THE ADEQUACY ARTICLE 356

Man Mohan Mishra[1]

Abstract

The Emergency Provisions was designed by our Constitution framers to meet such extraordinary conditions which pose grave danger to the security and democracy of India or any part of its territory. It was structured by such hierarchy that no particular constitutional position was given the autocracy of power to impose. It intended to involve all the heads of the Constitution equally in the declaration of the Emergency, namely – the President, the Governor and the Union Government. The President, although, was given the last and the final authority to give assent to the Proclamation, he was to be advised by the Union Cabinet and satisfied by the Governorin the case of State Emergency.

But by the recent case of Uttarakhand and Arunachal Pradesh, the frequent use of Emergency Provisions has raised questions on its misuse especially by the Union Government against the rival party government in the State under Article 356. The sacrosanct and sagacity of the Governor's office has also come into questions.They have many a times, in the past, recommended the imposition of President's rule without exhausting all the possible steps under the Constitution to affirm the confidence of the Assembly in the Government. Many States even demanded the removal of Governor's post from the Constitution as they have brought disgrace to the position several times.

By this paper, the author examine the extent and limits of Article 356 and other Articles in shelter to it. It also focuses on the powers and role of the Governor and President in relation to article 356 and their extent and scope of Judicial Review in this purview when it is limited under Articles 74(2) and 212. To limit the interference of the Centre in the State Governance what are the guidelines that has been issued and cited by the apex court and why bothFederal as well as unitary government is important to preserve the democratic ethics of the country, is the aim of this paper.

[1] Amity Law School-II, Amity University, Sector 125, Noida - 201303

The founding fathers of our constitution had a vision to unite a multilingual and multi-cultural nation which has wide followed diversities, religious pluralism and hierarchal caste structure and which was never united before. This wide geographical dimensions promoted them to create a power that can have a unitary characteristic and work for common good and general interest as a whole while creating a federal characteristic in the form of State Government which would have exclusive power from the Centre (Union) and work more for local interests. They intended to form a power structure where the State and Centre both could work in co-ordination with each other for general interest. This is why they profoundly demarcated the territories by article 1 and defined detailed exclusive and concurrent powers in Schedule Seventh of the constitution in such a way that neither of the powers protrude the powers of other. In cases where there is dispute between the powers of Centre and the State, the powers of Centre as enumerated in List I shall prevail over State power as enumerated in Lists II and III and in case of an overlapping between List II and III the latter shall prevail. Thus, they preferred Centre to have upper hand as per Article 246 of the constitution under Relations between State and Centre in case of overlapping powers but in cases where there is an irreconcilable direct conflict between the entries in the Centre and State Lists[2], except in cases of Article 249 and 250, the Centre cannot interfere with the powers of the State. However, in part XVIII the Centre has the powers to assume the powers of the State mentioned in List II by recommending the President's rule using the powers enshrined under article 355, 74 and 356 of the constitution. This has become a tool of misuse for Union Governments against State Governments of party otherwise. Recent case being toppling of Uttarakhand and Arunachal Pradesh Governments.

The Emergency Provisions under part XVIII was included in the Constitution in order to meet such a grave danger imminent to harm the implementation of law and order of the country or any part of its territory. By such proclamation, it was proposed that all the executive powers of the country, or that specified area where emergency is proclaimed, will come into the hands of the Union. The president, although, vested with the executive powers of the Union, he shall be advised by the Council of Ministers of the Union. Hence by such proclamation the powers of the executive will indirectly lay in the hands of the Union.

In the event of proclamation of emergency under Article 356, the powers of the legislature of the State gets suspended and exercised by the Parliament. The executive power is exercised

[2]*State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal,* AIR 2010 SC 1476

by the Union Government through the President. But, the essential condition for imposition of the Emergency in the State, as per Article 356, is that the Emergency is proclaimed in a State when there is a failure of constitutional machinery and if the President, "on the receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution". The conditions which are, therefore, essential to the proclamation of the Emergency in the State are- (1) That the President is satisfied, (2) on the report of Governor of that State or otherwise, (3) the situation has arisen in the State in which the Government cannot be carried out in accordance with the provisions of the Constitution, (4) the President may by proclamation etc. The use of word "may" in the fourth essential indicates that the President has the discretion to either consider the report to proclaim emergency or decline. But he is bound by the advice of the council of Ministers under Article 74. Secondly, the President should have substantive material in the form of report sent to him by the Governor or otherwise or both that indicate that the State Government cannot be carried out in accordance with the provisions of the Constitution.

