons belonging to the minority groups should continue to be given a chance as hitherto. (Para 4.6.09)
- 4.16.02 It is desirable that a politician from the ruling party at the Union is not appointed as Governor of a State which is being run by some other party or a combination of other parties. (Para 4.6.19)
- 4.16.03 In order to ensure effective consultation with the State Chief Minister in the selection of a person to be appointed as Governor, the procedure of consultation should be prescribed in the Constitution itself by suitably amending Article 155. (Para 4.6.25)

- 4.16.04 The Vice-President of India and the Speaker of the Lok Sabha may be consulted by the Prime Minister in selecting a Governor. The Consultation should be confidential and informal and should not be a matter of constitutional obligation. (Para 4.6.33)
- 4.16.05 The Governor's tenure of office of five years in a State should not be disturbed except very rarely and that too, for some extremely compelling reason. (Para 4.7.08)
- 4.16.06 Save where the President is satisfied that in the interest of the security of the State, it is not expedient to do so, the Governor whose tenure is proposed to be terminated before the expiry of the normal term of five years, should be informally apprised of the grounds of the proposed action and afforded a reasonable opportunity for showing cause against it. It is desirable that the President (in effect, the Union Council of Ministers) should get the explanation, if any, submitted by the Governor against his proposed removal from office, examined by an Advisory Group consisting of the Vice-President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India. After receiving the recommendation of this Group, the President may pass such orders in the case as he may deem fit. (Para 4.8.08)
- 4.16.07 When, before expiry of the normal terms of five years, a Governor resigns or is appointed Governor in another State, or has his tenure terminated, the Union Government may lay a statement before both Houses of Parliament explaining the circumstances leading to the ending of the tenure. Where a Governor has been given an opportunity to show cause against the premature termination of his tenure, the Statement may also include the explanation given by him, in reply. (Para 4.8.09)
- 4.16.08 As a matter of convention, the Governor should not, on demitting his office, be eligible for any other appointment or office of profit under the Union or a State Government except for a second term as Governor or election as Vice-President or President of India. Such a convention should also require that, after quitting or laying down his office, the Governor shall not return to active partisan politics. (Para 4.9.04)
- 4.16.09 A Governor should, at the end of his tenure, irrespective of its duration, be provided reasonable post-retirement benefits for himself and for his surviving spouse. (Para 4.10.02)
- 4.16.10 (a) In choosing a Chief Minister, the Governor should be guided by the following principles, viz. :
- (i) The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the government.
 - (ii) The Governor's task is to see that a government is formed and not to try to form a government which will pursue policies which he approves.
- (b) If there is a single party having an absolute majority in the Assembly, the leader of the party should automatically be asked to become the Chief Minister.

If there is no such party, the Governor should select a Chief Minister from among the following parties or groups of parties by sounding them, in turn, in the order of preference indicated below:

- (i) An alliance of parties that was formed prior to the Elections.
- (ii) The largest single party staking a claim to form the government with the support of others, including 'independents'.
- (iii) A post-electoral coalition of parties, with all the partners in the coalition joining government.
- (iv) A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including 'independents', supporting the government from outside.

The Governor while going through the process described above should select a leader who in his (Governor's) judgement is most likely to command a majority in the Assembly.

- (c) A Chief Minister, unless he is the leader of a party which has absolute majority in the Assembly, should seek a vote of confidence in the Assembly within 30 days of taking over. This practice should be religiously adhered to with the sanctity of a rule of law.

(Paras 4.11.03 to 4.11.06)

4.16.11 The Governor should not risk determining the issue of majority support, on his own, outside the Assembly. The prudent course for him would be to cause the rival claims to be tested on the floor of the House.

(Para 4.11.07)

4.16.12 The Governor cannot dismiss his Council of Ministers so long as they continue to command a majority in the Legislative Assembly. Conversely, he is bound to dismiss them if they lose the majority but do not resign.

(Para 4.11.09)

4.16.13 (a) When the Legislative Assembly is in session, the question of majority should be tested on the floor of the House.

