ARTICLE 356 UNDER THE CONSTITUTION OF INDIA CAN SUSTAIN AFTER 75 YEARS OF INDEPENDENCE OF THE LARGEST DEMOCRACY OR A FLAW IN CENTER STATES RELATIONS: A CRITIQUE

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"Federalism is the best curb on democracy. its assigns limited power to the central government. there by all power is limited. It excludes absolute power of the majority."

- James Madison

ABSTRACT

At the time of framing of constitution while the country was celebrating the attainment of independence and was looking towards liberal democratic regime,there were also prevailing quite abnormal situation like law and order problems due to large scale migration of population from and towards Pakistan. Further,there were apprehension,of integrating the princely states of india. Framers of the Constitution,therefore, gave an opinion that "in hour of grave emergency when the security or stability of the country or any part thereof was thtreatened, the central government should not not be a mere helpless observer but armed with necessary authority to deal with it". Article 356 has been one of the most contentious provisions whenever a debate on Emergency provisions under the Indian Constitution is initiated. It is an argument provoking provision of the Constitution because its misuse and abuse directly acts in consonance with the murder of the democratic fabric of the Indian polity. The paper has been arranged in such a manner to assist the reader to read and retain the information not just at the surface level, but to inculcate a deeper conceptual knowledge of Article 356 of the Indian Constitution, which is one of the cardinal legal provisions under the Constitution related to not only the subject of 'Emergency' but also Union and State relations in the federal structure of the Indian polity. The paper briefly focuses on the concept of emergency provisions as they exist in the Indian political and legal system, and majorly focuses on the constitutional dynamics surrounding Article 356 – which is infamously known as the *"President's Rule"* or *"State Emergency".*A Curious Question must aries in

each mind of us even after 75 years of independence we really need Article 356 or its utter misuse creates a tussle between center states relations.

Keywords: Article 356 – President's Rule –Constituent Assembly debates- S.R. Bommai Case Law – Sarkaria Commission Report – a dead letter of law or a misused provision.

1. INTRODUCTION

Article 356 of the Indian Constitution did not come into the minds of framers in one stroke though the need to have some kind of emergency provisions was felt right from the beginning then the gigantic task of framing a constitution for India was started by the Constituent Assembly." The task itself was very complicated and controversial firstly due to the limitations imposed by the Cabinet Mission Plan which the Congress had accepted reluctantly as there seemed to be no other alternative and which provided for a very weak centre, and secondly due to the uncertainty regarding the future of India as an united country as the Muslim League had boycotted the Constituent Assembly and was becoming increasingly assertive in its demand on the partition of the country despite the persistent efforts, by the Congress, to seek its participation in the constitution making. It was only after the acceptance of the Mountbatten Plan on June 3 1947, which declared the partition of the country that the Constituent Assembly could take up its task confidently. The Partition not only eliminated all the limitations imposed upon the Constituent Assembly by the Cabinet Mission Plan, it also gave a resounding blow to the protagonists of the provincial autonomy. Very swiftly, a process set in, in which the Constituent Assembly got involved in making a Constitution, which was to have a very strong Centre. Article 356 was the result of this general trend, which had suddenly made the centripetal forces very strong. It may be noted that the exercise of power by the President under article 356 hinges on his 'satisfaction' regarding a particular situation, namely, situation in which "the Government of the State cannot be carried on in accordance with the provisions of this Constitution". The language used here to indicate the situation in which the President is entitled to exercise the power is similar to the language in which the duty of the Union is stated in article 355.

Thus, a close reading of the provisions of articles 355 and 356 would clearly show that they constitute a single code; and, while the former stipulates the duty of the Union towards states, the latter empowers the President to fulfil that duty within the procedural framework specified

therein. Therefore, the contents and limitations of the power of the President mentioned in article 356 must be assessed in the light of the provisions of article 355 and for all practical purposes they have to be read together. If they are so read, it is clear that the power of the President under article 356 is confined to the performance of the duty of restoring normal situation in which constitutional machinery in a state can function in accordance with the Constitution by protecting the state against such 'external aggression' and 'internal disturbance'.