The Abuse

The abuse of Article 365 has become frequent by Union Governments to subvert rival party State Governments whenever they are newly elected by the people. The latest example being the case of Uttarakhand[3] and Arunachal Pradesh[4], where article 356 was imposed unconstitutionally, as decided by the Courts. This has once again put into the questions of misuse of Article 356, 74 and etc. by the Union Government and the powers of the Governors enshrined under the Constitution in order to topple the rival party governments in the State. In both the cases the Courts came down heavily on Centre and invalidated the imposition of President's rule vindicating both President and Governor's actions as unconstitutional, reiterating the necessity to enjoy the confidence of the house by the government and that 'whether the Council of Ministers has lost the confidence of the House is not a matter to bedetermined by the Governor or for that matter anywhere else exceptthe floor of the House'[5].

[3] *Shri Harish Chandra Singh Rawat vs Union of India & another,* Write Petition (M/S) No. 795 of 2016 (Nainital High Court)
[4] *NebamRebia, Bamang Felix vs Deputy Speaker and others,*Civil Appeal NOS. 6203-6204 of 2016 (Supreme Court)
[5] *S.R. Bommai and others vs Union of India and others*(1994) 3 SCC 1(Hereinafter Bommai's case)

This is not the first time that the powers of Governor, President and Union has come under judicial review when it is limited under article 74 (2), 212 and 361. In the landmark case of S.R. Bommai's[4], the powers of President, Governor and the Union had come into the domain of judicial review when the Union Government had recommended President's rule without going through the standard procedure of Floor Test. The apex court held that the courts have limited sphere of operation on the reasons given by the President in his order in regard to Article 356, if the Courts find that they are absolutely extraneous and irrelevant and based on personal and illegalconsiderations the Courts are not powerless to strike downthe order on the ground of mala fide if proved. Hence, in all the cases where a person files a petition challenging the imposition of Emergency in any part of the territory of India, the courts have the power of judicial scrutiny under Article 226 and 136 given the limitation imposed under Article 74 (2), 212 and 361, if it is sine qua non for action.

ARTICLE 356

The genesis of Article 356 is the occurrence of event where "constitutional machinery" has failed in a State. The person who is entitled to figure out such situation and report to the President regarding this failure is the Governor of that State. Being the executive head of the State, he is accountable for proper functioning of the Constitutional machinery in the State and report to the President where he finds such situation where the Government of the State is not being carried out in accordance with provisions of the Constitution. That is, something which is done by the State Government in contrast to any of the Articles of the Constitution.

The situations of failure of Constitutional machinery could be numerous. It is the responsibility of the Governor to report such situation to the President where he thinks relevant. The President, although, has the discretion to Proclaim Emergency in the State, he needs communication from the Union Cabinet to act as per Article 74[6]. Like the President, the Governor is also bound to function according to the advice of the Council of Ministers of the State under Article 163 but there are some exceptions where he can use his discretion. He has the duty under Article 159 where he takes oath to preserve, protect and defend the Constitution. It is this Obligation that requires him to report to the President without the advice of the State Council of Ministers that such situation has arisen in which the

[6] *Shamsher Singh Vs State of Punjab* (1974) 2 SCC 831

government of the State cannot be carried on in accordance to the provisions of the Constitution. Thus he has two contrasting duties – firstly to act on the advice of State Council of Ministers and secondly to report to the President regarding such situation under Article 356 (1) without the advice of State Council of Ministers.

Other than the reports from the Governor, the President can issue Proclamation under Article 356(1) by relying on the reports sent to him otherwise. These reports could be from media, Union Cabinet etc. In Uttarakhand's case, the president not only relied on Governor's letter but also took cognizance of letters sent to him from the leaders of opposition party in the State as well as the cabinet note. By such declaration he can take any or all actions specified in sub-clauses (a), (b) and (c) of 356(1).

Major Persons and their role involved in Article 365

The Governor

The Governor position was founded by the British under The Government of India Act, 1858. It was then formed to work as an agent for the British Crown functioning under the supervision of Governor-General. He was supposed to be the pivot of the provincial administration and guard the British interest where they had formal understandings like the princely States.

