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## **TO RETAIN OR NOT TO RETAIN: AN ANALYSIS OF THE CONSTITUTIONAL PROVISIONS AND IMPLICATIONS OF THE GOVERNOR'S POWER TO RESERVE BILLS IN INDIA**

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### **ABSTRACT**

By virtue of Article 200, the Governor has the discretion to withhold assent to the Bill passed by the legislature, while providing reasons for the same. The Governor must prompt the Legislature to reconsider the same. Reserving the Bill is still at the discretion of the Governor and leaves a room for exploitation. The paper analysis the constitutional provisions to elucidate the checks provided within the constitution on the power of the Governor to reserve bills and judicial review regarding the same. This paper contends that the power of the governor to reserve bills must be exercised in his discretion as construing it otherwise would defeat the intent behind the very provision.

Governor has limited functions in both the Executive and Legislative spheres of the State. Article 163 (1) envisages as a general rule that the functions of the Governor be exercised on the aid and advise of the council of ministers with the Chief Minister at the head and in his discretion as required by the Constitution. The Governor must act in his discretion to discharge his function under Article 200 , including reservation of Bills rather than on the aid and advice of council of ministers with the Chief Minister at the head or the Union Executive. Doing otherwise is a fraud to the constitutional scheme and threatens the federal structure. This paper suggests that a time limit be prescribed for reaching a decision on a pending bill. Moreover, the Governor may seek clarifications form the State legislature regarding the doubts , based on which he considers reference to the President. Thereon , the reference made to the President must be specific, and same must be communicated to the state legislature. The suggestion is made in light of the recent petitions and concerns of the state legislatures on the Governors taking unreasonable time to decide on pending bills for assent.

## RESEARCH QUESTIONS:

1. Whether the Governor has complete discretion to retain bills for the consideration of President?
2. Whether Governor's power to retain bills is subject to judicial review ? If yes, What is the scope of judicial review under Article 200 ?
3. Whether the Governor's Power to Reserve Bills infringes the right of the Legislature in law making?

## INTRODUCTION:

Governor being the executive head of the state <sup>1</sup>in the parliamentary form of government in India, The Governor of the state is appointed by the President “ under his hand and seal”<sup>2</sup>, the executive head of the union, acting on the aid and advice of the council of ministers. Appointment of the Chief minister and the council of ministers is one of the functions of the Governor. Governor has a “dual responsibility “to the Union and the State.<sup>3</sup> It is well settled now that the President is bound by the aid and advice rendered to him by his council of ministers<sup>4</sup>. The same is not the case with the Governor's office, as Article 164 envisages functions of the governor wherein he may discharge the same in his discretion. The constitution is silent on certain provisions where the discretion shall be exercised, and the same must be determined by the intent behind the provision. Whether the Governor's power to reserve bills is a function to be discharged in his discretion or otherwise? – is the central question the paper concerns itself and the implications, especially the scope of judicial review of the Governor's functions under Article 200.

## CHAPTER I: GOVERNOR'S POWER TO RESERVE BILLS

The Governor has three courses of action that he can take under Article 200 - assent , withhold assent or reserve for the consideration of the president of the bill passed by the House or Houses of the State legislature and presented to him. No time limit has been contemplated under Article

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<sup>1</sup> INDIA CONST. art 153.

<sup>2</sup> INDIA CONST. art 155.

<sup>3</sup> Rameshwar Prasad & Ors vs Union Of India & Anr (2006) 2 SCC 1.

<sup>4</sup> Samsher Singh vs. the State of Punjab and Anr. (1974) 2 SCC 831.

200 within which the Governor shall reserve the bill for the consideration of the President. The Literal interpretation of the text of Article 200 would suggest that the word “as soon as possible” in the first proviso is only applicable for reconsideration of bills <sup>5</sup>.

Reconsideration of the bill happens independently from the withholding assent to the bill. Any bill except of Money bills can be returned by the Governor to the House or Houses for reconsideration. This is because, the money bills can be introduced in the state legislature only on the approval from the Governor. Thus, he cannot withhold assent to a bill approved by him earlier or send it back for reconsideration to the House or Houses. Once the bill is re-passed by the State Legislative, the Bill assumes the footing of a money bill and it cannot be further sent for reconsideration, and the Governor shall not withhold assent to the Bill even if the Bill is passed again without making the changes suggested by the Governor in his message.

The second proviso under Article 200, contemplates one of the conditions on the fulfilment of which the Governor must reserve the bill. If in the Governor’s opinion, the bill on becoming an Act would “derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.” The Draft Article 176, which later became Article 201, was adopted by the Constituent Assembly on August 1, 1949 without much debate.

