Supreme Court of India S.R. Bommai And Others Etc. Etc. vs Union Of India And Others Etc. Etc. on 11 March, 1994 Equivalent citations: AIR 1994 SC 1918, JT 1994 (2) SC 215, 1994 (2) SCALE 37, (1994) 3 SCC 1, 1994 2 SCR 644 Author: P Sawant Bench: S R Ahmadi, K S Verma, P Sawant, K Ramaswamy, S Agrawal, Y Dayal, B J Reddy ORDER P.B. Sawant, J. 1. On behalf of Kuldip Singh, J. and himself. Article 356 has a vital bearing on the democratic parliamentary form of government and the autonomy of the States under the federal Constitution that we have adopted. The interpretation of the Article has, therefore, once again engaged the attention of this Court in the background of the removal of the governments and the dissolution of the legislative assemblies in six States with which we are concerned here, on different occasions and in different situations by the exercise of power under the Article. The crucial question that falls for consideration in all these matters is whether the President has unfettered powers to issue Proclamation under Article 356(1) of the Constitution. The answer to this question depends upon the answers to the following questions: (a) Is the Proclamation amenable to judicial review? (b) If yes, what is the scope of the judicial review in this respect? and (c) What is the meaning of the expression "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" used in Article 356(1)? Article 356 reads as follows: 356, Provisions in case of failure of constitutional machinery in States. - (1) If the President, on 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 President may by 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 any body 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 shall be laid before each House of Parliament and shall, 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 operate, 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. Provided also that in the case of the Proclamation issued under Clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first proviso to this clause to "three years" shall be construed as a reference to "five years". (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 issued 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 nothing in this clause shall apply to the Proclamation issued under Clause (1) on the 11th day of May, 1987 with respect to the State of Punjab. 2. Before we analyse the provisions of Article 356, it is necessary to bear in mind the context in which the Article finds place in the Constitution. The Article belongs to the family of Articles 352 to 360 which have been incorporated in Part XVIII dealing with "Emergency Provisions" as the title of the said Part specifically declares. Among the preceding Articles, Article 352 deals with Proclamation of emergency. It states that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or armed rebellion, he may by Proclamation make a declaration to that effect in respect of the whole of

India or of such part of the territory thereof as may be specified in the Proclamation. Explanation to Clause (1) of the said Article states that Proclamation of emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion, may be made before the actual occurrence of war or of any such aggression or rebellion if the President is satisfied that there is imminent danger thereof. Clause (4) of the said Article requires that every Proclamation issued under the said Article shall be laid before each House of Parliament and shall cease to operate at the expiration of one month, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. It is not necessary for our purpose to refer to other provisions of the said Article. Article 353 refers to the effect of the Proclamation of emergency. It states that while the Proclamation of emergency is in operation, executive power of the Union shall extend to the giving of the directions to any State as to the manner in which the executive power thereof is to be exercised. It further states that during the emergency the power of Parliament to make laws with respect to any matter, shall include power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter even if it is not enumerated in the Union List. Article 354 gives power to the President to direct that Articles 268 and 269 which relate to the distribution of revenue between the Union and the States shall cease to operate during the period of emergency. Article 358 gives power during the emergency to suspend the provisions of Article 19 to enable the State (i.e., the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India) to make any law or to take any executive action which the State would be competent to make or to take but for the provisions contained in Part III of the Constitution while the Proclamation of emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression, is in operation. Such power, it appears, cannot be assumed by the State when the security of India is threatened by armed rebellion and the Proclamation of emergency is issued for that purpose. Article 359 gives power to the President to declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution except those conferred by Articles 20 and 21, shall remain suspended when a Proclamation of emergency is in operation. Article 355 makes an important provision. It casts a duty on the Union to protect States against external aggression and internal disturbance, and to ensure that the Government of every State is carried "in accordance with the provisions of the Constitution". This Article corresponds to Article 277-A of the Draft Constitution. Explaining the purpose of the said Article to the Constituent Assembly, Dr. Ambedkar stated as follows: Some people might think that Article 277-A is merely a pious declaration, that it ought not to be there. The Drafting Committee has taken a different view and I would, therefore, like to explain why it is that the Drafting Committee feels that Article 277-A ought to be there. I think it is agreed that our Constitution, notwith-

standing the many provisions which are contained in it, whereby the center has been given powers to override the Provinces, none-the-less is a Federal Constitution and when we say that Constitution is a Federal Constitution, it means this, that the provinces are as sovereign in their field which is left to them by the Constitution as the center is in the field which is assigned to it. In other words, barring the provisions which permit that center to override any legislation that may be passed by the Provinces, the Provinces have a plenary authority to make any law for the peace, order and good government of that Province. Now, when once the Constitution makes the sovereign and gives them plenary power to make any law for the peace, order and good government of the province, really speaking, the intervention of the center or any other authority must be deemed to be barred, because that would be an invasion of the sovereign authority of the province. That is a fundamental proposition which, I think, we must accept by reason of the fact that we have a Federal Constitution. That being so, if the center is to interfere in the administration of provincial affairs, as we propose to authorise the center by virtue of Articles 278 and 278-A, it must be by and under some obligation which the Constitution imposes upon the center. The invasion must not be an invasion which is wanton, arbitrary and unauthorised by law. Therefore, in order to make it quite clear that Articles 278 and 278-A are not to be deemed as a wanton invasion by the center upon the authority of the province, we propose to introduce Article 277-A. As Members will see, Article 277-A says that it shall be the duty of the Union to protect every unit, and also to maintain the Constitution. So far as such obligation is concerned, it will be found that it is not our Constitution alone which is going to create this duty and this obligation. Similar clauses appear in the American Constitution. They also occur in the Australian Constitution, where the Constitution in express terms, provides that it shall be the duty of the Central Government to protect the units or the States from external aggression or internal commotion. All that we propose to do is to add one more clause to the principle enunciated in the American and Australian Constitutions, namely, that it shall also be the duty of the Union to maintain the Constitution in the provinces as enacted by this law. There is nothing new in this and as I said, in view of the fact that we are endowing the provinces with plenary powers and making them sovereign within their own field, it is necessary to provide that if any invasion of the provincial field is done by the center it is in virtue of this obligation. It will be an act in fulfilment of the duty and the obligation and it cannot be treated, so far as the Constitution is concerned, as a wanton, arbitrary, unauthorised act. That is the reason why we have introduced Article 277-A. (C.A.D. Vol. IX, p-133) Articles 278 and 278-A of the Draft Constitution referred to above correspond to present Articles 356 and 357 of the Constitution respectively. Thus it is clear from Article 355 that it is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Articles 356 and 357. What is however, necessary to remember in this connection is that while Article 355 refers to three situations, viz., (i) external aggression, (ii) internal disturbance, and (iii) non-carrying on of the Government of the States, in accordance with

the provisions of the Constitution, Article 356 refers only to one situation, viz., the third one. As against this, Article 352 which provides for Proclamation of emergency speaks of only one situation, viz., where the security of India or any part of the territory thereof, is threatened either by war or external aggression or armed rebellion. The expression "internal disturbance" is certainly of larger connotation than "armed rebellion" and includes situations arising out of "armed rebellion" as well. In other words, while a Proclamation of emergency can be made for internal disturbance only if it is created by armed rebellion, neither such Proclamation can be made for internal disturbance caused by any other situation nor a Proclamation can be issued under Article 356 unless the internal disturbance gives rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. A mere internal disturbance short of armed rebellion cannot justify a Proclamation of emergency under Article 352 nor such disturbance can justify issuance of Proclamation under Article 356(1), unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution. Article 360 envisages the Proclamation of financial emergency by the President when he is satisfied that a situation has arisen whereby the financial stability or credit of the country or of any part of the territory thereof is threatened. It declares that such Proclamation shall be laid before each House of Parliament and shall cease to operate at the expiration of two months unless it is approved by the resolutions of both Houses of Parliament. We have thus emergency provisions contained in other Articles in the same Part of the Constitution. The common thread running through all these Articles in Part XVIII relating to emergency provisions is that the said provisions can be invoked only when there is an emergency and the emergency is of the nature described therein and not of any other kind. The Proclamation of emergency under Articles 352, 356 and 360 is further dependent on the satisfaction of the President with regard to the existence of the relevant conditions precedent. The duty cast on the Union under Article 355 also arises in the twin conditions stated therein. It is in the light of these other provisions relating to the emergency that we have to construe the provisions of Article 356. The crucial expressions in Article 356(1) are - if the President, "on the receipt of report from the Governor of a State or otherwise" "is satisfied" that "the situation has arisen in which the Government of the State cannot be carried on"in accordance with the provisions of the Constitution". The conditions precedent to the issuance of the Proclamation, therefore, are: (a) that the President should be satisfied either on the basis of a report form the Governor of the State or otherwise, (b) that in fact a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. In other words, the President's satisfaction has to be based on objective material. That material may be available in the report sent to him by the Governor or otherwise or both from the report and other sources. Further, the objective material so available must indicate that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Thus the existence of the objective material showing that the Government of the State cannot be carried

on in accordance with the provisions of the Constitution is a condition precedent before the President issued the Proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question, However, if there is no such objective material before the President, or the material before him cannot reasonably suggest that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the Proclamation issued is open to challenge. It is further necessary to note that the objective material before the President must indicate that the Government of the State"cannot be carried on in accordance with the provisions of the Constitution". In other words, the provisions require that the material before the President must be sufficient to indicate that unless a Proclamation is issued, it is not possible to carry on the affairs of the State as per the provisions of the Constitution. It is not every situation arising in the State but a situation which shows that the constitutional Government has become an impossibility, which alone will entitle the President to issue the Proclamation. These parameters of the condition precedent to the issuance of the Proclamation indicate both the extent of and the limitations on, the power of the judicial review of the Proclamation issued. It is not disputed before us that the Proclamation issued under Article 356(1) is open to judicial review. All that is contended is that the scope of the review is limited. According to us, the language of the provisions of the Article contains sufficient guidelines on both the scope and the limitations, of the judicial review. 3. Before we examine the scope and the limitations of the judicial review of the Proclamation issued under Article 356(1), it is necessary to deal with the contention raised by Shri Parasaran appearing for the Union of India. He contended that there is difference in the nature and scope of the power of judicial review in the administrative law and the constitutional law. While in the field of administrative law, the Court's power extends to legal control of public authorities in exercise of their statutory power and therefore not only to preventing excess and abuse of power but also to irregular exercise of power, the scope of judicial review in the constitutional law extends only to preventing actions which are unconstitutional or ultra vires the Constitution. The areas where the judicial power, therefore can operate are limited and pertain to the domain where the actions of the Executive or the legislation enacted infringe the scheme of the division of power between the Executive, the Legislature and the judiciary or the distribution of powers between the States and the center. Where, there is a Bill of Rights as under our Constitution, the areas also cover the infringements of the fundamental rights. The judicial power has no scope in constitutional law beyond examining the said infringements. He also contended that likewise, the doctrine of proportionality or unreasonableness has no play in constitutional law and the executive action and legislation cannot be examined and interfered with on the anvil of the said doctrine. We are afraid that this contention is too broad to be accepted. The implication of this contention, among others, is that even if the Constitution provides preconditions for exercise of power by the constitutional authorities, the Courts cannot examine whether the preconditions have been satisfied. Secondly, if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the concerned

authority under the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. We have not been pointed out any authority is support of these propositions. We also find that many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law. That is also true of the doctrine of proportionality. 4. We may now examine the principles of judicial review evolved in the field of administrative law. As has been stated by Lord Brightman in Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141,"judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made". In other words, judicial review is concerned with reviewing not the merits of the decision but the decision-making process itself. Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374 at 408, has enunciated three heads of grounds upon which administrative action is subject to control by judicial review, viz., (i) illegality, (ii) irrationality and (iii) procedural impropriety. He has also stated there that the three grounds evolved till then did not rule out that"further development on a case by case basis may not in course of time add further grounds" and has added that "principle of proportionality" which is recognised in the administrative law by several members of European Economic Community may be a possible ground for judicial review for adoption in the future. It may be stated here that we have already adopted the said ground both statutorily and judicially in our labour and service jurisprudence. Lord Diplock has explained the three heads of grounds. By "illegality" he means that the decision-maker must understand correctly that law that regulates its decision-making power and must give effect to it, and whether he has or has not, is a justiciable question. By "irrationality" he means unreasonableness. A decision may be so outrageous or in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it, and it is for the judges to decide whether a decision falls in the said category. By "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the Tribunal's jurisdiction is conferred even where such failure does not involve any denial of natural justice. Where the decision is one which does not alter rights or obligations enforceable in private law, but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review. It was observed by Donaldson LJ in R. v. Crown Court at Carlisle, exp Marcus-Moore [1981] Times, 26 October, DC, that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in issue. In R. v. Panel on

Take-overs and Mergers, exp Guinness plc (1987) QB 815 at 842, he referred to the judicial review jurisdiction as being supervisory or as 'longstep' jurisdiction. He observed that unless that restriction on the power of the Court is observed, the Court will under the guise of preventing the abuse of power be itself guilty of usurping power. That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. Lord Roskil in Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374 at 414, opined that the phrase "principles of natural justice" "be better replaced by speaking of a duty to act fairly. . . .It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case. . . Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken." In Puhlhofer v. Hillingdon London Borough Council [1986] AC 484 at 518, Lord Brightman stated: Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. In Leech v. Deputy Governor of Parkhurst Prison [1988] AC 533 583, Lord Oliver stated: the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called upon to make the decision. While we are on the point, it will be instructive to refer to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of the Pakistan Constitution is not couched in the same terms. In Muhammad Sharif v. Federation of Pakistan, PLD [1988] Lahore 725, the question was whether the order of the President dissolving the National Assembly on 29.5.1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Constitution. Article 58(2)(b) is as follows: 58(2) Notwithstanding anything contained in Clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion. . . . (a) xxxxxxxxxxx (b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. The provisions of Article 48(2) are as follows: Notwithstanding anything contained in Clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so (and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever. The Presidential Order

read as follows: WHEREAS the objects and purposes for which the National Assembly was elected have not been fulfilled; AND WHEREAS the law and order in the country have broken down to an alarming extent resulting in tragic loss of innumerable valuable lives as well as loss of property; AND WHEREAS the life, property, honour and security of the citizens of Pakistan have been rendered totally unsafe and the integrity and ideology of Pakistan have been seriously endangered; AND WHEREAS public morality has deteriorated to unprecedented level; AND WHEREAS in my opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. NOW THEREFORE, I, General Muhammad Zia-ul-Haq, President of Pakistan in exercise of the powers conferred on me by Clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan hereby dissolve the national Assembly with immediate effect and in consequence thereof the Cabinet also stands dissolved forthwith. The main argument against the order was that an order under the said provision is to be issued not in subjective discretion or opinion but on objective facts in the sense that the circumstances must exist to lead one to the conclusion that the relevant situation had arisen. As against this, the argument of the Attorney General and other counsel supporting the Presidential Order was that it is the subjective satisfaction of the President and it is in his discretion and opinion to dissolve the National Assembly. It was also argued on their behalf that in spite of the fact that Article 58(2)(b) states that "notwithstanding anything contained in Clause (2) of Article 48," the President may also dissolve the National Assembly in his discretion under Article 58(2) and when he does exercise his discretion to dissolve the Assembly, the validity thereof cannot be questioned on any ground whatsoever as provided for under Article 48(2). Dealing with the first argument, the learned Chief Justice, Salam stated as follows: Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise this powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for. Dealing with the second argument, the learned Chief Justice held: If the argument be correct then the provision "Notwithstanding anything contained in Clause (2) of Article 48" would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be

correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that "Notwithstanding Clause (2) of Article 48–", the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid redundancy. Courts' Power whenever intended to be excluded is expressly stated; otherwise it is presumed to be there in Courts of record. . . .Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice. . . . It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects. . . . Dealing with the same arguments, R.S. Sidhwa, J. stated as follows: . . . I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Articles 58(2)(b) and 112(2)(b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer. xxxxxxxxxxxxxxxxx 15. The main question that arises in this case is when can it be said that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The expression "Government of the Federation" is not limited to any one particular function, such as the executive, the legislative, or the judicial, but includes the whole functioning of the Federation Government in all its remifications. 5. We may now refer to the decisions of this Court on the subject. In Barium Chemicals Ltd. and Anr. v. The Co. Law Board and Ors. [1966] Suppl. 3 S.C.R. 311, the facts were that an order was issued on behalf of the Company Law Board under Section 237(b) of the Companies Act appointing four Inspectors to investigate the affairs of the appellant-Company on the ground that the Board was of the opinion that there were circumstances suggesting that the business of the appellant-Company was being conducted with intent to defraud its creditors, members or any other persons and that the persons concerned in the management of the affairs of the Company had in connection therewith, been guilty of fraud, misfeasance and other misconduct towards the Company and its members. The appellant-Company had filed a writ petition before the High Court challenging the said order and one of the grounds of challenge was that there was no material on which such order could have been made. In reply to the petition, the Chairman of the Company Law Board filed an affidavit in which it was contended, inter alia, that there was

material on the basis of which the order was issued and that he had himself examined this material and formed the necessary opinion within the meaning of the said Section 237(b) before the issue of the order and that it was not competent for the Court to go into the question of the adequacy or otherwise of such material. However, in the course of reply to some of the allegations in the petition, the affidavit in paragraph 14 had also proceeded to state the facts on the basis of which the opinion was formed. The majority of the judges held that the circumstances disclosed in paragraph 14 of the said affidavit must be regarded as the only material on the basis of which the Board formed the opinion before ordering an investigation under Section 237(b) and that the said circumstances could not reasonably suggest that the business of the Company was being conducted to defraud the creditors, members or other persons or that the management was guilty of fraud towards the Company and its members. They were, therefore, extraneous to the matters mentioned in Section 237(b) and the impugned order was ultra vires the section. Hidaytullah, J., as he then was, in this connection stated that the power under Section 237(b) is discretionary power and the first requirement for its exercise is the honest formation of an opinion that an investigation is necessary and the next requirement is that there are circumstances suggesting the inferences set out in the section. An action not based on circumstances suggesting an inference of the enumerated kind will not be valid. Although the formation of opinion is subjective, the existence of circumstances relevant to the inference as the sine qua non for action, must be demonstrable. If their existence is questioned, it has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist, and give no clue to what they are, because the circumstances must be such as to lead to conclusions of action definiteness. Shelat, J. commenting on the same issue, stated that although the formation of opinion is a purely subjective process and such an opinion cannot be challenged in a Court on the ground of propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from circumstances suggesting what is set out in Sub-clauses (i), (ii) or (iii) of Section 237(b). The expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. It is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the matters enumerated in Section 237(b), the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute. In MA. Rashid and Ors. v. State of Kerala , the facts were that the respondent State issued a notification under Rule 114(2) of the Defence of India Rules, 1971 imposing a total ban on the use of machinery for defibring husks in the districts of Trivandrum,

Quilon and Alleppey. The appellants who were owners of Small Scale Industrial Units, being affected by the notification, challenged the same. In that connection, this Court observed that where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them" or when "in their opinion" a certain state of affairs existed, or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated. Administrative decisions in exercise of powers conferred in subjective terms are to be made in good faith and on relevant considerations. The courts can inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts opinion of what is reasonable to the criterion of what a reasonable body might have decided; and courts will find out whether conditions precedent to the formation of the opinion have a factual basis. But the onus of establishing unreasonableness rests upon the person challenging the validity of the acts. In State of Rajasthan and Ors. etc. etc. v. Union of India etc. etc. , Bhagwati, J. on behalf of Gupta, J. and himself, while dealing with the "satisfaction of the President" prior to the issuance of the Proclamation under Article 356(1) stated as follows: ... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so.... This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitation. That is the essence of the Rule of Law.... xxxxxxxxxxx ... we must make it clear that the constitutional jurisdiction of this Court is confined only to saying whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits. Here the only limit on the Power of the President under Article 356, Clause (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as "judicially discoverable" and "manageable standards". It would largely be a po-

litical judgment based on assessment of diverse and varied factors, fact changing situations, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot, therefore, by its very nature be a fit subject-matter for judicial determination and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The Court cannot in the circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based.... But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 356, Clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid.... It must of course be concerned (sic.) that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Article 356, Clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds.... This is the narrow minimal area in which the exercise of power under Article 356, Clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists. In Kehar Singh and Anr. etc. v. Union of India and Anr. [1988] Supp. 3 S.C.R. 1103, it is held that the President's power under Article 72 of the Constitution dealing with the grant of pardons, reprives, respites, remissions of punishments or suspensions, remissions or commutations of sentences of any person convicted of any offence falls squarely within the judicial domain and can be examined by the court by way of judicial review However, the order of the President cannot be subjected to judicial review on its merits except within the strict limitation defined in Mam Ram etc. etc. v. Union of India and Anr. . Those limitations are whether the power is exercised on considerations or actions which are wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases the Court will examine the exercise of the said power. 6. From these authorities, one of the conclusions which may safely be drawn is that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. Needless to emphasise that it is not

any material but material which would lead to the conclusion that the Government of the State cannot be carried on in accordance with the provisions of the Constitution which is relevant for the purpose. It has further to be remembered that the Article requires that the President "has to be satisfied" that the situation in question has arisen. Hence the material in question has to be such as would induce a reasonable man to come to the conclusion in question. The expression used in the Article is "if the President is satisfied". The word "satisfied" has been defined in Shorter Oxford English Dictionary [3rd Edition] at page 1792 as 4. To furnish with sufficient proof or information, to set free from doubt or uncertainty, to convince; 5. To answer sufficiently [an objection, question]; to fulfil or comply with [a request]; to solve [a doubt, difficulty]; 6. To answer the requirements of [a state of things, hypothesis, etc.]; to accord with [conditions]. Hence, it is not the personal whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review. It has also to be remembered in this connection that the power exercised by the President under Article 356[1] is on the advice of the Council of Ministers tendered under Article 74[1] of the Constitution. The Council of Ministers under our system would always belong to one or the other political party. In view of the pluralist democracy and the federal structure that we have accepted under our Constitution, the party or parties in power [in case of coalition Government] at the center and in the States may not be the same. Hence there is a need to confine the exercise of power under Article 356[1] strictly to the situation mentioned therein which is a condition precedent to the said exercise. That is why the framers of the Constitution have taken pains to specify the situation which alone would enable the exercise of the said power. The situation is no less than one in which "the Government of the State cannot be carried on in accordance with the provisions of this Constitution". A situation short of the same does not empower the issuance of the Proclamation. The word "cannot" emphatically connotes a situation of impasse. In shorter Oxford dictionary, third edition, at page 255, the word "can" is defined as "to be able; to have power or capacity". The word "cannot", therefore, would mean "not to be able" or "not to have the power or capacity". In Stroud's judicial dictionary, fifth edition, the word "cannot" is defined to include a legal inability as well as physical impossibility. Hence situation which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the State according to the Constitution, would not merit the issuance of the Proclamation under the Article. It has also to be remembered that a situation contemplated under the Article is one where the government of the state cannot be carried on "in accordance with the provisions of the Constitution". The expression indeed envisages varied situations. Article 365 which is in Part XIX

entitled Miscellaneous“, has contemplated one such situation. It states that: Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold 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 failure to comply with or to give effect to the directions given by the Union under any of the provisions of the Constitution, is of course, not the only situation contemplated by the expression"government of the State cannot be carried on in accordance with the provisions of this Constitution" Article 365 is more in the nature of a deeming provision. However, the situations other than those mentioned in Article 365 must be such where the governance of the State is not possible to be carried on in accordance with the provisions of the Constitution. In this connection, we may refer to what Dr. Ambedkar had to say on the subject in the Constituent Assembly: Now I come to the remarks made by my Friend Pandit Kunzru. The first point, if I remember correctly, which was raised by him was that the power to take over the administration when the constitutional machinery fails is a new thing, which is not to be found in any constitution. I beg to differ from him and I would like to draw his attention to the article contained in the American Constitution, where the duty of the United States is definitely expressed to be to maintain the Republican form of the Constitution. When we say that the Constitution must be maintained in accordance with the provisions contained in this Constitution we practically mean what the American Constitution means, namely that the form of the Constitution prescribed in this Constitution must be maintained. Therefore, so far as that point is concerned we do not think that the Drafting Committee has made any departure from an established principle. [C.A.D. Vol. IX, p.175-76] As pointed out earlier, more or less similar expression occurs in Article 58[2][b] of the Pakistan Constitution. The expression there is that the “Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate is necessary.” Commenting upon the said expression, Shafiur Rahman, J. in Ahmad Tariq v. Federation of Pakistan, PLD [1992] S.C. 646 at 664 observed “It is an extreme power to be exercised where there is actual or imminent breakdown of the constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasions for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous, provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by the methods extra-Constitutional.” Sidhwa, J. in the same case observed that “to hold that because a particular provision of the Constitution was not complied with, the National Assembly could be dissolved under Article 58[2][b] of the Constitution would amount to an abuse of power. Unless such a violation independently was so grave that a Court could come to no other conclusion but that it alone directly led to the breakdown of the functional working of the Government, it would not constitute a valid ground. The expression and its implication have also been the subject of elaborate dis-

cussion in the Report of the Sarkaria Commission on center-State Relations. It will be advantageous to refer to the relevant part of the said discussion, which is quite illuminating: 6.3.23 In Article 356, the expression"the government of the State cannot be carried on in accordance with the provisions of the Constitution", is couched in wide terms. It is, therefore, necessary to understand its true import and ambit. In the day-to-day administration of the State, its various functionaries in the discharge of their multifarious responsibilities take decisions or actions which may not, in some particular or the other, be strictly in accord with all the provisions of the Constitution. Should every such breach or infraction of a constitutional provision, irrespective of its significance, extent and effect, be taken to constitute a"failure of the constitutional machinery" within the contemplation of Article 356. In our opinion, the answer to the question must be in the negative. We have already noted that by virtue of Article 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356, on the other hand, provides the remedy when there has been an actual breakdown of the constitutional machinery of the State. Any abuse or misuse of this drastic power damages the fabric of the Constitution, whereas the object of this Article is to enable the Union to take remedial action consequent upon breakdown of the constitutional machinery, so that that governance of the State in accordance with the provisions of the Constitution, is restored. A wide literal construction of Article 356[1], will reduce the constitutional distribution of the powers between the Union and the States to a licence dependent on the pleasure of the Union Executive. Further it will enable the Union Executive to cut at the root of the democratic Parliamentary form of government in the State. It must, therefore, be rejected in favour of a construction which will preserve that form of government. Hence, the exercise of the power under Article 356 must be limited to rectifying a 'failure of the constitutional machinery in the State'. The marginal heading of Article 356 also points to the same construction. 6.3.24. Another point for consideration is, whether 'external aggression' or 'internal disturbance' is to be read as an indispensable element of the situation of failure of the constitutional machinery in a State, the existence of which is a pre-requisite for the exercise of the power under Article 356. We are clear in our mind that the answer to this question should be in the negative. On the one hand, 'external aggression' or 'internal disturbance' may not necessarily create a situation where government of the State cannot be carried on in accordance with the Constitution. On the other, a failure of the constitutional machinery in the State may occur, without there being a situation of 'external aggression' or 'internal disturbance'. xxxx xxxx xxxx xxxx 6.4.01. A failure of constitutional machinery may occur in a number of ways. Factors which contribute to such a situation are diverse and imponderable. It is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase, "the government of the State cannot be carried on in accordance with the provisions of this Constitution". Even so, some instances of what does and what does not constitute a constitutional failure within the contemplation of this Article, may be grouped and discussed under the following heads: [a] Polit-

ical crisis. [b] Internal subversion. [c] Physical break-down. [d] Non-compliance with constitutional directions of the Union Executive. It is not claimed that this categorisation is comprehensive or perfect. There can be no water-tight compartmentalisation, as many situations of constitutional failure will have elements of more than one type. Nonetheless, it will help determine whether or not, in a given situation it will be proper to invoke this last-resort power under Article 356. The Report then goes on to discuss the various occasions on which the political crisis, internal subversion, physical break-down and non-compliance with constitutional directions of the Union Executive may or can be said to, occur. It is not necessary here to refer to the said elaborate discussion. Suffice it to say that we are in broad agreement with the above interpretation given in the Report, of the expression "the government of the State cannot be carried on in accordance with the provisions of this Constitution", and are of the view that except in such and similar other circumstances, the provisions of Article 356 cannot be pressed into service. 7. It will be convenient at this stage itself, also to illustrate the situations which may not amount to failure of the constitutional machinery in the State inviting the presidential power under Article 356[l] and where the use of the said power will be improper. The examples of such situations are given in the Report in paragraph 6.5.01. They are: [i] A situation of maladministration in a State where a duly constituted Ministry enjoying majority support in the Assembly, is in office. Imposition of President's rule in such a situation will be extraneous to the purpose for which the power under Article 356 has been conferred. It was made indubitably clear by the Constitution framers that this power is not meant to be exercised for the purpose of securing good government. [ii] Where a Ministry resigns or is dismissed on losing its majority support in the Assembly and the Governor recommends, imposition of President's rule without exploring the possibility of installing an alternative government enjoying such support or ordering fresh elections. [iii] Where, despite the advice of a duly constituted Ministry which has not been defeated on the floor of the House, the Governor declines to dissolve the Assembly and without giving the Ministry an opportunity to demonstrate its majority support through the 'floor test', recommends its supersession and imposition of President's rule merely on his subjective assessment that the Ministry no longer commands the confidence of the Assembly. [iv] Where Article 356 is sought to be invoked for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State, has suffered a massive defeat. [v] Where in a situation of 'internal disturbance', not amounting to or verging on abdication of its governmental powers by the State Government, all possible measures to contain the situation by the Union in the discharge of its duty, under Article 355, have not been exhausted. [vi] The use of the power under Article 356 will be improper if, in the illustrations given in the preceding paragraphs 6.4.10, 6.4.11 and 6.4.12, the President gives no prior warning or opportunity to the State Government to correct itself. Such a warning can be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action, under Article 356, will lead to disastrous consequences. [vii]

