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POSSIBILITY OF ARTICLE 356 OF CONSTITUTION OF INDIA ENDANGERING THE FEDERAL POLITY

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***Abstract*--We have a crisis laden country from external as well as internal forces. Article 356 has been incorporated under the Indian constitution to enable the central government to combat from internal crisis occasioned on account of, constitutional deadlock due to lack of majority by any party in state elections, militancy, communal and class conflicts, politico-religious turmoils, strikes, bandhs or other incidents of like nature where State government can't be carried on in accordance with the provisions of the constitution. The present research paper envisages finding out whether this extra-ordinary power has been the matter of great controversy in every society since the establishment of an organised political system like India.**
Keywords: Article 356, President Rule, Federal Polity.

INTRODUCTION

The emergence of emergency powers was subject to a lot of debate and discussion in the constituent assembly with regard to its possibility of endangering the federal polity. Finally 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. Intending to have remained as the least used provisions these finally turned out to be the most misused provisions of the constitution. Though Article 356 was incorporated in all good faith for the national integrity, it 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. So the contemplation of Dr. B. R. Ambedkar towards the rarest application of these provisions has actually gained force in the exactly opposite direction. The political leaders have tasted experience against reason and chosen to deny power to the state in certain matters, but it has also tempered reason against experience and provided the elasticity required to adapt a controlling constitution to the necessities of emergency situations, where the government of the state cannot becarried on in accordance with the provisions of the constitution in both the dimensions of power i.e. the defence power1 and the civil power.[1]

One of the most significant provisions of the Indian constitution is Article 356. During the finalisation 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".[2]

[1] Article 356 of the constitution of India

[2] the choice of a controlling constitution was in itself a deliberate departure from the pre constitutional past which had seen political factors deciding governmental response.

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HISTORICAL EVOLUTION OF ARTICLE 356

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. It can be safely stated that the concept of emergency is not entirely a western concept as considerable historical evidence of the recognition of emergency powers in eastern politics is also found corroborating it. The universal tradition of emergency rule has been adopted in one form or the other, by successive generations in mostly al political systems. The government is justified in suspending the normal rules of governance.

The Britishers introduced the Government of India Act 1935 which envisaged a federal system of government with the governor at the head of each province and underlined with the concept of division of power. Section 93 of the Act It 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 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.

In the first place Article 188 of the draft constitution was analogous to Section 93 of the Government of India Act 1935 and it was contemplated that the governor of a state could assume the powers of the state when the government of the state is not carried in accordance with the constitution. This was deleted. In the finalized text it was the president alone who could issue a proclamation, when there is a failure of constitutional machinery in the state and assumes all or any of the functions of the State. 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 (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.

CONSTITUTIONAL PROVISIONS IN RELATION TO EMERGENCY

Three types of emergency have been recognized and they have been reduced to words in Articles 352-360 of the Indian constitution. These are:-

1. Emergency caused by war, external aggression or internal disturbances (Article 352), otherwise known as national emergency.
2. Breakdown of the constitutional machinery in the state (Article 356), otherwise called as President's Rule.
3. Financial emergency (Article 360).

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SARKARIA'S COMMISSION REPORT ON ARTICLE 356

It was in 1987 when the Sarkaria Commission headed by Justice R.S. Sarkaria, was appointed in 1983 and spent four years researching reforms to improve Centre-State relations and it submitted its report that part of the obscurity surrounding Article 356 was cleared. The Sarkaria Commission recommended extreme 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 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. 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.

THE GOVERNOR'S OBLIGATION AT THE TIME OF STATE EMERGENCY

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). It will be seen from this peremptory examination of the important passages of the Sarkaria Commission Report that its recommendations are extensive and define the applicability and justification of Article 356 in full. The views of Sri P.V. Rajamannar, former Chief Justice of the Madras (Chennai) High Court, who headed the Inquiry Commission by the State of Tamil Nadu to report on Center-State relations, concur broadly with the views of the Sarkaria Commission. But it is unfortunate that the principles and recommendations given by them are disregarded in the present day

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and that actions have been taken that are prima facie against the letter and spirit of the Constitution of India.

LANDMARK JUDGMENT: S. R. BOMMAI VS. UNION OF INDIA - PARADIGM AND LIMITATIONS WITHIN WHICH ARTICLE 356 WAS TO FUNCTION

S. R. Bommai v. Union of India is the most vital milestone in the history of the Indian Constitution when comes to the application of Article 356. 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*."[3]

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.

(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

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

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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. 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.[4] Thus it can be seen from the conclusions of this Bench of the 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.

SCOPE AND DIMENSION OF ARTICLE 356

The Supreme Court after analysing the scope and dimension of Article 356, gave few illustrations as to where application of Article 356 would be proper, few of them are mentioned below:-

1. Hung assembly scenario, having no possibility of forming the government.
2. Large scale law and order problem.
3. Damage to national integrity or security of state and calling for an application of Art 352.
4. Gross mismanagement of administration or abuse of power.
5. State involve in creating disunity and dissatisfaction among people.
6. Acting contrary to the constitution or union directives, i.e., subversion of the constitution by state government.
7. Failure to meet an extra ordinary situation e.g.an outbreak of unprecedented violence, a great natural calamity etc.

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

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The result has been that since the said decision, the use of Article 356 has drastically come down. Indeed in the year 1999 when the Central Government recommended to the President to dismiss the State government in Bihar, the President called upon the Central Government to reconsider the matter in the light of the principles enunciated in the said decision. On a reconsideration of the matter, the government withdrew the proposal. We may also refer to yet another decision where the Governor of U.P. chose to dismiss arbitrarily the State government without allowing the government to test its majority on the floor of the House. Following the principles enunciated in S.R. Bommai, the Allahabad High Court restored the dismissed government to its office (W.P. 7151 of 1998 disposed of on 23 February, 1998). This decision was not disturbed by the Supreme Court in appeal though it purported to evolve a peculiar kind of floor-test, namely, both the contenders for the office of chief minister were asked to test their strength on the floor of the House. The Chief Minister who was dismissed wrongly by the Governor established his majority and continued in office (A.I.R. 1998 Supreme Court 998).

WHETHER ARTICLE 356 NEEDS TO BE AMENDED?

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. I am, therefore, not in favour of deleting Article 356.

CONCLUSION

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.

SUGGESTIONS

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:-

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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. 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.