DYNAMICS OF ARTICLE 356 OF THE CONSTITUTION OF INDIA : A TREPINDATION TURNS TRUE

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The incorporation of emergency powers in the Constitution of India were subject to a lot of debate and discussion in the Constituent Assembly with regard to its possibility of endangering the federal polity. What has been an irony of political circumstances that the aspect of emergency was foreseen to have remained as the least used provisions, finally turned out to be amongst the most misused provisions of the Constitution. These provisions were incorporated in the Constitution believing that these would be the dead letters but to the utter dismay they became the death letters of the Constitution.

Polity of the country bears testimony to the fact that these provisions seemed to have paved way for settling personal scores with the states being ruled by other parties. In one way or the other the parties in control by manipulating these constitutional provisions have more or less succeeded in quenching their political animosities.

India has a vast and diverse population, with a large number of people living in abject poverty. 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.

One of the most significant provisions of the Indian constitution is Article 356. During the finalization of the text of the Constitution this provision had attracted notice and debate but the Chairman of the Drafting Committee, Dr. B.R. Ambedkar, had opined that the provision was meant to be used only in the "rarest of the rare cases".

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SCOPE & METHODOLOGY

The methodology used for the research enquiry is basically doctrinal although related factual data are looked at from historical point of view. The Constitution of India, commentaries, reports of various committees and commissions, judicial decisions and other reliable sources of information contributes to the data source.

The scope of this paper is to objectively examine the provision in the constitution in relation to imposition of President's rule. The prime purpose of this paper is to critically review the essence of Article 356, its working in practice and the loopholes that needs to be looked into to check the arbitrary application of the same.

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.[2] During the medieval age, emergency powers were handed down by the ruling princes to the commissioners appointed under royal prerogative, who exercised specific powers on the basis of special instructions.

However the background of the evolution of the emergency provisions in the present constitutional set up can be summed up under the following two heads:-

I. Roots traced back to The Government of India Act, 1935.

The Britishers introduced the Government of India Act 1935 which envisaged a federal system of government with the Governor as the head of each province and underlined with the concept of division of power. *Section 93* of the Act of 1935 was basically meant to be an experiment where the British Government entrusted limited powers to the Provinces. The colonial powers were not inclined to trust these Ministries even with limited powers probably in view of the fact that not only the political parties in India were ambiguous regarding entering the Legislatures and Ministries created under the said Act but some of them were also proclaiming that even if they entered the Ministries they would try to break the governments from within. These precautions were manifested

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

in the form of emergency powers under Sections 93 and 45 of this Act, where the Governor General and the Governor, under extraordinary circumstances, exercised near absolute control over the Provinces.[3]

B. The role of Dr. B. R. Ambedkar

On August 29, 1947, a Drafting Committee was set up by the Constituent Assembly. Under the chairmanship of Dr. B.R. Ambedkar to prepare a draft Constitution for India.

Even though Article 356 was patterned upon the controversial *Section 93* of the 1935 Act, with this difference that instead of the Governor, the President is vested with the said power - it was yet thought necessary to have it in view of the problems that the Indian republic was expected to face soon after independence.

When it was suggested in the Drafting Committee to confer similar powers of emergency as had been held by the Governor-General under the Government of India Act, 1935, upon the President, many members of that eminent committee vociferously opposed that idea. The Constituent Assembly debates disclose these sentiments. They also disclose that several members strongly opposed the incorporation of Article 356 (the then *Draft Article 278*) precisely for the reason that it purported to reincarnate an imperial legacy. However, these objections were overridden by Dr. Ambedkar with the argument that no provision of any Constitution is immune from abuse as such and that mere possibility of abuse cannot be a ground for not incorporating it. He stated:

> *"In fact I share the sentiments expressed by my Hon'ble friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain as dead letters. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces."*

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

[3] National Commission to Review the Working of the Constitution; Report, I, 8.1.2 (2002)

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.

Constitutional Framework

The concept of emergency provisions has been accepted in India in its constitution, whereby the government by constitutional sanction can take special measures to govern the citizens during the emergency. Three types of emergency have been recognized and they have been reduced to words in Articles 352-360 of the Indian constitution.

Since in the present research work, relates to State Emergency/ President's Rule, the following Articles of the Constitution deserve a mention as follows:-

355. DUTY OF THE UNION TO PROTECT STATES AGAINST EXTERNAL AGGRESSION AND INTERNAL DISTURBANCE - *It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.*

356. PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY IN STATE - (1) *If the President, on receipt of report from the Governor of the 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 President may be Proclamation-*

- ***(a)*** *assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;*
- ***(b)*** *declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;*
- ***(c)*** *make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions*

of this constitution relating to anybody or authority in the State.

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

***(2)** Any such Proclamation may be revoked or varied by a subsequent Proclamation.*

***(3)** Every Proclamation issued under this article except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation Shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.*

***(4)** A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation: Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operating, but no such Proclamation shall in any case remain in force for more than three years:*

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

(5) *Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless-*

(a) *a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and*

(b) *the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned:*

Provided that in the case of the Proclamation issued under clause (1) on the 6th day of October, 1985 with respect to the State of Punjab, the reference in this clause to "any period beyond the expiration of two years."[4]

Necessarily this would involve the look into when the provision can be invoked, where it can be invoked, the consequences of its application and the merits and demerits of the provision with a view to forming an opinion about it.