Where in response to the prior warning or notice or to an informal or formal direction under Articles 356, 257, etc., the State Government cither applies the corrective and thus complies with the direction, or satisfies the Union Executive that the warning or direction was based on incorrect facts, it shall not be proper for the President to hold that "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". Hence, in such a situation, also, Article 356 cannot be properly invoked. [viii] The use of this power to sort out internal difference or intra-party problems of the ruling party would not be constitutionally correct. [ix] This power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State. [x] This power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry. [xi] The exercise of this power, for a purpose extraneous or irrelevant to the one for which it has been conferred by the Constitution, would be vitiated by legal mala fides. We have no hesitation in concurring broadly with the above illustrative occasions where the exercise of power under Article 356[1] would be improper and uncalled for. 8. It was contended on behalf of the Union of India that since the Proclamation under Article 356[1] would be issued by the President on the advice of the Council of Ministers given under Article 74[1] of the Constitution and since Clause [2] of the said Article bars enquiry into the question whether any, and if so, what advice was tendered by Ministers to the President, judicial review of the reasons which led to the issuance of the Proclamation also stands barred. This contention is fallacious for reasons more than one. In the first instance, it is based on a misconception of the purpose of Article 74[2]. As has been rightly pointed out by Shri Shanti Bhushan, the object of Article 74[2] was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the Court. A good deal of light on the said purpose of the provision is thrown by its history. Identical provisions were contained in Sections 10[4] and 51[4] of the Government of India Act, 1935. However, in the Government of India Act, 1915, as amended by the Act of 1919 it was provided under Section 52[3] as follows: 3. In relation to the transferred subjects the governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice. The relations of the Governor-General and the Governor with the Ministers were not regulated by the Act but were left to be governed by an Instrument of Instructions issued by the Crown. It was considered undesirable to define these relations in the Act or to impose an obligation on the Governor-General or Governor to be guided by the advice of their Ministers, since such a course might convert a constitutional convention into a rule of law and thus bring it

within the cognisance of the Court. Prior to the Constitution [42nd Amendment] Act, 1976, under the Constitutional convention, the President was bound to act in accordance with the advice of the Council of Ministers [Re: Shamsher Singh and Anr. v. Slate of Punjab . By the 42nd Amendment, it was expressly so provided in Article 74[1], The object of Article 74[2] was thus not to exclude any material or document from the scrutiny of the courts. This is not to say that the rule of exclusion laid down in Section 123 of the Indian Evidence Act is given a go-bye. However, it only emphasises that the said rule can be invoked in appropriate cases. 9. What is further, although Article 74[2] bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74[2] does not negate their right to know about the factual existence of any such material. This is not to say that the Union Government cannot raise the plea of privilege under Section 123 of the Evidence Act. As and when such privilege against disclosure is claimed, the Courts will examine such claim within the parameters of the said section on its merits. In this connection, we may quote Justice Mathew, who in the case of State of U.P. v. Raj Narain observed as follows: To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and it must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined on its merits. 10. Since further the Proclamation issued under Article 356[1] is required by Clause [3] of that Article to be laid before each House of Parliament and ceases to operate on the expiration of two months unless it has been approved by resolutions by both the Houses of Parliament before the expiration of that period, it is evident that the question as to whether a Proclamation should or should not have been made, has to be discussed on the floor of each House and the two Houses would be entitled to go into the material on the basis of which the Council of Ministers had tendered the advice to the President for issuance of the Proclamation Hence the secrecy claimed in respect of the material in question cannot remain inviolable, and the plea of non-disclosure of the material can hardly be pressed. When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government. 11. A further

question which has been raised in this connection is whether the validity of the Proclamation issued under Article 356[1] can be challenged even after it has been approved by both Houses of Parliament under Clause [3] of Article 356. There is no reason to make a distinction between the Proclamation so approved and a legislation enacted by the Parliament. If the Proclamation is invalid, it does not stand validated merely because it is approved of by the Parliament. The grounds for challenging the validity of the Proclamation may be different from those challenging the validity of a legislation. However, that does not make any difference to the vulnerability of the Proclamation on the limited grounds available. As has been stated by Prof. H.W.R. Wade in "Administrative Law - 6th Edition." ... There are many cases where some administrative order or regulation is required by statute to be approved by resolutions of the Houses. But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act. Whether the challenge is made before or after the Houses have given their approval is immaterial. [p-29] xxxx xxxx xxxx ... in accordance with constitutional principle, parliamentary approval does not affect the normal operation of judicial review. [p-411] xxxx xxxx xxxx As these cases show, judicial review is in no way inhibited by the fact that rules or regulations have been laid before Parliament and approved, despite the ruling of the House of Lords that the test of unreasonableness should not then operate in its normal way. The Court of Appeal has emphasised that in the case of subordinate legislation such as an Order in Council approved in draft by both Houses, 'the courts would without doubt be competent to consider whether or not the Order was properly made in the sense of being intra vires'. [p- 870] In this connection a reference may also be made to R v. H.M. Treasury ex p. Smelday (1985) QB 657, from which decision the learned author has extracted the aforesaid observations. 12. We may also point out that the deletion of Clause [5] of Article 356 as it stood prior to its deletion by the Constitution [44th Amendment] Act in 1978, has made no change in the legal position that the satisfaction of the President under Clause [1] of Article 356, was always judicially reviewable. The clause read as follows: 5. Notwithstanding anything in this Constitution, satisfaction of the President mentioned under Clause [1], shall be final and conclusive and shall not be questioned in any court on any ground. On the other hand, the deletion of the clause has reinforced the earlier legal position, viz., that notwithstanding the existence of the Clause [5], the satisfaction of the President under Clause [1] was judicially review-able and the judicial review was not barred on account of the presence of the clause. In this connection, we may usefully refer to the decision of this Court in State of Rajasthan v. Union of India [supra] where it was unanimously held that in spite of the said finality clause, the Presidential Proclamation was subject to judicial review on various grounds. It was observed there as follows: ... This is indeed a very drastic power which, if misused or abused, can destroy the constitutional equilibrium between the Union and the States and its potential for harm was recognized even by the Constitution makers.... [p-72] xxxx xxxx xxxx Of course by reason of Clause [5] of Article 356, the satisfaction of the President is final and conclusive and cannot be

assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. [p-82] It was accordingly held that in view of the finality clause, the narrow area in which the exercise of power under Article 356 was subject to judicial review included the grounds where the satisfaction is perverse or mala fide or based on wholly extraneous and irrelevant grounds and was therefore, no satisfaction at all. In A.K. Roy v. Union of India , the Court has observed that "Clause [5] has been deleted by the 44th Amendment and, therefore, any observations made in the State of Rajasthan case [supra] on the basis of that clause cannot any longer hold good". These observations imply that after the deletion of Clause [5], the judicial review of the Proclamation issued under Article 356[1] has become wider than indicated in the State of Rajasthan case [supra]. In Kihoto Hollohan v. Zachillhu and Ors. [1992] Supp. 2 SCC 651 at 707-710, the Court has observed that "an ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action, but precludes challenge to such action on the grounds of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction". Again in Union of India v. Jyoti Prakash Mittar and Union of India v. Tulsi Ram Patel [1985] Supp. 2 SCR 131, this Court observed that "When there is such a finality clause restricting the scope of judicial review, the judicial review would be confined to jurisdictional errors only, viz., infirmities based on violation of constitutional mandates, mala fides, non-compliance with rule of natural justice and perversity". These observations are of course, in the field of administrative law and hence a reference to the rule of natural justice has to be viewed in that light. 13. It will be an inexcusable error to examine the provisions of Article 356 from a pure legalistic angle and interpret their meaning only through jurisdictional technicalities. The Constitution is essentially a political document and provisions such as Article 356 have a potentiality to unsettle and subvert the entire constitutional scheme. The exercise of powers vested under such provisions needs, therefore, to be circumscribed to maintain the fundamental constitutional balance lest the Constitution is defaced and destroyed. This can be achieved even without bending much less breaking the normal rules of interpretation, if the interpretation is alive to the other equally important provisions of the Constitution and its bearing on them. Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric. The power vested de jure in the President but de facto in the Council of Ministers under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinise the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly. This can be done by the Courts while confining themselves to the acknowledged parameters of the judicial review as discussed above viz., illegality, irrationality and mala fides. Such scrutiny of the material will also

be within the judicially discoverable and manageable standards. 14. We may in this connection, refer to the principles of federalism and democracy which are embedded in our Constitution. Article 1 of the Constitution states that India shall be a Union of States. Thus the States are constitutionally recognised units and not mere convenient administrative divisions. Both the Union and the States have sprung from the provisions of the Constitution. The learned author, H.M. Seervai, in his commentary "Constitutional Law of India" [page 166, third edition] has summed up the federal nature of our Constitution by observing that the federal principle is dominant in our Constitution and the principle of federalism has not been watered down for the following reasons : "(a) It is no objection to our Constitution being federal that the States were not independent States before they became parts of a Federation. A Federal situation existed, first, when the British Parliament adopted a federal solution in the G.I. Act, 1935, and secondly, when the Constituent Assembly adopted a federal solution in our Constitution; (b) Parliament's power to alter the boundaries of States without their consent is a breach of the federal principle, but in fact it is not Parliament which has, on its own, altered the boundaries of States. By extra constitutional agitation, the States have forced Parliament to alter the boundaries of States. In practice, therefore, the federal principle has not been violated; (c) The allocation of the residuary power of legislation to Parliament (i.e. the Federation) is irrelevant for determining the federal nature of a Constitution. The U.S. and the Australian Constitutions do not confer the residuary power on the Federation but on the States, yet those Constitutions are indisputably federal; (d) External sovereignty is not relevant to the federal nature of a Constitution, for such sovereignty must belong to the country as a whole. But the division of internal sovereignty by a distribution of legislative powers is an essential feature of federalism, and our Constitution possesses that feature. With limited exceptions, the Australian Constitution confers overlapping legislative powers on the States and the Commonwealth, whereas List II, Schedule VII of our Constitution confers exclusive powers of legislation on the States, thus emphasising the federal nature of our Constitution; (e) The enactment in Article 352 of the emergency power arising from war or external aggression which threatens the security of India merely recognises de jure what happens de facto in great federal countries like the U.S., Canada and Australia in times of war, or imminent threat of war, because in war, these federal countries act as though they were unitary. The presence in our Constitution of exclusive legislative powers conferred on the States makes it reasonable to provide that during the emergency created by war or external aggression, the Union should have power to legislate on topics exclusively assigned to the States and to take corresponding executive action. The Emergency Provisions, therefore, do not dilute the principle of Federalism, although the abuse of those provisions by continuing the emergency when the occasion which caused it had ceased to exist, does detract from the principle of federal government. The amendments introduced in Article 352 by the 44th Amendment have, to a considerable extent, reduced the chances of such abuse. And by deleting clauses which made the declaration and the continuance of emergency by the President conclusive,

the 44th Amendment has provided opportunity for judicial review which, it is submitted, the Courts should not lightly decline when as a matter of common knowledge, the emergency has ceased to exist. This deletion of the conclusive satisfaction of the President has been prompted not only by the abuse of the Proclamation of emergency arising out of war or external aggression, but, even more, by the wholly unjustified Proclamation of emergency issued in 1975 to protect the personal position of the Prime Minister; (f) The power to proclaim an emergency originally on the ground of internal disturbance, but now only on the ground of armed rebellion, does not detract from the principle of federalism because such a power exists in indisputably federal constitutions. Deb Sadhan Roy v. The State of West Bengal has established that internal violence would ordinarily interfere with the powers of the Federal Government to enforce its own laws and to take necessary executive action. Consequently, such interference can be put down with the total force of the United States. And the same position obtains in Australia; (g) The provisions of Article 355 imposing a duty on the Union to protect a State against external aggression and internal disorder are not inconsistent with the federal principle. The War Power belongs to the Union in all federal governments and therefore the defence of a State against external aggression is essential in any federal government. As to internal disturbance, the position reached in Deb's case |supra] shows that the absence of an application by the State does not materially affect the federal principle. Such application has lost its importance in the United States and in Australia; (h) Since it is of the essence of the Federal principle that both Federal and State laws operate on the same individual, it must follow that in case of conflict of a valid Federal law and a valid State law, the Federal law must prevail and our Constitution so provides in Article 254, with an exception noted earlier which does not affect the present discussion; (i) It follows from what is stated in (g) above, that Federal laws must be implemented in the States and that the Federal executive must have power to take appropriate executive action under Federal laws in the State, including the enforcement of those laws. Whether this is done by setting up in each State a parallel Federal machinery of law enforcement, or by using the existing State machinery, is a matter governed by practical expediency which does not affect the Federal principle. In the United States, a defiance of Federal law can be, and has been put down by the use of Armed Forces of the U.S. and the National Militia of the States. This is not inconsistent with the Federal principle in the United States. Our Constitution has adopted the method of empowering the Union Government to give directions to the States to give effect to the Union law and to prevent obstruction in the working of the Union law. Such a power, though different in form, is in substance the same as the power of the Federal government in the U.S. to enforce its laws, if necessary by force. Therefore, the power to give directions to the State governments does not violate the Federal principle; (j) Article 356 (read with Article 355) which provides for the failure of constitutional machinery was based of Article 4, Section 4 of the U.S. Constitution and Article 356, like Article 4, Section 4, is not inconsistent with the Federal principle. As stated earlier, these provisions were meant to be the last resort, but have been gravely abused and can therefore be

said to affect the working of the Constitution as a Federal Government. But the recent amendment of Article 356 by the 44th Amendment, and the submission to be made hereafter that the doctrine of the Political Question does not apply in India, show that the Courts can now take a more active part in preventing a mala fide or improper exercise of the power to impose a President's Rule, unfettered by the American doctrine of the political question; (k) The view that unimportant matters were assigned to the Stales cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the Stales, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union." In this connection, we may also refer to what Dr. Ambedkar had to say while answering the debate in the Constituent Assembly in the context of the very Articles 355, 356 and 357. The relevant portion of his speech has already been reproduced above. He has emphasised there that notwithstanding the fact that there are many provisions in the Constitution whereunder the center has been given powers to override the States, our Constitution is a federal Constitution. It means that the States are sovereign in the field which is left to them. They have a plenary authority to make any law for the peace, order and good government of the State. 15. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the center. The fact that during emergency and the certain other eventualities their powers are overriden or invaded by the center is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule. 16. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi- federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context, viz., whether the powers under Article 356[1] can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the concerned State. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the center, it cannot be argued that merely because (and assuming it is correct) the Constitution is labelled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under

Article 356[1]. If the Presidential powers under the said provision are subject to judicial review within the limits discussed above, those limitations will have to be applied strictly while scrutinising the concerned material. 17. It must further not be forgotten that in a representative democracy in a populous country like ours when legislatures of the States are dissolved pursuant to the power used under Article 356[1] of the Constitution and the elections are proposed to be held, it involves for the public exchequer an enormous expenditure and consequently taxes the public. The machinery and the resources of the State are diverted from other useful work. The expenses of contesting elections which even other wise are heavy and unaffordable for common man are multiplied. Frequent elections consequent upon unjustified use of Article 356[1] has thus a potentially dangerous consequence of negating the very democratic principle by making the election-contest the exclusive preserve of the affluent. What is further, the frequent dissolution of the Legislature, has the tendency to create disenchantment in the people with the process of election and thus with the democratic way of life itself. The history warns us that the frustration with democracy has often in the past, led to an invitation to fascism and dictatorship of one form or the other. 18. The Presidential power under Article 356[1] has also to be viewed from yet another and equally important angle. Decentralisation of power is not only valuable administrative device to ensure closer scrutiny, accountability and efficiency, but is also an essential part of democracy. It is for this purpose that Article 40 in Part IV of our Constitution dealing with the Directive Principles of State Policy enjoins upon the State to take steps to organise village panchayats and endow them with the such powers and authorities as may be necessary to enable them to function as units of sell-governance. The participation of the people in the governance is a since qua non of democracy. The democratic way of life began by direct participation of the people in the day to day affairs of the society. With the growth of population and the expansion of the territorial boundaries of the State, representative democracy replaced direct democracy and people gradually surrendered more and more of their rights of direct participation, to their representatives, Notwithstanding the surrender of the requisite powers, in matters which are retained, the powers are jealously guarded and rightly so. If it is true to say that in democracy, people are sovereign and all power belongs primarily to the people, the retention of such power by the people and the anxiety to exercise them is legitimate. The normal rule being the selfgovernance, according to the wishes expressed by the people, the occasions to interfere with the self-governance should both be rare and demonstrably compelling. 19. In this connection, a very significant and special feature of our society has to be constantly kept in mind. Our society is, among other things, multi-lingual, multi-ethnic and multi-cultural. Prior to independence, political promises were made that the States will be formed on linguistic basis and the ethnic and cultural identities will not only be protected but promoted. It is in keeping with the said promises, that the States eventually have come to be organised broadly on linguistic, ethnic and cultural basis. The peoples in every State desire to fulfil their own aspirations through self-governance within the framework of the Constitution. Hence interference

with the self governance also amounts to the betrayal of the people and unwarranted interference. The betrayal of the democratic aspirations of the people is a negation of the democratic principle which runs through our constitution. 20. What is further- and this is an equally, if not more important aspect of our Constitutional law, we have adopted a pluralist democracy. It implies, among other things, a multi- party system. Whatever the nature of federalism, the fact remains that as stated above, as per the provisions of the Constitution, every State is constituent political unit and has to have an exclusive Executive and Legislature elected and constituted by the same process as the Union Government. Under our political and electoral system, political parties may operate at the State and national level or exclusively at the State level. There may be different political parties in different States and at the national level. Consequently, situations may arise, as indeed they have, when the political parties in power in various States and at the center may be different. It may also happen - as has happened till date - that through political bargaining, adjustment and understanding, a State-level party may agree to elect candidates of a national level party to the Parliament and vice versa. This mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours. Hence the temptation of the political party or parties in power [in a coalition Government] to destabilise or sack the Government in the State not run by the same political party or parties is not rare and in fact the experience of the working of Article 356[1] since the inception of the Constitution, shows that the State Governments have been sacked and the legislative assemblies dissolved on irrelevant, objectionable and unsound grounds. So far the power under the provision has been used on more than 90 occasions and in almost all cases against governments run by political parties in opposition. If the fabric of pluralism and pluralist democracy and the unity and integrity of the country are to be preserved, judiciary in the circumstances is the only institution which can act as the saviour of the system and of the nation. It is for these reasons that we are unable to agree with the view that if the ruling party in the States suffers an overwhelming defeat in the elections to the Lok Sabha - however complete the defeat may be - it will be a ground for the issue of the Proclamation under Article 356[1]. We do not read the decision in State of Rajasthan case [supra] to have taken such a view. This is particularly so since it is observed in the judgment that: Now, we have no doubt at all that merely because the ruling party in a State suffers defeat in the elections to the Lok Sabha or for the matter of that, in the panchayat elections, that by itself can be no ground for saying that the government of the State cannot be carried on in accordance with the provisions of the Constitution. The Federal structure under our Constitution clearly postulates that there may be one party in power in the State and another at the center. It is also not an unusual phenomenon that the same electorate may elect a majority of members of one party to the Legislative Assembly, while at the same time electing a majority of members of another party to the Lok Sabha. Moreover, the Legislative Assembly, once elected, is to continue for a specific term and mere defeat at the elections to the Lok Sabha prior to the expiration of the term without anything more would be no ground for its dissolution. The

defeat would not necessarily in all cases indicate that the electorate is no longer supporting the ruling party because the issues may be different. But even if it were indicative of a definite shift in the opinion of the electorate, that by itself would be no ground for dissolution, because the Constitution contemplates that ordinarily the will of the electorate shall be expressed at the end of the term of the Legislative Assembly and a change in the electorate's will in between would not be relevant... the defeat of the ruling party in a State at the Lok Sabha elections cannot by itself, without anything more, support the inference that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. To dissolve the Legislative Assembly solely on such ground would be an indirect exercise of the right of recall of all the members by the President without there being any provision in the Constitution for recall even by the electorate. [p-84-85] There is no doubt that certain observations in the said decision create an impression to the contrary. We have already endorsed earlier the recommendation in the Report of the Sarkaria Commission that the concerned ground cannot be available for invoking power under Article 356[1]. It has no relevance to the conditions precedent for invoking the said power, viz., the break-down of the constitutional machinery in the State. 21. Thus the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the judicial review of the Proclamation issued under Article 356[1] is not only an imperative necessity but is a stringent duty and the exercise of power under the said provision is confined strictly for the purpose and to the circumstances mentioned therein and for none else. It also requires that the material on the basis of which the power is exercised is scrutinised circumspectly. In this connection, we may refer to what Dr. Ambedkar had to say in reply to the apprehensions expressed by the other Hon'ble Members of the Constituent Assembly, in this context which also bring out the concerns weighing on the mind of the Hon'ble Members: In regard to the general debate which has taken place in which it has been suggested that these articles are liable to be abused, 1 may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the center to override the Provinces. In fact I share the sentiments expressed by my honourable Friend Mr. Gupte 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 these powers, will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere 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. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this article. It is only in those circumstances he would resort to this article. I do not think we could then say that these articles were imported in vain or that the President had acted wantonly." [C.A.D. Vol. IX, p - 177] The

extract from the Report of the Sarkaria Commission which has been reproduced in paragraph 7 above will show that these hopes of Dr. Ambedkar and other Hon'ble Member of the Constituent Assembly have not come true. 22. The further equally important question that arises in this context is whether the President when he issues Proclamation under Article 356[1], would be justified in removing the Government in power or dissolving the Legislative Assembly and thus in exercising all the powers mentioned in Sub-clauses (a), (b) and (c) of Clause [1] of Article 356 whatever the nature of the situation or the degree of the failure of the constitutional machinery. A strong contention was raised that situations of the failure of the constitutional machinery may be varied in nature and extent, and hence measures to remedy the situation may differ both in kind and degree. It would be a disproportionate and unreasonable exercise of power if the removal of Government or dissolution of the Assembly is ordered when what the situation required, was for example, only assumption of some functions or powers of the Government of the State or of any body or authority in the State under Article 356[1][a]. The excessive use of power also amounts to illegal, irrational and mala fide exercise of power. Hence, it is urged that the doctrine of proportionality is relevant in this context and has to be applied in such circumstances. To appreciate the discussion on the point, it is necessary to realise that the removal of Government and the dissolution of Assembly are effected by the President, if he exercises powers of the Governor under Articles 164[1] and 1742 respectively under Sub-clause [a] of Article 356[1], though that is neither necessary nor obligatory while issuing the Proclamation. In other words, the removal of the Ministry or the dissolution of the Legislative Assembly is not an automatic consequence of the issuance of the Proclamation. The exercise of the powers under Sub-clauses [a], [b] and [c] of Article 356[1] may also co-exist with a mere suspension of the political Executive and the Legislature of the State. Sub-clause [c] of Article 356[1] makes it clear. It speaks of incidental and consequential provisions to give effect to the objects of the Proclamation including suspension in whole or part of the operation of any provision of the Constitution relating to any body or authority in the State. It has to be noted that unlike Sub-clause [a], it does not exclude the Legislature of the State. Sub-clause [b] only speaks of exercise of the powers of the Legislature of the State by or under the authority of the Parliament. What is further, the assumption of only some of the functions of the Government and the powers of the Governor or of any body or authority in the State other than the Legislature of the State under Sub-clause [a], is also conceivable with the retention of the other functions and powers with the Government of the State and the Governor or any body or authority in the State. The language of Sub-clause [a] is very clear on the subject. It must be remembered in this connection that where there is a bicameral Legislature, the Upper House, i.e., the Legislative Council cannot be dissolved. Yet under Sub-clause [b] of Article 356[1] its powers are exercisable by or under the authority of Parliament. The word used there is "Legislature" and not "Legislative Assembly". Legislature includes both the Lower House and the Upper House, i.e., the Legislative Assembly and the Legislative Council. It has also to be noted that when the powers of the Legislature of the State are

declared to be exercisable by or under the authority of the Parliament under Article 356[1][b], it is competent for Parliament under Article 357, to confer on the President the power of such Legislature to make laws and to authorise the President to delegate the powers so conferred, to any other authority to be specified by him. The authority so chosen may be the Union or officers and authorities thereof. Legally, therefore, it is permissible under Article 356[1], firstly, only to suspend the political executive or any body or authority in the State and also the Legislature of the State and not to remove or dissolve them. Secondly, it is also permissible for the president to assume only some of the functions of the political executive or of any body or authority of the Stale other than the Legislature while neither suspending nor removing them. The fact that some of these exercises have not been resorted to in practice so far, does not militate against the legal position which emerges from the clear language of Article 356[1]. In this connection, we may refer to what Dr. Ambedkar had to say on the subject in the Constituent Assembly. The relevant extract from his speech is reproduced in paragraph 21 above. Hence it is possible for the President to use only some of the requisite powers vested in him under Article 356[1] to meet the situation in question. He does not have to use all the powers to meet all the situations whatever the kind and degree of the failure of the constitutional machinery in the State. To that extent, the contention is indeed valid. However, whether in a particular situation the extent of powers used is proper and justifiable is a question which would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or mala fide as to invite judicial intervention. In fact, once the issuance of the Proclamation is held valid, the scrutiny of the kind and degree of power used under the Proclamation, falls in a narrower compass. There is every risk and fear of the Court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The Court will thus travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy-making. The "political thicket" objection sticks more easily in such circumstances. Although, therefore, on the language of Article 356[1], it is legal to hold that the President may exercise only some of the powers given to him, in practice it may not always be easy to demonstrate the excessive use of the power. 23. An allied question which arises in this connection is whether, notwithstanding the fact that a situation has arisen where there is a breakdown of the constitutional machinery in the State, it is always necessary to resort to the power of issuing Proclamation under Article 356[1]. The contention is that since under Article 355, it is the duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution and since further the issuance of the. Proclamation under Article 356[1] is admittedly a drastic step, there is a corresponding obligation on the President to resort to other measures before the step is taken under Article 356[1]. This is all the more necessary considering the principles of federal and democratic polity embedded in our Constitution. In this connection, we may refer again to what Dr. Ambedkar himself had to say on the subject.

We have quoted the relevant extract from his speech in paragraph 6 above. He has expressed the hope there that resort to Article 356[1] would be only as a last measure and before the Article is brought into operation, the President would take proper precaution. He hoped that the first thing the President would do would be to issue a mere warning. If the warning failed, he would order an election and it is only when the said two remedies fail that he would resort to the Article. We must admit that we are unable to appreciate the second measure to which Dr. Ambedkar referred as a preliminary to the resort to Article 356[1]. We should have thought that the elections to the Legislative Assembly are a last resort and if they are held, there is nothing further to be done by exercising power under Article 356[1]. We may, therefore, ignore the said suggestion made by him. But we respectfully endorse the first measure viz. of warning to which the President should resort before rushing to exercise the power under Article 356[1]. In addition to warning, the President will always have the power to issue the necessary directives. We are of the view that except in situations where urgent steps are imperative and exercise of the drastic power under the Article cannot brook delay, the President should use all other measures to restore the constitutional machinery in the State. The Sarkaria Commission has also made recommendations in that behalf in paragraphs 6.8.01 to 6.8.04 of its Report. It is not necessary to quote them here. We endorse the said recommendations.
24. The next important question to be considered is of the nature and effect of the action to be taken by the President pursuant to the Proclamation issued by him. The question has to be considered with reference to three different situations. Since Clause [3] of Article 356 requires every Proclamation issued under Clause[1] thereof, to be laid before each House of Parliament and also states that it shall 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, the question which emerges is what is the legal consequence of the actions taken by the President, [a] if the Proclamation is invalid, yet it is approved by both Houses of Parliament; [b] if the Proclamation is invalid and not approved by either or both Houses of Parliament; and [c] if the Proclamation is valid but not approved by either or both Houses of Parliament. The other question that arises in this connection is, whether the legal consequences differ in these three classes of cases, depending upon the nature of the action taken by the President. The Proclamation falling under Clauses [a] and [b] will not make any difference to the legal status of the actions taken by the President under them. The actions will undoubtedly be illegal. However, the Court by suitably moulding the relief, and the Parliament and the State Legislature by legislation, may validate those acts of the President which are capable of being validated. As far as the Parliament is concerned, such acts will not include the removal of the Council of Ministers and the dissolution of the Legislative Assembly since there is no provision in the Constitution which gives such power to the Parliament. That power is given exclusively to the Governor under Articles 164[1] and 174[2][b] respectively. It is this power, among others, which the President is entitled to assume under Article 356[1][a]. The Parliament can only approve or disapprove of the removal of the Council of Ministers and the dissolution of

the Legislative Assembly under Clause [3] of that Article, if such action is taken by the President. The question then arises is whether the Council of Ministers and the Legislative Assembly can be restored by the Court when it declares the Proclamation invalid. There is no reason why the Council of Ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the Proclamation, the same being the normal legal effect to the invalid action. In the context of the constitutional provisions which we have discussed and in view of the power of the judicial review vested in the Court, such a consequence is also a necessary constitutional fall-out. Unless such result is read, the power of judicial review vested in the judiciary is rendered nugatory and meaningless. To hold otherwise is also tantamount to holding that the Proclamation issued under Article 356[1] is beyond the scope of judicial review. For when the validity of the Proclamation is challenged, the Court will be powerless to give relief and would always be met with the fait accompli. Article 356 would then have to be read as an exception to judicial review. Such an interpretation is neither possible nor permissible. Hence the necessary consequence of the invalidation of the Proclamation would be the restoration of the Ministry as well as the Legislative Assembly, in the State. In this connection, we may refer to the decision of the Supreme Court of Pakistan in Mian Mumammad Nawaz Sharif v. President of Pakistan and Ors., |1993] PLD SC 473. The Court there held that the impugned order of dissolution of National Assembly and the dismissal of the Federal Cabinet were without lawful authority and, therefore, of no legal effect. As a consequence of the said declaration, the Court declared that the National Assembly, Prime Minister and the Cabinet stood restored and entitled to function as immediately before the impugned order was passed. The Court further declared that all steps taken pursuant to the impugned order including the appointment of care-taker Cabinet and care-taker Prime Minister were also of no legal effect. The Court, however, added that all orders passed, acts done and measures taken in the meanwhile, by the care-taker Government which had been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary and orderly running of the State, shall be deemed to have been validly and legally done. As regards the third class of cases where the Proclamation is held valid but is not approved by either or both Houses of Parliament, the consequence of the same would be the same as where the Proclamation is revoked subsequently or is not laid before each House of the Parliament before the expiration of two months or where it is revoked after its approval by the Parliament or ceases to operate on the expiration of a period of six months from the date of its issue, or of the further permissible period under Clause [4] of Article 356. It does not, however, appear from the provisions of Article 356 or any other provision of the Constitution, that mere non-approval of a valid Proclamation by the Parliament or its revocation or cessation, will have the effect either of restoring the Council of Ministers or the Legislative Assembly. The inevitable consequence in such a situation is fresh elections and the Constitution of the new Legislative Assembly and the Ministry in the State. The law made in exercise of the power of the Legislature of the State by Parliament or the President or any

other authority during the period the valid Proclamation subsists before it is revoked or disapproved, or before it expires, is protected by Clause [2] of Article 357. It is therefore, necessary to interpret Clauses [1] and [3] of Article 356 harmoniously since the provisions of Clause [3] are obviously meant to be a check by the Parliament [which also consist of members from the concerned States] on the powers of the President under Clause [1]. The check would become meaningless and rendered ineffective if the President takes irreversible actions while exercising his powers under Sub-clauses [a], [b] and [c] of Clause [1] of the said Article. The dissolution of the Assembly by exercising the powers of the Governor under Article 174[2][b] will be one such irreversible action. Hence, it will have to be held that in no case, the President shall exercise the Governor's power of dissolving the Legislative Assembly till at least both the Houses of Parliament have approved of the Proclamation issued by him under Clause [1] of the said Article. The dissolution of the assembly prior to the approval of the Proclamation by the Parliament under Clause [3] of the said Article will be per se invalid. The President may, however, have the power of suspending the Legislature under Sub-clause [c] of Clause [1] of the said Article. 25. Our conclusion, therefore, firstly, is that the President has no power to dissolve the Legislative Assembly of the State by using his power under Sub-clause [a] of Clause [1] of Article 356 till the Proclamation is approved by both the Houses of the Parliament under Clause [3] of the said Article. He may have power only to suspend the Legislative Assembly under Sub-clause [c] of Clause [1] of the said Article. Secondly, the Court may invalidate the Proclamation whether it is approved by the Parliament or not. The necessary consequence of the invalidation of the Proclamation would be to restore the status quo ante and, therefore, to restore the Council of Ministers and the Legislative Assembly as they stood on the date of the issuance of the Proclamation. The actions taken including the laws made during the interregnum may or may not be validated either by the Court or by the Parliament or by the State Legislature. It may, however, be made clear that it is for the Court to mould the relief to meet the requirements the situation. It is not bound in all cases to grant the relief of restoration of the Legislative Assembly and the Ministry. The question of relief to be granted in a particular case pertains to the discretionary jurisdiction of the Court. The further important question that arises is whether the Court will be justified in granting interim relief and what would be the nature of such relief and at what stage it may be granted. The grant of interim relief would depend upon various circumstances including the expeditiousness with which the Court is moved, the prima facie case with regard to the invalidity of the Proclamation made out, the steps which are contemplated to be taken pursuant to the Proclamation etc. However, if other conditions are satisfied, it will defeat the very purpose of the judicial review if the requisite interim relief is denied. The least relief that can be granted in such circumstances is an injunction restraining the holding of fresh elections for constituting the new Legislative Assembly. There is no reason why such a relief should be denied if a precaution is taken to hear the challenge as expeditiously as possible taking into consideration the public interests involved. The possibility of a delay in the disposal of the challenge cannot be a ground

for frustrating the constitutional right and defeating the constitutional provisions. It has, however, to be made clear that the interlocutory relief that may be granted on such challenge is to prevent the frustration of the constitutional remedy. It is not to prevent the constitutional authority from exercising its powers and discharging its functions. Hence it would be wholly impermissible either to interdict the issuance of the Proclamation or its operation till a final verdict on its validity is pronounced. Hence the normal rules of quia timet action have no relevance in matters pertaining to the challenge to the Proclamation. To conclude, the Court in appropriate cases will not only be justified in preventing holding of fresh elections but would be duty-bound to do so by granting suitable interim relief to make effective the constitutional remedy of judicial review and to prevent the emasculation of the Constitution. 26. In the light of our conclusions with regard to the scope of the power of the President to issue Proclamation under Article 356[1], of the parameters of judicial review and the quia timet action, we may now examine the facts in the individual cases before us. It has, however, to be made clear at the outset that the facts are not being discussed with a view to give relief prayed for, since in all cases fresh elections have been held, new Legislative Assemblies have been elected and new Ministries have been installed. Nor do the petitioners/appellants seek any such relief. The facts are being discussed to find out whether the action of the President was justified in the light of our conclusions above. The finding may serve as a guidance for future. For the sake of convenience, we propose to deal with the cases of the States of Karnataka, Meghalaya and Nagaland separately from those of the States of Himachal Pradesh, Madhya Pradesh and Rajasthan. KARNATAKA: C.A.No. 3645 of 1989 27. Taking first the challenge to the Proclamation issued by the President on 21.4.1989 dismissing the Government of Karnataka and dissolving the State Assembly, the Proclamation does not contain any reasons and merely recites that the President is satisfied on a consideration of the report of the Governor and other information received by him, that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The facts were that the Janata Party being the majority party in the State Legislature had formed Government under the leadership of Shri S.R. Bommai on 30.8.1988 following the resignation on 1.8.1988 of the earlier Chief Minister, Shri Hegde who headed the Ministry from March 1985 till his resignation. In September 1988, the Janata Party and Lok Dal [B] merged into a new party called Janata Dal. The Ministry was expanded on 15.4.1989 with addition of 13 members. Within two days thereafter, i.e., on 17.4.1989, one Shri K.R. Molakery, a legislator of Janata Dal defected from the party and presented a letter to the Governor withdrawing his support to the Ministry. On the next day, he presented to the Governor 19 letters allegedly signed by 17 Janata Dal legislators, one independent but associate legislator and one legislator belonging to the Bhartiya Janata Party which was supporting the Ministry, withdrawing their support to the Ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On 19.4.1989, the Governor sent a report to the President stating therein that

there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party, viz., Janata Dal, there were dissensions and defections. In support of his case, he referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the chief Minister, Shri Bommai did not command a majority in the Assembly and, hence, it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356[1]. It is not disputed that the Governor did not ascertain the view of Shri Rommai either after the receipt of the nineteen letters or before making his report to the President. On the next day, i.e., 20.4.1989. seven out of the nineteen legislators who had allegedly written the said letters to the Governor sent letters to him complaining that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e., on 27.4.1989. The Chief Minister and his Law Minister met the Governor the same day and informed him about the decision to summon the Assembly Session. It is also averred in the petition that they had pointed out to the Governor the recommendation of the Sarkaria Commission that the strength of the Ministry should be tested on the floor of the House. The Chief Minister also offered to prove has majority on the floor of the House even by proponing the Assembly Session, if needed. To the same effect, he sent a telex message to the President. The Governor, however sent yet another report to the President on the same day i.e., 20-4-1989, in particular, referring to the letters of seven members pledging their support to the Ministry and withdrawing their earlier letters. He, however, opined in the report that the letters from the seven legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356[1]. On that very day, the President issued the Proclamation in question with the recitals already referred to above. The Proclamation was, thereafter approved by the Parliament as required by Article 356[3], Shri Bommai and some other members of the Council of Ministers challenged the validity of the Proclamation before the Karnataka High Court by a writ petition on various grounds. The petition was resisted by the Union of India, among others. A three-Judge Bench of the High Court dismissed the petition holding, among other things, that the facts stated in the Governor's report could not be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The Court also held that recourse to floor-test was neither compulsory nor obligatory and was not a pre-requisite to sending the report to the President. It was also held that

the Governor's report could not be challenged on the ground of legal mala fides since the Proclamation had to be issued on the satisfaction of the Union Council of Ministers. The Court further relied upon the test laid down in the State of Rajasthan case [supra] and held that on the basis of the material disclosed, the satisfaction arrived at by the President could not be faulted. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislatOrs. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislatOrs. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which lest the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on 27-4-89, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all cannons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356[1] clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more fairly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed, was therefore liable to be struck down. 28. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of

the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356[1]. Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid. We may on this subject refer to the unanimous Report of the Five-member Committee of Governors which recommended as follows: . . . the test of confidence in the ministry, should normally be left to a vote in the Assembly. . . where the Governor is satisfied by whatever process or means, that the ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove this majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima

facie proof of his no longer enjoying the confidence of the legislature. If then, an alternative ministry can be formed, which, in the Governor's view, is able to command a majority in the assembly, he must dismiss the ministry in power and install the alternative ministry in office. On the other hand, if no such ministry is possible, the Governor will be left with no alternative but to make a report to the President under Article 356.... xxxx xxxx xxxx As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and his Council of Ministers should be left to the legislature, and that it is only if a responsible government cannot be maintained without doing violence to correct constitutional practice that the Governor should resort to Article 356 of the Constitution.... xxxx xxxx xxxx What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek.... xxxx xxxx xxxx ...the guiding principle being, as already stated, that the constitutional machinery in the state should, as far as possible, be maintained. MEGHALAYA: T.C. Nos. 5 & 7 of 1992. 29. In this case the challenge is to the Proclamation dated 11.10.1991 issued under Article 356[1]. The facts are that the writ petitioner G.S. Massar belonged to a Front known as Meghalaya United Parliamentary Party [MUPP] which had a majority in the Legislative Assembly and had formed in March 1990, a Government under the leadership of Shri B.B. Lyngdoh. On 25-7- 1991, one Kyndiah Arthree who was at the relevant time, the Speaker of the House, was elected as the leader of the opposition group known as United Meghalaya Parliamentary Forum [UMPF]. The majority in this group belonged to the Congress Party. On his election, Shri Arthree claimed support of majority of the members in the Assembly and requested the Governor to invite him to form the Government. Thereupon, the Governor asked the then Chief Minister Shri Lyngdoh to prove his majority on the floor of the House. Accordingly, a special Session of the Assembly was convened on 7.8.1991 and a Motion of Confidence in the Ministry was moved. Thirty legislators supported the Motion and 27 voted against it. However, instead of announcing the result of the voting on the Motion, the Speaker declared that he had received a complaint against five independent MLAs of the ruling coalition front alleging that they were disqualified as legislators under the Anti-defection law and since they had become disentitled to vote, he was suspending their right to vote. On this announcement, uproar ensured in the House and it had to be adjourned. On 11.8.1991, the Speaker issued show cause notices to the alleged defectors, the five independent MLAs on a complaint filed by one of the legislators Shri Shylla. The five MLAs replied to the notice denying that they had joined any of the parties and contended that they had continued to be independent. On receipt of the replies, the speaker passed an order on 17.8.1991, disqualifying the five MLAs on the ground that four of them were Ministers in the then Ministry and one of them was the Deputy Government Chief Whip. Thereafter, again on the Governor's advice, the Chief Minister Shri Lyngdoh summoned the Session of the Assembly on 9.9.1991 for passing a vote of confidence in the Ministry. The Speaker however, refused to send the notices of the Session to the five independent MLAs disqualified by him and simultaneously made arrangements to prohibit their entry into the Assembly.