In *Visweshwar Rao v The State of Madhya Pradesh* (1952)<sup>6</sup>, while deciding on the contentions raised by the Petitioner of the terms “law” and “bill” w.r.t the now repealed Article 31, the court held that Article 200 doesn’t contemplate a second reservation by the Governor. In *Rajendra Diwan v Pradeep Kumar Ranibala* (2019)<sup>7</sup>, S.C held that the legislative competence of the state legislature is not altered on the basis of Presidential Assent and referred to the *L Chandrakumar case*,<sup>8</sup> wherein it held that the powers of the High Court under Article 226/227 is an inviolable basic feature of the Constitution. On this basis, Section 13(3) of the Rent Control Act was declared unconstitutional. In *Kailash Pati Singh vs The State of Bihar v. Sir Kameshwar Singh*<sup>9</sup>, the Court held wherein the reservation of the bill by the Governor is made obligatory, the Governor is “prohibited from giving his assent”.

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<sup>5</sup> Purushothaman Nambudiri vs The State Of Kerala 1962 AIR 694 .

<sup>6</sup> 1975 AIR 1083.

<sup>7</sup> AIR ONLINE 2019 SC 1711.

<sup>8</sup> L. Chandra Kumar vs Union Of India And Others 1997 (3) SCC 261

<sup>9</sup> AIR 1952 SC 252.

In *B.K Pavitra v Union of India* (2019)<sup>10</sup>, the S.C, while considering the validity of Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Bill 2017 reserved by the Karnataka Governor for the Consideration of President, it was contended that the Governor's reference didn't raise any specific issues with regard to the bill but only stated that a constitutional interpretation was required, and that the central government cannot create a reference which the state government didn't. Moreover, the state government also gave its opinion that the current bill doesn't warrant such reference. The question before the court was whether the reference was unconstitutional? Also, whether the assent of the a Governor is required for bring to force the bill? The Court held that Governor's assent is not contemplated under Article 201, when the Presidential assent is given. Further, "The validity of the assent by the President is non-justiciable."

Article 254 deals with repugnancy of state laws to union laws, and Article 254 (2) reads as :

*"(2)Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State."*

Thus, reservation by the Governor under Article 200 is permissible when there is inconsistency between union and state laws. The second proviso to Article 200 only mandates the Governor to reserve the bill in one circumstance. The proviso does not limit the larger substantive provision of Article 200, which clearly doesn't provide for all the circumstances in which the governor may reserve the bill. The circumstances in which the governor shall reserve is left to the discretion of the Governor and the limit to the discretion of the Governor is the constitution itself as per Article 163 (1).

*"The framers carefully eschewed defining the circumstances in which the Governor may reserve a Bill for the consideration of the President. By its very nature the conferment of the power cannot be confined to specific categories. Exigencies may arise in the working of the Constitution which justify a recourse to the power of reserving a Bill for the consideration of*

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<sup>10</sup> AIR ONLINE 2019 SC 275.

*the President. They cannot be foreseen with the vision of a soothsayer. The power having been conferred upon a constitutional functionary, it is conditioned by the expectation that it would be exercised upon careful reflection and for resolving legitimate concerns in regard to the validity of the legislation.”*<sup>11</sup>

It's clear that reservation of bills can be made only in exceptional circumstances and not otherwise. This is the reason behind conferring the Governor with discretionary power under Article 200. While making a reference under Article 254(2), the Governor must record reasons for the same as to why the assent is sought. In *Gram Panchayat of Village Jamalpur v Malwinder Singh*<sup>12</sup>, the assent was sought for a particular purpose which didn't point to the repugnancy between state enacted law and the law made by the parliament. Thus, the state law was invalidated on the ground that the assent sought was for a different reason.

The paper contends that reference made to the President by the Governor must be specific in all cases i.e not just w.r.t repugnancy between union and state laws but also in any other circumstance where the Governor reserves. The same must be communicated to the State legislature so that the Governor is made to act on the bill reasonably without pending assent and later reserving it for the consideration of the President.

### **Governor's Power under Article 200 and President's Power under Article 201 : A comparison**

Governor's Power under Article 200 corresponds to that of President Power under Article 111 as regards the assent to bills passed by State Legislature and the Parliament, respectively. President's Power on a re-passed bill under Article 201 is beyond that of the Governor's under 200. As the president can withhold assent for a re-passed bill, which is not available to the Governor under Article 200. Moreover, reserving bills for the consideration of the President, who exercises his power on the aid and advise of the council of ministers<sup>13</sup>, shows the control of Union Government over the State Legislatures.

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<sup>11</sup> AIR ONLINE 2019 SC 275.

<sup>12</sup> 1985 (3) SCC 661.