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[4] P.M Bakshi; The Constitution of India; Universal Publication Edition, 2002

Presidential Rule & Indian Federal Character

It needs to be remembered that only the spirit of "co-operative federalism" can preserve the balance between the Union and the States and promote the good of the people and not an attitude of dominance or superiority.

Dr. Babasaheb Ambedkar, who chaired the Drafting Committee of the Constituent Assembly, 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.[5] 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.

On the basis of a study of similar systems in ancient times, like the Achaean League or the Lycian Confederacy, it is revealed 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.[6] This is precisely the rationale behind the distribution of power between the Union and the States in India. In fact, specific powers are divided into three lists - the Union List, the State List, and the Concurrent List (powers shared by both the Union and the States). The power of governance is distributed in several organs and institutions - a sine qua non for good governance.

It can be considered federal because of the distribution of powers between the Center and States and it may be considered unitary because of the retention of Union control over certain State matters, and also because of the constitutional provisions relating to emergencies when all powers of a State would revert to the Center.

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[5] National Commission to Review the Working of the Constitution, Report, I, 8.1.2 (2002).

[6] James Madison; The Alleged Danger from the Powers of the Union to the State Governments Considered, Independent Journal; Jan. 1788.

The Centre has not always kept in mind the concept of co-operative federalism or the spirit and object with which the article was enacted while dealing with the States and has indeed grossly abused the power under Article 356 on many occasions. The facts and figures contained in the *Sarkaria Commission Report* and the decision of the Hon'ble Supreme Court in *S.R. Bommai v. Union of India* (reported in AIR 1994 SC 1918) amply bear out the truth of this assertion.

Proposals made by Sarkaria Commission Report-1987

Sarkaria Commission headed by Hon'ble Justice R.S. Sarkaria, was appointed in 1983 and spent four years researching reforms to improve Center-State relations and it submitted its report that part of the obscurity surrounding Article 356 was cleared.

Interpretations made by the Commission as to the scope of Article 356

The Sarkaria Commission recommended extreme rare use of Article 356. The Commission observed that the wordings,

"... the government of the State cannot be carried on in accordance with the provisions of this Constitution ..."

are vague as 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).[7] 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. 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.

[7] Sarkaria Commission and its recommendations; http://interstatecouncil.nic.in/Sarkaria_Commission.html; visited on 14.01.2015.

Furthermore, 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. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. 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.

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).[8]

S.R. Bommai vs. Union of India **- Redefining the interpretation of Article 356**

S. R. Bommai v. Union of India is the most vital milestone in the history of the Indian Constitution when comes to he application of Article 356. It was in this case that the Hon'ble 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."*[9]

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[8] 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.

[9] Soli Sorabjee; Constitutional Morality Violated in Gujarat, Indian Express, Pune, India, Sept. 21, 1996

The views expressed by the various Hon'ble Judges of the Hon'ble 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 Hon'ble 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.

(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) 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. 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. However 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. 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.

(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.[10]

Thus it can be seen from the conclusions of this Bench of the Hon'ble Supreme Court that the President's power under Article 356 is not absolute or arbitrary. The President cannot impose Central rule on a State at his whim, without reasonable cause.

Need for Amendment of Article 356?

In the light of the entire preceding discussion, the question arises whether Article 356 needs to be amended. In fact there has been a strident demand for deletion of Article 356 but if Article 356 is removed while retaining Articles 355 and 365, the situation may be worse from the point of view of the States. In other words, the checks which are created by Article 356 and in particular by clause (3) thereof, would not be there and the Central Government would be free to act in the name of redressing a situation where the government of a State cannot be carried on in accordance with the provisions of the Constitution. It is therefore not *favorable* to incline towards the deletion of Article 356 in its entirety.

If, however, Art. 356 (and the consequential article 357) is to be deleted then certain other provisions too require to be deleted viz.

(a) The words *".....and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution"* in Art. 355; and

(b) Art. 365, in its entirety.

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[10] S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297

But then what would one say regarding Art. 256 and 257[11] , which, no doubt, state the obvious, yet if they are deleted, the Courts may construe such deletion as bringing about a drastic change in Centre-State Relations. In any event, it is felt that the stage has not yet arrived in our constitutional development, where the deletion of Art. 356 can be recommended. What is required is its proper use and that has to be ensured by appropriate juristic amendments to the article.

Suggestions and Conclusion

After going through the intricate dimensions of this constitutional provision and analyzing the imposition of the President's rule in practice for umpteen times, following suggestions worth a mention:-

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.

Secondly, 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 and integrity of the country as a whole.

Thirdly, 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.

Fourthly, 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

[11] There has been consistent demands from certain State Governments to delete Articles 256 and 257 along with Article 365 - a fact that is also referred to in the Report of Sarkaria Commission, Chapter III.

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.

Fifthly, 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 nowhere else. If necessary, the Central Government should take necessary steps to enable the Legislative Assembly to meet and freely transact its business.

Under the light of the preceding discussion on Article 356 from various dimensions the author inclines towards the rationale given by the constitutional framers towards the desirability of having such a provision. The intervention of the Hon'ble 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, its now time for the executive to fasten its loose ends and thereby not give any room for criticism.

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