On 6.9.1991, the five MLAs, approached this Court. The Court issued interim order staying the operation of the Speaker's orders dated 7.8.1991 and 17.8.1991 in respect of four of them. It appears that one of the members did not apply for such order. The Speaker, thereafter, issued a Press-statement in which he declared that he did not accept any interference by any Court with his order of 17.8.1991. The Governor, therefore, prorogued the Assembly indefinitely by his Order dated 8.9.1991. The Assembly was again convened at the instance of the Governor on 8.10.1991. In the meanwhile, the four independent MLAs who had obtained the interim orders moved a contempt petition in this Court against the Speaker who had not only made the declaration in the Press statement defying the interim order of this Court but also taken steps to prevent the independent MLAs from entering the House. On 8.10.1991, this Court passed another order directing that all authorities of the State should ensure the compliance of the Court's interim order of 6.9.1991. Pursuant to this direction, the four of the five independent MLAs received invitation to attend the Session of the Assembly convened on October 8, 1991. In all, 56 MLAs including the four independent MLAs attended the Session. After the Motion of Confidence in the Ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of the four independent MLAs. Thereafter, declaring that there was a tie in voting, he cast his own vote against the Motion and declared that the Motion had failed and adjourned the House sine die. However, 30 MLAs, viz., 26 plus four independent MLAs who had voted for the Motion, continued to stay in the House and elected the Speaker from amongst themselves to conduct the business. The new Speaker declared that the Motion of Confidence in the Ministry had been carried since 30 MLAs had voted in favour of the Government. They further proceeded to pass a Motion of No- confidence in the Speaker. The thirty MLAs thereafter sent a letter to the Governor stating therein that they had voted in favour of the Ministry and had also passed a Motion of No-confidence in the Speaker. However, on 9.10.1991, the Governor wrote a letter to the Chief Minister asking him to resign in view of what had transpired in the Session on 8.10.1991. Unfortunately, the Governor in the said letter also proceeded to observe that the non-cognisance by the Speaker of the Supreme Court's orders relating to the four independent MLAs was a matter between the Speaker and the Court. The Chief Minister moved this Court, thereafter, against the letter of the Governor, and this Court on 9.10.1991, among other things, asked the Governor to take into consideration the orders of this Court and votes cast by the four independent MLAs before taking any decision on the question whether the Government had lost the Motion of Confidence. In spite of this, the President on 11.10.1991 issued Proclamation under Article 356[1]. The Proclamation stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. The Government was dismissed and the Assembly was dissolved. This Court by an order of 12.10.1991, set aside the order dated 17.8.1991 of the then Speaker. However, thereafter, both the Houses of Par-

liament met and approved the Proclamation issued by the President. 30. The unflattering episode shows in unmistakable terms the Governor's unnecessary anxiety to dismiss the Ministry and dissolve the Assembly and also his failure as a constitutional functionary to realise the binding legal consequences of and give effect to the orders of this Court. What is worse, the Union Council of Ministers also chose to give advice to the President to issue the Proclamation on the material in question. It is not necessary to comment upon the validity of the Proclamation any further save and except to observe that prima facie, the material before the President was not only irrational but motivated by factual and legal mala fides. The Proclamation was, therefore, invalid. NAGALAND CA. Nos. 193-94 of 1992 31. The Presidential Proclamation dated 7.8.1988 was issued under Article 356[1] imposing President's rule in the State of Nagaland. At the relevant time, in the Nagaland Assembly consisting of 60 members, 34 belonged to Congress-I, 18 to Naga National Democratic Party, one belonged to Naga Peoples Party and seven were independent, Shri Sema, the leader of the ruling party was the Chief Minister heading the State Government. On 28th July, 1988, 13 of the 34 MLAs of the ruling Congress-I Party informed the Speaker of the Assembly that they had formed a party separate from Congress-I ruling party and requested him for allotment of separate seats for them in the House. The Session was to commence on 28.8.1988. By his decision of 30.7.1988, the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the Constitution. On 31.7.1988, Shri Vamuzo, one of the 13 defecting MLAs who had formed separate party, informed the Governor that he commanded the support of 35 out of the then 59 members in the Assembly and was in a position to form the Government. On 3.10.1988, the Chief Secretary of the State wrote to Shri Vamuzo that according to his information, Shri Vamuzo had wrongfully confined the MLAs who had formed the new party. Shri Vamuzo denied the said allegation and asked the Chief Secretary to verify the truth from the Members themselves. On verification, the Members told the Chief Secretary that none of them was confined, as alleged. On 6.8.1988, the Governor sent a report to the President of India about the formation of a new party by the 13 MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement by Shri Vamuzo and one other person, and that the story of split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going on in the State. He made a special reference to the insurgency in Nagaland and also stated that some of the members of the Assembly were having contacts with the insurgents. He expressed the apprehension that if the affairs were allowed to continue as they were, it would affect the stability of the State. In the meanwhile, the Chief Minister submitted his resignation to the Governor and recommended the imposition of the President's rule. The President thereafter, issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Shri Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Guahati High Court. The petition was heard by a Division Bench comprising the Chief Justice and Hansaria, J. The

Bench differed on the effect and operation of Article 74[2] and hence the matter was referred to the third Judge. But before the third learned judge could hear the matter, the Union of India moved this Court for grant of special leave which was granted and the proceedings in the High Court were stayed. It may be stated here that the Division Bench was agreed that the validity of the Proclamation could be examined by the Court and it was not immune from judicial review. We have already discussed the implications of Article 74[2] earlier and have pointed out that although the advice given by the Council of Ministers is free from the gaze of the Court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny. On the facts of this case also we are of the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House. This was particularly so because the Chief Minister, Shri Sema had already submitted his resignation to the Governor. This is notwithstanding the fact that the Governor in his report had stated that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress-I MLAs were allured by the monetary benefits and that amounted to incredible lack of the political morality and complete disregard of the wishes of the electorate. It has to be emphasised here that although the Tenth Schedule was added to the Constitution to prevent political bargaining and defections, it did not prohibit the formation of another political party if it was backed by no less than 1/3 rd members of the existing legislature party. Since no opportunity was given to Shri Vamuze to prove his strength on the floor of the House as claimed by him and to form the Ministry, the Proclamation issued was unconstitutional. 32. We may now deal with the cases of the States of Madhya Pradesh. Rajasthan and Himachal Pradesh. The elections were held to the Legislative Assemblies in these States along with the elections to the Legislative Assembly of Uttar Pradesh, in February, 1990. The Bhartiya Janata Party [BJP] secured majority in the Assemblies of all the four States and formed Governments there. Following appeals of some organisations including the BJP, thousands of kar sevaks from Uttar Pradesh as well as from other States including Madhya Pradesh, Rajasthan and Himachal Pradesh gathered near the Ram Janam Bhumi-Babri Masjid structure on the 6th December, 1992 and eventually some of them demolished the disputed structure. Following the demolition, on the same day the Uttar Pradesh Government resigned. Thereafter, on the same day the President issued Proclamation under Article 356[1] and dissolved the Legislative Assembly of the State. The said Proclamation in not challenged. Hence we are not concerned in these proceedings with its validity. As a result of the demolition of the structure which was admittedly a mosque standing at the site for about 400 years, there were violent reactions in this country as well as in the neighbouring countries where some temples were destroyed. This in turn created further reactions in this country resulting in violence and destruction of the property. The Union Government tried to cope up with the situation by taking several steps including a ban on several organisations including Rashtriya Swayamsevak Sangh [RSS], Vishva Hindu Parishad [VHP] Bajrang Dal which had along with BJP given a call for kar sevaks to march towards Ayodhya on 6th December, 1992.

The ban order was issued on 10th December, 1992 under under the Unlawful Activities [Prevention] Act, 1967. The dismissal of the State Governments and the State Legislative Assemblies in Madhya Pradesh, Rajasthan and Himachal Pradesh were admittedly a consequence of these developments and were effected by the issuance of Proclamations under Article 356[1], all on the 15th December, 1992. MADHYA PRADESH C.A. Nos. 1692, 1692-A to 1692-C of 1993 & C.A. Nos. 4627-30 of 1993. 33. The Proclamation was a consequence of three reports sent by the Governor to the President. The first was of 8.12.1992. It referred to the fast deteriorating law and order situation in the wake of widespread acts of violence, arson and looting. He expressed his "lack of faith" in the ability of the State Government to stem the tide primarily because of the political leadership's "overt and covert support to the associate communal organisations" which seemed to point out that there was a break-down of the administrative machinery of the State. This report was followed by second report on 10.12.1992 which referred to the spread of violence to the other till then peaceful areas. Yet another report was sent by him on 13.12.1992 along with a copy of a letter dated 11.12.1992 received by him from the Executive Director, Bharat Heavy Electricals Ltd., Bhopal [BHEL]. This letter had referred to the total failure of the law and order machinery to provide safety and security of life and property in the areas in and around the BHEL factory and the pressure brought on the Administration of the factory to accommodate the kar sevaks in the BHEL area. The Governor also referred to the statement of the Chief Minister of Madhya Pradesh, Shri Sunder Lal Patwa describing the ban of RSS and VHP as unfortunate. In view of the statement of the Chief Minister, the Governor expressed his doubt about the credibility of the State Government to implement sincerely the center's direction to ban the said organisations, particularly because the BJP leaders including the Chief Minister, Shri Patwa had always sworn by the values and traditions of the RSS. In this context, he also referred to the decision of the VHP to observe December 13th as blackday to protest against the ban and to observe protest week against the "heinous law" from 14th to 20th December, 1992. He expressed his anxiety that all these moves were fraught with danger in the context of the situation obtaining then. The Governor, therefore, recommended that considering the said facts and the fact that the RSS was contemplating a fresh strategy to chalk out its future plan, and also the possibility of the leaders of the banned organisations going underground, particularly with the connivance of the State Administration, the situation demanded immediate issuance of the Proclamation. Hence the Proclamation. HIMACHAL PRADESH T.C. No. 8 of 1993 34. The Proclamation issued by the President succeeded the report of the Governor of Himachal Pradesh which was sent to him on 15.12.1992. In his report the Governor had stated, among other things, that the Chief Minister and his Cabinet had instigated kar sevaks from Himachal Pradesh to participate in the kar seva on 6.12.1992 at Ayodhya. Not only that, but some of the Ministers had expressed their desire publicly to participate in kar seva if the party high-command permitted them to do so. As a result, a number of kar sevaks including some BJP MLAs participated in the kar seva at Ayodhya. A member of the Legislative Assembly belonging to the ruling BJP

had also openly stated that he had participated in the demolition of the Babri Masjid. The Governor then added that Chief Minister, Shri Shanta Kumar had met him on 13.12.1992, i.e., two days before he sent the letter to the President, and had informed him "that he desired to implement the ban orders imposed by the Government of India on RSS, VHP and three other organisations and that he had already issued directions in that behalf. The Governor, however, opined that since the Chief Minister himself was a member of RSS, he was not in a position to implement the directions honestly and effectively and that most of the people in the State felt the same way. He also stated that some of the Ministers were publicly criticising the ban on the said three communal organisations and when the Chief Minister and some of his colleagues in the Ministry were members of the RSS, it was not possible for the administrative machinery to implement the ban honestly and effectively. It is on the basis of this report that the Proclamation in question was issued. RAJASTHAN T.C.No. 9 of 1993 35. The Presidential Proclamation was pursuant to the report of the Governor sent to the Prime Minister that Government of Rajasthan had played"an obvious role" in the episode at Ayodhya; that the BJP had control over RSS, VHP and Bajrang Dal which were the banned organisa tions, and the ban was not being implemented at all. One of the Ministers had resigned and along with him, 22 MLAs and 15500 BJP workers had participated in the Kar seva at Ayodhya. They were given a royal send-off on their departure from the State and a royal welcome on their return by the influential people in the political party running the Government, i.e., BJP. For more than a week, the law and order situation had deteriorated and the dominant feature of the break- down of the law and order situation was the anti-minority acts. He opined that it was not possible for the Administration to function effectively, objectively and in accordance with the rule of law, in the then political set up and hence a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. 36. The validity of the three Proclamations was challenged by writ petitions in the respective State High Courts. The writ petition challenging the Proclamations in respect of Madhya Pradesh Government and the Legislative Assembly was allowed by the High Court and the appeal against the decision of the High Court is preferred in this Court by the Union of India. By its order dated 16.4.93, the writ petitions challenging the Proclamations in respect of the Governments and the Legislative Assemblies of Rajasthan and Himachal Pradesh which were pending in the respective High Courts, stand transferred to this Court. 37. It is contended that the imposition of the President's rule in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh was mala fide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and/or instances of arson and looting took place is no ground for imposing the President's rule. Indeed, such incidents took place in several Congress (I) - ruled States as well as in particular, in the State of Maharashtra - on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against BJP governments. It is pointed out that so far as Himachal Pradesh is concerned, there were no communal disturbances at all. There was no law

and order problem worth the name. Even the Governor's report did not speak of any such incidents. The governments of Madhya Pradesh, Rajasthan and Himachal Pradesh, it is argued, cannot be held responsible for what happened at Ayodhya on December 6, 1992. For that incident, the Government of Uttar Pradesh had resigned owning responsibility therefore. It is also pointed out that according to the report of the Governor of Himachal Pradesh, the Chief Minister met him and indicated clearly that he was desirous of and was implementing the ban, and that some arrests were also made. In such a situation, there was no reason for the Governor to believe, or to report, that the Chief Minister is not sincere or keen to implement the ban on the said organisations. As a matter of fact, the Tribunal under Unlawful Activities (Prevention) Act, 1967, has declared the ban on RSS as illegal and accordingly the ban has since been revoked. The non-implementation of an illegal ban cannot be made the basis of action under Article 356. Assuming that there was such inaction or refusal, it cannot be made a ground for dismissing the State Government and for dissolving the Assembly. The White Paper now placed before the Court was not in existence on December 15, 1992. The manifestoes issued by the BJP from time to time cannot constitute the information referred to in the Proclamations-not, in any event, legally relevant material. In the counter to the writ petition in the Madhya Pradesh High Court, the case of the Union of India inter alia, was that the Proclamation is issued on the satisfaction of the President that government of Madhya Pradesh cannot be carried on in accordance with the provisions of the Constitution. The reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and property of the State against internal disturbance. On the basis of the said reports, the President formed the requisite satisfaction. The Proclamation under Clause (1) has been approved by both Houses of Parliament. In such a situation the Court ought not to entertain the writ petition to scrutinise the wisdom or otherwise of the Presidential Proclamation or of the approval of the Parliament. It was further contended that the circumstances in the State of M.P. were different from several other States where too serious disturbance to law and order took place. There is no comparison between both situations. "Besides Bhopal, over-all situation in the State of M.P. was such that there were sufficient and cogent reasons to be satisfied that the Government in the State could not be carried on in accordance with the provisions of the Constitution. It is denied that there was no law and order situation in the State." The Governor's reports are based upon relevant material and are made bona fide, and after due verification. In the counter affidavit filed in the writ petition (T.C. 8/93) relating to Himachal Pradesh, it is stated that the events of 6th December, 1992 were not the handiwork of few persons. It is "the public attitude and statements of various groups and political parties including BJP which led to the destruction of the structure in question and caused great damage to the very secular fabric of the country and created communal discord and disharmony all over the country including Himachal Pradesh." It is stated that the repercussions of the event cannot be judged by comparing the number of persons killed in different States. It is asserted that the Council of Ministers and the President "had a

wealth of material available to them in the present case which are relevant to the satisfaction formed under Article 356. They were also aware of the serious damage to communal amity and harmony which has been caused in the State of Madhya Pradesh, among others. They were extremely concerned with repercussions which events at Ayodhya might still have in the States" and "the ways and means to bring back normally not only in the law and order situation but also communal amity and harmony which had been so badly damaged as a result of the activities, attitude and stand of inter alia the party in power in the State." It is also stated that, according to the definite information available to the Government of India, members of the RSS were not only present on the spot at Ayodhya but actually participated in the demolition and they were responsible for promotion of communal disharmony. It is also asserted that the action was taken by the President not only on the basis of the report of the Governor but also on the basis of other information received by him. In the Counter affidavit filed in the writ petition relating to Rajasthan (T.C.No.9 of 1993), it is stated that after the demolition on 6th December, 1992, violence started in various parts of the country leading to loss of life and property. It is asserted that it is not possible to assess the law and order situation in different States only on the basis of casualty figures. The situation in each State has to be assessed differently. The averment of the petitioner that the State Government implemented the ban on RSS properly is denied. There is no requirement that the report of the Governor should be addressed to the President. It can also be addressed to the Prime Minister. Besides the report of the Governor, other information was also available on which the President had formed his satisfaction. The allegations of mala fide, capricious and arbitrary exercise of power are denied. The Presidential Proclamation need not contain reasons for the action, it is submitted. No irrelevant material was taken into consideration by the President. The learned Counsel for Union of India and other counsel supporting the impugned Proclamations argued that the main plank and the primary programme of BJP was the construction of a Ram Temple at the very site where the Babri Masjid stood. The party openly proclaimed that it will remove - relocate, as it called it - the Babri Masjid structure since according to it the Babri Masjid was super-imposed on an existing Ram Temple by Emperor Babar. The party came to power in all the four States on the said plank and since then had been working towards the said goal. It has been the single goal of all the leaders of BJP, their Ministers, Legislators and all cadres. For this purpose, they had been repeatedly collecting kar sevaks from all corners at Ayodhya from time to time. In the days immediately preceding December 6, 1992, their leaders had been inciting and exhorting their followers to demolish the Babri Masjid and to build a temple there. The Ministers in Madhya Pradesh, Himachal Pradesh and Rajasthan had taken active part in organising and sending kar sevaks to Ayodhya. When the kar sevaks returned from Ayodhya after demolishing the Masjid, they were welcomed as heroes by those very persons. Many of the Ministers and Chief Ministers were members of RSS and were protesting against the ban on it. They could not, therefore, be trusted to enforce the ban, notwithstanding the protestations to the contrary by some of them. The counsel relied for the

purpose upon the following facts to support there contentions: In May/June, 1991, mid-term poll was held to Lok Sabha. The manifesto issued by the BJP on the eve of May/June, 1991 mid-term poll states that the BJP "seeks the restoration of Ram Janambhoomi in Ayodhya only by way of a symbolic righting of historic wrongs, so that the old unhappy chapter of acrimony could be ended, and a Grand National Reconciliation effected." At another place under the head "Sri Ram Mandir at Janmasthan", the following statement occurs: "BJP firmly believes that construction of Ram Mandir at Janmasthan is a symbol of the vindication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it will not allow any vested interests to give it a sectarian and communal colour. Hence, the party is committed to build Shri Ram Mandir at Janmasthan by relocating super-imposed Babri structure with due respect." By themselves, the above statements may not mean that the programme envisaged unlawful or forcible demolition of the disputed structure. The said statements are also capable of being understood as meaning that the party proposed to vindicate their stand by constitutional means that the disputed structure was in fact the Ram Janmasthan which was forcibly converted into a mosque by Emperor Babar and that only thereafter they would relocate the said structure and build Shri Ram Temple at that site. However, the above statements when read in the light of the speeches and acts of the leaders of the BJP., give room for another interpretation as well. Those facts are brought out in the "White Paper on Ayodhya" issued by the Government of India in February, 1993. They are as follows: A movement to construct the Shri Ram Temple at the site of the disputed structure by removing or relocating it gathered strength in recent years. A determined bid to storm the structure in October/November, 1990 resulted in some damage to the structure and loss of lives as a result of police firing. The Central Government was negotiating with various parties and organisations for a peaceful settlement of the issue. However, a new dimension was added to the campaign for construction of the temple with the formation of the Government in Uttar Pradesh in June, 1991. The Government declared itself committed to the construction of the temple and took certain steps like the acquisition of land adjoining the disputed structure, demolition of certain other structure, including temples standing on the acquired land, and digging and levelling of a part of the acquired land. The disputed structure itself was left out of the acquisition. The plan of the proposed temple released by the VHP envisaged location of the sanctum sanctorum of the temple at the very site of the disputed structure. The Union Government was concerned about the safety of the structure. But at the meeting of the National Integration Council held on November 2, 1991, the Chief Minister of Uttar Pradesh, Shri Kalyan Singh, undertook to protect the structure and assured everybody there that it is the responsibility of the State Government to protect the disputed structure and that no one would be allowed to go there. He also undertook that all the orders of the Court will be faithfully implemented. In July 1992, a large number of kar sevaks gathered on the acquired land and proposed to start the construction. The situation was averted and kar seva was called off on July 26, 1992. The BJP decided to re-enact the Rath Yatra by

Sri L.K. Advani and Shri M.M. Joshi on the pattern of 1990 Rath Yatra with the objective of mobilising people and kar sevaks for the construction of Shri Ram Temple. Shri Advani said that they have now plunged into the temple movement in full strength. The leaders of the BJP were acting in concert with VHP, RSS and allied organisations. The Rath Yatras started on December 1, 1992. Shri Advani started from Varanasi and Shri Joshi from Mathura. The starting points had their own sinister significance for the future demands and programmes for restoration of the temples at both these places. Both the leaders travelled through eastern and western parts of Uttar Pradesh and reached Ayodhya. During their Yatra, both these leaders gave provocative speeches and mobilised kar sevaks and asked their workers and people to reach Ayodhya in large numbers to perform kar seva. Shri L.K. Advani, during the Rath Yatra, kept constantly appealing to the kar sevaks to take the plunge and not bother about the survival of the Kalyan Singh Government. He also kept saying that kar seva in Ayodhya would not remain restricted to "bhajan or kirtan" but would involve physical labour. Shri Joshi, during the Rath Yatra, maintained that the BJP Government in U.P. would not use force against the kar sevaks in Ayodhya and that the nature of kar seva would be decided by Sants/Mahants and the RJB-BM issue was a religious matter which can be solved only by the Dharmacharyas but not by the Supreme Court. He threatened of serious consequences if the BJP Government in U.P. was dismissed. On 1st December, 1992, Shri Joshi appealed to the gathering [at Mathura] to assemble at Ayodhya in large numbers for kar seva and demolish the so-called Babri Masjid. Smt. Vijayaraje Scindia, another leader of the BJP stated at Patna on November 23, 1992 that the Babri Masjid will have to be demolished. Shri V.H. Dalmiya, a leader of VHP declared on November 9, 1992 at Delhi that the RJB Temple would be constructed in the same way it was demolished by Babar. He stated that Kar sevaks were pressuring the leadership the they should be called not to construct the RJB Temple but to demolish the masjid. As early as 1st December, 1992, 25,000 kar sevaks had reached Ayodhya. By 5th December, their number crossed two lacs. Arrangements were made for their accommodation in tents, schools and colleges and even in the open near the disputed structure. The local Administration stepped up its efforts to increase civic amenities in view of the arrival of kar sevaks in such large numbers. The Central Government had posted paramilitary forces at Ayodhya to meet any eventuality and to be ready for any assistance that the local Administration or the BJP Government may ask for. Instead of utilising the services of the said forces, the Chief Minister of Uttar Pradesh had been protesting to the Central Government about the camping of the said forces at Ayodhya. In his letter dated 1st December, 1992 addressed to the Prime Minister, Sri Kalyan Singh recorded his protest about the continued presence of the said forces at Ayodhya, termed it as unauthorised and illegal on the ground that they were stationed there without the consent and against the wishes of the State Government. On December 6, 1992, while the crowd of kar sevaks was being addressed by leaders of the BJP, VHP etc., roughly 150 persons in a sudden move broke through the cordon on the terrace, regrouped and started pelting stones at the police personnel. A large crowd

broke into the dispute structure. The mob swelled enormously within a short time and started demolishing the structure. The local police stood by as mute spectators since they were under orders of the Chief Minister not to use force against the kar sevaks. The Central forces were equally helpless since they were not allowed to intervenes by the local Magistrate on the spot. It was also emphasised that according to the statement of the Union Home Minister made in Rajya Sabha on December 21, 1992, "all these kar sevaks, when they returned, were received by the Chief Ministers and Ministers,. Relying on these facts and events, it was contended that what happened on December 6, 1992 did not happen in a day. It was the culmination of a sustained campaign carried on by the BJP and other allied organisations over the last few years. It was then pointed out that in the manifesto issued by the BJP in connection with the 1993 General Elections, there is not a word of regret about what happened on December 6, 1992. On the contrary, the following statement occurs there under the heading"Ayodhya". Ayodhya In their actions and utterances, the forces of pseudo-secularism convey the unmistakable impression of a deep repugnance for all things Hindu. Indeed, in their minds"Hindu" has come to be associated with "communal". The controversy over the Ram Janmabhoomi temple in Ayodhya is a powerful illustration of this phenomenon. For them "Sahmat" is secular and "Saffron" communal. Although the facts of the dispute are well known, certain features merit repetition. First, it was always apparent that a vast majority of Hindus were totally committed to the construction of a grand temple for Lord Rama at the site where puja has been performed uninterruptedly since 1948 and where besides, no namaz has been offered since 1936. The structure build by the Moghul Emperor Babur was viewed by the Hindus as a symbol of national humiliation. Second, the election of 1991 in Uttar Pradesh centerd on the Ayodhya dispute. It was a virtual referendum on Ram Janmabhoomi and the BJP with its promise to facilitate the construction of the Ram Temple won the election. However, this update did not prevent the Congress and other pseudo-secular parties from wilfully obstructing the initiatives of the Uttar Pradesh government. Everything, from administrative subterfuge to judicial delay, was used by the opponents of the temple to prevent the BJP government from fulfilling its promise to the electorate. On December 6, 1992 kar sevaks from all over India assembled in Ayodhya to begin the reconstruction of the Rama Temple at the site adjoining the garbha griha. Matters took an unexpected turn when, angered by the obstructive tactics of the Narasimha Rao government, inordinate judicial delays and pseudo-secularist taunts, the kar sevaks took matters into their own hands, demolished the disputed structure and constructed a makeshift temple for Lord Rama at the garbha griha. Owning responsibility for its inability to prevent the demolition, the BJP-government headed by Shri Kalyan Singh submitted its resignation. A disoriented Central government was not content with the imposition of President's rule in Uttar Pradesh. In violation of democratic norms, the center dismissed the BJP governments in Rajasthan, Madhya Pradesh and Himachal Pradesh. Further, it banned the Rashtriya Swayamsevak Sangh, Vishwa Hindu Parishad and Bajrang Dal. Worst of all, in collusion with other rootless forces the government unleashed a vicious propaganda offensive

aimed at belittling the Hindus. The kar sevaks were denigrated as fascists, lumpens and vandals, and December 6, was described as a "national shame". Recently, the CBI has filed chargesheets against leaders of the BJP and the Vishwa Hindu Parishad with the purpose of projecting them as criminals. This relentless onslaught of the pseudo-secular forces against the people of India had very serious consequences. For a start, it created a wide emotional gulf between the rulers and the people. Ayodhya was a popular indictment of the spurious politics of double-standards. Far from recognising it as such, the Congress and other anti-BJP parties used it as a pretext for furthering the cause of unprincipled minorityism. It is this minorityism that prevents the Congress, Janata Dal, Samajvadi Party and the Communist Parties from coming out with an unambiguous declaration of intent on Ayodhya. This BJP is the only party which is categorical in its assurance to facilitate the construction of the Rama Temple at the site of the erstwhile Babri structure. This is what the people desire. The further submission was that the demolition of the disputed structure was the outcome of the speeches, programme and the several campaigns including Rath Yatras undertaken by the leaders of the BJP. It is neither possible nor realistic to dissociate the Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh from the acts and deeds of their party. It is one party with one programme. It is stated in the report of the Himachal Pradesh Governor that the Chief Minister himself was a member of the RSS. In the report of the Governor of Madhya Pradesh also, it is stated that the Chief Minister and other ministers swore by the values and traditions of the RSS. The reports also indicate that these governments actively participated in organising and despatching the kar sevaks to Ayodhya and welcomed them and praised when they came back after doing the deed. Thus, a common thread runs through all the four BJP Governments and binds them together. The manifestoes of the party on the basis of which these Governments came to power coupled with their speeches and actions clearly demonstrate a commonness, and unity of action between the party and the four Governments. The very manifestoes and their programme of action were such as to hurt the religious feelings of the Muslim Community. The demolition of the disputed structure was no ordinary event. The disputed structure had become the focal point, and the bone of contention between two religious communities. The process which resulted in the demolition and the manner in which it was perpetrated, dealt a serious blow to the communal harmony and peace in the country. It had adverse international repercussions as well. A number of Hindu temples were demolished in Pakistan and Bangladesh in reprisal of the demolition at Ayodhya. It was difficult in this situation for the minorities in the four States to have any faith in the neutrality of the four Governments. It was absolutely necessary to recreate a feeling of security among them. They required to be assured of the safety and security of their person and property. This was not possible with the BJP Governments in power. It was also stressed that the Chief Ministers of Himachal Pradesh and Madhya Pradesh were the members of the banned RSS in such circumstances, the respective Governors were rightly of the view that the said Chief Ministers could not be expected to, or relied upon to implement the ban sincerely. Hence it could not be said to

be an unfounded opinion. Allowing a party which had consciously and actively brought about such a situation to continue in office in these circumstances would not have helped in restoring the faith of people in general and of the minorities in particular. It is no answer to say that disturbance took place on a much larger scale in certain States ruled by Congress (I) party and that no action was taken against those Governments. In reply to these contentions, the counsel for the petitioners submitted that if the reasoning of the counsel for the Union of India was accepted, it would mean that BJP cannot form government in any State and the party has to be banned and that the acceptance of such submissions would create a serious political situation. They also pointed out that the majority judgment of the two judges of the Madhya Pradesh High Court had quashed the Proclamation taking the view that is was not possible to accept that failure on the part of the State Government to save the lives and properties of citizens in a few cities in the State as a result of sudden outbreak of violence could reasonably lead to the satisfaction of the President that the Government was unable to function in accordance with the Constitution and, therefore, the consequent dissolution of the Assembly was also bad in law. 38. The gist of the contentions of the petitioners was that a mere disturbance in some parts of Madhya Pradesh and Rajasthan involving the loss of some lives and destruction of some property did not amount to a situation where it could be said that the Governments of those States could not be carried on in accordance with the provisions of the Constitution. Further, the fact that the ministries of these States belonged to BJP whose one of the political planks in the election manifesto was the construction of Shri Ram Temple at the site of the mosque by relocating the mosque somewhere else, did not amount to an act to give rise to the apprehension the the Ministries of that party were infidel to the objective of secularism enshrined in the Constitution. So also, the pursuit of the programme of constructing the temple on the site of the mosque by relocating the latter elsewhere, by speeches and by exhorting the kar sevaks to assemble at Ayodhya on 6th December, 1992 and by giving them a warm send-off for the purpose did not amount to a deviation form the creed of secularism nor did the welcome to the kar sevaks in the State after the destruction of the mosque or the inaction of the leaders of the BJP present at the site in preventing the kar sevaks from destroying the mosque or want of the expression of regret on their part over such destruction amount to a breach of the goal of secularism. A mere continuance in office of the Ministries which were formed on the said political plank in the aftermath of the destruction of the mosque by itself could not further have led to the feelings of insecurity in the minds of the Muslims when the State Governments of Rajasthan and Madhya Pradesh could not be said to be remiss in taking all necessary actions to prevent riots and violence and when there was no incident of violence or destruction in Himachal Pradesh. As against this, the sum and substance of the contentions on behalf of the Union of India and others supporting the Proclamations in these States was that the Ministries heading the administration in these States could not be trusted to adhere to secularism when they had admittedly come to power on the political plank of constructing Shri Ram Mandir on the site of the mosque by relocating the mosque elsewhere

which meant by destroying it and then reconstructing it at other place. This was particularly so, when by its actual deed on 6th December, 1992, the party in question demonstrated what they meant by their said political manifesto. It was facile thereafter to contend that the party only wanted to follow the constitutional means to pursue the goal of constructing the Ram Temple on the said site. The destruction of mosque was a concrete proof of the creed which the party in question wanted to pursue. In such circumstances, the Ministries formed by the said party could not be trusted to follow the objective of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution. 39. These contentions inevitably invite us to discuss the concept of secularism as accepted by our Constitution. Our Constitution does not prohibit the practice of any religion either privately or publicly. Through the Preamble of the Constitution, the people of this country have solemnly resolved to constitute this country, among others, into a secular republic and to secure to all its citizens [i] JUSTICE, social, economic and political; [ii] LIBERTY of thought, expression, belief, faith and worship; [iii] EQUALITY of status and of opportunity; and [iv] to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation. Article 25 of the Constitution guarantees to all persons equally the freedom of conscience and the right freely to profess, practice and propagate religion subject to public order, morality and health and subject to the other Fundamental Rights and the State's power to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Article 26 guarantees every religious denomination or any section thereof the right [a] to establish and maintain institutions for religious and charitable purposes, [b] to manage its own affairs in matters of religion, [c] to own and acquire movable and immovable property and [d] to administer such property in accordance with law. Article 29 guarantees every section of the citizens its distinct culture, among others. Article 30 provides that all minorities based on religion shall have the right to establish and administer educational institutions of their choice. It prohibits the State from making any discrimination in granting aid to an educational institution managed by a religious minority. Under Articles 14, 15 and 16, the Constitution prohibits discrimination against any citizen on the ground of his religion and guarantees equal protection of law and equal opportunity of public employment. Article 44 enjoins upon the State to endeavour to secure to its citizens a uniform civil code. Article 51A casts a duty on every citizen of India, among others, [a] to abide by the Constitution and respect its ideals and institutions, [b] to promote harmony and the spirit of common brotherhood, among all the people of India, transcending, among others, religious and sectional diversities, [c] to value and preserve the rich heritage of our composite culture, [d] to develop scientific temper, humanism and the spirit of inquiry and reform; and [e] to safeguard public property and to abjure violence. These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations.