<sup>13</sup> INDIA CONST. art 74.

## CHAPTER II : DISCRETIONARY POWER OF GOVERNOR REGARDING RESERVATION OF BILLS

The question for consideration under this chapter is whether the Governor must exercise his power under Article 200 on the aid and advice of the council of ministers and the chief minister or on his discretion as required by the Constitution<sup>14</sup>? Article 200 requires the Governor to discharge his function of reserving the bill in his discretion and not on the aid and advice of the Council of Ministers. The intent of the Drafters of our Constitution behind the provision for reserving the bill is to ensure that the state's enactment doesn't not violate any constitutional provisions, or derogate from the powers of the high courts guaranteed under the constitution as expressly mentioned in proviso two of Article 200, and in case of repugnancy between laws made by the parliament and the bill passed by the state legislature<sup>15</sup>. The utility of the provision will be defeated if exercised on the aid and advise of the council of ministers and the chief minister as they have an interest in seeking the assent of the Governor for a bill which has been passed by majority in the legislature<sup>16</sup>.

In *Nabam Rebia v Deputy Speaker*<sup>17</sup>, S.C held as follows:

*“Additionally, a Governor can exercise his functions in his own discretion, in situations where an interpretation of the concerned constitutional provision, could not be construed otherwise.”*

Thus, the Governor in exercise of his power to reserve bills, must act in his discretion. At the same time the discretionary power of the Governor is not absolute and is subject only to exceptional circumstances wherein the state bill has the potential of being ultra vires to the constitution.

The precursor of the draft Article 176, and the present Article 200 can be traced to Section 75 of the Government of India Act, 1935.

*“A Bill which has been passed by the Provincial Legislative Assembly or, in the case of a*

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<sup>14</sup> INDIA CONST. art 163.

<sup>15</sup> INDIA CONST. art 254.

<sup>16</sup> Rajni Goyal, *THE GOVERNOR: CONSTITUTIONAL POSITION AND POLITICAL REALITY*, 53 IJPS 505, 515-517 (1992).

<sup>17</sup> 2016 (11) SCC 673.

*Province having Legislative Council, has been passed by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor in his discretion shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General.”*<sup>18</sup>

Though the word “in his discretion” does not find its presence in Article 200, the same cannot be said to not be there for the Governor as it can be traced to Article 163 (1) which states that generally the functions of the governor shall be exercised on the aid and advice of the Council of Ministers with the Chief Minister as the head, with the exceptions of functions wherein he is expressly or impliedly by the Constitution is required to exercise his functions in his discretion. The discretionary power of the governor to reserve a bill is implied under Article 200.

Justice M.M. Punchhi Commission report<sup>19</sup>, in paragraphs 4.2.09 to 4.2.15 puts forth that the Governor cannot act in his personal capacity when the function he discharges concerns the executive power of the State. The power to reserve bills falls under Chapter III of Part VI, which deals with “State Legislature”, in support of the argument why the governor must act in his discretion while reserving bills rather than on the aid and advice of the council of ministers under Article 163 forming part of Chapter II – Executive. In this, the paper disagrees with the line of reasoning of both the Sarkaria Commission Report and the Punchhi Commission Report, wherein only when the constitutional provision expressly provides that the Governor shall act in his discretion that his discretion be constitutionally justified or that terms such as “he thinks fit” are to be construed to mean the council of ministers thinks fit.

The Governor being an appointee of the Union, he has the duty to ensure that the integrity of the country is maintained during critical situations. At the same time, the legislative powers of the state which is paramount to the federal structure of the country must not be compromised. The abuse of discretionary power entrusted to the governor for reserving bills after sitting on the bill for years, must be checked. This has arisen due to the politicization of the nominal head post. For this, prescribing a time limit for reservation of bills under Article 200 through a constitutional amendment could be considered. Moreover, the Governor must

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<sup>18</sup> The Government of India Act, 1935.

<sup>19</sup> <https://interstatecouncil.gov.in/report-of-the-commission-on-centre-state-relations/>

act in his personal capacity or independent discretion as opposed to the aid and advice from the Union Executive.

### **CHAPTER III: SCOPE OF JUDICIAL REVIEW ON RESERVATION OF BILLS BY THE GOVERNOR:**

While deciding on the scope of Governor's discretionary power under Article 163 (2) in *Nabam Rebia v Deputy Speaker* (2016)<sup>20</sup>, the apex court examined the powers of the Governor w.r.t the Legislative affairs of the State. Earlier, Guwahati H. C ruled that the Governor's discretionary power under Article 163 and the Legislative proceedings under Article 212 cannot be challenged in a court of law.