The Government of India Act, 1935[7] introduced provincial autonomy where the Indians were given reservations in the State legislature. The Governor was now required to act on the advice of the Council of Ministers of the province. Even then, he was given certain special discretionary powers where he can use them without such advice under the supervision of Governor-General. It was probably, to give British an upper hand than the elected Government.

After Independence, the Constitution Framers laid emphasis on democratically elected form of government with a quasi-federal power structure. The Union was given wide powers than the States. The Governor's office was also intact but his discretionary powers were made limited. He was now made responsible to the President who appointed him and no one else.

[7]Repealed in 1998

His duty was to preserve, protect and defend the Constitution[8] in the State where he was appointed. The Council of Ministers of that State were to aid and advice in the exercise of his functions except where the Constitution expressly required him to use his discretion. However, the Union Government was given no direct relation to the Governor's office, albeit he was appointed by the President on Union's advice.

In Arunachal Pradesh case[9] the Supreme Court cited Constituent Assembly debates on draft Article 143 which eventually became Article 163 in the Constitution. Mr. T.T. Krishnamachari had said, "Actually I think this is more by way of a safeguard because there are specific provisions in this Draft Constitution which occur subsequently where the Governor isempowered to act in his discretion irrespective of the advice tenderedby his Council of Ministers.There are two ways of formulating the idea underlying it. One is to make a mention of this exception in thisarticle 143 and enumerating the specific power of the Governor wherehe can exercise his discretion in the articles that occur subsequently,or to leave out any mention of this power here and only state it in theappropriate article. The former method has been followed. Here the general proposition is stated that the Governor has normally to act on the advice of his Ministers except in so far as the exercise of his discretions covered by those articles in the Constitution in which he is specifically empowered to act in his discretion. So long as there arearticles occurring subsequently in the Constitution where he isasked to act in his discretion, which completely cover all cases ofdeparture from the normal practice to which I seemy honourable Friend Mr. Kamath has no objection, I may refer to Article 188."

Dr. B.R. Ambedkar highlighted the constitutional role of the Governor in the following terms[10]: "The Governor under the Constitution has no functions which he can discharge by himself; no functions at all. While he has no functions,he has certain duties to perform, and I think the House will do well tobear in mind this distinction." He further states, "His duties according to me, may be classified in two parts. One is, that hehas to retain the Ministry in office. Because, the Ministry is to holdoffice during his pleasure, he has to see whether and when he shouldexercise his pleasure against the Ministry. The second duty which theGovernor has, and must have, is to advice the Ministry, to warn theMinistry, to suggest to

[8] Article 159
[9] *NebamRebia, Bamang Felix vs Deputy Speaker and others,* Civil Appeal NOS. 6203-6204 of 2016 (Supreme Court) pp. 38
[10] *id.,* at p. 61-62.

the Ministry an alternative and to ask for areconsideration." He says, "He is the representative not of a party; he is the representative of the people as a whole of the State. It is in the nameof the people that he carries on the administration. He must see thatthe administration is carried on at a level which may be regarded asgood, efficient, honest administration. I submit that he cannotdischarge the constitutional functions of a Governor which I have justreferred to unless he is in a position to obtain the information··· It isto enable the Governor to discharge his functions in respect of a goodand pure administration that we propose to give the Governor thepower to call for any information···." He adds, "The Governor does not exercise the executive functions individually or personally. The State Government at various levelstakes executive action in the name of the Governor in accordancewith the rules of business framed under Article 166(3). Hence, it isthe State Government and not the Governor who may sue or be suedin respect of any action taken in the exercise and performance of thepowers and duties of his office [Articles 361, 299(2) and 300]."

By Article 356, the Governor sends reports to the President regarding the situation of the State. It is under obligation of his duty that the administration is carried on at a level which may be regarded as good, efficient and honest government. For that purpose, he may call for an action to determine the confidence of the Legislative Assembly in the Government without the advice of the Council of Ministers. He cannot abruptly or on personal ipse dixit recommend imposition of emergency to the President unless he himself had made sure. He is nowhere suppose to act on the advice of the party in the opposition or fraction of the ruling party which has turned rebel, but to act as per his duties impartially.