As has been explained by Shri M.C. Setalvad, [Patel Memorial Lecturer - 1965 on Secularism], "secularism often denotes the way of life and conduct guided by materialistic considerations devoid of religion. The basis of this ideology is that material means alone can advance mankind and that religious beliefs retard the growth of the human beings... this ideology is of recent growth and it is obvious that it is quite different from the concept of Secular State in the West which took root many centuries ago..." "A different view in relation to religion is the basis of 'secularism' understood in the sense of what may be called a"secular attitude" towards life. Society generally or the individual constituting it tend progressively to isolate religion from the more significant areas of common life. Many of us, Hindus and Muslims and others, are in our way of life, and outlook on most matters largely governed by ideas and practices which are connected with or are rooted in our religion. The secular attitude would wean us away from this approach so that in our relations with our fellow-beings or in dealings with other social groups, we have less and less regard for religion and religious practices and base our lives and actions more on worldly consideration, restricting religion and its influence to what has been called its "proper" sphere, i.e., the advancement of the spiritual life and well-being of the individual. Secularism of this character is said to be essential to our progress as human beings and as a nation because it will enable us to shake off the narrow and restrictive outlook arising out of castism, communalism and other life ideas which come in the way of our development"."... the concept of a Secular State is quite distinct from 'secularism' of the kinds we have adverted to above....No doubt, the two concepts are interdependent in the sense that it is difficult to conceive of a society or a group of individuals being induced to adopt a secular philosophy or a secular attitude without the aid of a Secular State." "A secular State is not easy to define. According to the liberal democratic tradition of the West, the secular State is not hostile to religion but holds itself neutral in matters of religion...." Thereafter, referring to the Indian concept of secularism, the learned jurist stated as follows: "...the secularist way of life was repeatedly preached by leaders of movement so that religious matters came to be regarded entirely as relating to the conscience of the individuals...." "The coming of the partition emphasised the great importance of secularism. Notwithstanding the partition, a large Muslim minority consisting of a tenth of the population continued to be the citizens of independent India. There are other important minority groups of citizens. In the circumstances, a secular Constitution for independent India under which all religions could enjoy equal freedom and all citizens equal right and which could weld together into one nation, the different religious communities, became inevitable." Thereafter, the learned jurist has gone on to point out that our Constitution undoubtedly lacks a complete separation between the church and the State as in the United States and at the same time, we have no established church as in Great Britain or some other countries, In our country, all religions are placed on the basis of equality and it would, therefore, seem that it is erroneous to describe our country as a secular State. He quoted Dr. Radhakrishnan who said that "the religious impartiality of the Indian State is not to be confused with secularism or atheism. He also pointed

out that the proceedings of the Constituent Assembly show that"two attempts made to introduce the word "secular" in the Constitution had failed. . . ."At the same time, he asserted that". . . nevertheless, it could not be said that the Indian State did not possess some important characteristics of a secular State" and has pointed out some of the provisions of the Constitution to which we have already made a reference above. He has then stated that the ideal of a secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly secular State by which he meant a State which creates complete separation between religion and the State. Justice Chinnapga Reddy, delivering his Ambedkar Memorial lecture on 'Indian Constitution and Secularism' has observed that ". . . Indian constitutional secularism is not supportive of religion at all but has adopted what may be termed as permissive attitude towards religion out of respect for individual conscience and dignity. There, even while recognising the right to profess and practice religion etc., it has excluded all secular activities from the purview of religion and also of practices which are repugnant to public order, morality and health and are abhorrent to human rights and dignity, as embodied in the other fundamental rights guaranteed by the Constitution." One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State. This is also clear from Sub-section [3] of Section 123 of the Representation of the Peoples Act, 1951 which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols. Sub-section [3A] of the same section prohibits the promotion or attempt to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion, race, caste community or language by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. A breach of the provisions of the said Sub-sections [3] and [3A] are deemed to be corrupt practices within the meaning of the said section. Mr. Ram Jethmalani contended that what was prohibited by Section 123[3] was not an appeal to religion as such but an appeal to religion of the candidate and seeking vote in the name of the said religion. According to him, it did not prohibit the

candidate from seeking vote in the name of a religion to which the candidate did not belong. With respect, we are unable to accept this contention. Reading Sub-sections [3] and [3A] of Section 123 together, it is clear that appealing to any religion or seeking votes in the name of any religion is prohibited by the two provisions. To read otherwise is to subvert the intent and purpose of the said provisions. What is more, assuming that the interpretation placed by the learned Counsel is correct, it cannot the content of secularism which is accepted by and is implicit in our Constitution. 40. In view of the content of secularism adopted by our Constitution as discussed above, the question that poses itself for our consideration in these matters is whether the three Governments when they had to their credit the acts discussed above, could be trusted to carry on the governance of the State in accordance with the provisions of the Constitution and the President's satisfaction based on the said acts could be challenged in law. To recapitulate, the acts were [i] the BJP manifesto on the basis of which the elections were contested and pursuant to which elections the three Ministries came to power stated as follows: BJP firmly believes that construction of Shri Ram Mandir at Janmasthan is a symbol of the indication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it not allow any vested interest to give it a sectarian and communal colour. Hence party is committed to build Shri Ram Mandir at Janmasthan by relocating superimposed Babri structure with due respect. [Emphasis supplied] [ii] Leaders of the BJP had consistently made speeches thereafter to the same effect. [iii] Some of the Chief Ministers and Ministers belonged to RSS which was a banned organisation at the relevant time. [iv] The Ministers in the Ministries concerned exhorted people to join kar seva in Ayodhya on 6th December, 1992. One MLA belonging to the ruling BJP in Himachal Pradesh made a public statement that he had actually participated in the destruction of the mosque. [v] Ministers had given public send-off to the kar sevaks and had also welcomed them on their return after the destruction of the mosque. [vi] The implementation of the policy pursuant to the ban or the RSS was to be executed by the Ministers who were themselves members of the said organisation. [vii] At least in two States, viz., Madhya Pradesh & Rajasthan there were atrocities against the Muslims and loss of lives and destruction of property. As stated above, religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism. It is our cardinal faith. Any profession and action which go counter to the aforesaid creed are a prima facie proof of the conduct in defiance of the provisions of our Constitution. If, therefore, the President had acted on the aforesaid "credentials" of the Ministries in these States which had unforeseen and imponderable cascading consequences, it can hardly be argued that there was no material before him to come to the conclusion that the Governments in the three States could not be carried on in accordance with the provisions of the Constitution. The consequences of such professions and acts which are evidently against the

provisions of the Constitution cannot be measured only by what happens in praesentie. A reasonable prognosis of events to come and of their multifarious effects to follow can always be made on the basis of the events occurring, and if such prognosis and led to the conclusion that in the circumstances, the governments of the States could not be carried on in accordance with the provisions of the Constitution, the inference could hardly be faulted. We are, therefore, of the view that the president had enough material in the form of the aforesaid professions and acts of the responsible section in the political set up of the three States including the Ministries to form his satisfaction that the Governments of the three States could not be carried on in accordance with the provisions of the Constitution. Hence the Proclamations issued could not be said to be invalid. 41. The appeals filed against the judgment of the Madhya Pradesh High Court have, therefore, to be allowed and the Transfer Cases challenging the Proclamation, have to be dismissed. SUMMARY OF CONCLUSION: Our conclusions, therefore, may be summarised as under: I. The validity of the Proclamation issued by the President under Article 356[1] is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the Proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report. II. Article 74[2] is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction. III. When the President issues Proclamation under Article 356[1], he may exercise all or any of the powers under Sub-clauses [a], [b] and [c] thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation. IV. Since the provisions contained in Clause [3] of Article 356 are intended to be a check on the powers of the President under Clause [1] thereof, it will not be permissible for the President to exercise powers under Sub-clauses [a], [b] and [c] of the latter clause, to take irreversible actions till a least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 174[2][b] read with Article 356[1][a] till at least both the Houses of Parliament approve of the Proclamation. v. If the Proclamation issued is held invalid, then notwithstanding the fact that it is approved by both Houses of the Parliament, it will be open to the Court to restore the status quo ante to the issuance of the Proclamation and hence to restore the Legislative Assembly and the Ministry. VI. In appropriate cases, the Court will have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the proclamation to avoid the fait accompli and the remedy of judicial review being rendered fruitless. However, the Court will not interdict the issuance of the Proclamation or the exercise of any other power under the Proclamation. VII. While restoring the status quo ante, it will be open for the Court to mould the relief suitable and declare as valid actions taken

by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President. VIII. Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. IX. The Proclamations dated 21.4.1989 and 11.10.1991 and the action taken by the president in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 & 7 of 1992 respectively are unconstitutional. The Proclamation dated 7.8.1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the proclamation operated, are valid. The Civil Appeal No.3645 of 1989 and Transfer Case Nos. 5 & 7 of 1992 are allowed accordingly with no order as to costs. Civil Appeal Nos. 193-94 of 1989 are disposed of by allowing the writ petitions filed in the Guahati High Court accordingly but without costs. X. The proclamations dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said Proclamations are not unconstitutional. Civil Appeals No. 1692, 1692A-1692C, 4627-30 of 1993 are accordingly allowed and Transfer Case Nos. 8 & 9 of 1993 are dismissed with no order as to costs. B.P. Jeevan Reddy, J. 42. Article 356 of the Constitution of India is a provision without a parallel. Constitution of no other country contains a similar provision. The only other Constitution that contains a somewhat similar provision is the Constitution of Pakistan of 1973, viz., Article 58(2) and Article 112(2). Both the Indian and Pakistani provisions appear to be inspired by Section 45 and Section 93 of the Government of India Act, 1935. Article 356, however, is qualitatively different, while the Pakistani provisions are more akin to the provisions of 1935 Act. Under Article 356, the President is empowered to remove the State Government, dissolve the Legislative Assembly of the State and take over the functions of the government of the State in case he is satisfied that the government of that State cannot be carried on in accordance with the provisions of the Constitution. In the context of the Indian Constitution (more specifically after the amendment of Article 74(1) by the 42nd (Amendment) Act) this really is the power vested in the council of ministers headed by the Prime Minister at the center. The action can be taken either on the report of the Governor or on the basis of information received otherwise or both. An awesome power indeed. The only check envisaged by the Constitution apart from the judicial review - is the approval by both Houses of Parliament which in practice has proved to be ineffective, as this judgment will demonstrate. And with respect to judicial review of the action under Article 356, serious reservations are expressed by the counsel for

the Union of India and other respondents. If what they say is accepted, there is a danger of this power eroding the very federal structure of our State and introducing a serious imbalance in our constitutional scheme. It is, therefore, necessary to define the parameters of this power and the parameters of judicial review in these matters in the interest of our constitutional system. It is for this reason that we heard elaborate arguments from all the parties before us on the meaning, scope and dimensions of the power under this Article. We may say, we are fully aware of the delicate nature of the problem. We are aware that though the questions raised herein are constitutional in character, they do have political overtones. Is quite likely that our views will not be found palatable by some but that probably cannot be helped. Sworn to uphold the Constitution, we must say what the Article says and means. 43. It is true that on account of elections having taken place subsequent to the issuance of the proclamations impugned herein, no effective relief can be granted in these matters, we are yet requested by all the parties concerned herein that we should express ourselves on all the issues arising herein so that the principles enunciated by this Court may serve as guidelines for the future for all concerned. ARTICLE 356: THE BACKGROUND: 44. India became a British colony in the year 1858. Roughly two- thirds of it was under direct British rule while the remaining one-third was under the rulership of more than 500 Princes, who in turn were directly under the thumb of the British crown. The 1935 Act introduced, for the first time, the concept of division of powers between the center and the provinces. Most of the powers were retained with the center. The provincial governments were kept under an ever-watchful and all powerful center. The Governors in the provinces and the Governor-General at the center exercised real and substantial power, unlike the Governors and the President under the Constitution. From the British point of view, it was an experiment, the first one, in self-rule by the Indians. A few powers were entrusted to the elected governments at the center or in the provinces; even those could be resumed and taken back by the Governor-General or Governor, as the case may be, whenever he was satisfied that the government at the center or of the province could not be carried on in accordance with the provisions of the Act. Governor-General and Governor, under the 1935 Act, meant the imperial colonial power. Evidently, the British Parliament was not prepared to trust the Indian political parties. Many of them were opposed to British rule and some of their leaders had declared openly that they would enter the Legislatures and the government with a view to break the system from within. Sections 45 and 93 were the products of this mis-trust. 45. But then why was a provision like Article 356 ever made in the Constitution? What was the occasion and necessity for it? For ascertaining this, we may have to turn to the debates in the Constituent Assembly. The draft Articles 277(4) and 278 (corresponding to Articles 355 and 356) were taken up for consideration on August 3, 1949. It would be appropriate to read both Articles 355 and 356 as enacted by the Constituent Assembly: 355. Duty of the Union to protect States against external aggression and internal disturbance.– It shall be the duty of the Union to products 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 Slates.– (1) If the President, on 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 President may by 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 any body 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 provisions of this Constitution relating to High Courts. (2) Any such Proclamation may be revoked or varied by a sub-sequent Proclamation. (3) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, 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 State, but no resolutions 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 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. 46. Dr. B.R. Ambedkar was of the view that the Constitution must provide for situation of break-down of the Constitutional machinery in the State analogous to provisions contained in Section 93 of the 1935 Act. If

a situation arises, for whatever reason, where the government of a State cannot be carried on in accordance with the provisions of the Constitution, he said, the President of India must be empowered to remedy it. For that purpose, he could take over all or any of the functions of the government as well as of the State Legislature. He could also make such other provisions as he may think necessary - including suspension of the provisions of the Constitution except those relating to High Court. This power, he stated must be understood in the context of draft Article 277(A) (Article 355), which cast an obligation upon 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 the Constitution. To discharge this obligation, he said, the center must be empowered to take over the government of the State. At the same time, he said, the President is not expected to act in a wanton or arbitrary manner but on the basis of a report from the Governor or on the basis of other material in his possession, as the case may be. 47. Several members strongly opposed the incorporation of a provisions like the one contained in draft Article 278 on the ground inter alia that it would be an invasion upon the field reserved for the States and that permitting the President to take over the government of the State even on the basis of the information received "otherwise" - i.e., without there being a report of the Governor to that effect, was bound to be abused. A few members pleaded that this power should be exercised only on the report of the Governor and that the words "or otherwise" should be deleted from the Article. All these objection were over-ridden by Dr. Ambedkar with the argument that no provisions of any Constitution, for that matter, is immune from being abused. He then made this significant statement: "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 a dead letter. If at all the 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." He added: "I hope the first tiling be will do would be to issue a clear warning to province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution." 48. Article 356 was thus conceived as a mechanism to ensure that the government of the State is carried on in accordance with the provisions of the Constitution. Democratic rule based on adult franchise was being introduced for the first time. Almost l/3rd of the country, under princely rule, had never known elections. Rule of Law was a novelty in those areas. The infant democracy required careful nurturing. Many a hiccup was expected in the days to come. This perhaps explains the need for a provisions like the one in Article 356. 49. Article 356 finds place in Part XVIII which carries the heading "Emergency Provisions". Article 352, the first article in this Part, empowers the President of India to proclaim emergency in the country or any part thereof if he is satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war, external aggression or armed rebellion. (By the 44th Amendment, the words "armed rebellion" were substituted in the place of the words "internal distur-

bance"). Articles 353 and 354 set out the effects of such a proclamation and provide for certain incidental matters. Article 355, set out hereinbefore, imposes a duty upon the Union to protect the States against external aggression and armed rebellion and also to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. Articles 355, 356 and 357 go together. Article 356 provides for the action to be taken by the President where he is satisfied that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution by making a proclamation in that behalf, while Article 357 sets out the powers that can be exercised by the Parliament when a proclamation under Article 356 is in operation. Articles 358 and 359 deal with suspending of certain fundamental rights during the period the proclamation under Article 352 is in operation, while Article 360 empowers the President to declare financial emergency in certain situations. 50. In a sense, Article 356 is an emergency provision though, it is true, it is qualitatively different from the emergency contemplated by Article 352, or for that matter, from the financial emergency contemplated by Article 360. Undoubtedly, break-down of the Constitutional machinery in a State does gives rise to a situation of emergency. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution, consistent with his oath. He is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen. 51. By 42nd (Amendment) Act of the Constitution, Clause (5) was added in Article 356. It was deleted by 44th (Amendment) Act which incorporated an altogether different provisions as Clause (5). It would be appropriate to take the article as it now stands while trying to understand its meaning, purpose and scope. But before we do that, it would be appropriate to examine the nature or the Indian Federation as ordained by our Constitution. 52. THE FEDERAL NATURE OF THE CONSTITUTION: 53. The expression "Federation" or "federal form of government" has no fixed meaning. It broadly indicates a division of powers between a central (federal) government and the units (States) comprised therein. No two federal constitutions are alike. Each of them, be it of U.S.A., Canada, Australia or of any other country, has its own distinct character. Each of them is the culmination of certain historical process. So is our constitution. It is, therefore, futile to try to ascertain and fit our Constitution into any particular mould. It must be understood in the light of our own historical process and the constitutional evolution. One thing is clear: it was not a case of independent State coming together to form a federation as in the case of U.S.A. 54. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the founding fathers wished to establish a strong a center. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. A land as varied as India is, a strong center is perhaps a necessity. This bias towards center is reflected in the distribution of legislative heads between the center and States. All the more important heads of Legis-

lation are placed in List-I. Even among the legislative heads mentioned List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain Entries in List-I to some or the other extent. Even in the concurrent list (List-III), the Parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the center. By the 42nd Amendment, quite a few of the Entries in List-II were omitted and/or transferred to other lists. Above all, Article 3 empowers the Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty seven States and one area. Even the names of the States can be changed by the Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the Legislatures of the affected States. There is single citizenship, unlike U.S.A. The judicial organ, one of the three organs of the State, is one and single for the entire country - again unlike U.S.A., where you have the Federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List-II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a proclamation of emergency, Parliament can make laws with respect to any matter in List-II (Article 250). Similarly, the Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the Stales and the proponents of the States autonomy. Several taxes are collected by the center and made over, either partly or fully, to the States. Suffice it to say that center has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the center including the one in Article 355 - the duty to protect every State against external aggression and internal disturbance. Indeed, this very Articles confers greater power upon the center in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power. 55. The fact that under the scheme of our Constitution, greater power is conferred upon the center vis-a-vis the States does not mean that Stales are mere appendages of the center Within the sphere allotted to them. States are supreme. The center cannot tamper with their powers. More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Government - be it the result of advances in technological/scientific fields or

otherwise, and that even in U.S.A. the center has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Sri M.C. Setalvad in his Tagore Law Lectures "Union and State relations under the Indian Constitution" (published by Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible - nor is it necessary - for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards center vis-a-vis the States The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and Ors. . It is equally necessary to emphasise that Courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation. 56. A few decisions supporting the view expressed hereinabove may be referred to briefly. In Berubari Union and Exchange of Enclaves - Reference under Article 143 - [1960] 3 S.C.R. 850 and 256, Gajendragadkar, J. observed: It may, therefore, be assumed that in construing Article 3 we should take into account the fact that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee about their territorial integrity. 57. Similarly, in State of West Bengal v. Union of India , this Court observed: There is no constitutional guarantee against alteration of the boundaries of the States. By Article 2 of the Constitution the Parliament may admit into the Union of establish new States on such terms and conditions as it thinks fit, and by Article 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State of by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State alter the boundaries of any State, and alter the name of any State. Legislation which so vitally affects the very existence of the States may be moved on the recommendation of the President which in practice means the recommendation of the Union Ministry, and if the proposal in the Bill affects the area, boundaries or name of any of the States, the President has to refer the Bill to the Legislature of that. State for merely expressing its views thereon. Parliament is therefore by law invested with authority to alter the boundaries of any State and to diminish its area so as to destroy a State with all its powers and authority. AN ANALYSIS OF ARTICLE 356: 58. The heading of Article 356 characterises it as a provision providing for failure of Constitutional machinery in State. Clause (1), however, does not use the words "failure of constitutional machinery". Even so, the significance of the title of the Section cannot be overlooked. It emphasises the level, the stage, the situation in which the power is to be exercised. Clause (1) speaks of the President being 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". If so satisfied, he may, by proclamation, assume and exercise the several powers mentioned in Sub-clauses (a), (b) and (c). An analysis of Clause (1) of the Article yields the following ingredients: (a) if the President is satisfied; (b) on receipt of report from the Governor of State or otherwise; (c) that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution; (d) the President may by proclamation, (1) assume to himself all or any of the functions of the Government of the State of all or any of the powers of the Governor or any other body or authority in the State except the legislature of the State; (ii) declare that the powers of the legislature of the State shall be exercised by the Parliament or under its authority; and (iii) make such incidental or consequential provisions as appear to him 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 any body or authority in the State. (The proviso to Clause (1) clarifies that nothing in the said 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 part the operation of any provision relating to High Courts.) Clause (2) says that any proclamation under Clause (1) can be revoked or varied by a subsequent proclamation. Clause (3) provides that every proclamation issued under Clause (1) (except a proclamation revoking a previous proclamation) shall be laid before each House of the Parliament and "shall. . . 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". The proviso to Clause (3) provides for a situation where the Lok Sabha is dissolved on the date of the proclamation or is dissolved within two months of such proclamation. Clause (4) says that a proclamation so approved by both Houses of Parliament shall, unless revoked earlier, cease to operate on the expiration of period of six months. (By 42nd Amendment, the words 'one year' were substituted for the words 'six months' but by 44th Amendment, the words "six months" have been restored). The three provisos to Clause (4) provide for certain situations which it is not necessary for us to consider for the purpose of these cases. Clause (5), as inserted by 38th Amendment ran as follows: " (5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any court on any grounds". By 44th Amendment, however, this clause was repealed altogether and in its place a new Clause (5) introduced which limits the maximum period, for which such a proclamation can be operative, to one year except in a case where a proclamation of emergency is in operation. It is not necessary to consider Clause (5) also for the purpose of these cases. 59. The power conferred by Article 356 is a conditioned power; it is not an absolute power to be exercised in the discretion of the President. The condition is the formation of satisfaction-subjective, no doubt-that a situation of the type contemplated by the clause has arisen. This satisfaction may be formed on the basis of the report of the Governor or on the basis of other information received by him or both. The existence of relevant material is a pre-condition to the formation of satisfaction.

The use of the word"may indicates not only a discretion but an obligation to consider the advisability and necessity of the action. It also involves an obligation to consider which of the several steps specified in Sub-clauses (a), (b) and (c) should be taken and to what extent? The dissolution of the Legislative Assembly-assuming that it is permissible is not a matter of course. It should be resorted to only when it is necessary for achieving the purposes of the proclamation. The exercise of the power is made subject to approval of the both Houses of Parliament. 60. Clause (3) is both a check on the power and a safeguard against abuse of power. Clause (1): Clause (1) opens with the words "if the president... is satisfied". These words are indicative of the satisfaction being a subjective one. In Barium Chemicals v. Co. Law Board [1966] Suppl. S.C.R. 311 - a decision followed uniformly ever since it was pronounced-Shelat, J. pointed out, on a consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion", "or has reasons to believe" are indicative of subjective satisfaction, though it is true the nature of the power has to be determined on a totality of consideration of all relevant provisions. Indeed, there was no controversy before us regarding the nature of this power. Clause (1), it may be noted, uses the words "is satisfied", which indicates a more definite state of mind than is indicated by the expressions "is of the opinion" or "has reasons to believe". Since it is a case of subjective satisfaction, question of observing the principles of natural justice does not and cannot arise. Having regard to the nature of the power and the situation in which it is supposed to be exercised, principles of natural justice cannot be imported into the clause. It is evident that the satisfaction has to be formed by the President fairly, on a consideration of the report of the Governor and or other material, if any, placed before him. Of course, the President under our Constitution being, what may be called, a constitutional President obliged to act upon the aid and advice of the council of ministers (which aid and advice is binding upon him by virtue of Clause (1) of Article 74), the satisfaction referred to in Article 356(1) really means the satisfaction of the union council of ministers with the Prime Minister at its head. 61. Clause (1) requires the President to be 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 words "cannot" emphasise the type of situation contemplated by the clause. These words read with the title of one Article "provisions in case of failure of constitutional machinery in states" emphasise the nature of the situation contemplated. 62. The words "provisions of this Constitution" mean what they say. The said words cannot be limited or confined to a particular chapter in the Constitution or to a particular set of Articles, while construing a constitutional provision, such a limitation ought not to be ordinarily inferred unless the context does clearly so require. The provisions of the Constitution include the chapter relating to fundamental rights, the chapter relating to directive principles of the state policy as also the preamble to the Constitution. Though, at one time, it was thought that preamble does not form part of the Constitution, that view is no longer extent. It has been held by the majority of judges in Keshavananda Bharti v. State of Kerala [1973] Suppl. S.C.R. 1 that preamble does form part of the Constitution. It

cannot be otherwise. The attempt to limit the said words to certain machinery provisions in the Constitution is misconceived and cannot be given effect to. It is difficult to believe that the said words do not take in fundamental provisions like the fundamental rights in Chapter-III. It must, however, be remembered that it is not each and every non-compliance with a particular provision of the Constitution that calls for the exercise of the power under Article 356(1). The non-compliance or violation of the Constitution should be such as to lead to or given rise to a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution. It is indeed difficult-nor is it advisable-to catalogue the various situations which may arise and which would be comprised within Clause (1). It would be more appropriate to deal with concrete cases as and when they arise. 63. The satisfaction of the President referred to in Clause (1) may be formed either on the receipt of the report(s) of the Governor or otherwise. The Governor of a State is appointed by the President under Article 155. He is indeed a part of the government of the State. The executive power of the State is vested in him and is exercised by him directly or through officers subordinate to him in accordance with the provisions of the Constitution (Article 154). All executive action of the government of a State is expressed to be taken in the name of the Governor, except a few functions which he is required to exercise in his discretion. He has to exercise his powers with the aid and advice of the council of ministers with the Chief Minister at its head (Article 163). He takes the oath, prescribed by Article 159, to preserve, protect and defend the Constitution and the laws to the best of his ability. It is this obligation which requires him to report to the President the commissions and omission of the government of his State which according to him are creating or have created a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution. In fact, it would be a case of his reporting against his own government but, this may be a case of his wearing two hats, one as the head of the State government and the other as the holder of an independent constitutional office whose duty it is to preserve, protect and defend the Constitution See Shamsher Singh v. State of Punjab . Since he cannot himself take any action action of the nature contemplated by Article 356(1), he reports the matter to the President and it is for the President to be satisfied-whether on the basis of the said report or on the basis of any other information which he may receive otherwise- that situation of the nature contemplated by Article 356(1) has arisen. It is then and only then that he can issue the proclamation. Once the proclamation under Article 356(1) is issued or simultaneously with it, the President can take any or all the actions specified in Clauses (a), (b) and (c). 64. Power of the President to dissolve Legislative Assembly of the State: We shall now examine whether Clause (1) of Article 356 empowers the President to dissolve the Legislative Assembly of the State. There are two points of view-which we may set out before expressing our preference: 65. ONE VIEW, which is supported by the opinions of some of learned Judges in State of Rajasthan and Ors. v. Union of India , is that the power of dissolution is implicit in Sub-clause (a). The reasoning runs thus: the President assumes the functions of the government of the State as well as the Powers of the

Governor under the said sub-clause; the Legislative Assembly can be dissolved by the Governor under Article 174(2)(B); of course, this may have to be done on the advice of the council of ministers with the Chief Minister at its head; since the President assumes to himself the powers and functions of both the government and the Governor, he can dissolve the Legislative assembly as part of the same proclamation or by a subsequent order. 66. THE OTHER VIEW, which says that the President has no such power, runs along the following lines: The clause does not speak of dismissal of the government or the dissolution of the Legislative Assembly. It says that if the President 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 (i) assume to himself all or any of the functions of the government of the state; (ii) assume to himself all or any of the powers vested in or exercisable by the Governor; (iii) assume to himself all or any of the functions of any body or authority in the State other than the Legislature of the State,(iv) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament and (v) make such incidental or consequential provision, as may be necessary for giving effect to the proclamation including suspending in whole or part the operation of any provisions of the Constitutions relating to any body or authority in the state except the High Court. Now, when Sub-clause (a) speaks of the President assuming to himself all or any of the powers vested in or exercisable by the Governor, it surely does not mean or imply dismissal or removal of the Governor. Similarly, the assuming by the President of all or any of the functions or powers of any body or authority in the state (other than the legislature of the state) does not mean the dismissal or dissolution of such body or authority. For the same reason, it must be held that the words "the President may assume to himself all or any of the functions of the government of the state" in Sub-clause (a) do not by themselves mean the dismissal of the state government, But if these words are read along with the main limb of Clause (1) which speaks of a situation in which "the government of the state cannot be carried on in accordance with the provisions of this Constitution", it can and does mean dismissal of the government for the reason that government of the state is carried on by the government of the State alone. This dismissal is not absolute in the sense of a physical death of a living being. It only means putting the government out of the way. Such dismissal does not preclude the President from restoring the government after the period of proclamation is over, or at any time earlier by revoking the proclamation, if he is so advised. Coming to Sub-clause (b), when it speaks of the powers of Legislature of the State being made exercisable by Parliament, or under its authority, it cannot and does not mean or imply dissolution of the Legislature of the State. It is significant to note that the sub-clause refers to Legislature of the State and not Legislative Assembly. In a given State, the legislature may consist of Legislative Assembly as well as Legislative Council. In such a case, there can be no question of dissolving the Legislative Council since it is a continuing body [Article 172(3)]. Only the Legislative Assembly can be dissolved [Article 174(2)(b)]. In other words, there can be no question of dissolution of the "Legislature of the State" - the expression

employed in Sub-clause (b). The question may then arise, why was Sub-clause (b) put in and what does it imply? The answer must be that when the government of the State is dismissed or removed from office, the Legislative Assembly cannot function normally. It is difficult to visualise a legislative Assembly, or for that matter Legislature, functioning without a council of ministers, i.e., government. Thus, where the government of a State is dismissed or removed from the office, the Legislature of the State becomes ipso facto unworkable. It is for this reason that Sub-clause (b) provides that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament. Indeed, the very fact that Clause (b) has provided for only one situation (viz., the powers of the Legislature being vested in the Parliament) means and implies that any other step like dissolution of the Legislative Assembly was not within the contemplation of the Constitution makers. Sub-clause (c) empowers the President to make such incidental or consequential provisions as may appear to be necessary or desirable for giving effect to the objects of the proclamation. Such incidental or consequential provisions may also include "suspending in whole or part the operation of any provisions of this Constitution relating to any body or authority" except, of course, the High Court. The provisions of the Constitution relating to the Legislative Assembly of the State may be suspended under Sub-clause (c) during the period of proclamation - generally referred to as keeping the Legislative Assembly under suspended animation - to prevent the majority party (or any other party) calling upon the Governor to invite it to form the ministry and/or for preventing the Legislature from passed resolutions or transacting other business which may interfere with the President's 'rule in the State. It is significant to notice in this connection that during the Constituent Assembly debates on these Articles, Dr. Ambedkar only spoke of suspension of the powers of the Legislatures and not their dissolution. (Vide Page 134 - Vol. IX - Constituent Assembly Debates.) 67. According to this line of reasoning - since the Legislature of the State can only be kept under suspended animation by suspending the relevant provisions of the Constitution - the Legislature of the State springs back to life with the expiry of the period of proclamation. This is for the reason that with the expiry of the period of proclamation or on the revocation of the proclamation, as the case may be, the suspension of the provision of the Constitution will also come to end. 68. The proponents of this view criticise the other (first) view on several grounds: firstly, they say, it does not seem to take into consideration the fact that dissolution of the Legislative Assembly is an extremely serious step; if this power was supposed to be conferred on the President under Clause (1) of Article 356, the Constitution makers would have said so expressly and not left it to be inferred. Secondly, it ignores the language of Sub-clause (b). Sub-clause (b) speaks of "powers of the Legislature of the State" being exercised by the Parliament or under its authority. Clause (b) does not speak of dissolution of "Legislature of the State", since that is an impossibility - only the Legislative Assembly can be dissolved and not the Legislative Council as explained hereinabove. There are quite a few States where the Legislature consists of Legislative Assembly as well as Legislative Council. Thirdly, Clause (1) speaks of failure