- (b) If during the period when the Assembly remains prorogued, the Governor receives reliable evidence that the Council of Ministers has lost 'majority', he should not, as a matter of constitutional propriety, dismiss the Council unless the Assembly has expressed on the floor of the House its want of confidence in it. He should advise the Chief Minister to summon the Assembly as early as possible so that the 'majority' may be tested.

- (c) Generally, it will be reasonable to allow the Chief Minister a period of 30 days for the summoning of the Assembly unless there is very urgent business to be transacted like passing the Budget, in which case, a shorter period may be allowed. In special circumstances, the period may go up to 60 days.

(Paras 4.11.10, 4.11.11 and 4.11.13)

4.16.14 So long as the Council of Ministers enjoys the confidence of the Legislative Assembly, the advice of the Council of Ministers in regard to summoning and proroguing a House of the Legislature and in dissolving the Legislative Assembly, if such advice is not patently unconstitutional, should be deemed as binding on the Governor.

(Para 4.11.17)

- 4.16.15
- (a) The Governor may in the exigencies of certain situations, exercise his discretion to summon the Assembly only in order to ensure that the system of responsible government in the State works in accordance with the norms envisaged in the Constitution.
 - (b) When the Chief Minister designedly fails to advise the summoning of the Assembly within six months of its last sitting, or advises its summoning for a date falling beyond this period, the Governor can summon the Assembly within the period of six months specified in Article 174(1)
 - (c) When the Chief Minister (who is not the leader of the party which has absolute majority in the Assembly), is not prepared to summon the Legislative Assembly within 30 days of the taking over [*viderecommendation* 4.16.10(c) above] or within 30 days or 60 days as the case may be, when the Governor finds that the Chief Minister no longer enjoys the confidence of the Assembly [*viderecommendation* 4.16.13 (c) above], the Governor would be within his constitutional right to summon the Assembly for holding the "Floor Test".

(Paras 4.11.19 and 4.11.20)

- 4.16.16
- If a notice of a no-confidence motion against a Ministry is pending in a House of the Legislature and the motion represents a legitimate challenge from the Opposition, but the Chief Minister advises that the House should be prorogued, the Governor should not straightaway accept the advice. He should advise the Chief Minister to postpone the prorogation and face the motion.

(Para 4.11.22)

- 4.16.17
- (a) When the advice for dissolving the Assembly is made by a Ministry which has lost or is likely to have lost majority support, the Governor should adopt the course of action as recommended in paras 4.16.12, 4.16.13 and 4.16.15 (c) above.
 - (b) 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.
 - (c) If the Assembly is to be dissolved and an election can be held early, the Governor should normally ask the outgoing Ministry to continue as a caretaker Government. However, this step would not be proper if the outgoing Ministry has been responsible for serious mal-administration or corruption.
 - (d) A convention should be adopted that a caretaker Government should not take any major policy decisions.
 - (e) If the outgoing Ministry cannot be installed as a caretaker Government for the reason indicated in (c) above or if the outgoing Ministry is not prepared to function as a caretaker Government, the Governor, without dissolving the Assembly, should recommend President's rule in the State.
 - (f) If fresh election cannot be held immediately on account of a national calamity or State-wide disturbances, it should not be proper for the Governor to install a caretaker Government for the long period that must elapse before the next election is held. He should recommend proclamation of President's rule under Article 356 without dissolving the Assembly.

- (g) If it is too early to hold fresh election, the Assembly not having run even half its normal duration of five years, the Governor should recommend President's rule under Article 356 without dissolving the Assembly.

(Paras 4.11.25 to 4.1130)

- 4.16.18 The Governor has no discretionary power in the matter of nominations to the Legislative Council or to the Legislative Assembly. If at the time of making a nomination, a Ministry has either not been formed or has resigned or lost majority in the Assembly, the Governor should await the formation of a new Ministry.