The language of Article 356 is vague and ambiguous. The Constitution is silent about the circumstances that clearly indicate the 'failure of constitutional machinery of the State.' Therefore, the Union Government or Governors have interpreted this phrase to fulfil their vested interests. The Union Government uses or misuses this power through the Governor of the State concerned. Usually, Governors act as agents of the Union Government and not as the impartial constitutional heads of the States. The Constitution does not provide any safeguard against such misuse.

It creates serious problems in Centre-State relations and Article 356 has become the most controversial subject in our Constitution. The National Commission to Review the Working of the Constitution (Venkatachaliah Commission) (2002) pointed out that "Article 356 is one of the most talked about and a subject of controversy allegedly on grounds of having been frequently misused and abused."[1] Article 356 of the Indian Constitution has acquired quite some notoriety due to its alleged misuse. The essence of the Article is that upon the breach of a certain defined state of affairs, as ascertained and reported by the Governor of the State concerned (or otherwise), the President concludes that the 'constitutional machinery' in the State has failed.

2. FEDERALISM IN INDIA

Federalism in stressed the importance of describing India as a 'Union of States' rather than a 'Federation of States.' He said: '. . . what is important is that the use of the word “Union” is deliberate . . . Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source.[2]

[1] Government of India (2002), Report of the National Commission to Review the Working of the Constitution. Ministry of Law: New Delhi, vol. I, p.247.

[2] National Commission to Review the Working of the Constitution, Report, I, 8.1.2 (2002), at http://lawmin.nic.in/ncrwc/finalreport/volume1.htm (last visited JUNE 14, 2022).

This is in essence how one would describe Center-State relations in India; excepting provisions for certain emergency situations in the Constitution of India, where the Union would exercise absolute control within the State. James Madison dealt extensively with the issues related with the relinquishing of sovereign powers by States to a Central (or 'federal') authority in the *Federalist Papers*, specifically Federalist No. 45. [3]

He believes that, for the common good of all the members of a federal system, it is necessary for the individual States to sacrifice some of their powers to the Union.[4] He contends that a study of similar systems in ancient times, like the Achaean League or the Lycian Confederacy, would reveal that the danger of usurpation of authority by the Federal power would be smaller than the danger of degeneration of the federation into smaller factions that would not be able to defend themselves against external aggression.

Extraordinary situations are not novel to the Indian political scene. Therefore extraordinary powers to deal with these situations become necessary. The power contained in Article 356 is both extraordinary and arbitrary, but it is an uncanny trait of extraordinary power that it tends to corrupt the wielder. A close scrutiny of the history of its application would reveal that Article 356 is no exception. But before we turn to that, a systematic analysis of the constitutional development of this controversial piece of legislation is in order

India is at once similar and distinct from other federations like that of America; distinct in that it is not a group of independent States coming together to form a federation by conceding a portion of their rights of government, but a distributed entity that derives its power from a single source - the Union. Sovereignty and the powers of governance are distributed and shared by several entities and organs within the Indian constitutional system.[5] Dr. Babasaheb Ambedkar, who chaired the Drafting Committee of the Constituent Assembly,

3. EVOLUTION & HISTORICAL BACKGROUND

Emergency rule or crisis government as it is generally called has been in existence for almost as long as organized government itself.[6]During the medieval age, emergency powers were

[3] James Madison, The Alleged Danger from the Powers of the Union to the State Governments Considered, INDEPENDENT JOURNAL, Jan. 1788 at http://memory.loc.gov/const/fed/fed_45.html (last visited JUNE 20,2022)

[4] Id.