of the government and not of the Legislative Assembly, though it is true, the government is drawn from and very often forms the majority party in the Legislative Assembly. But the Legislative Assembly also consists of the opposition and other parties, groups and independent members, who may themselves have been pointing out and demonstrating against the unconstitutional working of the government. There does not appear to be any good reason why the Legislative Assembly should be dissolved for the acts and defaults of the government. It is true, say the proponents of this view, if the President cannot dissolve the Legislative Assembly, it would spring back to life after the period of proclamation and elect the very same government which was dismissed. They answer it by saying firstly that this may or may not happen. Secondly, they say, even if the same government is elected again, it is in no way contrary to the spirit of the Article. The objection was not to its existence but to its working. There is no reason to presume that it will again carry on the government otherwise than in accordance with the provisions of the Constitution. 69. Having given our anxious consideration to both the contending view points - and notwithstanding the obvious appeal of the second point of view - we are inclined to agree with the first view which says that Clause (1) does empower the President to dissolve the Legislative Assembly. This view is also supported by the decision in State of Rajasthan, besides the fact that over the last forty-four years, the said power has never been questioned. We are inclined to hold that the power to dissolve the Legislative Assembly is implicit in Sub-clause (a) of Clause (1) though there is no such thing as dissolution of the 'Legislature of the State' where it consists of two Houses. It must also be recognised that in certain situations, dissolution of Legislative Assembly may be found to be necessary for achieving the purposes of the proclamation. Power there is. It's exercise is a different matter. The existence of power does not mean that dissolution of Legislative Assembly should either be treated as obligatory or should invariably be order whenever a government of the State is dismissed. It should be a matter for the President to consider, taking into consideration all the relevant facts and circumstances, whether the Legislative Assembly should also be dissolved or not. If he thinks that it should be so dissolved, it would be appropriate, indeed highly desirable, that he states the reasons for such extraordinary step in the order itself. 70. The question then arises at what stage should he exercise this power? To answer this query, we must turn to Clause (3). Clause (3) says that every proclamation issued under Article 356(1) shall be laid before both Houses of Parliament and shall cease to operate at the expiry of two months unless before the expiration of that period it has been approved by resolutions passed by both Houses. This is conceived both as a check upon the power and as a vindication of the principle of Parliamentary supremacy over the Executive. The President's action - which is really the action of the Union Council of Ministers - is subject to approval of both Houses of Parliament. Unless approved by both House of Parliament, the proclamation lapses at the end of two months and earlier if it is disapproved or declined to be approved by both the Houses of Parliament, as explained hereinafter. Having regard to the incongruity of the Executive (even though Union Executive) dissolving the Legislature (even if of a State), it would be consistent

with the scheme and spirit of the Constitution - particularly in the absence of a specific provision in the Constitution expressly empowering the President to do so - to hold that this power of dissolution can be exercised by the President only after both Houses of Parliament approve the proclamation and not before such approval. Once the Parliament places its seal of approval on the proclamation, further steps as may be found necessary to achieve the purposes of the proclamation, i.e., dissolution of Legislative Assembly, can be ordered. In other words, once the Parliament approves the initial exercise of his power, i.e., his satisfaction that a situation had arisen where the government of the State could not be carried on in accordance with the Constitution, the President can go ahead and take further steps necessary for effectively achieving the objects of the proclamation. Until the approval, he can only keep the Assembly under suspended animation but shall not dissolve it. 71. It must be made clear even at this stage that while no writ petition shall be entertained by any court before the actual issuance of proclamation under Clause (1), it shall be open to a High Court or Supreme Court to entertain a writ petition questioning the proclamation if it is satisfied that the writ petition raises arguable questions with respect to the validity of the proclamation. The court would be entitled to entertain such a writ petition even before the approval of the proclamation by the Parliament -as also after such approval. In an appropriate case and if the situation demands, the High Court/Supreme Court can also state the dissolution of the Assembly but not in such a manner as to allow the Assembly to continue beyond its original term. But in every such case where such an order is passed the High court/Supreme Court shall have to dispose of the matter within two to three months. Not disposing of the writ petition while; granting such an interim order would create several complications because the life of the proclamation does not exceed six months even after the; approval by Parliament and in any event the proclamation cannot survive beyond one year except in the situation contemplated by Clause (5) which is, of course, an exceptional situation. 72. Meaning of approval in Clause (3)" In State of Rajasthan Chandrachud, Bhagwati and A.C. Gupta, JJ. have expressed the view that the proclamation issued under Clause (1) remains in operation for a period of two months in any event. It is held that even if the Parliament disapproves or declines to approve the proclamation within the said period of two months, the proclamation continues to be valid for two months. The approval of the Parliament under Clause (3) is held to be relevant only for the purpose of continuance of the proclamation beyond two months. It has also been held further that even if both the Houses do not approve or disapprove the proclamation, the government which has been dismissed or the Assembly which may have been dissolved do not revive. With utmost respect to the learned Judges, we find ourselves unable to agree with the said view in so far as it says that even where both Houses of Parliament disapprove or do not approve the proclamation, the government which has been dismissed does not revive. (The State of Rajasthan also holds that such disapproval or non-approval does not revive the Legislative Assembly which may have been dissolved but we need not deal with this aspect since according to the view expressed by us hereinabove, no such dissolution is permissible before the

approval of both the Houses.) Clause (3), it may be emphasised, uses the words "approved by resolutions of both Houses of Parliament". The word "approval" means affirmation of the action by higher or superior authority. In other words, the action of the President has to be approved by the Parliament. The expression "approval" has an intrinsic meaning which cannot be ignored. Disapproval or non-approval means that the Houses of Parliament are saying that the President's action was not justified or warranted and that if shall no longer continue. In such a case, the proclamation lapses, i.e., ceases to be in operation at the end of two months - the necessary consequence of which is the status quo ante revives. To say that notwithstanding the disapproval or non-approval, the status quo ante does not revive is to rob the concept of approval of its content and meaning. Such a view renders the check provided by Clause (3) ineffective and of no significance whatsoever. The Executive would be telling the Parliament: "I have dismissed the government. Now, whether you approve or disapprove is of no consequence because the government in no event be revived. The deed is done. You better approve it because you have practically no choice". We do not think that such a course is consistent with the principle of Parliamentary supremacy and Parliamentary control over the Executive, the basic premise of the Parliamentary supremacy. It would indeed mean supremacy of the Executive over the Parliament. The dismissal of a government under Sub-clause (a) of Clause (1) cannot also be equated to the physical death of a living being. There is no irrevocability about it. It is capable of being revived and it revives. Legislative Assembly which may have kept in suspended animation also springs back to life. So far as the validity of the acts done, orders passed and laws, if any, made during the period of operation of the proclamation is concerned, they would remain unaffected inasmuch as the disapproval or non-approval does not render the proclamation invalid with retrospective effect. It may be recalled that the power under Article 356(1) is the power vested in the President subject no doubt to approval within two months. The non-approval means that the proclamation ceases to be in operation at the expiry of two months, as held in State of Rajasthan. 73. Now, coming to the power of the court to restore the government to office in case it finds the proclamation to be unconstitutional, it is, in our opinion, beyond question. Even in case the proclamation is approved by the Parliament it would be open to the court to restore the State government to its office in case it strikes down the proclamation as unconstitutional. If this power were not conceded to the court, the very power of judicial review would be rendered nugatory and the entire exercise meaningless. If the court cannot grant the relief flowing from the invalidation of the proclamation, it may as well decline to entertain the challenge to the proclamation altogether. For, there is no point in the court entertaining the challenge, examining it, calling upon the Union Government to produce the material on the basis of which the requisite satisfaction was formed and yet not give the relief. In our considered opinion, such a course is inconceivable. 74. A question may arise - what happens to the acts done, orders made and laws enacted by Parliament or under its authority during the period the proclamation was in operation in case the proclamation is declared to be unconstitutional by the court? Would all of them become

unconstitutional or void? Firstly, there is no reason to presume that a court which strikes down the proclamation would not provide for this contingency. It would be within the power of the court to say that these acts and orders are saved. Indeed, it should say so in the interests of general public and to avoid all kinds of complication, leaving it to government and the Legislature of the State concerned to rectify, modify or repeal them, if they so choose. The theory of factum valet may also be available to save the act, orders and things done by the President or under his authority during the said period. 75. It was suggested by Sri Ram Jethmalani that the President can "assume all or any of the functions" of the State government without dismissing the government. Emphasis is laid upon the words "all or any" in Sub-clause (1). In particular, he submitted, where the State government is found remiss in performing one or some of the functions, that or those functions of the State government can be assumed by the President with a view to remedy the situation. After rectifying the situation, the counsel submitted, the President will give those functions back to the State government and that in such a situation there would be no occasion or necessity for dismissing the State government. The learned Counsel gave the analogy of a motor car - if one or a few of the parts of a car mal-function or cease to function, one need not throw away the car. That or those particular parts can be replaced or rectified and the car would function normally again. It is difficult to agree with the said interpretation. The power under Article 356(1) can be exercised only where the President is satisfied the "the government of the State cannot be carried on in accordance with the provisions of the Constitution." The title to the Article "failure of constitutional machinery in the States" also throws upon the nature of the situation contemplated by it. It means a situation where the government of the State, - and not one or a few functions of the government - cannot be carried on in accordance with the Constitution. The inability or unfitness aforesaid may arise either on account of the non- performance or mal-performance of one or more functions of the government or on account of abuse or misuse of any of the powers, duties and obligations of the government. A proclamation under Article 356(1) necessarily contemplates the removal of the government of the state since it is found unable or unfit to carry on the government of the State in accordance with the provisions of the Constitution. In our considered opinion, it is not possible to give effect to the argument of Sri Ram Jethmalani. Acceptance of such an argument would introduce the concept of two governments in the same sphere - the Central Government exercising one of some of the powers of the State government and the State government performing the rest. Apart from its novelty, such a situation, in our opinion, does not promote the object underlying Article 356 nor is it practicable. 76. Sri Jethmalani brought to our notice the British Joint Parliamentary Report, para 109, in support of his contention aforementioned. We are unable to see any relevance of the said para to the interpretation of Article 356(1). Under the Government of India Act, 1935 the Governor-General and the Governor were not constitutional heads of State as under the Constitution. They exercised real power in their own right. Only a few powers were entrusted to the elected governments and even those could

be taken away (by the governor-General at the center and the Governor in the provinces) as and when they were satisfied that a situation has arisen where the government at the center of the province cannot be carried on the accordance with the provisions of the said Act. Under Article 356, the position is entirely different. The power can be exercised only against the States and that too by the President and not by the Governor. The entire constitutional philosophy is different. Therefore, merely because the same words "all or any" in Sections 93 and 45 of the Government of India Act occur in Article. 356(1), the same meaning cannot be attributed to them mechanically, ignoring all other factors - assuming that the said words in Sections 93 and 45 meant what Sri Jethmalani says. ARTICLE 356 IN ACTION: 77. Since the commencement of the Constitution, the President has invoked Article 356 on as many as ninety or more occasions. Quite a performance for a provision which was supposed to remain a 'dead-letter'. Instead of remaining a 'dead-letter', it has proved to be the 'death-letter' of scores of State Governments and Legislative Assemblies. The Sarkaria Commission which was appointed to look into and report on center-State relations considered inter alia the manner in which this power has been exercised over the years and made certain recommendations designed to prevent its misuse. Since the Commission was headed by a distinguished Judge of this Court and also because it made its report after an elaborate and exhaustive study of all relevant aspects, its opinions are certainly entitled to great weight notwithstanding the fact that the report has not been accepted so far by the Government of India. 78. In para 6.3.23, the Commission observed that though the words "a government of the State cannot be carried on in accordance with the provisions of the Constitution" are of wide amplitude, each and every breach and infraction of constitutional provision, irrespective of its significance, extent and effect, cannot be treated as constituting failure of constitutional machinery. Article 356 the Commission said, provides remedy for a situation where there has been an actual break-down of the constitutional machinery of the State. Any abuse or misuse of this drastic power, said the Commission, damages the fabric of the Constitution. A literal construction of Article 356(1) should be avoided, it opined. 79. In para 6.4.01, the Commission noted that failure of constitutional machinery may occur in a number of cases. It set- out some of the instances leading to it, viz., (1) political crisis; (b) internal subversion; (c) fiscal break-down; and (d) non-compliance with constitutional directions of the Union Executive. The Commission, however, hastened to add that the instances set out by it are not claimed to be comprehensive or perfect. Then it examined each of the said four heads separately. 80. In para 6.5.01, the Commission set out illustrations in which invoking Article 356 would be improper. Illustration (iii) in the said paragraph read thus: (iii) Where, despite the advice of a duly constituted ministry which has not been defeated no the floor of the house, the Governor decides to dissolve the assembly and without giving the ministry an opportunity to demonstrate its majority through the floor-test, recommends its supersession and imposition of President's rule merely on subjective assessment that the ministry no longer commands the confidence of the assembly. 81. In para 6.6.01, the Commission noticed the criticism levelled against the frequent

invoking of Article 356 and proceeded to examine its validity. In its opinion, dismissal of nine assemblies following the general elections to the Lok Sabha in March, 1977 and a similar dismissal following the general election to the Lok Sabha in 1980, were clear instances of invoking Article 356 for purely political purposes unrelated to Article 356. After examining the facts and the principle of the decision of this Court in State of Rajasthan v. Union of India, and after considering the various suggestions placed before it by several parties, individuals and organisations, the Commission made the following recommendation in para 6.8, which have been strongly commended for our acceptance by the learned Counsel for the petitioners. They read as follows: RECOMMENDATIONS 6.8.01,Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a break-down of constitutional machinery in the State. All attempts should be made to resolve the crisis at the State level before taking recourse to the provisions of Article 356. The availability and Choice of these alternatives will depend on the nature of the constitutional crisis, its causes and exigencies of the situation. These alternatives may be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action under Article 356 will lead to disastrous consequences, (paragraph 6.7.04) 6.8.02,A warning should 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 when not taking immediate action would lead to disastrous consequences, (paragraph 6.7.08) 6.8.03. When an 'external aggression' or 'internal disturbance' paralyses the State administration creating a situation drafting towards a potential breakdown of the Constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under Article 355 should be exhausted to contain the situation. (paragraph 6.3.17) 6.8.04. (a) In 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 avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of mal-administration or corruption and is agreeable 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 be allowed to function. As a matter of convention, the caretaker government should merely carry on the day-to day government and desist form taking any major policy decision. (Paragraph 6.4.08) (b) If the important ingredients described above are absent, it would not be proper for the Governor to dissolve the Assembly and instal a caretaker government. The Governor should recommend proclamation of President's rule without dissolving the Assembly. (Paragraph 6.4.09) 6.8.05. Every Proclamation should be placed before each house of Parliament at the earliest, in any case before

the expiry of the two month period contemplated in clause (3) of Article 356 (Paragraph 6.7.13) 6.8.06. The State Legislative Assembly should not be dissolved either by the Governor or the President before the Proclamation issued under Article 356(1) has been laid before parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this (paragraph 6.6.20) 6.8.07. Safeguards corresponding, in principle, to Clauses (7) and (8) of Article 352 should be incorporated in Article 356 to enable Parliament to review continuance in force of a Proclamation. (Paragraph 6.6.23) 6.6.08. To make the remedy of judicial review on the ground of mala fides a little more meaningful, it should be provided, through an appropriate amendment, notwithstanding anything in Clause (2) of Article 74 of the Constitution, the material facts and grounds on which Article 356(1) is invoked should be made an integral part of the Proclamation issued under that Article this will also make the control of Parliament over the exercise of this power by the Union Executive, more effective. (paragraph 6.6.25) 6.8.09. Normally, the President is moved to action under Article 356 on the report of the Governor. The report of the Governor is placed before each house of Parliament. Such a report should be a "speaking document" containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356 (Paragraph 6.6.26) 6.8.10. The Governor's report, on the basis of which a Proclamation under Article 356(1) is issued, should be given wide publicity in all the media and in full. (Paragraph 6.6.28) 6.8.11. Normally, President's Rule in a State should be proclaimed on the basis of the Governor's report under Article 356(1). (Paragraph 6.6.29) 6.8.12. In Clause (5) of Article 356, the word 'and' occurring between Sub-clauses (a) and (b) should be substituted by 'or'.(Paragraph 6.7.11) 82. The aforesaid recommendations are evidently the outcome of the opinion formed by the Commission that more often than not, the power under Article 356 has been invoked improperly. It is not for us to express any opinion whether this impression of the commission is justified or not. It is not possible for us to review all the ninety cases in which the said power has been invoked and to say in which cases it was invoked properly and in which cases, not. At the same time, we are inclined to say, having regard to the constitutional scheme obtaining under our Constitution, that the recommendations do merit serious consideration. 83. It is probably because he was of the opinion that the invocation of this power was not warranted in many cases, Sri P.V. Rajamannar, former Chief Justice of Madras High Court, - (who was appointed as the Inquiry Committee by the Government of Tamil Nadu to report on the center-State relations) - recommended that Articles 356 and 357 be repealed altogether. (See Para (8) in Chapter IX, "Emergency Provisions" of his Report, submitted in 1971). In the alternative, he recommended safeguards must be provided to secure the interests of the States against the arbitrary and unilateral action of a party commanding overwhelming majority at the center. In other respects, Sri Rajamannar's views accord broadly with the views expressed by the Sarkaria Commission and hence, need not be set out in extenso. THE Constitution of India AND THE CONCEPT OF SECULAR-

ISM: 84. Article 356(1) speaks of a situation where the government of a state cannot be carried on in accordance with the provisions of the Constitution. We have said hereinbefore that the words "the provisions of this Constitution" take in all the provisions including the Preamble to the Constitution. The Preamble to the Constitution speaks of a secular Indian Republic. While the respondents' counsel contended that secularism being a basic feature of the Constitution, a State government can be dismissed if it is guilty of unsecular acts, the counsel for petitioners, Sri Ram Jethmalani strongly refuted the idea. According to Sri Jethmalani, 'secularism' is a vague concept, not defined in the Constitution and hence, cannot furnish a ground for taking action under Article 356. Without going into the specifics of the said contention, we shall examine first how far this concept is embedded in our Constitution and in what sense. 85. Having completed the process of framing the Constitution, the Constituent Assembly proceeded to finalise its preamble. Speaking on behalf of and in the name of the people of India, they said, their object has been to constitute India into a "Sovereign Democratic Republic", and to secure to all its citizens social justice, liberty of belief, faith and worship, and equality of status and opportunity. They said, the goal was also to promote among all the people of India " fraternity assuring the dignity of the individual. . . ". By the 42nd Amendment to the Constitution, the words"socialist, secular" were added after the word "sovereign" and before the word "democratic". No other provision of the Constitution was amended to adumbrate these concepts. 86. Both the expressions - 'socialist' and 'secular' - by themselves are not capable of precise definition. We are, however, not concerned with their general meaning or content. Our object is to ascertain the meaning of the expression "secular" in the context of our Constitution. As the discussion hereafter would demonstrate, the 42nd Amendment merely made explicit what was implicit in it. The preamble speaks of "social justice", "liberty of belief, faith and worship" and of "equality of status and of opportunity". Article 14 (under the sub-heading "Right of Equality") enjoins the State not to deny to any person equality before the law or the equal protection of laws within the territory of India. Articles 15 and 16 elucidate this doctrine of equality. They say that the State shall not discriminate against any citizen on ground only of religion, race or caste, whether in the matter of employment under the State or otherwise. By Article 25, "all persons" are declared equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion, subject, of course, to public order, morality and health. Articles 26, 27 and 28 elucidate the freedom guaranteed by Article 25. Article 27 declares that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Article 28(1) decrees that no religious instruction shall be provided in any educational institution wholly maintained out of the State funds while Article 28(3) says that no person attending an educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious worship conducted in such institution, except with his or his guardian's (in the case of a minor) consent. Similarly, Clause (2) of Article 30 enjoins upon the State

not to discriminate against any educational institution, in granting aid, on the ground that it is under the management of a minority, religious or linguistic. Clause (3) of Article 51-A [introduced by the 42nd (Amendment) Act] says that "it shall be the duty of every citizen of India - to promote harmony and spirit of brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities". What do these articles, read together with the Preamble signify? While Article 25 of the Constitution guarantees to all its people freedom of religion, Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, caste faith or belief. While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes. How are the Constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religious. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution as affirmed in Keshavananda Bharti and Indira N. Gandhi v. Raj Narain [1975] 2 S.C.C. 159. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional. This does not mean that the State has no say whatsoever in matters of religion. Laws can be made regulating the secular affairs of Temples, Mosques and other places of worship; and maths. (See S.P. Mittal v. Union of India .) The power of the Parliament to reform and rationalise the personal laws is unquestioned. The command of Article 44 is yet to be realised. The correct perspective appeared to have been placed by Sri K.M. Munshi during the Constituent Assembly Debates. He said: Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors - and important factors - which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say. 'Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation. 87. Sri M.C. Setalvad in his lecture on secularism (Patel Memorial Lectures - 1965) points out that after

affirming the ideas of religious liberty and adequate protection to the minorities at its Karachi Session (1931), the Congress party asserted emphatically that "the State shall observe neutrality in regard to all religions". He says that this resolution is in a manner the key to the under standing of the attitude adopted by those who framed the Indian Constitution nearly twenty years later, embodying in it the guarantee of religious neutrality. He also points out that "the debates in the Constituent Assembly leave little doubt that what was intended by the Constitution was not the secularisation of the State in the sense of its complete dissociation from religion, but rather an attitude of religious neutrality, with equal treatment to all religions and religious minorities." The same idea is put forward by Gajendragadkar, J., (in his inaugural address to the Seminar on "Secularism; o ts implications for Law and life in India") in the following words: It is true that the Indian Constitution does not use the word "secularism" in any of its provisions, but its material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of a welfare State. And the concept of welfare is purely secular and not based on any considerations of religion. The essential basis of the Indian Constitution is that all citizens are equal, and this basic equality (guaranteed by Article 14) obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The state does not owe loyalty to any particular religion as such; it is not irreligious or anti-religion; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of secularism which is writ large in all the provisions of the Indian Constitution. 88. Prof. Upendra Baxi says that "Secularism" in the Indian Constitution connotes: (i) The state by itself, shall not espouse or establish or practice any religion; (ii) public revenues will not be used to promote any religion; (iii) the state shall have the power to regulate any "economic, financial or other secular activity" associated with religious practice (Article 25(2)(a) of the Constitution); (iv) the state shall have the power through the law to provide for "social welfare and reform or the throwing open of the Hindu religious institutions of a public character to all classes and sections of Hindus" (Article 25(2)(b) of the Constitution); (v) the practice of untouchability (in so far as it may be justified by Hindu religion) is constitutionally outlawed by Article 17; (vi) every individual person will have, in that order, an equal right to freedom of conscience and religion; (vii) these rights are however subject to the power of the state through law to impose restrictions on the ground of "public order, morality and health"; (viii) these rights are furthermore subject to other fundamental rights in Part III; (The Struggle for the Re-definition of Secularism in India - published in Social Action Vol. 44 - January, March 1994) 89. In short, in the affairs of the State (in its widest connotation) religion is irrelevant; it is strictly a personal affair. In this sense and in this behalf, our Constitution is broadly in agreement with the U.S. Constitution, the First Amendment whereof declares that " Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. . . " (generally referred to as the

"establishment clause"). Perhaps, this is an echo of the doctrine of separation of Church and State; may be it is the modern political thought which seeks to separate religion from the State - it matters very little. 90. In this view of the matter, it is absolutely erroneous to say that secularism is a "vacuous word" or a "phantom concept". 91. It is perhaps relevant to point out that our founding fathers read this concept into our Constitution not because it was fashionable to do so, but because it was an imperative in the Indian context. It is true - as Sri Ram Jethmalani was at pains to emphasise - that India was divided on the basis of religion and that areas having majority muslim population were constituted into a new entity - Pakistan - which immediately proceeded to proclaim itself as an Islamic Republic, but it is equally a fact that even after partition, India contained a sizeable population of minorities. They comprised not less than 10 to 12% of the population. Inspired by Indian tradition of tolerance and fraternity, for whose sake, the greatest son of Modern India, Mahatma Gandhi, laid down his life and seeking to redeem the promise of religious neutrality held forth by the Congress party, the founding fathers proceeded to create a state, secular in its outlook and egalitarian in its action. They could not have countenanced the idea of treating the minorities as second-class citizens. On the contrary, the dominant thinking appears to be that the majority community, Hindus, must be secular and thereby help the minorities to become secular. For, it is the majority community alone that can provide the sense of security to others. The significance of the 42nd (Amendment) Act lies in the fact that it formalised the pre-existing situation. It put the matter beyond any doubt, leaving no room for any controversy. In such a situation, the debate whether the Preamble to the Constitution is included within the words "the provisions of this Constitution" is really unnecessary. Even if we accept the reading of Sri Jethmalani, Preamble is a key to the understanding of the relevant provisions of the Constitution. The 42nd (Amendment) Act has furnished the key in unmistakable terms. 92. Given the above position, it is clear that if any party or organisation seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share State power. That is their aim. They may be associations of individuals but one cannot ignore the functional relevance. An association of individuals may be devoted to propagation of religrat; it would be a religious body. Another may be devoted to promotion of culture; it would be an cultural organisation. They are not aimed at acquiring State power, whereas a political party does. That is one of its main objectives. This is what we mean by saying 'functional relevance'. One cannot conceive of a democratic form of government without the political parties. They are part of the Political system and constitutional scheme. Nay, they are integral to the governance of a democratic society. If the Constitution requires the State to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and State power. Both must be kept apart. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. Introducing religion

into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favourable position. This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove. Under our Constitution, no party or organisation can simultaneously be a political and a religious party. It has to be either. Same would be the position, if a party or organisation acts and/or behaves by word of mouth, print or in any other manner to bring about the said effect, it would equally be guilty of an act of unconstitutionality. It would have no right to function as a political party. The fact that a party may be entitled to go to people seeking a mandate for a drastic amendment of the Constitution or its replacement by another Constitution is wholly irrelevant in the context. We do not know how the Constitution can be amended so as to remove secularism from the basic structure of the Constitution. The decision of this Court in Keshavananda Bharti [1973] Suppl. 1 SCR at 166 and 280 says that secularism is one of the basic features of the Constitution. Nor do we know how the present Constitution can be replaced by another; it is enough for us to know that the Constitution does not provide for such a course - that it does not provide for its own demise. 93. Consistent with the constitutional philosophy, Sub-section (3) of Section 123 the Representation of Peoples Act, 1951 treats an appeal to the electorate to vote on the basis of the religion, race, caste or community of the candidate or the use of religious symbols as a corrupt practice. Even a single instance of such a nature is enough to vitiate the election of the candidate. Similarly, Sub-section (3-A) of Section 123 provides that "promotion of , or attempt to promote, feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language" by a candidate or his agent etc. for the furtherance of the prospects of the election of the candidate is equally a corrupt practice. Section 29-A provides for registration of associations and bodies as political parties with the Election Commission. Every party contesting elections and seeking to have a uniform symbol for all its candidates has to apply for registration, while making such application, the association or body has to affirm its faith and allegiance to "the principles of socialism, secularism and democracy" among others. Since the Election Commission appears to have made some other orders in this behalf after the conclusion of arguments and because those orders have not been placed before us or debated, we do not wish to say anything more on this subject. ARTICLE 74(2) - ITS MEANING AND SCOPE: 94. The Constitution of India has introduced parliamentary democracy in this country. The parliamentary democracy connotes vesting of real power of governance in the Prime Minister and council of his ministers who are very often drawn from the majority party in Parliament. Some Jurists indeed refer to it derisively as Prime-ministerial form of Government. In such a democracy, the head of the State, be he the King or the President, remains a constitutional head of the State. He acts in accordance with the aid and advice tendered to him by the council of ministers with the Prime Minister at its head. This is

what Clause (1) of Article 74 provided, even before it was amended by the 42nd (Amendment) Act. It was so understood and interpreted in Ramjaway Kapoor v. State of Punjab , and in Shamsher Singh. The 42nd Amendment merely made explicit what was already implicit in Clause (1). The 44th Amendment inserted a proviso to Clause (1) which too was in recognition of an existing reality. It empowers the President to require the council of ministers to reconsider the advice tendered by them. The advice tendered on such reconsideration is made binding upon the President. Since Clause (2) of Article 74 has to be read and understood having regard its context, it would be appropriate to read both the Clauses of Article 74 as they stand now: 74. Council of Ministers to aid and advice President –(1) There shall be a Council of the Ministers with the Primes Minister at (he head to aid and advice the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice., either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration. (2) The question whether any, and if so what, advice was tendered by Ministers to the president shall not be inquired into in any Court. (Emphasis added) 95. Article 53(1) of the Constitution says that "the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution." Clause (2), however, declares that without prejudice to Clause (1), the supreme command of the Armed forces of the Union shall be vested in the President and that the exercise of such power shall be regulated by law. 96. Clause (1) of Article 77 provides that "all executive action of the Government of India shall be expressed to be taken in the names of the President." Clause (2) then says that all orders made and other instruments executed in the name of the President shall be authenticated in such manner as may be specified in the Rules to be made by the President. It further provides that the validity of an order or instrument which is authenticated in accordance with the said Rules shall not be called in question on the ground that it is not an order or instrument made or executed by the President. Rules have been made by the President as contemplated by this clause contained in Notification No. SO. 2297 dated November 11, 1958 (as amended from time to time). Several officers of the Government have been empowered to authenticate the orders and other instruments to be made and executed in the name of the President. Clause (3) requires the President to make Rules for the more convenient transaction of the business of the Government of India and for allocation among Ministers of the said business. In other words, Rules have to be made by the President under Clause (3) for two purposes, viz., (1) for the more convenient transaction of the business of the Government of India and (b) for the allocation among Ministers of the said business. Rules of business have indeed been made as required by this clause and the business of the Government of India allocated between several Ministers. 97. Yet another article which requires to be noticed in this connection is Article 361 which declares that "the President shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the

exercise and performance of those powers and duties". No criminal proceeding can be instituted or continued against the President in any Court while he is in office, nor is he subject to any process for his arrest or imprisonment. 98. Article 78 specifies the duties of the Prime Minister as regards the furnishing of information to President and certain other matters. Clause (1) obliges the Prime Minister to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation. Clause (b) says that Prime Minister shall furnish such information as the president may call for with respect to the matters communicated under Clause (a). Clause (c) obliges the Prime Minister, if required by the President, to submit any matter for reconsideration of the Council of Ministers which has not been considered by it. 99. The President is clothed with several powers and functions by the Constitution. It is not necessary to detail them to expect to say that Article 356 is one of them. When Article 74(1) speaks of the President acting "in the exercise of his functions", it refers to those powers and functions. Besides the Constitution, several other enactments too confer and may hereinafter confer, certain powers and functions upon the President. They too will be covered by Article 74(1). To wit, the President shall exercise those powers and discharge those functions only on the aid and advice of the Council of Ministers with the Prime Minister at its head. 100. Article 361 is the manifestation of the theory prevalent in English law that 'King can do no wrong' and, for that reason, beyond the process of the court. Any and every action taken by the President is really the action of his ministers and subordinates. It is they who have to answer for, defend and justify any and every action taken by them in the name of the President, if such action is questioned in a Court of law. The President cannot be called upon to answer for or justify the action. It is for the council of ministers to do so. Who comes forward to do so is a matter for them to decide and for the court to be satisfied about it. Normally speaking, the Minister or other official or authority of the Ministry as is entrusted with the relevant business of the Government, has to do it. 101. Article 53(1) insofar as says that the executive power of the Union, which vests in the President, can be exercised by him either directly or through officers subordinate to him in accordance with the Constitution stresses the very idea. Even where he acts directly, the President has to act on the aid and advice of the Council of Ministers or the Minister concerned, as the case may be. (Advice tendered by a Minister is deemed to be the advice tendered by the council of Ministers in view of the principle of joint responsibility of the cabinet/council of ministers). If such act is questioned in a Court of Law, it is for the Minister concerned (according to Rules of Business) or an official of that Ministry to defend the Act. Where the President acts through his subordinates, it is for that subordinate to defend the action. 102. Article 74 and 77 are in a sense complimentary to each other , though they may operate in different fields. Article 74(1) deals with the acts of the President done "in exercise of his functions", whereas Article 77 speaks of the executive action of the Government of India which is taken in the names of the President of India. Insofar as the executive action of the Government of India is concerned, it has to be taken by the Minister/Official to whom the said

business is allocated by the rules of Business made under Clause (3) of Article 77 for the more convenient transaction of the business of the Government of India. All orders issued and the instruments executed relatable to the executive action of the Government of India have to be authenticated in the manner and by the officer empowered in that behalf. The President does not really comes into the picture so far as Article 77 is concerned. All the business of the Government of India is transacted by the Ministers or other officials empowered in that behalf, of course, in the name of the President. Orders are issued, instruments are executed and other acts done by various Ministers and officials, none of which may reach the President or may be placed before him for his consideration. There is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. Though expressed in the name of the President, they are the acts of the Government of India. They are distinct from the acts of the President "in the exercise of his functions" contemplated by Article. 74. Of course, even while acting in exercise of his functions, the President has to act in accordance with the aid and advice tendered by the Council of Ministers with the Prime Minister at its head. He is thus rendered a constitutional - or a titular-head. (The proviso to Clause (1) no doubt empowers him to require the Council of Ministers to reconsider such advice, either generally or in any particular cases, but if and when the Council of Ministers tenders the advice on such re-consideration, he is bound by it.) Then comes Clause (2) of Article 74 which says that the question "whether any, and if so, what advice was tendered by the Ministers to the President shall not be enquired into in any Court." The idea behind Clause (2) is this: the Court is not to enquire - it is not concerned with - whether any advice was tendered by any Minister or Council of Ministers to the President, and if so, what was that advice. That is a matter between the President and his Council of Ministers. What advice was tendered, whether it was required to be reconsidered, what advice was tendered after reconsideration, if any, what was the opinion of the President, whether the advice was changed pursuant to further discussion, if any, and how the ultimate decision was arrived at, are all matters between the President and his Council of Ministers. They are beyond the ken of the Court. The Court is not to go into it. It is enough that there is an order/act of the President in appropriate form. It will take it as the order/act of the President. It is concerned only with the validity of the order and legality of the proceeding or action taken by the President in exercise of his functions and not with what happened in the inner Councils of the President and his Ministers. No one can challenge such decision or action on the ground that it is not in accordance with the advice tendered by the Ministers or that it is based on no advice. If, in a given case, the President acts without, or contrary to, the advice tendered to him, it may be a case warranting his impeachment, but so far as the Court is concerned, it is the act of the President. (We do not wish to express any opinion as to what would be the position if in the unlike event of the council of Ministers itself questioning the action of the President as being taken without, or contrary, to their advice). 103. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the