(Para 4.11.31)

- 4.16.19 Where a State University Act provides that the Governor, by virtue of this office, shall be the Chancellor of the University and confers powers and duties on him not as Governor of the State but as Chancellor, there is no obligation on the Governor, in his capacity as Chancellor, always to act on Ministerial advice under Article 163(1). However, there is an obvious advantage in the Governor consulting the Chief Minister or other Ministers concerned, but he would have to form his own individual judgement. In his capacity as Chancellor of University, the Governor may be required by the University's statute to consult a Minister mentioned in the statute on specified matters. In such cases, the Governor may be well advised to consult the Minister on other important matters, also. In either case, there is no legal obligation for him to necessarily act on any advice received by him.

(Paras 4.11.37 to 4.11.39)

- 4.16.20 The Governor, while sending *ad hoc* or fortnightly reports to the President, should normally take his Chief Minister into confidence, unless there are overriding reasons to the contrary.

(Para 4.12.06)

- 4.16.21 The discretionary power of the Governor as provided in Article 163 should be left untouched.

(Para 4.13.03)

- 4.16.22 When a Governor finds that it will be constitutionally improper for him to accept the advice of his Council of Ministers, he should make every effort to persuade his Ministers to adopt the correct course. He should exercise his discretionary power only in the last resort.

(Para 4.13.04)

- 4.16.23 Certain specific functions have been conferred (or are conferrable) on the Governors of Maharashtra and Gujarat [Article 371(2), Nagaland [First Proviso to Article 371A(1)(b), Article 371A(1)(d) and article 371A(2)(b) and (f)], Manipur [Article 371C(1)], Sikkim [Article 371F(g)] and Arunachal Pradesh [First Proviso to Article 371H(a)] to be exercised by them in their discretion. In the discharge of these functions, the Governor concerned is not bound to seek or accept the advice of his Council of Ministers. However, before taking a final decision in the exercise of his discretion, it is advisable that the Governor should, if feasible, consult his Ministers even in such matters, which relate essentially to the administration of a State.

(Para 4.14.05)

- 4.16.24 It would be neither feasible nor desirable to formulate a comprehensive set of guidelines for the exercise of the discretionary powers of the Governor. A Governor should be free

to deal with a situation according to his best judgement, keeping in view the Constitution and the law and the conventions of the Parliamentary system outlined in this Chapter as well as in Chapter V "Reservation of Bills by Governors for President's consideration" and Chapter VI "Emergency Provisions".

(Para 4.15.06)

ANNEXURE II

EXTRACTS FROM CHAPTER V OF THE REPORT OF THE COMMISSION ON CENTRE STATE RELATIONS (SARKARIA COMMISSION REPORT PART - I)

RECOMMENDATIONS

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

(Paras 5.6.06 & 5.6.13(i))

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

(Paras 5.6.09 & 5.6.13(ii))

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

- (a) to secure immunity from the operation of Articles 14 and 19 *vide* the First Proviso to Article 31A(1) and the Proviso to Article 31C;
- (b) to save a Bill on a Concurrent List subject from being invalidated on the ground of repugnancy to the provisions of a law made by Parliament or an existing law *vide* Article 254(2);
- (c) to ensure validity and effect for a State legislation imposing tax on water or electricity stored, generated, consumed, distributed or sold by an authority established under a Union law, *vide* Article 288(2);

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

(Para 5.14.05)

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

(Para 5.16.04)

- 5.19.05 (a) Every reference of a State Bill from the State should be self-contained, setting out precisely the material facts, points for consideration and the ground on which the reference has been made. The relevant provisions of the Constitution should also be indicated.
- (b) If the reference is made under Article 254(2), the provisions of the Bill which are considered repugnant to or inconsistent with the specific provisions of a Union law or an existing law, should be clearly identified.