The recommendation of the Emergency on the grounds of horse trading by legislators was also held not so cogent in Bommai's case (supra). It was held that the actions of the Governor is mala fide and based on mere ipse dixit if there is no cogent material to support the conclusion.

The President

The President is the one who proclaims all forms of the emergency. He is the last and only person who is vested with the power of Proclamation of the Emergency in whole of India or any part of the territory as advised by the Council of Ministers. It is after his ascent that the emergency is imposed. Being the Supreme Head of the Executive he can commands his instructions directly but after the aid and advice of the Union Council of Ministers. The

Governors of the States are subordinate to the President and it is theirs duty to keep him alive of the situations in the State.

Justice Jagdish Singh Kehar in Arunacha Pradesh's case (supra) cited B.R. Ambedkar's answer to the question on discretionary Powers of President. He said, "Of course there is because we do not want to vest the President with any discretionary power. Becausethe provincial Governments are required to work in subordination tothe Central Government, and therefore, in order to see that they doact in subordination to the Central Government the Governor willreserve certain things in order to give the President the opportunity tosee that the rules under which the provincial Governments aresupposed to act according to the Constitution or in subordination tothe Central Government are observed."

It was opined that giving President the discretionary powers would affect the principles of democracy and that is why he was given a limited discretionary powers where the centre could not interfere He is merely a figure head who acts on the aid and advice of the Union Council of Ministers. Anything where he is supposed to act without the advice of Council of Ministers like under Article 123, 352, 356, etc., it still requires ratification by the Parliament within specified time limit or else such act would become null and void in existence on expiration.

Under Emergency Provisions be like Article 352, 356, 360 or etc. the President do have the final authority to proclaim the Emergency but he is under obligation to follow Union's directions under Article 74(1). Except in the exceptional cases where he thinks he should act to the best ability to preserve, protect and defend the Constitution by the Oath he takes under Article 60. It grants him duty to act in the interest of the Constitution whenever it is necessary. Article 356 gives him the same duty in respect of States. He has the authority to impose the Emergency but after the advice of Council of ministers as it is the Union's duty to protect the States against external aggressions and internal disturbances. It was confirmed in the case of State of Rajasthan[11] where Supreme Court held, "A dispute clearly postulates that there must be opposing claims which are sought to be put forward by oneparty and resisted by the other. One of the essentialingredients of Article 131 is that the dispute must involvea legal right based on law or fact. If the CentralGovernment chooses to advise the President to issue aProclamation, the President has got no option but to issuethe Proclamation. This

[11] *State of Rajasthan & Ors. Etc. Etc. Vs Union of India Etc. Etc.*, Date of Judgement 06/05/1977 para 12

manifestly shows that the CentralGovernment has a legal right to approach the President toissue a Proclamation for dissolution of an Assembly as apart of the essential duties which a Council of Ministershave to perform while aiding and advising the President.The State Governments, however, do not possess any suchright at all. There is no provision in the Constitutionwhich enjoins that the State Government should be consultedor their concurrence should be obtained before the Councilof Ministers submit their advice to the President regardinga matter pertaining to the State so far as the dissolutionof an assembly is concerned. The right of the StateGovernments to exist depends on the provisions of theConstitution which is subject to Art. 356. If the Presidentdecides to accept the advice of the Council of Ministers ofthe Central Government and issue a proclamation dissolvingthe Assemblies, the State Governments have no right objectto the constitutional mandate contained in Art. 356."

The Union Government

Since the object of our Constitution framers were to create India an ideal democratic republic where the Government is by the people, for the people and of the people, the Union Government was given more preference in exercise of their powers. They are the direct representatives of the people which is why they have given significant powers over the States and the Executives under Article 74(1), 256, 257, 352, etc.

In relation to States, the powers of both the Governments are clearly demarcated under Seventh Schedule of the Constitution. The mutual powers are given under List III of the same schedule. In case of dispute, the laws made by the Union Government were to be implemented over the States. Thus, the States were created for better representation and development of the people and the Union was created for wider developments. In Bommai's case[12], Justice Reddy opined, "The fact that under the scheme of our Constitution greater power is conferred upon the Centre vis-à-vis States does not mean that States are mere appendages of the Centre. Within the Sphere allotted to them States are Supreme. The Centre cannot tamper with their powers."