President and his Council of Ministers. In fact, Clause (2) is a reproduction of Sub-section (4) of Section 10 of the Government of India Act, 1935. (The Government of India Act did not contain a provision corresponding to Article 74(1) as it stood before or after the Amendments aforementioned). The scope of Clause (2) should not be extended beyond its legitimate field. In any event, it cannot be read or understood as conferring an immunity upon the council of ministers or the Minister/Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his function. The limited provision contained in Article 74(2) cannot override relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed to have been taken in accordance with Article 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/action is for them to decide and for the Court to be satisfied about it. Where, of course, the act/order questioned is one pertaining to the executive power of the Government of India, the position is much simpler. It does not represent the act/order of the President done/taken in exercise of his functions and hence there is no occasion for any aid or advice by the Ministers to him. It is the act/order of Government of India, though expressed in the name of the President. It is for the concerned Minister or Ministry, to whom the function is allocated under the Rules of Business to defend and justify such action/order. 104. Section 123 of the Evidence Act, in our opinion, is in no manner relevant in ascertaining the meaning and scope of Article 74(2). Its field and purpose is altogether different and distinct. Section 123 reads thus: 123. Evidence as to affairs of State–No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. 105. Evidence Act is a pre Constitution enactment. Section 123 enacts a rule of English common Law that no one shall be permitted to give evidence derived from unpublished official records relating to affairs of State except with the permission of the concerned head of the department. It does not prevent the head of department permitting it or the head of the department himself giving evidence on that basis. The law relating to Section 123 has been elaborately discussed in several decisions of this Court and is not in issue herein. Our only object has been to emphasise that Article 74(2) and Section 123 cover different and distinct areas. It may happen that while justifying and government's action in Court, the Minister or the concerned official may claim a 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 that Section. But, Article 74(2) does not and cannot mean that the Government of India need not justify the action taken by the President in the exercise of his functions because of the provision contained therein. No such immunity was intended - or is provided - by the clause, if the act or order of the President is questioned in a Court of Law, it is for the Council of Ministers to justify it by disclosing the material which formed the basis of the act/order. The Court will not ask whether such

material formed part of the advice tendered to the President or whether that material was placed before the President. The Court will not also ask what advice was tendered to the President, what deliberations or discussions took place between the President and his Ministers and how was the ultimate decision arrived at. The Court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action under Article 356(1). The court will not go into the correctness of the material or its adequacy. Even if the court were to come to a different conclusion on the said material, it would not interfere since the Article speaks of satisfaction of the President and not that of the court. 106. In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Article 74(2). The argument that the advice tendered to the President comprises material as well and , therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him - and if need be to satisfy him - that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing in such a case that writing is the advice and is covered by the protection provided by Article 74(2). But it is difficult to appreciate how does the supporting material becomes part of advice. The respondents cannot say that whatever the President sees - or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court. Article 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find it difficult to agree with the reasoning in State of Rajasthan on this score, insofar as it runs contrary to our holding. ARTICLE 356 AND JUDICIAL REVIEW: 107. Judicial review of administrative and statutory action is perhaps the most important development in the field of public law in the second half of this century. In India, the principles governing this jurisdiction are exclusively Judge-made. A good amount of debate took place before us with respect to the applicability, scope and reach of judicial review vis-a-vis the proclamation issued by the President under Article 356 of the Constitution. A Large volumes of case-law and legal literature has been placed before us. Though it may not be possible to refer to all that material, we shall refer to relevant among them at the appropriate place. 108. One of the contentions raised by the Union of India in Writ Petition No. 237 of 1993 (filed by Sri Sunderlal Patwa and others in Madhya Pradesh High Court questioning the proclamation) and other writ petitions is that inasmuch as the action under Article 356 is taken on the subjective satisfaction of the President and further because the President cannot be sued in a Court of Law by virtue of Article 361, the impugned proclamation is not justiciable, this argument is, however, not pressed before us. It is also averred

that since the Parliament has approved the said proclamation, the Court ought not to entertain the writ petition and/or examine the correctness or otherwise of the Presidential proclamation. (This contention has been further elaborated and pressed before us, as we shall mention hereinafter). Article 74(2) is relied upon to submit that the material on which the President based the requisite satisfaction cannot be compelled to be produced in Court. (This contention has already been dealt with by us.) It is also submitted that the report of the Governor which forms the basis of action under Article 356 and the material upon which it is based cannot be called in question by virtue Article 361 - (urged in a modified form). 109. Sri K. Parasaran, learned Counsel appearing for the Union of India conceded that the action of the President under Article 356 cannot be said to be beyond judicial review and judicial scrutiny. He, however, submitted that having regard to the nature of the function, the high constitutional status of the authority in whom the power is vested and the exigencies in which the said action is taken, the Court ought not to go into the question of the advisability of the action or into the adequacy of the material on which it is based. The Presidential action, counsel submitted, is not susceptible to normal rules of judicial review, having regard to the political nature of the action and absence of any judicially manageable standards. There may be several imponderables in the situation, which the Court cannot weigh. The President's action under Article 356 cannot be equated to administrative action of a government official. It is exercise of a constitutional function by the highest dignitary of the nation, the President of India. May be the learned Counsel submitted, in a case like Meghalya (Transferred Case Nos. 5 and 7 of 1992), the Court may interfere where the invalidity of action is demonstrable with reference to the orders of this Court, i.e., where the invalidity is writ large on its face. But, generally speaking, the Court is ill-fitted to judge the material on which the action is based to determine whether the said material warranted the action taken. The Court cannot sit in judgment over the prognosis of the President (for that matter, of the Union Council of Ministers) that the situation in a given State was one in which the government of that State could not be carried on in accordance with the provisions of the Constitution. This is an instance, the learned Counsel continued, where the Constitution has committed a particular power to the President to be exercised in his discretion in certain specified situations - a power flowing from the obligation cast by Article 355 upon the Union of India to ensure that "the government of every State is carried on in accordance with the provisions of this Constitution". The President is oath-bound to protect and preserve the Constitution. Placed as he is and having regard to the material which is available to him alone - and also because he alone is best fitted to determine on the basis of material before him whether the situation contemplated by Article 356(1) has arisen - the matter must be left to his judgment and good sense. He alone is presumed to possess the astute political-cum-administrative expertise necessary for a proper and sound exercise of the said power. Judicial approach, which the courts are trained to adopt, is not suited to the function under Article 356. The Courts would be better advised to leave the function to those to whom it is entrusted by the Constitution. The President of In-

dia has to be trusted. Of course, President in Article 356(1) means the Union Council of Ministers by virtue of Article 74(1) but that makes little difference in principle. That is the system of government we have adopted. There is no reason to believe that the highest authority like the President of India - i.e., the Union Council of Ministers - would not act fairly and honestly or that they would not act in accordance with the spirit and scheme of the Constitution. Sri Parasaran further submitted that where a particular proclamation is questioned, the burden of establishing its invalidity lies upon the petitioner. It is for him to produce the material to substantiate his contentions. By virtue of Article 74(2), the Court would not enquire into the advice tendered by the Ministers to the President leading to the issuance of the impugned proclamation. The advice comprises and is based upon certain material and information. The advice and material cannot be separated. If the Court cannot enquire into the advice, it cannot also call upon the Union of India to disclose that material. The learned Counsel submitted further that there is a distinction between judicial review of administrative action and Judicial review of constitutional action. The decisions of this Court relating to judicial review of administrative or statutory action and discretion cannot be applied to judicial review of constitutional action. Appeal against such action, properly and truly speaking, must, and should always be, to the ultimate political sovereign -the people. 110. Sri P.P. Rao, learned Counsel for the State of Madhya Pradesh while adopting the contentions of Sri K. Parasaran concentrated mainly upon the secular nature of our Constitution, with the sequiter that non-secular policies, programmes and acts of political parties place such parties outside the pale of constitutionalism. He submitted that by adopting such policies and programmes and by indulging in non-secular course of action, the governments run by such parties render themselves amenable to action under Article 356. According to the learned Counsel, B.J.P.'s election manifesto, together with the speeches and acts of their leaders and cadres make it a non-secular party and, therefore, the dismissal of their government in Madhya pradesh is perfectly justified. Sri Andhyarujina, learned Advocate-General of Maharashtra submitted that the doctrine of political question has not been given-up altogether by the decision of the U.S. Supreme Court in Baker v. Carr [1962] 11 L.Ed. 633. All that the decision has done is to limit the area of operation of the said doctrine. The dismissal of a State government or dissolution of the State Legislative Assembly is essentially a political question, the validity and correctness whereof cannot be adjudged with reference to any know judicial standards and/or dicta. Such matters be best left to the wisdom of the President and ultimately of the people. It is for the people to judge whether a particular dismissal or dissolution was just or not. 111. S/Sri Soli Sorabjee, Ram Jethmalani and Shanti Bhushan, learned Counsel for the Petitioners submitted, on the other hand, that the action of the President under Article 356 is not beyond judicial scrutiny. The Constitution does not create any such immunity and it would not be desirable to infer any such immunity by a process of reasoning or as a matter of self-restraint by this Court. The power has been used more often than not for purposes other than those contemplated by Article 356. The provision has been abused repeatedly over the years re-

ducing the State governments and the State Legislatures to the status of mere municipalities. If the Court were to refuse to enquire into the validity of such proclamations, a serious imbalance will set in the constitutional scheme. This Court is as much bound to uphold, protect and preserve the Constitution as the President of India. The founding fathers did not say or indicate anywhere that the President shall exercise the said power in his absolute discretion/judgment. On the contrary, the action is made expressly subject to approval by both the Houses of Parliament. The remedy of judicial review guaranteed by Articles 32 and 226 extends and applies to this action as to any other action of the President under the Constitution. Where the Parliament wished to bar judicial review, it has said so expressly, e.g., Article 31-B and 31-C. There is no distinction between the judicial review of administrative/statutory action and judicial review of Constitutional action. The tests are the same. No other tests can possibly be suggested. The power under Article 356 is undoubtedly the power to be exercised on the subjective satisfaction of the President, which means the Council of Ministers. The latter is undoubtedly a political body and the experience shows that where a different party is in power in a state, the Central Government has been resorting to Article 356 to destabilise that party and to further the prospects of their own party. The circumstances in which and the grounds on which the action based on subjective satisfaction can be interfered with, have been exhaustively stated by this Court in Barium Chemicals as far back as 1966 which decision has been followed uniformly by this Court over the last three decades. The tests evolved in the said decision are relevant even in the case of action under Article 356. The power under Article 356 is a conditioned power; it can be exercised only when the President is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution. Even in the case of an unqualified and unconditional power like the one under Article 72 (power to grant pardon etc.) this Court has held that the action of the President is amenable to judicial review Kehar Singh v. Union of India [1988] Suppl. 3 S.C.R. 1102. The satisfaction must be based upon existing material and must be such as would lead a reasonable man to be satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Even if the action is taken with the best of intentions, it would be bad if the action is outside the pale of Article 356. If the grounds are not relevant or if there are no grounds warranting the requisite satisfaction, the action would be bad. Article 74(2) has no relevance in this behalf. It is a sort of red herring drawn across the trial by the Respondents' counsel to confuse the issue. The petitioners are not interested in or anxious to know that advice, it any, was tendered by the Ministers to the President leading to the issuance of the impugned proclamation. They are not interested in that aspect. There challenge is to the validity of the proclamation and since it is an action based upon subjective satisfaction and also because the proclamation does not recite the grounds upon it has been issued, it is for the Union of India to justify their action before this Court. This is the general principle applicable to cases of subjective satisfaction and the proclamation under Article 356 is no exception to this rule say the counsel. 112. Since it is not disputed

by the counsel for the Union of India and other respondents that the proclamation under Article 356 is amenable to judicial review, it is not necessary for us to dilate on that aspect. The power under Article 356(1) is a conditional power. In exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. In what circumstances the court would interfere is a different matter but the amenability of the action to judicial review is beyond dispute. It would be sufficient to quote a passage form State of Rajasthan: ...So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so...this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of law.... 113. The controversy really pertains to the scope, reach and extent of the judicial review. 114. Regarding the scope and reach of judicial review, it must be said at the very outset that there is not, and there cannot be, a uniform rule applicable to all cases. It is bound to vary depending upon the subject-matter, nature of the right and various other factOrs. 115. This aspect has been emphasised by this Court in Indra Sawhney v. Union of India (1992) 6 J.T. 655, in the following words: The extent and scope of judicial scrutiny depends upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive - a co-equal wing - in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to the due weight. 116. A passage from the article "Justiciability and the control of discretionary power" b Prof. D.G.T. Welliams appears to echo our thought correctly the Professor says, "Variability, of course, is the outstanding feature of judicial review of administrative action...an English Judge has commented that (with administrative law 'in a phase of active development') the Judges 'will adapt the rules...to protect the rule of law' and an Australian judge has noted that there 'is no fixed rule which requires the same answer to be given in every case'. Similar sentiments have been expressed in the case of express procedural requirements where the Courts have to wrestle with the distinction between mandatory and directory requirements, where the law has been described 'as inextricable tangle of loose ends', and where the variables - including ideas of substantial compliance' or as to whether anyone has been prejudiced - are such that even the same statutory provision may be differently interpreted according to the circumstances of a case...the fluidity of the rules on express procedural requirements has been eloquently recognized

both by Lord Hailsham - who, against a background of 'the rapidly developing jurisprudence of administrative law' spoke of a 'spectrum of possibilities' when he stressed that the Courts are not necessarily 'bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invested by lawyers for the purposes of convenient exposition'...". 117. Having said this, we may now proceed to examine a few decisions where proclamations of emergency were questioned to notice how the challenge was dealt with. We may first notice the decision of the Privy Council in Bhagat Singh v. King Emporer Section 72 of the Government of India Act, 1919 empowered the Governor-General to make and promulgate ordinance for the peace and good Government of British India in case of emergency. The ordinance so made, however was to be effective for a period of six months from the date of its promulgation and was to be effective like an enactment made by the Indian legislature and be subject to the very same restrictions applying to an enactment made by the Indian legislature. The section read as follow: 72. The Governor-General may in cases of emergency make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinance under this section is subject to the like restrictions, as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and may be controlled or superseded by any such Act. 118. Exercising the said power, the Governor-General issued an ordinance whereunder the appellant was convicted. In the appeal to the Board, the appellant contended that, as a matter of fact, there was no state of emergency and that the Governor-General acted illegally in proclaiming that one exists and issuing the ordinance on that basis. This contention was rejected by the Board in the following words: That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance. Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board-after a contentious and protracted enquiry-that no state of emergency existed, and that the ordinance with all that followed on it was illegal. In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it. It was next said that the ordinance did not conduce to the peace and good government of British India The same remarks applies. The Governor-General is also the judge

of that. The power given by Section 72 is an absolute power without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good Government of India demands it. 119. Thus, the approach of the Board was one of 'hands-off. The Governor-General was held to be the final Judge of the question whether an emergency exists. The power conferred by Section 72 was described an an absolute power without any limits prescribed, except that which apply to an enactment made by the Indian legislature. It was also observed that the subject matter is not fit one for a court to enquire into. 120. We may point out that this extreme position is not adopted by Sri Parasaran, learned Counsel appearing for the Union of India. He did concede that judicial review under the Constitution is not excluded in the matter of proclamation under Article 356(1) though his submission was that it should be available in an extremely narrow and limited area since it is a power committed expressly to the President by the Constitution and also because the issue is not one amenable to judicial review by applying known judicially manageable standards. The Supreme Court of Pakistan in Federation of Pakistan v. Mohd. Saifullah Khan, P.L.D. (1989) S.C. 166, described the approach (adopted in Bhagat Singh) in the following words (quoting Cornelius, J.): "In the period of foreign rule, such an argument, i.e., that the opinion of the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the State are themselves citizens of the same State, it can hardly be tolerated." 121. We have no hesitation in rejecting the said approach as totally inconsistent with the ethos of our Constitution, as would be evident from the discussion infra. 122. The view taken in Bhagat Singh was affirmed by the Privy Council in the year 1944 in King Emporer v. Benoari Lal Sharma and Ors. (1944) 72 I.A. 57, CPC. It was held that whether an emergency existed at the time the ordinance was made and promulgated was a matter of which the Governor-General was the sole Judge. If it were not so, it was observed, the Governor- General would be disabled from taking action necessary to meet the emerging dangerous situation, according to his assessment of the situation. It is enough to say that this case again represents what we have called the extreme view. It is inappropriate in the context of Article 356. 123. The next decision is again of the Privy Council in Stephen Kalong Ningkan v. Government of Malaysia (1970) A.C. 379. The appellant was the Chief Minister of Sarawak, and Estate in the Federation of Malaysia. On June 16, 1966, the Governor of Sarawak requested him to resign on the ground that he had ceased to command the confidence of the council Negri. The appellant refused whereupon the Governor informed him on June 17, 1966 that he ceased to hold the office. The appellant approached the High Court of Kuching against the governor's intimation. On September 7, 1966, the High Court upheld his plea and ruled that the Governor had no power to dismiss him. On September 14, 1966, His Majesty Yang di-Pertuan Agong (Head of the State of Malaysia) proclaimed a state of emergency throughout the territories of the State of Sarawak. The proclamation was made under Article 150 of the Federal Constitution of Malaysia, which reads thus: Article 150(1): If the Yang di-Petruan Agong is

satisfied that a grave emergency exists whereby the security or the economic life of the Federation or of any part thereof is threatened, he may issue a proclamation or emergency. 124. The Article provided for such proclamation being placed for approval before both the Houses of Parliament, who had the power to disapprove the same. Clause (5) of Article 150 empowered the Federal Parliament, during the period the proclamation of emergency was in operation, to make laws with respect to any matter which it appeared to it as required by reason of the emergency. Such law, it was provided, shall be operative notwithstanding anything contained either in the Constitution of the Federation or the Constitution of the State of Sarawak, and will not be treated as amendment to the constitution. Any such law was, however, to be in force only for the period of emercency. In exercise of the power conferred by Clause (5) of Article 150, the Federation Parliament passed Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. Section 5 of this Act specifically empowered the Governor to dismiss the Chief Minister, in his absolute discretion, if, at any time, the Council Negri passed the resolution of no-confidence in the Government by a majority and yet the Chief Minister failed to resign. On September 23, 1966, the Council Negri met and passed the resolution of no-confidence in the Chief Minister (appellant). On the next day, the Governor dismissed the appellant under the new Act. He impugned the action in the Federal Court of Malaysia, wherein he sought for a declaration that the 1966 Act aforesaid was ultra vires the Federal Parliament. He contended that the proclamation of emergency was a fraud on the Constitution and of no effect inasmuch as no state of grave emergency existed. The Act aforesaid founded as it was on the proclamation of emergency, was equally void and of no effect, he submitted. He contended that the evidence showed that non of the usual signs and symptoms of "grave emergency" existed in Sarawak at or before the time of the proclamation; that no disturbances, riots or strikes had occurred; that no extra troops or police had been placed on duty; that no curfew or other restrictions on movement had been found necessary and that the 'confrontation' with Indonesia had already come to an end. The Federation of Malaysia repudiated all the said contentions. It submitted that the proclamation of emergency was conclusive and not assailable before the Court. 125. The Privy Council (Lord MacDermott speaking for the Board) expressed the view in the first instance that it was "unsettled and debatable" whether a proclamation made by the Supreme Head of the Federation of Malaysia under statutory powers could be challenged on some or other grounds but then proceeded on the assumption that the matter is justiciable. On that assumption, the Board proceeded to examine the further contentions of the appellant. It found that the proclamation of emergency and the impugned Act were really designed to meet the constitutional dead-lock that had arisen on account of the absence of provision empowering the Governor to dismiss the Chief Minster where the latter ceased to enjoy the confidence of the Council Negri. It observed: "It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Governor of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to enquire whether that situation could itself have been avoided by a different

approach." The Privy Council observed further that "they can find, in the material presented, no ground for holding that the respondent- government was acting erroneously or in any way malafide in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of a state government and amounted to any emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essential matters to be determined according to the judgment of the respondent-ministers in the light of their knowledge and experience... and that he (the appellant) failed to satisfy the Board that the steps taken by the Government including the proclamation and the impugned Act, were in fraudem Legis or otherwise unauthorised by the relevant legislation". The appeal was according dismissed. 126. There stands of reasoning are evident in the decision. Firstly, the Privy Council assumed that the issue was justiciable. On that basis, it examined the facts of the case and found that the situation did amount to an emergency. Secondly and more importantly, it examined and found that there was no "reason for saying that the emergency thus considered to exist was not grave and not threaten the security of Sarawak", though at the same time, it held that existence of emergency is a matter to be determined by the council of ministers in the light of their knowledge and experience and thirdly, that the appellant failed to establish that the proclamation of emergency was a fraud on the Constitution. 127. We may now notice the only decision of this Court dealing with Article 356, viz., State of Rajasthan. Two circumstances must be kept in mind while examining the decision, viz., (i) the writ petitions (and suits) filed by various states were not directed against proclamation(s) of emergency, since no such proclamations were issued prior to the filing of those suits and writ petitions; and (ii) at that time, Clause (5) introduced by 38th (Amendment) Act was in force. Clause (5) read as follows: 5. Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in the Clause (1) shall be final and conclusive and/shall not be questioned in any court on any ground. [This clause was substituted by an altogether different clause by the 44th (Amendment) Act]. 128. The subject matter of challenge in the suits (under Article 131) and writ petitions (under Article 32) in this matter was a letter written by the then Home Minister to Chief Ministers of certain States advising them to seek the dissolution of respective Legislative Assemblies and seek a fresh mandate from the people. The letter stated that the elections to Lok Sabha held in March, 1977 indicated that the Congress party, in power in those States, has lost its mandate totally and has become alienated with the people. The letter, together with a statement made by the then Union Law Minister, was treated as a threat to dismiss those State governments. To ward off such a threat, they approached the Supreme Court by way of suits and writ petitions. They was heard expeditiously and dismissed on April 29, 1977. Reasoned opinions were delivered later, by which date proclamations under Article 356(1) were actually issued. One of the questions related to the maintainability of the suits, with which question, of course, we are not concerned. 129. Six opinions were delivered by the Seven-Judge Bench. Though all of them agreed

that the writ petitions and suits be dismissed, their reasoning is not uniform. It would, therefore, be appropriate to notice the ratio underlying each of the opinions insofar as it is relevant for our purposes: Beg, C.J. 130. The opinion of Beg, C.J. contains several strands of thought. They may be stated briefly thus: (i) The language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State governments with respect to the question how the State governments should function and who should hold reins of power. (ii) By virtue of Article 365(5) and Article 74(2), it is impossible for the Court to question the satisfaction of the President. It has to decide the case on the basis of only those facts as may have been admitted by or placed by the President before the Court. (iii) The language of Article 356(i) is very wide. It is desirable that conventions are developed channelising the exercise of this power. The Court can interfere only when the power is used in a grossly perverse and unreasonable manner so as to constitute patent misuse of the provisions or to an abuse of power. The same idea is expressed at another place saying that "a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved" by the proclamation, it would be liable to be struck down. The question whether the majority party in the Legislative Assembly of a State has become totally estranged from the electorate is not a matter for the Court to determine. (iv) The assessment of the Central Government that a fresh chance should be given to the electorate in certain States as well as the question when to dissolve the Legislative Assemblies are not matters alien to Article 356. It cannot be said that the reasons assigned by the Central Government for the steps taken by them are not relevant to the purposes underlying Article 356. 131. We may say at once that we are in respectful disagreement with propositions (i), (ii) and (iv) altogether. So far as proposition (iii) is concerned, it is not far off the mark and in substance accords with our view, as we shall presently show. Y.V. Chandrachud, J. 132. On the scope of judicial review, the learned Judge held that where the reasons disclosed by the Union of India are wholly extraneous, the court can interfere on the ground of malafides. Judicial scrutiny, said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed". The court cannot sit in judgment over the satisfaction of the President for determining whether any other view of the situation is reasonably possible, opined the learned Judge. Turning to the facts of the case before him, th6 learned Judge observed that the grounds assigned by the Central Government in its counter-affidavit cannot be said to be irrelevant to Article 356. The Court cannot go deeper into the matter nor shall the Court enquire whether there were any other reasons besides those disclosed in the counter-affidavit. P.N. Bhagwati and A.C. Gupta, JJ. 133. The learned Judges enunciated the following propositions in their opinion: The action under Article 356 has to be taken on the subjective satisfaction of the President. The satisfaction is not objective. There are no judicially discoverable and manageable standards by which the Court can examine the correctness of the satisfaction of the President. The satisfaction to be arrived at is largely political in nature, based on an assessment of various and varied facts and factors besides several imponderables and fast

changing situations. The court is not a fit body to enquire into or determine the correctness of the said satisfaction or assessment, as it may be called. However, if the power is exercised malafide or is based upon wholly extraneous or irrelevant grounds, the Court would have jurisdiction to examine it. Even Clause (5) is not a bar when the contention is that there was no satisfaction at all. The scope of judicial review of the action under Article 356, - the learned Judge held - is confined to a "narrow minimal area: May be that in most cases, it would be difficult, if not impossible, to challenge the exercise of power under Article 356(1) on the aforesaid limited ground, because the facts and circumstances on which the satisfaction is based, would not be known, however, where it is possible, the existence of satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. 134. We may say with great respect that we find it difficult to agree with the above formulations in toto. We agree only with the statements regarding the permissible grounds of interference by court and the effect of Clause (5), as it then obtained. We also agree broadly with the first proposition, though not in the absolute terms indicated therein. Goswami and Untwalia, JJ. 135. The separate opinions of Goswami and Untwalia, JJ. emphasise one single fact, namely, that inasmuch as the facts stated in the counter-affidavit filed by the Home Minister cannot be said to be"malafide, extraneous or irrelevant", the action impugned cannot be assailed in the Court. Fazal Ali, J. 136. The learned Judge held that: (i) the action under Article 356 is immune from judicial scrutiny unless the action is"guided by extraneous consideration" or "personal consideration". (ii) the inference drawn by the Central Government following the 1977 elections to the Lok Sabha cannot be said to be unreasonable. It cannot be said that the inference drawn had no nexus with Article 356. 137. It would thus be seen that there is a broad concensus among five of the seven Judges that the court can interfere if it is satisfied that the power has been exercised malafide or on wholly extraneous or irrelevant grounds. Some learned Judges have stated the rule in narrow terms and some others in a little less narrow terms but not a single learned Judge held that the proclamation is immune from judicial scrutiny. It must be remembered that at that time Clause (5) was there barring judicial review of the proclamation and yet they said that court can interfere on the ground of malafides or where it is based wholly on extraneous or irrelevant grounds. Surely, the deletion of Clause (5) has not restricted the scope of judicial review. Indeed, it removed the cloud cast on the said power. The court should, if anything, be more inclined to examine the constitutionality of the proclamation after such deletion. 138. It would be appropriate at this stage to examine a few decisions of the Pakistan Supreme Court, since the Constitution of Pakistan, 1973 contains a provision somewhat similar to Article 356. 139. Article 58 of the Constitution of Pakistan, 1973 provides for dissolution of National Assembly. Clause (1) says that the President shall dissolve the National Assembly if so advised by the Prime Minister. It further provides that in any event on the expiry of forty-eight hours after the Prime Minister has advised the dissolution, the National Assembly stands dissolved. Clause (2) is relevant for our purpose. It reads thus: (2) Notwithstanding anything contained in Clause

(2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion- (a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of majority of the members of the National Assembly in accordance with the provisions of the Constitution as ascertained in a session of the National Assembly summoned for the purpose; or (b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. 140. Sub-clause (b) of Clause (2) approximates to Clause (1) of Article 356 of our Constitution. Under this clause, the President may dissolve the National Assembly, in his discretion, where in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. 141. The first decision is in Federation of Pakistan v. Mohammad Khan, a decision of a Bench of twelve-Judges of the Pakistan Supreme Court, reported in P.K.D. [1989] S.C. 166. Acting under Article 58(2)(b), the President of Pakistan dissolved the National Assembly and dismissed the federal cabinet with immediate effect by a notification dated May 29, 1988. The order made by the President recited 'that the objects and purposes for which the National Assembly was elected have not been fulfilled; that the law and order in the country have broken down to an alarming extent, resulting in tragic loss of innumerable valuable lives as well as property; that the life, property, honour and security of the citizens of Pakistan have been rendered totally unsafe; and that the integrity and ideology of Pakistan have been seriously endangered." The validity of the said order was challenged by a member of the National Assembly by way of writ petition in the Lahore High Court, which allowed it but declined to grant the further relief sought for by the petitioner; viz., restoration of the National Assembly, (Provincial Assembly of Punjab was also dissolved by a similar order made by the Governor of Punjab under Article 112(2)(b), which too was questioned in the High Court and with the same result.) In the appeal before the Supreme Court, it was contended that the action of the President was immune from judicial scrutiny inasmuch as it was an instance of exercise of his discretionary power. The contention was repelled by the Supreme Court in the following words. The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute one, but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it. It must further be noted that the reading of the provisions of Article 48(2) and 58(2) shows that the President has to first form his opinion, objectively, and then, it is open to him to exercise his discretion one way or the other, i.e., either to dissolve the Assembly or to decline to dissolve it. Even if some immunity envisaged by Article 48(2) is available to the action taken under Article 58(2) that can possibly be only in relation to his 'opinion'. An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly. In Abul Ala Maudoodi v

. Government of West Pakistan, P.L.D. [1964] S.C. 673, Cornelius C.J., while interpreting certain provisions of the Criminal Law Amendment Act, 1908, construed the word 'opinion' as under: ...it is a duty of Provincial Government to take into consideration all relevant facts and circumstances. That imports the exercise of an honest judgment as to the existence of conditions in which alone the opinion must be formed honestly, that the restriction is necessary. In this process, the only element which I find to possess a subjective quality as against objective determination, is the final formation of opinion that the action proposed is necessary. Even this is determined, for the most part, by the existence of cir cumstances compelling the conclusion. The scope for exercise of personal discretion is extremely limited....As I have pointed out, if the section be construed in a comprehensive manner, the requirement of an honest opinion based upon the ascertainment of certain matters which are entirely within the grasp and appreciation of the government agency is clearly a pre-requisite to the exercise of the power. In the period of foreign rule, such an argument, i.e., that the opinion of the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the State are themselves citizens of the same States, it can hardly be tolerated. 142. It was further held that "though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material." 143. One of the learned Judges (Shaifur Rehman, J.) dealt with the meaning and significance of the words "cannot be carried on" occurring in Article 58(2)(b) in the following words: the expression "cannot be carried on", sandwiched as it is between "Federation Government" and "in accordance with the provisions of the Constitution", acquires a very potent, a very positive and very concrete content. Nothing has been left to surmises, like or dislikes, opinion or view. It does not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock ensuring the observance of the provisions of the Constitution. 144. The next decision of the Pakistan Supreme Court brought to our notice is in Khaja Ahmed Tariq Rahim v. The Federation of Pakistan, reported in P.L.D. [1992] S.C. 646. On August 6, 1990, the President of Pakistan dissolved the National Assembly in exercise of his discretion, by an order made under Article 58(2)(b) of the Constitution of Pakistan. The formal order referred to the National Assembly being afflicted with internal dissensions and frictions, persistent and scandalous 'horse-trading' for political gain and furtherance of personal interests, corrupt practices and inducement in contravention of the Constitution and the Law and failure to discharge substantive legislative functions other than the adoption of the Finance Bill all of which led the President to believe that the National Assembly has lost the confidence of the people. The validity of the order was challenged by a former Federal Minister in the Lahore High Court. The High Court upheld the Presidential Order whereupon the matter was carried to the Supreme Court. Both the parties agreed that the principles enunciated by the Supreme Court in Federation of Pakistan v. Mohammad Saifullah Khan, do govern the controversy. 145.