(Para 5.15.01(i)&(ii))

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

(Para 5.15.02)

- 5.19.07 (a) As a matter of salutary convention, a Bill reserved for consideration of the President should be disposed of by the President within a period of 4 months from the date on which it is received by the Union Government.
- (b) If, however, it is considered necessary to seek clarification from the State Government or to return the Bill for consideration by the State Legislature under the Proviso to Article 201, this should be done within two months of the date on which the original reference was received by the Union Government.
- (c) Any communication for seeking clarification should be self-contained. Seeking clarification piece-meal should be avoided.
- (d) On receipt of the clarification or the reconsidered Bill from the State under the Proviso to Article 201, the matter should be disposed of by the President within 4 months of the date of receipt of the clarification or the back reference on the reconsidered Bill, as the case may be, from the State Government.
- (e) It is not necessary to incorporate these or any other time-limits in the Constitution.

(Para 5.16.03 & 5.7.09)

- 5.19.08 (a) As a matter of convention, the President should not withhold assent only on the consideration of policy differences on matters relating, in pith and substance, to the State List, except on grounds of patent unconstitutionality such as those indicated in the recommendation in paragraph 5.19.01 above.
- (b) President's assent should not ordinarily be withheld on the ground that the Union is contemplating a comprehensive law in future on the same subject.

(Para 5.10.06)

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

(Para 5.8.06 & 5.8.07)

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

(Para 5.11.02)

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

(Para 5.17.01)

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

(Para 5.18.12)

- 5.19.13 In due regard to the requirement of clause (2) of Article 213, whenever the provisions of an Ordinance have to be continued beyond the period for which it can remain in force, the State Government should ensure, by scheduling suitably the legislative business of the State Legislature, enactment of a law containing those provisions in the next ensuing session. The occasions should be extremely rare when a State Government finds that it is compelled to 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 any case, the question of re-promulgating an Ordinance for a second time should never arise.

(Para 5.18.14)

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

(Para 5.18.15)

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

(Para 5.18.16)

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

(Para 5.18.17)

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

(Para 5.18.23)

**QUESTIONNAIRE
ON
INSTITUTION OF GOVERNOR
UNDER THE CONSTITUTION**

1. (a) Is the present method of appointing Governors working well?

YES

NO

(b) Does Article 155 of the Constitution need to be amended, providing for a collegium for selection of governors comprising of the Vice President, Prime Minister, Union Home Minister, Speaker of the Lok Sabha and Chief Minister of the concerned State?

YES

NO

(c) Is there any other composition which you would suggest?

YES

NO

Suggestions

2. Should the term of office of the Governor should be fixed (five years) and not subject to the pleasure of the President?

YES

NO

Suggestions

3. Should there be a procedure for impeachment of the Governor, on the same lines as that of the President, with suitable alterations to take care of the absence of the Upper House in most States?

YES

NO

4. Do you endorse the suggested criterion for appointment as Governor, i.e. he should be an eminent person, from outside the State, detached from active politics for some time prior to his appointment, particularly local politics?

YES

NO

Suggestions

5. Should the practice of sending *ad hoc* or fortnightly reports from the Governor be stopped, except when the Governor in conformity with his oath, feels obliged to do so under Article 356 i.e. when he is honestly satisfied that a situation has arisen where it is not possible to carry on the government of a State in accordance with the provisions of the Constitution?

YES

NO

6. Do you agree with the suggestion that a time limit of four months for the Governor to decide upon a Bill passed by the State Legislature and presented to him for his assent has to be incorporated in the Constitution?

YES

NO

7. In the event the Governor refers a Bill to the President, should an outer limit of three months be prescribed for the President to do one of the three things that is open to him viz., to assent to the Bill, or direct the Governor to return the same to the Legislature or seek the opinion of the Supreme Court under Article 143 of the Constitution, on the constitutionality of the proposed legislation?

YES

NO

8. Should the 'Money Bills' be specifically exempt from the afore-mentioned reference procedure?

YES

NO

9. Should the entire provision providing for reservation of a Bill by the Governor for the consideration of the President be expressly excluded, the same being permissible only in instances when the Constitution specifically mandates the same?

YES

NO

10. Do you agree with the suggestion that the provision of the Constitution enabling the Governor to withhold assent be deleted?

YES

NO

11. Do you like to make any other suggestions relating to the institution of Governor under the Constitution?

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than 200
words