[5] National Commission to Review the Working of the Constitution, A Consultation Paper on Article 356 of the Constitution, II, 2.1 (2002), at http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm (last visited JUNE. 22, 2022)

6 Venkat Iyer; States of Emergency : The Indian Experience, (New Delhi : Butterworths India, 2000)

handed down by the ruling princes to the commissioners appointed under royal prerogative, who exercised specific powers on the basis of special instructions.

The role of Dr. B. R. Ambedkar

A drafting committee was set up by the constituent assembly on August 29, 1947 under the chairmanship of Dr. B. R. Ambedkar, it was to prepare Constitution of India. when it was suggested that the similar power to be confer of emergency as held by the Governor General on Government of India Act, 1935, upon the president, there was an oppose to the idea then Dr. Ambedkar pacified them by Stating[7] : ***'In fact I share the sentiment expressed by my Hon'ble friend Mr. Gupta yesterday that the proper thing we ought to expect is that such articles will never be called into operation and they would remain a dead letter. If at all they are brought into operation, I hope the president who is endowed with those powers, will take proper precautions before actually suspending the administration of the provinces. He added : ' I hope the first thing he will do would be to issue a clear warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the constitution."***[8] As it was clearly stated by Dr. Ambedkar that the application of the article was the last resort to be applied and used in rarest of the rare events, as a good constitution is one which would provide solution to all possible exigencies. Therefore this article is a valve in case of disruption of political machinery in the state.

By virtue of this earnest advice given by the prime architect of the Indian Constitution, we can safely conclude that this is the very last resort to be used only in the rarest of rare events. A good Constitution must provide for all conceivable exigencies. Therefore this Article is like a safety valve to counter disruption of political machinery in a State.

4. THE SARKARIA COMMISSION REPORT, 1987

1. BACKGROUND:-

In spite of the precautions laid down in Article 356, the Article was invoked on several occasions by the Center due to ambiguities in its wording. It was only in 1987 when the Sarkaria Commission submitted its report that part of the obscurity surrounding Article 356 was cleared.

[7] First Day in the Constituent Assembly, at http://parliamentofindia.nic.in/debates/facts.htm (last visited JUNE. 24, 2022)
[8] National Commission to Review the Working of the Constitution, supra note 2, at 2.2.

The Commission, headed by Justice R.S. Sarkaria, was appointed in 1983 and spent four years researching reforms to improve Center-State relations.

2. RARE USE OF ARTICLE 356:-

The Sarkaria Commission recommended extremely rare use of Article 356. The Commission observed that, although the passage, '. . . the government of the State cannot be carried on in accordance with the provisions of this Constitution . . .' is vague, each and every breach and infraction of constitutional provisions, irrespective of their significance, extent, and effect, cannot be treated as constituting a failure of the constitutional machinery. According to the Commission, Article 356 provides remedies for a situation in which there has been an actual breakdown of the constitutional machinery in a State. Any abuse or misuse of this drastic power would damage the democratic fabric of the Constitution. The report discourages a literal construction of Article 356(1).[9]

The Commission, after reviewing suggestions placed before it by several parties, individuals and organizations, decided that Article 356 should be used sparingly, as a last measure, when all available alternatives had failed to prevent or rectify a breakdown of constitutional machinery in a State. Before taking recourse to the provisions of Article 356, all attempts should be made to resolve the crisis at State level.[10]

3. AVOIDING DISASTROUS CONSEQUENCES:-

According to the Commission's report, these alternatives may be dispensed with only in cases of extreme emergency, where failure on the part of the Union to take immediate action under Article 356 would lead to disastrous consequences. The report further recommended that a warning be issued to the errant State, in specific terms that it is not carrying on the government of the State in accordance with the Constitution. Before taking action under Article 356, any explanation received from the State should be taken into account. However, this may not be possible in a situation in which not taking immediate action would lead to disastrous consequences.[11]

4. THE GOVERNOR'S OBLIGATION TO EXPLORE ALTERNATIVES:-

[9] THE SARKARIA COMMISSION REPORT, 6.3.23 (1987).
[10] Id at 6.8.01.
[11] Id at 6.8.02.