Article 356 is an Emergency Provision which is meant to impose Central Government control in the State through the President in the event of failure of Constitutional machinery or such a situation where the Government of the State cannot be run as per the provision of the Constitution. It is never meant for the Central Government to misuse its powers to remove the

[12]*S.R. Bommai and Ors. Vs. Union of India and Ors.* [1994] 2 S.C.R. 668

rival party Government in the State by imposing President's rule through Article 74(1). In State of Rajasthan[13] case the apex Court stated, "As the reasons given by the Council of Ministers in tendering their advice to the President cannot be inquiredinto by the Courts, it is hoped that the Central Governmentin taking momentous decisions having far reaching consequenceon the working of the Constitution, will art withgreat care and circumspection and with some amount ofobjectivity so as to consider the pros and cons and thevarious shades and features of the problems before them in acoot and collected manner. The guiding principles in suchcases should be the welfare of the people at large and theintention to strengthen and preserve the Constitution. And that this matter will receive the serious attention of theGovernment. The stamp of finality given by Cl. (5) of Art.356 of the Constitution does not imply a free licence to theCentral Government to give any advice to the President andget an order passed on reasons, which are wholly irrelevantor extraneous or which have absolutely no nexus with thepassing of the Order. To this extent the judicial review remains."

In both the cases of Arunachal Pradesh[14] and Uttarakhand[15], the courts invalidated the imposition of the Proclamation and restored the former Governments. It also quoted various case laws to state the imposition wrong in its procedure without directly condemning the advice of Union Cabinet.

Conclusion

The abuse of Article 356 has been used time and again by the Central Government to take control of the States since the independence. The very first case was Punjab[16] where the Emergency was imposed to resolve an internal crisis in the same party. This gave genesis to future abuse of the provision. From 1951 to 1967, the provision was imposed for only twelve times vis-à-vis in the next eight years it was resorted to sixty-two times. In 1977 alone it was imposed in nine states collectively at the same time.

Every time when the courts intervention was asked in this matter, it upheld the Constitutional

[13] *State of Rajasthan & Ors. Etc. Etc. Vs Union of India Etc. Etc.*, Date of Judgement 06/05/1977 (supra) para 13
[14] *NebamRebia, Bamang Felix vs Deputy Speaker and others,* Civil Appeal NOS. 6203-6204 of 2016 (Supreme Court)
[15] *Shri Harish Chandra Singh Rawat vs Union of India & another,* Write Petition (M/S) No. 795 of 2016 (Nainital High Court)

[16] 1951

Supremacy. Standing as a guardian and protector of the constitution, it has always come to the rescue to establish an ideal frame of democracy. This could truly be seen in historical cases where misuse by misinterpretation of the provisions of the Constitution were made and the courts delivered the proper interpretation of it. In cases like Shamsher Singh[17], State of Rajasthan[18], S.R. Bommai[19], etc. the Supreme Court interpreted the importance of Emergency Provisions in context of States. It laid down the guidelines which needs to be followed before imposing Article 356.

After rise in frequent use of Emergency Provisions in 1970s, the Government of India in 1983 established Sarkaria Commission to examine and review the relations between States and the Union Government in regard to distribution of functions and powers. One of the major studies which the commission conducted was regarding the role of Governor and implementations of the Emergency Provisions. It defined the situations in which article 356 should be imposed. Although it was not implemented by the Government, the courts till date takes cognizance of its recommendations.

The guidelines and precedents laid down by the Hon'ble courts has no noticeable significance to the barons of power holders until their actions are challenged in the Courts. Like in the case of Arunachal Pradesh and Uttarakhand the Governors in both the States did not took cognizance of the guidelines given in the case of S.R. Bommai while President's rule was imposed without holding floor test. Therefore, the foremost thing which is needed to be done is that the Government of India needs to implement the recommendations of Sarkaria Commission and the precedents underlined by the courts.

[17] *Shamsher Singh Vs State of Punjab* (1974) 2 SCC 831 (supra)
[18] *State of Rajasthan & Ors. Etc. Etc. Vs Union of India Etc. Etc.,* Date of Judgement 06/05/1977 (supra)
[19] *S.R. Bommai and Ors. Vs. Union of India and Ors.* Date of Judgement March 11, 1994