On fact, the Supreme Court found that though some of the goods given may not be relevant, there are other relevant goods all of which read together "are sufficient to justify the action taken". 146. The next decision relied upon by Sri Sorabjee is in Mirza Mohd. Nawaz Sharief v. The President of Pakistan reported in P.L.D. [1993] S.C. 473. The said decision pertains to the most recent dismissal of the Federal Government and dissolution of the National Assembly by the President of Pakistan by his order dated April 18, 1993. 147. In this decision, several propositions have been enunciated by the court. Firstly, it is reiterated that "if it could be shown that no grounds existed on the basis of which an honest opinion could be formed 'that a situation had arisen in which the government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary' the exercise of the power would be unconstitutional and open to correction through judicial review". It is next held that "Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives. It is an exceptional power provided for an exceptional situation and must receive, as it has in Federation of Pakistan v. Haji Md. Seifullah Khan and Ors., P.L.D [1989] SC 166, the narrowest interpretation". It is also held that if there is a doubt whether the Prime Minister had lost the confidence of the National Assembly "the only course left constitutionally open for the President for arriving at his satisfaction in this matter is to 'summon the National Assembly and require the Prime Minister to obtain a vote of confidence in the National Assembly". This observation was, of course, me ie in the context of Article 91(5), which says: (5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly. 148. The court then examined the presidential order and held that none of the ground therein bore any nexus to the order passed and that the grounds stated were extraneous and irrelevant and in clear departure of the constitutional provisions. Accordingly, it was held that the presidential declaration was unconstitutional and that as a natural and logical corollary, the ministry which has been dismissed along with the dissolved National Assembly must be restored and revived. 149. Before we refer to the principle of these decisions, it is necessary to bear in mind the nature of the power conferred by the Constitution of Pakistan. Under Article 58(2)(b), the President, who acts alone and personally, is empowered not only to dismiss the federal government but also to dissolve the National Assembly if, in his opinion, a situation has arisen in which the government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. This is of course, not the position under our Constitution. Under our Constitution, the President has to act and does act in accordance with the aid and advice tendered to him by the council of ministers with the Prime Minister at its head. There is no occasion for the President to act in his personal capacity or without reference to council of ministers. The second

distinguishing feature is that under the Pakistan Constitution the President is empowered to dismiss the federal government just as the Governor of a province is empowered to dismiss the provincial government, whereas under our Constitution, there is no question of President dismissing the Union Government; it is really a case where the Union Government dismisses the State government if the situation contemplated by Article 356(1) arises. The strong remarks made by the Pakistan Supreme Court must no doubt be understood in the context of the aforesaid character of Article 58(2)(b). Yet the relevance of the approach adopted by the Pakistan Supreme Court is not without significance. 150. We may at this stage refer to the decision of the Constitution Bench of this Court in Kehar Singh and Anr. v. Union of India [1988] Suppl. 3 S.C.R. 1102. Article 72 of the Constitution confers upon the President the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. The power extends to cases where the sentence is a sentence of death. The article does not provide any guidance in which matters should the President exercise which power and in which cases to refuse. In other words, the power appears ex-fade to be absolute. Kehar Singh was convicted under Section 302 IPC in connection with the assassination of the then Prime Minister of India, Smt. Indira Gandhi and sentenced to death. The sentence was confirmed by this Court on appeal. A subsequent writ petition and review filed by him in this Court failed. Kehar Singh's son then presented a petition to the President of India for grant of pardon under Article 72. He requested a personal hearing. Personal hearing was refused and in a letter addressed to Kehar Singh a counsel, the Secretary to the President expressed the President's opinion that the President cannot go into the merits of the case finally decided by the highest court of the land. The petition was accordingly rejected. The rejection of the petition was questioned by way of writ petition in this Court. This Court expressed the view that under Article 72, it is open to the President to scrutinise the evidence on record of a criminal case and come to a different conclusion from that recorded by the court both on the question of guilt as well as sentence. This power, it was held, is not in conflict with nor in supersession of judicial power. It is an altogether different power, an executive power exercised on the aid and advice of the council of ministers. It was also stated that any number of considerations may enter the decision of the President and that it is not possible to lay any guidelines governing the exercise of the said power. What is relevant for our purpose is the holding regarding the extent of judicial review of the exercise of power under the said article. It was held that the exercise of power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review. While the court cannot go into the merits, the limitations of such review are those enunciated in Maru Ram v. Union of India . The court held,"the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the full amplitude of the power is a matter for the court." This was so held inspite of the seemingly absolute nature of the power conferred by Article 72 upon the President. The argument

of the learned Attorney General of India that the exercise of power under Article 72 was not justiciable was accordingly rejected. 151. Counsel appearing on both the sides placed strong reliance upon the decision of the House of Lords in C.C.S.U. v. Minister for the Civil Service, as laying down correctly the principles to be followed in the matter of judicial review of administrative action whether governed by a statute or by 'common law'. The petitioners say that this approach ought to be adopted even in the case of the Constitutional action like the one under Article 356. The respondents demur to it. It is, therefore, necessary to examine what does the said decision lay down precisely. 152. The Government Communications Headquarters is a branch of the public services under the Foreign and Commonwealth office. Its main functions are to ensure the security of the United Kingdom military and official communications and to provide signals intelligence for the Government. Since 1947, i.e., from the time of its establishment, the staff employed therein were permitted to belong to national trade unions and most of them did so. There were several disputes between the staff and the government over the years all of which were settled by negotiations with the Union. On January 25, 1984, however, the Secretary of the State for Foreign and Commonwealth Affairs announced suddenly that the staff of the Government Communications Headquarters will no longer be permitted to belong to national trade unions and that they would be permitted to belong to only to a departmental staff association approved by the Director. The said decision was given effect to by certain orders issued on December 22, 1993. The Unions questioned the validity of the said instructions. 153. The conditions of service of the staff working in Government Communications Headquarters were to be regulated by the Minister for the Civil Service, empowered as he was by Article 4 of the 1982 Order-in-Council. The said order-in-Council was not issued under powers conferred by any Act of Parliament. It was issued by the Sovereign by virtue of her prerogative. According to the definition given by Dicey in"Introduction to the study of the Law of the Constitution" - which has been accepted and followed at all points of time in U.K. - "prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers." The very same idea has been stated by Lord Diplock in the following words: For a decision to be susceptible to judicial review, the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision, the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of the prerogative. 154. The contention on behalf of the Minister was that action taken by him in exercise of

the prerogative power is not amenable to judicial review. The said contention was rejected. So far as the merits are concerned, the only contention urged by the Unions related to "the manner in which the decision which led to these instructions being given, was taken, that is to say, without prior consultation of any kind with the appellant or, indeed, others." The right of prior consultation was founded upon the theory of legitimate expectation. All the Law Lords agreed that having regard to the practice in vogue since the establishment of the said establishment, the Unions could claim a legitimate expectation to be consulted before effecting any change in the conditions of their service. But, they held, the said legitimate expectation cannot prevail over the considerations of national security which prompted the Minister to issue the impugned instructions. It is on this ground alone that the House of Lords dismissed the appeal preferred by the Unions. 155. So far as India is concerned, there is no such thing as 'prerogative'. There is the executive power of the Government of India and there are the constitutional functions of the President. It is not suggested by the counsel for the respondents that all the orders passed and every action taken by the President or the Government of India is beyond judicial review. All that is suggested is that some of the powers of the President and the Government of India are immune. Sri Parasaran relies upon the opinion of Lord Roskill where certain prerogative powers are held not fit subject-matters for judicial scrutiny. They are the powers relating to entering of treaties with foreign power, defence of the realm, grant of pardon/mercy, conferring of honours, dissolution of Parliament and appointment of Ministers. We agree that broadly speaking the above matters, because of their very nature, are outside the ken of courts and the courts would not, ordinarily speaking, interfere in matters relating to above subjects. But that is different from saying all the President's action are immune. In fact, the main holding in this decision is that action taken in exercise of the prerogative power is not immune from judicial review apart from the clear enunciation of the grounds of judicial review. It is also held, of course, that in matters involving government policy, the ground of irrationality may not be an appropriate one. 156. We may now examine the principles enunciated by this Court in Barium Chemicals, which is the leading decision of this Court on the subject of subjective satisfaction, it exhaustively lays down the parameters of judicial review in such matters. Barium Chemicals was concerned with an enquiry ordered into the affairs of the appellant-company by the Company Law Board under Section 237(b) of the Companies Act, 1956. Section 237 read as follows : Without prejudice to its powers under Section 235, the Central Government (a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the center Government may direct, if (i) the company, by special resolution, or (ii) the Court, by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government; and (b) may do so it, in the opinion of the Central Government,there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or in a manners oppressive of any of its mem-

bers, or that the company was formed for any fraudulent or unlawful purpose; of (ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or (iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager of the company. 157. Clause (b) empowered the Central Government to appoint one or more persons as inspectors to investigate into the affairs of a Company and to report thereon if in its opinion "there are circumstances suggesting" one or the other of the circumstances mentioned in Sub-clauses (i), (ii) and (iii). The main opinion was delivered by Shelat, J. That the action contemplated under Section 237(b) could be taken on the subjective satisfaction of the Central Government was not in dispute. The controversy, however, centered round the next aspect. According to the appellant, though the opinion was subjective, the existence of circumstances set out in Clause (b) was a condition precedent to the formation of such opinion and, therefore, even if the impugned orders were to contain a recital of the existence of those circumstances, the Court can go behind that recital and determine whether they did in fact exist. On the other hand, the contention for the Company Law Board was that Clause (b) was incapable of such dichotomy and that not only the opinion was subjective but that the entire clause was made dependent on such opinion. It was urged that the words "opinion" and "suggesting" were clear indications that the entire function was subjective, that the opinion which the authority has to form is that circumstances suggesting what is set out in Sub-clauses (i) and (ii) exist and, therefore, the existence of those circumstances is by itself a matter of subjective opinion. The Legislature having entrusted that function to the authority, it was urged, the Court cannot go behind its opinion and ascertain whether the relevant circumstances exist or not. 158. After considering a large number of decisions, Shelat, J. held: ....the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining"reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits of, as Lord Redcliffe and Lord Reid called, the restraint of the statute as an alternative safeguard to rules of natural justice where the function is administrative. 159. The learned Judge then examined the object underlying Section 237 and held: There is no doubt that the formation of opinion by the Central Government is purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in Sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the

circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "cir cumstances suggesting". But, that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three Sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause per mitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process There must, therefore, exist circumstances which in the opinion of the Authority suggest what has been set out in Sub-clauses (i), (ii) and (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute. 160. Hidayatullah, J. observed thus in his separate opinion : Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. 161. The learned Judge proceeding further to say: We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in Section 237(b) can at all be drawn the action would be ultra vires the Act and void. 162. The principles enunciated in this case are not only self-evident, they have been followed uniformly since. We do not think it necessary to re-state these principles - they are too well-known. 163. Counsel brought to our notice a decision of the High Court of Australia in the Queen v. Toohey-Ex parte Northern Land Council, 151 Common Wealth Law Reports 170. Under the Aboriginal Land Rights (Northern Territory) Act, 1976, provision was made for the aboriginals to claim return of

the land traditionally occupied by them. The application was to be made to the Commissioner under the Act. Tochey, J. was acting as the Commissioner. The application was made by the Prosecutor, Northern Land Council,. According to the Land Rights Act, no such claim could be laid if the land claimed was comprised in a town. The expression 'town' was defined to have the same meaning as in the law relating to Planning and Development of Town. In 1979, Planning Act was enacted superseding an earlier Act. In Section 4(1) of the Planning Act, "town" meant inter alia "lands specified by the regulations to be an area which has to be treated as a town". Planning Regulations were made by the Administrator of the Northern territory under the Planning Act specifying inter alia the cox peninsula as part of 'Darwin town'. The cox peninsula was separated from Darwin town-proper by an arm of the sea. The land route for reaching the peninsula from Darwin town-proper was a difficult and long one. The Prosecutor, Northern Land Council challenged the validity of the Planning Regulation on the ground that the inclusion of cox peninsula in the Darwin town is not really for the purposes germane to the Planning Act and the Regulations made thereunder but for an altogether extraneous purpose. The question was whether such a plea can be investigated by the courts. The contention of the other side was that the Administrator was the Crown's Representative in the Territory and, therefore, the power exercised by him was immune from any examination by the courts. This argument was met by the prosecutor of the Northern Land Council saying that the Administrator is only the servant of the crown and not its representative and hence, possesses no immunity and on the further ground that even if he is the Representative of the Crown, there was no such immunity. The majority (Murphy, J. dissenting) held that judicial review of the Regulations was not barred. The conclusion may best be set out in the words of Stephen, J.: Conclusion on examinability. The trend of decisions in British and Commonwealth courts has encouraged me to conclude that, in the unsettled state of Australian authority, the validity of reg.5 was open to be attacked in the manner attempted by the Council. Such a view appears to me to be in accord with principle. It involves no intrusion by the courts into the sphere either of the legislature or of the executive. It ensures that, just as legislatures of constitutionally limited competence must remain within their limits of power, so too must the executive, the exercise by it of power granted to it by the legislature being confined to the purposes for which it was granted. In drawing no distinction of principle between the acts of the representative of the Crown and those of Ministers of the Crown it recognises that in the exercise of statutory powers the former acts upon the advice of the latter: as Latham, C.J. said in the Australian Communist Part Case, the opinion of the Queen's representative "is really the opinion of the Government of the day". That this is so in the Northern Territory appears from Section.33 of the Northern Territory (Self-Government) Act 1978. I have already referred to the possibility of a legislature by appropriate words excluding judicial review of the nature here in question. The terms of the present grant of power conferred by Section 165(1) are devoid of any suggestion of such exclusion. It follows that if it be shown that a regulation made under that power was made for a purpose wholly alien to the Planning Act it

will be ultra vires the power and will be so treated by the courts. 164. This case establishes that the validity of an action whether taken by a Minister or a Representative of the Crown is subject to judicial review even if done under the statute. In this case, it may be noted, the Regulations in question were made under a statute, no doubt by the Administrator who was supposed to be the Representative of the Crown in the Territory. This factor, the court held, did not preclude the court from reviewing the validity of the Regulations made by him. 165. Having noticed various decisions projecting different points of view, we may now proceed to examine what should be the scope and reach of judicial review when a proclamation under Article 356(1) is questioned. While answering this question, we should be, and we are, aware that the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the government of the States is carried on in accordance with the Constitution. We are equally aware that any misuse or abuse of this power is bound to play havoc with our constitutional system. Having regard to the form of government we have adopted, the power is really that of the Union Council of Ministers with the Prime Minister at its head. In a sence, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the center for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power - undoing the will of the people of a State by dismissing the duly constituted government and dissolving the duly elected Legislative Assembly - must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later. Sow a wind and you will reap the whirlwind. Wisdom lies in moderation and not in excess. 166. Whenever a proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court - Supreme Court and High Courts - by the Constitution. Now, what are the grounds upon which the court can interfere and strike down the proclamation? While discussing the decisions hereinabove, we have indicated the unacceptability of the approach adopted by the Privy Council in Bhagat Singh v. Emporer and King Emporer v. Benoari Lal Sarma. That was in the years 1931 and 1944, long before the concept of judicial review had acquired its present efficacy. As stated by the Pakistan Supreme Court, that view is totally unsuited to a democratic polity. Even the Privy Council has not stuck to that view, as is evident from its decision in the case from Malaya Stephen Kaalong Ningkan v. Government of Malaysia. In this case, the Privy Council proceeded on the assumption that such a proclamation is amenable to judicial review. On facts and circumstances of this case, it found the action justified. Now, coming to the approach adopted by the Pakistan Supreme Court, it must be said - as indicated hereinbefore - that it is coloured by the nature of the

power conferred upon the President by Section 58(2)(b) of the Pakistan Constitution. The power to dismiss the federal government and the National Assembly is vested in the President and President alone. He has to exercise that power in his personal discretion and judgment. One man against the entire system, so to speak - even though that man too is elected by the representatives of the people. That is not true of our Constitution. Here the President acts on the aid and advice of the Union council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in Barium Chemicals is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot ipso facto be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities - nor at any rate, in their entirety. We would rather adopt the formulation evolved by this Court in State of Rajasthan, as we shall presently elaborate. We also recognise, as did the House of Lords in C.C.S.U. v. Minister for the Civil Service that there are certain areas including those elaborated therein where the court would leave the matter almost entirely to the President/Union Government. The court would desist from entering those arenas, because of the very nature of those functions. They are not the matter which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. But the same cannot be said of the power under Article 356. It is another matter that in a given case the court may not interfere. It is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may very from an ordinary case of subjective satisfaction. 167. Without trying to be exhaustive, it can be stated that if a proclamation is found to be malafide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be struck down, as indicated by a majority of learned Judges in the State of Rajasthan. This holding must be read along with our opinion on the meaning and scope of Article 74(2) and the further circumstance that Clause (5) which expressly barred the jurisdiction of the courts to examine the validity of the proclamation has been deleted by the 44th Amendment to the Constitution. In other words, the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its' opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of malafides takes in inter alia situations where the proclamation is found to be a clear case of abuse

of power, or what is sometimes called fraud on power - cases where this power is invoked for achieving oblique ends. This is indeed merely an elaboration of the said ground. The Meghalaya case, discussed hereinafter, demonstrates that the types of cases calling for interference cannot either be closed or specified exhaustively. It is a case, as will be elaborated a little later, where the Government recommended the dismissal of the government and dissolution of the Assembly in clear disregard of the orders of this Court. Instead of carrying out the orders of this Court, as he ought to have, he recommended the dismissal of the government on the ground that it has lost the majority support, when in fact he should have held following this Court's orders that it did not. His action can be termed as a clear case of malafides as well. That a proclamation was issued acting upon such a report is no less objectionable. 168. It is necessary to reiterate that the court must be conscious while examining the validity of the proclamation that it is a power vested in the highest constitutional functionary of the Nation. The court will not lightly presume abuse or misuse. The court would, as it should, tread wearily, making allowance for the fact that the President and the Union Council of Ministers are the best judges of the situation, that they alone are in possession of information and material - sensitive in nature sometimes -and that the Constitution has trusted their judgment in the matter. But all this does not mean that the President and the Union Council of Ministers are the final arbiters in the matter or that their opinion is conclusive. The very fact that the founding fathers have chosen to provide for approval of the proclamation by the Parliament is itself a proof of the fact that the opinion or satisfaction of the President (which always means the Union Council of Ministers with the Prime Minister at its head) is not final or conclusive. It is well-known that in the parliamentary form of government, where the party in power commands a majority in the Parliament more often that not, approval of Parliament by a simple majority is not difficult to obtain. Probably, it is for this reason that the check created by Clause (3) of Article 356 has not proved to be as effective in practice as it ought to have been. The very fact that even in cases like Meghalaya and Karnataka, both Houses of Parliament approved the proclamations shows the enervation of this check. Even the proponents of the finality of the decision of the President in this matter could not but concede that the said check has not proved to be an effective one. Nor could they say with any conviction that judicial review is excluded in this behalf. If judicial review is not excluded in matters of pardon and remission of sentence under Article 72 - a seemingly absolute and unconditional power - it is difficult to see on what principle can it be said that it is excluded in the case of a conditional power like the one under Article 356. 169. We recognise that judicial process has certain inherent limitations. It is suited more for adjudication of disputes rather than for administering the country. The task of governance is the job of the Executive. The Executive is supposed to know how to administer the country, while the function of the judiciary is limited to ensure that the government is carried on in accordance with the Constitution and the Laws. Judiciary accords, as it should, due weight to the opinion of the Executive in such matters but that is not to say, it defers to the opinion of Executive altogether. What ultimately de-

termines the scope of judicial review is the facts and circumstances of the given case. A case may be a clear one - like Meghalaya and Karnataka cases where the court can find unhesitatingly that the proclamation is bad. There may also be cases like those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh - where the situation is so complex, full of imponderables and a fast-evolving one that the court finds it not a matter which admits of judicial prognosis, that it is a matter which should be left to the judgment of and to be handled by the Executive and may be in the ultimate analysis by the people themselves. The best way of demonstrating what we say is by dealing with the concrete cases before us. Sri Parasaran, learned Counsel for the Union of India urged that inasmuch as the Proclamation under Clause (i) has been approved by both Houses of Parliament as contemplated by Clause (3), the proclamation assumes the character of Legislation and that it can be struck down only on grounds on which a Legislation can be struck down. We cannot agree. Every act of parliament does not amount to and does not result in Legislation, though Legislation is its main function. Parliament performs many other functions, e.g., election of Speaker and Deputy Speaker, vote of confidence/no-confidence in the Ministry, motion of thanks to the President after the address by the President and so on. One of such functions is the approval of the proclamation under Clause (3). Such approval can by no stretch of imagination be called 'Legislation'. It is not processed or passed as a Bill nor is it presented to the President for his assent. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under Clause (1). It is a safeguard conceived in the interest of ensuring proper exercise of power under Clause (1). It is another matter that in practice the check has not proved effective. But that may not be so in future or for all times to come. Be that as it may, it is certainly not Legislation nor Legislative in character. 170. Sri Shanti Bhushan, learned Counsel for the petitioners urged that the deletion of Clause (5) by 44th Amendment, which clause was introduced by 38th Amendment, necessarily implies that the exercise of power under Clause (1) is amenable to judicial review in a far more extensive manner. Clause (5), as introduced by 38th Amendment, read as follows: (5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in the clause. (1) shall be final and conclusive and shall not be questioned in any court on any ground. 171. The effect of this clause was considered by-this Court in State of Rajasthan. It was held that the said clause does not preclude the Court from examining Whether the exercise of power is malafide or is based on extraneous grounds or whether it is based on no satisfaction at all. It was held that the said clause does not prevent the Court from examining the proclamation on the aforesaid grounds. We, however, agree that the deletion of this clause is certainly significant in the sense that the express bar created in the way of judicial review has since been removed consciously and deliberately in exercise of the constituent power of the Parliament. [SeeA.K. Roy v. Union of India (supra)J. The cloud cast by the clause on the power of judicial review has been lifted. 172. It was urged by Sri Parasaran,learned Counsel appearing for the Union of India that where a person challenges the validity of the proclamation under Article 356(1), the burden lies upon him to establish its validity

and that it is not part of the duty of the Union of India to assist the petitioner in establishing his case. Reliance is placed on certain observations in Stephen kalong Ningkong. He submitted that it would not be a correct practice for the court to call upon the Union of India to justify and establish the validity of the proclamation merely because a person chooses to question it. We do not think that there ought to be any room for confusion on this score - nor can the observations of Hidayatullah, J. in Barium Chemicals, quoted elsewhere be understood as saying so. We agree that merely because a person challenges the validity of the proclamation, the Court would not as a matter of course call upon the Union of India to produce the material/information on the basis of which the President formed the requisite satisfaction, the Court must be satisfied, prima facie, on the basis of the averments made by the petitioner and the material, if any, produced by him that is is a fit case where the Union of India should be called upon to produce the material/information on the basis of which the President formed the requisite satisfaction. It is then that the Union of India comes under a duty to disclose the same. Since the material/information on which the satisfaction was formed is available to, and known to, only the Union of India, it is for it to tell the Court what that material/information was. They are matters within the special knowledge of the Union of India. In such a case, only the Union of India can be called upon to satisfy the Court that there was relevant material/information before the President on the basis of which he had acted. It may be that, in a given case, the material/information may be such that the Union of India may feel it necessary to claim the privilege provided by Section 123 of the Indian Evidence Act. As and when such claim is made, it is obvious, it will be dealt with according to law. 173. While on this question, we may mention that if in a given case the proclamation contains the reasons, with adequate specificity, for which the proclamation was issued, the Court may have to be satisfied before calling upon the Union of India to produce the material/information that the reasons given in the proclamation are prima facie irrelevant to the. formation of the requisite satisfaction and/or that it is a fit case where the Union of India must yet be called upon to place the material/information on the basis of which it had formed the satisfaction. The Union of India may perhaps be well advised to follow the practice of stating the reasons and the grounds upon which the requisite satisfaction is founded. 174. ARTICLE 356 - IS IT CONFINED ONLY TO CASES WHERE THE STATE GOVERNMENT FAILS OR REFUSES TO ABIDE BY THE DIRECTIONS ISSUED BY THE CENTRAL GOVERNMENT? 175. It was submitted by Sri Jethmalani, the learned Counsel for some of the petitioners that in view of Article 365 of the Constitution, the only situation in which the power under Article 356 can be invoked by the President is the failure of the State Government to comply with or to give effect to the direction given in exercise of the executive power of the Union under any of the provisions of the Constitution and not in any other case. Reference is made in this connection to Articles 256 and 257. It would be appropriate to read all the three Articles at this stage: 256. Obligation of States and the Union:- The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament

and any existing laws which apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. 257. Control of the Union over States in certain cases:- (1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purposes. (2)The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance: Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works. (3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection or the railways within the State. (4) Where in carrying out any direction given to a State under Clause (2) as to the construction or maintenance of any means of communication or under Clause (3) as to the measures to be taken for protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such directions had not be given, there shall be paid by the Government of India to the State such sum as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India with respect of the extra costs so incurred by the State. 365. Effect of failure to comply with, or to give effect to, directions given by the Union:- Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution. 176. In our opinion, the contention urged is unacceptable. Article 256 merely states that the executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament whether existing or to be made in future. It is stated therein that the executive power of the Union shall extend to giving of such directions to a State as may appear to the Government of India to be necessary for the said purpose. This Article is confined to proper and due implementation of the parliamentary enactments and the power to give directions for that purpose. Article 257 says that executive power of every State shall be so exercised as to impede or prejudice the exercise of the executive power of the Union; for ensuring the same, the Union Government is empowered to give appropriate directions. Clauses (2), (3) and (4) illustrate and elaborate the power contained in Clause (1). Article 365, which incidentally does not occur in Part XVIII, but in Part XIX (Miscellaneous) merely says that where any State has failed to comply with or give effect to any directions given by the Union

of India in exercise of its executive power under my of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The article merely sets out one instance in which the President may hold that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It cannot be read as exhaustive of the situation where the President may form the said satisfaction. Suffice it to say that the directions given must be lawful and their disobedience must give rise to a situation contemplated by Article 356(1). Article 365 merely says that in case of failure to comply with the directions given, "it shall be lawful" for the President to hold that the requisite type of situation [contemplated by Article 356(1)] has arisen. It is not as if each and every failure ipso facto gives rise to the requisite situation. The President has to judge in each case whether it has so arisen. Article 365 says it is permissible for him to say so in such a case. The discretion is still there and has to be exercised fairly. FACTS AND MERITS OF INDIVIDUAL CASES: KARNATAKA: 177. By a proclamation dated April 21, 1989 the President dismissed the Government of Karnataka, dissolved the Legislative Assembly, took over the powers of the Government and the Governor, vested the powers of the State legislature in the Parliament and made other incidental and ancilliary provisions suspending several provisions of the Constitution with respect to that State. The proclamation does not contain any reasons except barely reciting the satisfaction of the President. The satisfaction is stated to have been formed on a consideration of the report of the Governor and other information received by him. Sri S.R. Bommai was the Chief Minister then. 178. The Janata Legislature Party emerged as the majority party in the State Legislature following elections to the Assembly in March, 1985. Sri Ramakrishna Hegde was elected the leader of the Janata Legislature Party and was sworn in as the Chief Minister in March, 1985. In August, 1988, Sri Hegde resigned and Sri Bommai was elected as the leader and sworn in as the Chief Minister on August 30, 1988. In September, 1988, Janata Party and Lok Dal (B) merged resulting in the formation of Janata Dal. The Janata Party in Karnataka Legislature was re-named Janata Dal. On April 15, 1989 the Ministry was expanded by Sri Bommai including thirteen more members. On April 17, 1989, a legislator, Sri Kalyan Rao Molakery, defected from the party and presented a letter to the Governor withdrawing his support to the Janata Dal Government. On the next day, he met the Governor and presented nineteen letters purported to have been signed by seventeen Janata Dal legislators, one associate independent legislator and one B.J.P. legislator withdrawing their support to the Government. The Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the letters verified. He did not, of course, inform Sri Bommai about these developments. On April 19, 1989, the Governor sent a report to the President stating that there were dissensions in Janta Party which led to the resignation of Sri Hegde earlier and that even after the formation of Janata Dal, there have been dissensions and defections. He referred to the letters received by him from defecting members and opined that on that account, the ruling party

has been reduced to minority in the Assembly. He stated that the council of ministers headed by Sri Bommai does not command a majority in the House and that, therefore, "it is not appropriate under the Constitution to have the State administered by an executive consisting of council of ministers who do not command the majority in the House". He opined that no other party is in a position to from the Government and recommended action under Article 356(1). 179. On April 20, 1989, seven legislators out of those who were said to have submitted the letters to the Governor submitted letters to the Governor complaining that their signatures were obtained on those letters by mis-representation and by misleading them. They re-affirmed their support to the Bommai Ministry. On the same day, the State Cabinet met and decided to convene the Assembly session on April 27, 1989. The Chief Minister and the Law Minister met the Governor on that day itself and informed him about the summoning of the Assembly session. They also brought to the Governor's notice the recommendation of the Sarkaria Commission that the support and strength of the Chief Minister should be tested on the floor of the Assembly. Sri Bommai offered to prove his majority on the floor of the House. He even expressed his readiness to pre-pone the Assembly Session if so desired by the Governor. He also sent a telex message to that effect to the President of India. Inspite of all this, the Governor sent another report to the President of India on April 20, 1989 referring to the letter of seven members withdrawing their earlier letters and opining that the said letters were evidently obtained by Sri Bommai by pressuring those M.L.As. He reported that "horse-trading is going on and atmosphere is getting vitiated". He reiterated his opinion that Sri Bommai has lost the confidence of the majority in the State Assembly and requested action being taken on his previous letter. On that very day, the President issued the proclamation. It says that the said action was taken on the basis of "the report form the Governor of the State of Karnataka and - other information received". 180. Both the Houses of Parliament duly met and approved the said proclamation as contemplated by Clause (3) of Article 356. 181. The validity of the proclamation was challenged by Sri Bommai and certain other members of the council of ministers by way of a writ petition (W.P. 7899 of 1989) in the Karnataka High Court. The Union of India (the first respondent in the writ petition) submitted that the decision of the President of India based on the report of the Governor and other information brought to his notice is not justiciable and cannot be challanged in the writ petition. While making a report, it was submitted, the Governor does not act on the aid and advice of his council of ministers but in his individual capacity. The report of the Governor cannot be challenged in view of Article 361 of the Constitution nor can he or the President be compelled to disclose the information or material upon which they have acted. Article 74(2) was said to be a bar to the Court enquiring into the said information, material and advice. It was also submitted that the proclamation has since been approved by both Houses of Parliament under Clause (3) of Article 356. The State of Karnataka submitted that the Governor had taken into consideration all the facts and circumstances prevailing in the State while submitting his report and that the proclamation issued on that basis is unobjectionable. 182. A Special

Bench of three-Judges of High court heard the writ petition and dismissed the same on the following reasoning: (1) The proclamation under Article 356(1) is not immune from judicial scrutiny. The court can examine whether the satisfaction has been formed on wholly extraneous material or whether there is a rational nexus between the material and the satisfaction. (2) In Article 356, the President means the Union council of ministers. The satisfaction referred to therein is subjective satisfaction. This satisfaction has no doubt to be formed on a consideration of all the facts and circumstances. (3) The two reports of the Governor conveyed to the President essential and relevant facts which were relevant for the purpose of Article 356. The facts stated in the Governor's report cannot be stated to be irrelevant. They are perfectly relevant. (4) Where the Governor's "personal bona fides" are not questioned, his satisfaction that no other party is in a position to form the government has to be accepted as true and is based upon a reasonable assessment of all the relevant facts. (5) Recourse to floor test was neither compulsory nor obligatory. It was not a prerequisite to sending up a report recommending action under Article 356(1). (6) The introduction of Xth Schedule to the Constitution has not affected in any manner the content of the power under Article 356. (7) Since the proclamation has to be issued on the satisfaction of the Union council of ministers, the Governor's report cannot be faulted on the ground of legal malafides. (8) Applying the test indicated in the State of Rajasthan v. Union of India, the court must hold, on the basis of material disclosed, that the subjective satisfaction arrived at by the President is conclusive and cannot be faulted. The proclamation, therefore, is unobjectionable. 183. We find ourselves unable to agree with the High Court except on points (1) and (2). To begin with, we must say that question of 'personal bonafides' of Governor is really irrelevant. 184. We must also say that the observation under point (7) is equally misplaced. It is true that action under Article 356 is taken on the basis of satisfaction of the Union Council of Ministers but on that score it cannot be said that 'legal malafides' of the Governor is irrelevant. When the Article speaks of the satisfaction being formed on the basis of the Governor's report, the legal malafides, if any, of the Governor cannot be said to the irrelevant. The Governor's report may not be conclusive but its relevance is undeniable. Action under Article 356 can be based only and exclusively upon such report. Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath. He is actually reporting against his own government. It is for this reason that Article 356 places such implicit faith in his report. If, however, in a given case his report is vitiated by legal malafides, it is bound to vitiate the President's action as well. Regarding the other points made in the judgment of the High Court, we must say that the High Court went wrong in law in approving and upholding the Governor's report and the action of the President under Article 356. The Governor's report is vitiated by more than one assumption totally unsustainable in law. The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority governments are not unknown. What is necessary is that that government should enjoy the confidence of the House. This aspect does

not appear to have been kept in mind by the Governor. Secondly and more importantly, whether the council of ministers has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House. It is gratifying to note that Sri R. Venkataraman, the former President of India has affirmed this view in his Rajaji Memorial Lecture (Hindustan Times dated February 24, 1994). 185. Exceptional and rare situations may arise where because of all pervading atmosphere of violence or other extraordinary reasons, it may not be possible for the members of the Assembly to express their opinion freely. But no such situation had arisen here. No one suggested that any such violent atmosphere was obtaining at the relevant time. 186. In this connection, it would be appropriate to notice the unanimous report of the committee of governors appointed by the President of India. The five Governors unanimously recommended that "the test of confidence in the ministry should normally be left to a vote in the Assembly....Where the Governor is satisfied by whatever process or means, that the ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying the confidence of the legislature. If then, an alternative ministry can be formed, which, in the Governor's view, is able to command a majority in the assembly, he must dismiss the ministry in power and instal the alternative ministry in office. On the other hand, if no such ministry is possible, the Governor will be left with no alternative but to make a report to the President under Article 356....As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and his Council of Ministers should be left to the legislature, and that it is only if a responsible government cannot be maintained without doing violence to correct constitutional practice that the Governor should resort to Article 356 of the Constitution....What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek.... the guiding principle being, as already stated, that the constitutional machinery in the state should, as far as possible, be maintained." (quoted from the Book "President's Rule in the States", edited by Sri Rajiv Dhavan and published under the auspices of the Indian Law Institute, New Delhi). It is a pity that the Governor of Karnataka did not keep the above salutary guidelines and principles in mind while making his report. 187. Dr. G.S. Dhillon Speaker, Lok Sabha (in his address to the conference of the Presiding Officers of legislative bodies in India) too affirmed in clear words that "whether the Ministry continued to command ma-

jority support in the legislature, the doubt should as far as possible be left to be resolved on the floor of the House and the Governor should not take upon himself unenviable task of deciding the question himself outside the legislature. 188. The High Court, in our opinon, erred in holding that the floor test is not obligatory. If only one keeps in mind the democratic principle underlying the Constitution and the fact that it is the legislative assembly that represents the will of the people - and not the Governor - the position would be clear beyond any doubt. In this case, it may be remembered that the council of ministers not only decided on April 20, 1989 to convene the Assembly on 27th of that very month i.e., within seven days, but also offered to pre-pone the Assembly if the Governor so desired. It pains us to note that the Governor did not choose to act upon the said offer. Indeed, it was his duty to summon the Assembly and call upon the Chief Minister to establish that he enjoyed the confidence of the House. Not only did he not do it but when the Council of Minister offered to do the same, he demurred and chose instead to submit the report to the President. In the circumstances, it cannot be said that the Governor's report contained, or was based upon, relevant material. There could be no question of the Governor making an assessment of his own. The loss of confidence of the House was an objective fact, which could have been demonstrated, one way or the other, on the floor of the House. In our opinion, wherever a doubt arises whether the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House except in an extraordinary situation whether because of all-pervasive violence, the Governor comes to the conclusion - and records the same in his report - that for the reasons mentioned by him, a free vote is not possible in the House. 189. We make it clear that what we have said above is confined to a situation where the incumbent Chief Minister is alleged to have lost the majority support or the confidence of the House. It is not relevant to a situation arising after a general election where the Governor has to invite the leader of the party commanding majority in the House or the single largest party/group to form the government. We need express no opinion regarding such a situation. 190. We are equally of the opinion that the High Court was in error in holding that enactment/addition of Xth Schedule to the Constitution has not made any difference. The very object of the Xth Schedule is to prevent and discourage 'floor-crossing' and defections, which at one time had assumed alarming proportions. Whatever may be his personal predilictions, a legislator elected on the ticket of a party is bound to support that party in case of a division or vote of confidence in the House, unless he is prepared to forgo his membership of the House. The Xth Schedule was designed precisely to counter-act 'horse-trading'. Except in the case of a split, a legislator has to support his party willy- nilly. This is the difference between the position obtaining prior to and after the Xth Schedule. Prior to the said Amendment, a legislator could shift his loyalty from one party to the other any number of times without imperilling his membership of the House - it was as if he had a property in the office. 191. Though the proclamation recites that the President's satisfaction was based also on"other information received", the counter-affidavit of the Union of India does not indicate or state that any other information/material