In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without delay, the report recommends that the Governor request the outgoing Ministry to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and agrees to continue.[12] The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate.[13]During the interim period, the caretaker government should merely carry on the day-to-day government and should desist from taking any major policy decision.[14]

Every Proclamation of Emergency is to be laid before each House of Parliament at the earliest, in any case before the expiry of the two-month period stated in Article 356(3).[15] The State Legislative Assembly should not be dissolved either by the Governor or the President before a Proclamation issued under Article 356(1) has been laid before Parliament and the latter has had an opportunity to consider it. The Commission's report recommends amending Article 356 suitably to ensure this.The report also recommends using safeguards that would enable the Parliament to review continuance in force of a Proclamation.[16]

5. S.R. BOMMAI VS. *UNION OF INDIA* - REDEFINING THE INTERPRETATION OF ARTICLE 356

S. R. Bommai v. Union of India was a landmark in the history of the Indian Constitution. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India, 'After the Supreme Court's judgment in the *S. R. Bommai* case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.'[17]

[12] Id at 6.8.04.
[13] Id at 6.8.04.
[14] Id at 6.8.04.
[15] Id at 6.8.08.
[16] Id at 6.8.08.
[17] Soli Sorabjee, Constitutional Morality Violated in Gujarat, INDIAN EXPRESS, PUNE, INDIA, Sept. 21, 1996.

The views expressed by the various judges of the Supreme Court in this case concur mostly with the recommendations of the Sarkaria Commission and hence need not be set out *in extenso.* However, the summary of the conclusions of the illustrious judges deciding the case, given in paragraph 434 of the lengthy judgment deserves mention:-

(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report(s) of the Governor - is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the Proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

(4) The Proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the Government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State Government in office. There cannot be two Governments in one sphere.

(5) (a) Clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two-month period. In such

a case, Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets reactivated. Since the Proclamation lapses — and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the Government/Legislative Assembly or other competent authority.

(b) However, if the Proclamation is approved by both the Houses within two months, the Government (which was dismissed) does not revive on the expiry of period of the proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of Proclamation or on its revocation.

(6). Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields. It may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section123.

(7). The Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) [which was introduced by the 38th (Amendment) Act] by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.
(8). If the Court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have

been dissolved or kept under suspension. In such a case, the Court has the power to declare that acts done, orders passed and laws made during the period the Proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.[18]

6.CONCLUSION

"Power tends to corrupt and absolute power corrupts absolutely". –Lord Aldon.

The invocation of Article 356 and usurpation of the state governance by the central government present a great challenge to country's federal system and its functioning. It subverts the centre-state relationships and also undermines the democracy. Until 1990s the institutional safeguard set in place to check the arbitrary use of power by the state if the emergency provisions have failed. The ascent of regional parties and their presence in the Parliament and central cabinet however, imposed certain restraints on the central government. It can be seen that the rise in the regional parties has facilitated in the revitalization of the institutional safeguards put forth by the members of the Constituent Assembly members, curbing the central government to take over the state governance.

It is evident that there is a lack of effective safeguards against the abuse of Article 356 of the Indian Constitution. The safeguard of 'parliamentary approval' - outlined in Article 356(3) - of a Proclamation under Article 356(1) could be biased because the Party that is in power at the Center generally dominates Parliament by a majority vote. Furthermore, even a vote in Parliament declaring a particular imposition (or failure to impose) of President's Rule to be wrongful cannot undo the damage already done.

However, the repeal of Article 356 is not advisable because the Indian polity is rife with crises and there has to be some contingency against a constitutional deadlock in a State. The NCRWC also advised against the repeal of Article 356, stating that this would create an imbalance in Union-State relations in upholding constitutional governance throughout India and that in many more instances than not the use of Article 356 was inevitable.[19]Another option is to introduce further checks on the exercise of power under Article 356, by amendment. Even this

[18] S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297, 434.
[19] National Commission to Review the Working of the Constitution, *supra* note 3, *at* 8.18.

is not advisable because it defeats the very purpose of the Article of dealing expeditiously with emergencies of constitutional failure in a State.