On appeal the Supreme Court, reversed the decision of the H.C and held that the discretionary power of the Governor under Article 163 is not absolute or all-pervading over the state legislature, and traced the discretionary power to Article 163(1) rather than Article 163 (2). Article 161 dealing with the Power of the Governor to grant pardons, etc - the same belonging to the executive realm, is exercised on the aid and advice of the Chief Minister and his Council of Ministers. The Governor does not have any significant role in the executive sphere.

As regards the position of the Governor in the legislative sphere, the Court held that the only legislative function of the Governor emanates from Article 200 and its ancillary provision found in Article 201 as far as the legislative process is concerned. Some legislative power vested in the Governor under Article 213 - "Power of governor to promulgate ordinances during recess of Legislature". The latter is to be exercised on the aid and advice of the council of ministers. The court also examined Article 174, and 208 regarding the Governor's role under it and came to a conclusion that the Governor doesn't have any significant functions and duties in the legislative sphere of the state through the harmonious construction of various provisions of the Constitution.

The court referred to the Constituent Assembly Debates, wherein Dr. B. R. Ambedkar response to the queries raised on the discretionary power of the Governor, the same can be traced to Article 163(1) which first "provides for the principle of ministerial responsibility". Moreover,

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<sup>20</sup> 2016 (11) SCC 673.



the discretionary power vested in the Governor is not opposed to the powers of the elected government. The discretionary power is limited and subject to the requirement of the Constitution. Moreover, in the *Samsher Singh* case, which reversed the decision of the Supreme Court in *Sardari Lal*, it was held that the satisfaction of the Governor or the President under the Constitution means “the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government”.

Accordingly, judicial review of the act of reserving the bills in exercise of Powers conferred under Article 200 cannot be permissible. The constitutionality of the Governor’s act under Article 200 cannot be challenged in a court of law<sup>21</sup>. The act of Governor - to retain or not to retain for the consideration of the President is non-justiciable in a court of law<sup>22</sup>.

In *B.K Pavitra v Union of India* (2019)<sup>23</sup>

*“By its very nature, it would not be possible for this Court to reflect upon the situations in which the power under Article 200 can be exercised. This was noticed in the judgment of this Court in Hoechst. Excluding it from judicial scrutiny, the Court held:*

*—86...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.”*

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<sup>21</sup> Kameshwar vs State of Bihar, A. I. R. 1951 .

<sup>22</sup> Hoechst Pharmaceuticals Ltd. And ... vs State Of Bihar And Others (1983 ) 4 SCC 224.

<sup>23</sup> AIRONLINE 2019 SC 275.

## CONCLUSION AND SUGGESTIONS

In light of the excessive political or union interference in the exercise of the discretionary power vested with the Governor under Article 200, w.r.t the reservation of bill for the consideration of the President, the paper strongly suggests prescribing a time limit of 6 months under Article 200, within which the Governor must declare that he either assents, withholds assent, or has reserved it for the consideration of the President. (in line with the recommendation of the Punchhi Commission (2010) as well). If the Governor takes longer than the prescribed period, then he must record reasons for the same and convey such a message to the State Legislature. In this regard, the author contends that the observation in *Purushothaman Nambudiri vs The State Of Kerala*<sup>24</sup>, with regard to Constitution makers not providing a time frame within which the Governor must give his decision, was considered from the aspect of bill facing the risk of lapse on the dissolution of the assembly. In contemporary India, this is not the concern of the state legislatures, as it's well-accepted position that the legislature is an institution envisaged by the Constitution. The concern is with regard to the politicization of the governor's office and the subverting of legislative powers of the state legislature by prolonging the decision to present the bill to the governor. The Constitution clearly does not envisage the governor to run a parallel government in the state.

Moreover, the Governor must seek clarifications from the State Legislature regarding the bill at hand that causes genuine apprehension in the mind of the Governor, if such bill were to become a law it would violate any constitutional provision. Only after seeking clarification from the State Legislature, and even then the Governor's doubt persists regarding the constitutionality of the bill, may he reserve it for the consideration of the President. It's the governor's duty to reserve the bill under these circumstances and such duty must be dispensed by the Governor "as soon as possible", seek clarifications from the State Legislature and reserve the bill if the clarification sought doesn't remove the doubt of the governor regarding its constitutionality. In this regard, the governor must act as a representative of the people of the State as a whole rather than as the representative of the Union. The state legislatures are elected representatives of the people and reflect their popular will. Thus, the Governor must carefully consider why a particular bill must be reserved for consideration of the president. The reference made must be specific, and recorded and communicated to the State legislature.

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<sup>24</sup> *Purushothaman Nambudiri vs The State Of Kerala* 1962 AIR 694.

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