Therefore, the most practical course left open may be to let history take its course. Eventually, the public opinion in India, we fervently hope, will awaken to the fact that Article 356 may veritably have become a noose that is slowly tightening around the neck of democracy in India, suffocating the right of the people under the Constitution. In the meantime, to nurture budding public opinion we do have a resource not to be underestimated, which is the power of judicial review of the Supreme Court, which has on more than one occasion shown that it is a power to be reckoned with. So we will have to suffice for now with occasional outcries against the Union Executive unsheathing or failing to unsheathe, at its sweet pleasure that double-edged sword called Article 356.

On ground of above observations it is evident that Article 356 has been deliberately incorporated to provide a platform to the amphibian central government to change its federal plane into unitary to avoid the political and social contingencies in a state, where its constitutional machinery can't be run according to the mandate of the constitution. Every power is purposive; it depends upon the nature of its application which brings it into repute and disrepute. Despite of its wide utility, Article 356, the dead letter of Dr, Abedkar has become the death letter to the popularly elected governments at states due to its indiscriminate and politically motivated application by union government. A careful observation of constitutional provisions in the light of judicial decisions makes it clear that central government's power under Article 356 is a canalized power bound by the constitutional, judicial and conventional norms and has not been given the blanket immunity.

Being extra-ordinary power it is to be exercised sparingly with great caution as a weapon of last resort to dislodge the elected government in a state following breakdown of constitutional machinery therein when all the possible avenues of federal dynamics have been explored and resources of federal solutions to set up an alternative administration exhausted. After going through the intricate dimensions of this constitutional provisions and analyzing the imposition of the president's rule in practice for umpteen times the writer would consider the following suggestions worth a mention:-

1. Firstly the appropriate provision should be incorporated whereby it provides that until both Houses of Parliament approve the proclamation issued under clause (1) of article 356, the

Legislative Assembly cannot be dissolved. If necessary it can be kept only under animated suspension.

2. Arbitrary transfer, posting and removal of governors must be prevented through necessary constitutional amendments so as to prevent them from being the agent of political party in rule at centre. Further in appointment of the governor at least advice of the concerned chief minister must be taken.

3.The single safeguard in the name of parliamentary approval in Article 356(3) is not sufficient because ordinarily the ruling party at Center generally dominates Parliament by a majority. Hence a concise Act incorporating the provisions of constitutional, judicial and conventional norms be passed to regulate the imposition of Article 356(1).

4.Before issuing the proclamation under clause (1), the President/the Central Government should indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity of redressing the situation, unless the situation is such that following the above course would not be in the interest of security of State or defence of the country.

5.Next it should be made a mandate that once a proclamation is issued, it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3). Even if a proclamation is substituted by another proclamation, the period prescribed in clause (3) should be calculated from the date of the first proclamation.

6.The proclamation must contain the circumstances and the grounds upon which the President is satisfied that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. Further, if the Legislative Assembly is sought to be kept under animated suspension or dissolved, reasons for such course of action should also be stated in the appropriate proclamation.

7.Whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and not in the chamber of governor or else other. If necessary, the Central Government should take necessary steps to enable the

Legislative Assembly to meet and freely transact its business. The Governors should not be allowed to dismiss the Ministry so long as it enjoys the confidence of the House. Only where a Chief Minister of the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State Government.

Under the light of the preceding discussion on Article 356 from various dimensions I tend to incline myself towards the rationale given by the constitutional framers towards the desirability of having such a provision. The intervention of the Supreme Court in the spate of misused applications of this Article for umpteen times seems to have turned the tide from blatant misuse to judicious use. With the reformative role played by the judiciary being laudable, it's now time for the executive to fasten its loose ends and thereby not give any room for criticism.