was available to the President or the Union Council of Ministers other than the report of the Governor - much less disclose it. In the circumstances, we must hold that there was no other information before the President except the report of the Governor and that the word"and other information received by me" were put in the proclamation mechanically. The Governor's report and the 'facts' stated therein appear to be the only basis of dismissing the government and dissolving the Assembly under Article 356(1). The proclamation must, therefore, be held to be not warranted by Article 356. It is outside its purview. It cannot be said, in the circumstances, that the President (or the Union council of ministers) was 'satisfied' that the government of the State cannot be carried on in accordance with the provisions of the Consitutioin. The action was malafide and unconstitutioinal. The proclamation is accordingly liable to be struck down and we would have struck it down herewith but for the fact that the elections have since been held to the Legislative Assembly of the State and a new House has come into being. The issuance of a writ at this juncture would be a futile one. But for the said fact, we could certainly have considered restoring the dismissed government to office and reactivating the dissolved Assembly. In any event, the judgment of Karnataka High Court is set aside. MEGHALAYA: (Transferred case Nos. 5 and 7 of 1992) 192. In March, 1990, Hill Peoples' Union, to which the petitioner, Gonald Stone Massar, belonged and several other State political parties and certain independent M.L.As. joined together to form a 'front', known as Meghalaya United Parliamentary Party (MUPP). This Front had a majority in the Assembly and formed the government headed by Sri B.B. Lyngdoh. On July 25, 1991, the then Speaker of the House, Sri P.R. Kyndiah Arthree was elected as the leader of the opposition group known as United Meghalaya Parliamentary Forum (UMPF), which was led by the Congress party to which Sri Kyndiah belonged. He claimed the support of the majority of members in the House and requested the Governor to invite him to form the Government. Thereupon the Governor requested Sri Lyngdoh to prove his majority on the floor of the House. On August 7, 1991, a special session of the Assembly was convened to pass a motion of confidence in the ministry. On the motion being moved, thirty members supported it and twenty seven voted against it. Before announcing the result, however, the Speaker announced that he had received a complaint against five independent M.L.As. in the ruling coalition alleging disqualification under the Anti-defection Law and that he was forthwith suspending their right to vote. This resulted in an uproar in the Assembly. The session had to be adjourned. On August 11, 1991. the Speaker sent identical show-cause notices to the said five independent MLAs on the basis of the complaint filed by one Sri H.S. Shylla. On August 16, the five MLAs sent their replies denying that they have joined any of the parties as alleged. They affirmed that they continue to remain independents. On August 17, 1991 the Speaker passed on order disqualifying all the five MLAs on the basis that four of them were ministers in the Lyngdoh ministry and one of them (Sri Chamberlain Marak) was the Deputy Government Chief Whip. The disqualification, it may be noted, was not on the ground alleged in the show cause notice. 193. Meanwhile, on the Governor's advice, the Chief Minister summoned the session of the Assembly

for September 9, 1991 for passing a vote of confidence. The Speaker refused to send the notices of the session to the five MLAs disqualified by him. He also made arrangements to ensure that the said five members are not allowed to enter the Assembly. On September 6, 1991, four of the said five MLAs approached this Court and obtained an interim order staying the operation of the orders of the Speaker dated August 7, 1991 and August 17, 1991, (one Member, Sri Ch. Marak, did not obtain any such orders). On coming to know of the order of this Court, the Speaker issued a press statement saying that he does not accept any interference by any court with his order dated August 7, 1991 disqualifying five members. He issued strict instructions to the security guards not to allow the said five members to enter the Assembly premisses. In this explosive situation, the Governor adjourned the Assembly indefinitely by an order dated September 8, 1991. After a brief interval and on the advice of the Governor, the Assembly was again summoned to meet on October 8, 1991. Meanwhile, a contempt petition was filed by the said four MLAs in this Court against the Speaker. They complained that his action in preventing them from entering into the Assembly premises and from acting as members of the Assembly was in violation of the orders of this Court dated September 6, 1991. On October 3, 1991, this Court passed another order affirming that all authorities of the State including the Governor must ensure that the orders of this Court dated September 6, 1991 are implemented. Accordingly, the said four independent MLAs were issued invitation to attend the session on October 8, 1991. The agenda relating to the business of the House showed two items for consideration on that day (1) a motion of confidence in the government and (2) a motion of no-confidence in the Speaker. 194. On October 8, 1991, 56 MLAs apart from the Speaker attended the session. The four MLAs who were disqualified by the Speaker but who had obtained orders from this Court also attended but not Sri Ch. Marak who did not obtain any orders from any court. After the motion of confidence in the government was put to vote, the Speaker declared that 26 voted for the motion and 26 against. In counting the votes casts in favour of the motion, he excluded the votes of the said four independent MLAs again. Holding that there was a tie, he cast his vote against the motion and declared the motion lost. He then adjourned the House sine die, evidently with a view to ward off the passing of motion against himself. The thirty MLAs (including the said four independent MLAs) however, continued to stay in the House. They elected a Speaker from among themselves and continued the business of the Assembly. The new Speaker found on a scrutiny of the records relating to voting on the motion of confidence that actually 30 members have signed in favour of the motion and 26 against. Accordingly, he declared that the motion of confidence in the government was carried. They also passed the motion of no confidence in the Speaker, Sri Kyndiah. The 26 members who had voted against the motion had, of course, left the House by that time. The said 30 MLAs thereafter sent a letter to the Governor affirming that they had voted in favour of the government and also in favour of the motion of no confidence in the Speaker. Inspite of all this, the Chief Minister received a letter dated October 9, 1991 from the Governor advising him to resign in view of the proceedings of the

Assembly dated October 8, 1991. The Governor observed in his letter that the dispute about the Speaker not taking cognizance of the orders of the Supreme Court was a matter between the Speaker and the Supreme Court and in that view of the matter, the Chief Minister should resign! Immediately, thereupon, the Chief Minister apprised his advocate in the Supreme Court of the said letter of the Governor. The counsel brought the matter to the notice of this Court and at 4.00 P.M. on the same day (October 9, 1991), this Court passed the following order: "Since the matter is extremely urgent, we deem it fit to pass this further order asking the Governor while taking any decision on the question whether the Government has lost the motion of confidence and lost its majority in the House, to take into account, the two earlier orders dated 6.9.1991 and 3.10.1991 of this Court and also to take into account how the aforesaid four appellant had cast their vote." No heed was paid to this order and on October 11, 1991, the President of India issued a proclamation under Article 356 of the Constitution declaring that he was satisfied on the basis of a report from the Governor of Meghalaya and other information received by him that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. He accordingly dismissed the government and dissolved the Assembly. Before proceeding further, it may be mentioned that by an order dated October 12, 1991, a Constitution Bench of this Court set aside the order of the Speaker dated August 17, 1989. 195. Both Houses of Parliament duly met and approved the proclamation. 196. It is a matter of deep regret that the Governor of Meghalaya did not think it his constitutional duty to give effect to the orders of this Court, not even after a specific direction to that effect. He could not have been unaware of the obligation created by Article 144, viz., the duty of all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court and its orders. By order dated October 9, 1991, he was specifically requested to take into account the orders of this Court while deciding whether the government has lost the confidence of the House and yet he ignored the same and reported to the President that the Ministry has lost the confidence of the House. We are intrigued by the strange logic of the Governor that obedience to the orders of this Court relating to the disqualification of members of the House is a matter between the Speaker and the Supreme Court. Evidently, he invoked this strange logic to enable him to say - as he wanted to say or as he was asked to say, as the case may be - that the Speaker's decision that the Ministry has lost the confidence of the House, is valid and effective - at any rate, so far as he is concerned. The governor ought to have noted that this Court had stayed the operation of the orders of the speaker disqualifying the four independent members, which meant that the said four MLAs were entitled to participate in the proceedings of the Assembly and to vote. They did vote in favour of the motion expressing confidence in the government. The Speaker was, however, bent upon unseating the government by means fair or foul and with tha view was openly flouting the orders of this Court. He managed to declare that the government has lost the confidence of the House by excluding the votes of the said four members in clear violation of the orders of this Court. It is surprising that the Governor chose to turn

Nelson's eye upon the misdeeds of the Speaker and also chose to refuse to take note of the proceedings of the majority of members taken upon the Speakership of another member elected by them. It is equally curious that the Governor chose to report that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Consititution. The violation of the provisions of the Constitution was by Sri Kyndiah and not by the ministry in office and yet Article 356 was resorted to by the President to dismiss the government on the basis of such a report. That even such an ex-fade unconstitutional proclamation was approved by both Houses of Parliament shows up the inadequacy of the safeguard envisaged in Clause (3) - by which provision much store was laid by the Counsel appearing for the Union of India as well as those supporting the impugned proclamations. 197. In this case too, the proclamation recites that the requisite satisfaction was arrived at on the basis of the report of the Governor and the other information received by the President but no such information or material has been brought to our notice. We must conclude that there was none and that the recital to that effect is a mere mechanical one. 198. We must say in fairness to Sri Parasaran, learned Counsel appearing for the Union of India that he did not seek to defend the proclamation in this case. 199. Accordingly, we hold the proclamation as unconstitutional. But for the fact that since the date of proclamation, fresh elections have been held to the Assembly and a new House has come into existence, we would have certainly issued the writ and directed the restoration of the Lyngdoh ministry to office and restored the Assembly as well. NAGALAND : 200. Elections to the Nagaland Assembly were held in November, 1987. The strength of the Assembly was 60. The position emerging from the election was: Congress (1)-35, Naga national Democratic Party-13 and Independents-7. The Congress (1) party formed the government with Sri Hokishe Sema as the Chief Minister. In August, 1988, a split occurred in the ruling party whose strength was 34 at that time, one member having died. The particulars of the split in the party are the following: On July 28, 1988, 13 of the 34 MLAs informed the Speaker of the assembly that they have dissociated from the ruling party and have formed a separate party called "Congress Ruling Party". They requested the Speaker for allotment of separate seats for them in the Assembly, the session of which was to commence on August 28, 1988. On July 30, 1988 the Speaker held that a split had occurred within the meaning of the Xth Schedule of the Constitution in the ruling party. Sri Vamuzo was one among the said 13 MLAs. He informed the Governor on July 31, 1988 that he has secured the support of 35 of the 59 members of the Assembly and was in a position to form the ministry in the State. At this stage, the Chief Secretary to the Government of Nagaland wrote to Sri Vamuzo on August 3, 1988 that according to the information received by him, the group of 13 MLAs aforesaid were wrongfully confined by him. Sri Vamuzo denied the same and invited the Chief Secretary to come and verify the truth of the allegation from the said members themselves. The members stated before the Chief Secretary that they were free agents and were not confined by any one. On August 6, 1988 the Governor of Nagaland sent a report to the President of India about the formation of Congress Ruling Party.

He reported that in the past 25 years, eleven governments have been formed and that thirteen MLAs who had dissociated themselves from the Congress (1) party were allured with money. He characterised the said weaning away of the thirteen members as "incredible lack of political morality and complete disregard to the wishes to the electorate on the part of the break-away congressmen". He also stated that the said thirteen persons were kept in forcible confinement by Sri Vamuzo and another person and that the story of split in the party is not true. He characterised the recognition accorded to the said group of thirteen members by the Speaker as hasty. He also spoke of political 'horse-trading' and machinations. He referred to the insurgency in Nagaland and that indeed some of the members of the Assembly were having contacts with the insurgent groups. He reported that the stability of the State may suffer due to the said episode and further that if the present affairs are allowed to continue, a serious development may ensue. 201. The Chief Minister, Sri Hokishe Sema, probably finding that he has lost the majority support in the House, submitted his resignation to the Governor and recommended the imposition of the President's rule. On August 7, 1988, the President issued the proclamation under Article 356 assuming the functions of the government of the State of Nagaland. The government was dismissed and the Assembly dissolved. The action was challenged by Sri Vamuzo by way of a writ petition in the Guwahati High Court being C.R. No. 1414 of 1988. The writ petition was heard by a Division Bench comprising the Chief Justice and Hansaria, J. Both the learned Judges agreed that the validity of the proclamation can be examined by the court and that the proclamation under Article 356 is not immune from judicial scrutiny. But on the question of the effect and operation of Article 74(2), they differed. The learned Chief Justice held : "the Union cannot be compelled to tender any information to this Court covered by Article 74 of the Constitution relevant to the dissolution of the Nagaland assembly. I am also of the view that the Union of India can legally claim all documents relevant to the dissolution of the Nagaland assembly as privileged documents and a 'class' documents under Section 123 of the Evidence Act. Therefore, the objection that the courts do not have powers to call for the information from the President of India in view of Article 74(2) of the Constitution is sustained. Since the Nagaland legislative assembly is dissolved by the two Houses of Parliament, no relief can be granted in the circumstances of this case". Accordingly, he proposed to dismiss the wit petition. Hansaria, J., however, took a contrary view. The learned Judge held that the material which formed part of 'other information' but has not been produced before the court, does not form part of the advice tendered by the council of ministers to the President. The court is, therefore, entitled to see the said material and for that purpose the Union of India must be given ten days time for producing the same. If, however, they decline to do so, the court would have no alternative but to act upon the present material and the Union of India will have to take the consequences of such a course. The learned judge did not propose to dispose of the writ petition but to wait for ten days and then pronounce the final orders. In view of the said difference of opinion, the matter was referred to a third Judge,but before the third Judge could hear the matter,

the Union of India moved this Court for grant of special Leave. Special Leave was granted and the proceedings in the High Court stayed. 202. We have discussed the effect and scope of Article 74(2) elsewhere. In the light of the same, the view taken by Hansaria, J. (as he then was) must be held to be the correct one and not the view taken by the learned Chief Justice. This Special Leave Petition is accordingly disposed of with the above direction. Inasmuch as fresh elections have since been held, the High Court may consider the advisability of proceeding with the matter at this point of time. MADHYA PRADESH, RAJASTHAN AND HIMACHAL PRADESH; 203. In the elections held in February, 1990, the BJP emerged as the majority party in the Assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the government therein. 204. On December 6,1992, the Ram Janambhoomi-Babri Masjid structure (disputed structutre) was demolished by the kar sevaks who had gathered there in response to appeals by the B.J.P., V.J.P.,Bajrang Dal, Shiv Sena and some other organisation. 205. Following the demolition at Ayodhya on 6th December, 1992, the Government of Uttar Pradesh resigned. It was dismissed by the President and the Legislative Assembly dissolved by a proclamation under Article 356 issued on the same day. The proclamation does not refer either to the report of the Governor nor does it say that the President had received any information otherwise. Be that as it may, the validity of the said proclamation not being in issue before us, we need not express any opinion in that behalf. 206. The demolition of the disputed mosque had serious repercussions all over the country as also in some neighbouring countries. A number of temples were reportedly demolished there. Serious disturbance to law and order occurred in various parts of the country resulting in considerable loss of lives and property. By an order dated December 10,1992 issued under Section 3(1) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), the Government of India banned several alleged communal organisations including RSS, VHP and Bajrang Dal. MADHYA PRADESH: 207. On December 8,1992, the Governor of Madhya Pradesh sent a report to the President setting out the "fast deteriorating law and order situation in the State in the wake of wide-spread acts of violence, arson and looting". He observed in his report that "the lack of faith in the ability of the State Government to stem the tide primarily because of the political leadership's overt and covert covert support to the associate communal organisations seem to point out that there is breakdown of the administrative machinery of the state." He followed it up with another report on December 10, 1992 wherein he mentioned about the violence spreading to hither to peaceful areas. On December 13, 1992, he sent his third report enclosing the photocopy of a letter received from the executive Director, Bharat Heavy Electricals Limited (BHEL), Bhopal dated December 11, 1992. The said letter, said the Governor, indicated the "abject failure of the law and order machinery to provide safety and security to life and property in the areas in and around BHEL factory". The letter also spoke of "the pressure brought on the administration to accommodate the so called kar sewaks in BHEL area". The Governor termed them as extremely serious developments that deserve a high level probe. The third report further stated that with the reported statement of the Chief Minister Sri

Sunder Lal Patwa that the decision of banning the RSS and VHP was unfortunate, the State Government's credibility to sincerely implement the center's direction in the matter is under a cloud... there is a question mark as to how BJP leaders like Sri Patwa who swore by the values and traditions of the RSS will be able to implement the ban both in letter and spirit. The VHP's decision to observe December 13 as 'Black Day' all over the country to protest against the above mentioned ban and its decision to observe protest week against these 'heinous laws' from December 14 to 20 are moves fraught with danger, particularly in the present context". The Governor recommended that"considering this and looked in the background of the RSS etc, contemplating on a fresh strategy to chalk out its future plan and the possibility of the leaders of the banned organisations going underground taking advantage of the soft reaction of the administration have reasons to be convinced that there should not be any further delay in imposition of President's rule according to Article 356 of the Constitution of India". HIMACHAL PRADESH: 208. The Governor of Himachal Pradesh sent a report on December 15,1992 wherein he stated inter alia:"there is no dispute on the point that the Chief Minister and his cabinet had instigated the kar sevaks from Himachal Pradesh to participate in the kar seva on the 6th December, 1992. Some of the Ministers expressed their desire even openly, provided the party High command permitted to do so. Consequently, a large number of kar sevaks including some BJP M.L.As. participated in the kar seva from Himachal Pradesh. A member of the Vidhan Sabha publicly admitted that he had participated in the demolition of the Babri Masjid (Indian Express dated 15.12.1992, Chandigarh Edition). Though Sri Shanta Kumar met me on December 13, 1992 and had informed me that he desired to implement the ban orders imposed by the Government of India on RSS, VHP and three other organisations and that he has already issued directions in this regard but since the Chief Minister himself is a member of RSS, therefore, he is not in a position to implement these directions honestly and effectively. Most of the people of the state also feel alike....As a matter of fact, when the Chief Minister himself and some of the colleagues are members of the banned RSS, then it is not possible for the administrative machinery to implement the ban honestly, especially when some of the Ministers are openly criticising the ban on these communal organisations". He, therefore, recommended imposition of the President's rule. RAJASTHAN: 209. The report of the Governor of Rajasthan, recommending imposition of the President's rule, stated the following facts: the government of Rajasthan has played 'an obvious role' in the Ayodhya episode. The BJP has control over RSS, VHP and Bajrang Dal which are now banned by the center. The said ban is not being implemented at all. Indeed, one of the Ministers had resigned and along with 22 MLAs and 15,500 BJP workers had participated in the kar seva at Ayodhya on December 12, 1992. They were given a royal send off and when they returned, they were given a similar royal welcome by the influential people in the political set up running the government. The law and order has been very bad for more than a week, the dominant character being the anti-minority on whom largely atrocities have been committed. The administration could not function effectively under the present political set up. He

expressed the apprehension that it would be extremely difficult to expect the administration to function objectively, effectively and in accordance with the rule of law and that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution. 210. On December 15, 1992, the President issued three proclamations dismissing all the three government in Madhya Pradesh, Rajasthan and Himachal Pradesh and dissolving their Legislative Assemblies. The action was purported to be taken on the basis of the reports of the Governors concerned as well as on the basis of other information received. The validity of the proclamations was challenged immediately by filing writ petitions in the appropriate High Courts. The Madhya Pradesh High Court allowed the same which is challenged by the Union of India in Civil Appeal Nos. 1692, 1692A-1692C of 1993. The writ petitions relating to Rajasthan and Himachal Pradesh were withdrawn to this Court and are numbered as Transferred case No. 9 of 1993 and transferred case No. 8 of 1993 respectively. 211. The petitioners challenged the proclamation as malafide, vitiated by extraneous considerations and an instance of political vendetta. It is submitted that incidents of disturbance to law and order cannot attract action under Article 356. In any event, in Himachal Pradesh, there was not a single instance. All the three governments were faithfully implementing all the Central and State laws. The impugned proclamations, it is submitted, are the result of internal differences among the leaders of the Congress party and are not supportable in law. 212. It is submitted by the learned Counsel for the petitioners that the imposition of the President's rule in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh was malafide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and/or instances of arson and looting took place is no ground for imposing the President's rule. Indeed, such incidents took place in several Congress (I) - ruled States as well - in particular, in the State of Maharashtra - on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against B.J.P. governments. It is pointed out that so far as Himachal Pradesh is concerned, there were no communal disturbances at all. 213. There was no law and order problem worth the name. Even the Governor's report did not speak of any such incidents. The governments of Madhya Pradesh, Rajasthan and Himachal Pradesh, it is argued, cannot be held responsible for what happened at Ayodhya on December 6, 1992. For that incident, the Government of Uttar Pradesh had resigned owning responsibility therefore and it was dismissed. That is not under challenge. But the Governments of these three States were in no way connected with the said incident and could not have been dismissed on account of the said incident. It is also pointed out that according to the report of the Governor of Himachal Pradesh, the Chief Minister met him and indicated clearly that he was desirous of and was implementing the ban and than some arrests were also made. In such a situation, there was no reason for the Governor to believe, or to report, that the Chief Minister is not sincere or keen to implement the ban on the said organisations. As a matter of fact, the Tribunal under Unlawful Activities (Prevention) Act, 1967, has declared the ban on R.S.S. as illegal and accordingly the ban has since been revoked.

The non-implementation of an illegal ban cannot be made the basis of action under Article 356. Assuming that there was such an inaction or refusal, it cannot be made a ground for dismissing the State Government and for dissolving the Assembly. The Union Government has also not disclosed what other material/information they had received on the basis of which the President had acted, though a recital to that effect has been made in the proclamations. The action taken by the President cannot be justified by producing the material gathered later. The respondents must disclose the information that was before the President when he issued the impugned proclamations. The White Paper now placed before the Court was not in existence on December 15, 1992. The manifestos issued by the B.J.P. from time to time cannot constitute the information referred to in the proclamations - not, in any event, legally relevant material. The counter filed by the Union of India in Madhya Pradesh High Court in M.P. No. 237/93 (Sunder Lal Patwa and Ors. v. Union of India and Ors.) does not refer to or disclose the other information received by the President. Even in the counters filed in writ petitions questioning the proclamations relating the Himachal Pradesh and Rajasthan, no such material is disclosed. It was the duty of the Union government to have disclosed to the Court the material/information upon which the requisite satisfaction was formed, more so because the proclamations themselves do not refer to any such material. Since they have failed to do so, an adverse inference should be drawn against them. Article 74(2), it is argued, does not and cannot relieve the Union of India of this obligation. The power and remedy of judicial review, it is argued, cannot be rendered ineffective with reference to Article 74(2). 214. A counter affidavit was filed by the Union of India in the writ petition filed in the Madhya Pradesh High Court questioning the Proclamation with respect to that State. Apart from the legal contentions, the following facts are stated therein: 215. The reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and property of the State against internal disturbance. On the basis of the said reports, the President formed the requisite satisfaction. 216. The circumstances in the State of M.P. were different from several other States where too serious disturbance to law and order took place. There is no comparison between both situations."Besides Bhopal, over-all situation in the State of M.P. was such that there was sufficient and cogent reasons to be satisfied that the Government in the State could not be carried on in accordance with the provisions of the Consttution. It is denied that there was no law and other situation in the State." The Governor's reports are based upon relevant material and are made bonafide and after due verification. 217. The allegations made against Sri Arjun Singh, Minister for Human Resource Development are baseless. The decision was a collective decision of the Council of Ministers. No comparison with regard to the State of affairs in the State of Madhya Pradesh can be made with those States. The Governor of Madhya Pradesh having reported that the Constitutional machinery in the State had broken down, the proclamation of President's rule is justified and Constitutional. 218. In the counter affidavit filed in the writ petition (Transferred Case No. 8 of 1993) relating to Himachal Pradesh, the very same objections as are put forward in

the counter affidavit filed in the Madhya Pradesh case have been reiterated. In the para-wise replies, it is stated that the events of 6th December, 1992 were not the handiwork of few persons but that "the public attitude and statements of various groups and political parties including B.J.P. led to the destruction of the structure in question and caused great damage to the very secular fabric of the country and created communal discord and disharmony all over the country including Himachal Pradesh." It is stated that the repercussions of the event cannot be judged by comparing the number of persons killed in different States. It is asserted that the Council of Ministers and the President "had a wealth of material available to them in the present case which are relevant to the satisfaction formed under Article 356. They were also aware of the serious damage to communal amity and harmony which has been caused in the State of Madhya Pradesh among others. They were extremely concerned with repercussions which events at Ayodhya might still have in the States and the ways and means to bring back normalcy not only in the law and order situation but also communal amity and harmony which had so badly damaged as a result of the activities, attitude and stand of inter alia the party in power in the State." It is also stated that, according to the definite information available to the Government of India, members of the R.S.S. were not only present on the spot at Ayodhya but actually participated in the demolition and that they were responsible for promotion of communal disharmony. It is for this reason that it was banned. It is also asserted that the action was taken by the President not only on the basis of the report of the Governor but also on the basis of other information received by him. 219. In the Counter affidavit filed in the writ petition relating to Rajasthan (Transferred Case No. 9 of 1993) it is stated that after the demolition on 6th December, 1992, violence started in various parts of the country leading to loss of life and property. It is asserted that it is not possible to assess the law and order situation in different states only on the basis of casualty figures. The situation in each State has to be assessed differently. The averment of the petitioner that the State Government implemented the ban on R.S.S. properly is denied. There is no requirement that the report of the Governor should be addressed to the President. It can also be addressed to the Prime Minister. Besides the report of the Governor, other information was also available on which the President had formed his satisfaction. The correctness, adequacy or sufficiency of the material contained in the Governor's report is not justiciable and cannot be gone into by the Court. The allegations of malafide, capricious and arbitrary exercise of power are denied. No irrelevant material was taken into consideration by the President and hence, it is averred, the satisfaction of the President is not judicially reviewable. 220. The learned Counsel for Union of India and other counsel supporting the impugned proclamations put their case thus: the main plank and the primary programme of B.J.P. was the construction of a Ram temple at the very site where the Babri Masjid stood. The party openly proclaimed that they will remove - relocate, as they called it - the Babri Masjid structure since according to them the Babri Masjid was super-imposed on an existing Ram temple by Emperor Babar. The party came to power in all the four States on the said plank and since then had

been working towards the said goal. It is the one single goal of all the leaders of B.J.P., their Ministers, Legislators and all cadres. For his purpose, they have been repeatedly gathering kar sevaks' from all corners at Ayodhya from time to time. In the days immediately preceding December 6, 1992, their leaders have been inciting and exhorting their followers to demolish the Babri Masjid and to build the temple there. The Ministers in Madhya Pradesh, Himachal Pradesh and Rajasthan took active part in organising and despatching kar sevaks to Ayodhya. When the kar sevaks returned from Ayodhya after demolishing the Masjid, they were welcomed as heroes by those very persons. Many of the Ministers and Chief Ministers were members of R.S.S. and were protesting against the ban on it. They could not, therefore, be trusted to enforce the ban, notwithstanding the protestations to the contrary by some of them. 221. The manifesto issued by the BJP on the eve of May/June, 1991 midterm poll states that the B.J.P. "seeks the restoration of Ram Janmabhoomi in Ayodhya only by way of a symbolic righting of historic wrongs, so that the old unhappy chapter of acrimony could be ended, and a Grand National Reconciliation effected." At another place under the head "Sri Ram Mandir at Janmasthan", the following statement occurs: "BJP firmly believes that construction of Ram Mandir at Janmasthan is a symbol of the vindication of our cultural heritage and national self-respect. For BJP it is purely a national issue and it will not allow any vested interests to give it a sectarian and communal colour. Hence, the party is committed to build Shri Ram Mandir at Janmasthan by relocating super-imposed Babri structure with due respect." Standing by themselves, it is true, the above statements may not mean that the programme envisaged unlawful or forcible demolition of the disputed structure. The said statement are also capable of being understood as meaning that the party proposed to vindicate their stand in Courts that the disputed structure was in fact the Ram Janmasthan which was forcible converted into a mosque by Emperor Babar and that only thereafter they will relocate the said structure and build Ram Temple at that site. But, says the counsel, if we read the above statements in the light of the speeches and acts of the leaders of the B.J.P., referred to in the White Paper issued by the Government of India, there would hardly be any room for such beneficial interpretation. The "White Paper on Ayodhya" issued by the Government of India in February, 1993, establishes the complicity of the Bhartiya Janta Party as such in the demolition of the disputed structure and its aftermath. 222. According to the statement of the Union Home Minister made in Rajya Sabha on December 21, 1992, the counsel pointed out, "all these kar sevaks, when they returned, were received by the Chief Ministers and Ministers". 223. The counsel for the respondents argued further that what happened on December 6, 1992 did not happen in a day. It was the culmination of a sustained campaign carried on by the BJP and other allied organisations over the last few years. They had been actively compaigning for the construction of Ram temple at the disputed site. They had been speaking of relocating the disputed structure which only meant that they wanted the disputed structure removed and a Ram temple constructed in that very place. The several speeches of the leaders of BJP and other allied parties, referred to in the White Paper, do clearly establish

the said fact. Indeed, in the manifesto issued by the BJP in connection with the 1993 General Elections, there is not a word of regret as to what happened on December 6, 1992. On the contrary, the following statement occurs under the heading "Ayodhya": Ayodhya In their actions and uttarances, the forces of pseudo-secularism convey the unmistakable impression of a deep repugnance for all things Hindu. Indeed, in their minds "Hindu" has come to be associated with "communal". The controversy over the Ram Janmabhoomi temple in Ayodhya is a powerful illustration of this phenomenon. For them "Sahmat" is secular and "Saffron" communal. Although the facts of the dispute are well known, certain features merit repetition, first, it was always apparent that a vast majority of Hindus were totally committed to the construction of a grand temple for Lord Rama at the site where puja has been performed uninterruptedly since 1948 and where besides, no namaz has been offered since 1936. The structure build by the Moghul Emporer Babur was viewed by the Hindus as a symbol of national humiliation. Second, the election of 1991 in Uttar Pradesh centerd on the Ayodhya dispute. It was a virtual referendum on Ram Janmabhoomi and the BJP with its promise to facilitate the construction the Ram Temple won the election. However, this mandate did not prevent the Congress and other pseudo-secular parties from wilfully obstructing the initiatives of the Uttar Pradesh government. Everthing, from administrative subterfuge to judicial delay, was used by the opponents of the temple to prevent the BJP government from fulfilling its promise to the electorate. On December 6, 1992 kar sevaks from all over India assembled in Ayodhya to begin the reconstruction of the Rama Temple at the site adjoining the garbha grina. Matters took an unexpected turn when, angered by the obstructive tactics of the Narasimha Rao government, inordinate judicial delays and pseudo-secularist taunts, the kar sevaks took matters into their own hands, demolished the disputed structure and constructed a makeshift temple for Lord Rama at the garbha griha. Owing responsibility for its inability to prevent the demolition, the BJP-government headed by Shri Kalyan Singh submitted its resignation. A disoriented Central Government was not content with the imposition of President's rule in Uttar Pradesh. In violation of democratic norms, the center dismissed the BJP governments in Rajasthan, Madhya Pradesh and Himachal Pradesh. Further, it banned the Rashtriya Swaymsevak Sangh, Vishwa Hindu Parishad and Bajrang Dal. Worst of all, in collusion with other rootless forces the government unleashed a vicious propaganda offensive aimed at belittling the Hindus. The kar sevaks were denigrated as fascists, lumpens and vandals, and December 6, was described as a "national shame". Recently, the CBI has filed chargesheets against leaders of the BJP and the Vishwa Hindu Parishad with the purpose of projecting them as criminals. This relentless onslaught of the pseudo-secular forces against the people of India had very serious consequences. For a stare, it created a wide emotional gulf between the rulers and the people. Ayodhya was a popular indictment of the spurious politics of double-standards. Far from recognising it as such, the Congress and other anti-BJP parties used it as pretext for furthering the cause of unprincipled minorityism. It is this minorityism that prevents the Congress, Janata Dal, Samajvadi Party and the Communist Parties from coming out with an unam-

biguous declaration of intent on Ayodhya. This BJP is the only party which is categorical is its assurance to facilitate the construction of the Rama temple at the site of the erstwhile Babri structure. That is what the People of what desire. 224. The counsel further pointed out the significance of the total inaction on the part of the top leaders of the B.J.P. present near the disputed structure at Ayodhya on December 6,1992. They took no steps whatsoever to stop the demolition. The kar sevaks had gathered there at their instance. They had appealed to the kar sevaks to gather there from all corners of the country. Some of these leaders had been speaking of demolition of the disputed structure to enable the construction of Ram temple at that very place. Even assuming that the assault on the disputed structure was a sudden move on the part of some kar sevaks, it is not as if the demolition took place in a couple of minutes. It must have certainly taken a few hours. If the BJP leaders present there really wanted to prevent it, they should have appealed to the people and ought to have taken other effective steps to prevent the kar sevaks from demolishing the structure. There is no allegation anywhere in the writ petition or other material placed before the court that they ever did so. If one reads the aforesaid statements in the manifestos of 1991 and 1993 in the light of the above facts, if would be clear,says the counsel, that the demolition of the disputed structure was the outcome of the speeches, programme and the several campaigns including Rath Yatras undertaken by the leaders of the BJP. It is neither possible nor realistic to dissociate the governments of Madhya Pradesh, Rajasthan and Himachal Pradesh from the acts and deeds of their party. It is one party with one programme. Kar sevaks were sent by and welcomed back by the Ministers and legislators (belonging to B.J.P.) of these three States as well. Thereby they expressed and demonstrated their approval of the deed done by the kar sevaks. It is stated in the report of the Himachal Pradesh Governor that the Chief Minister himself was a member of the RSS. In the report of the Governor of Madhya Pradesh also, it is stated that the Chief Minister and other ministers swore by the values and traditions of the RSS. The reports also indicate that these governments actively participated in organising and despatching the kar sevaks to Ayodhya and welcomed them and praised when they came back after doing the deed. Thus, a common thread runs through all the four B.J.P. governments and binds them together, say the counsel. All these four governments had launched upon a course of action in tandem with top B.J.P. leaders, which led to the demolition. Their actions and deeds were contrary Jo the provisions of the Constitution. The manifestos of the party on the basis of which these governments came to power coupled with their speeches and actions clearly demonstrate a commonness, an inseparable unity of action between the party and these four governments. The very manifestos and their programme of action were such as to hurt the religious feelings of the Muslim community. They negated the secular concept, a basic feature of our Constitution. The demolition of the disputed structure was no ordinary event. The disputed structure had become the focal point, the bone of contention between two religious communities. The process which resulted in the demolition and the manner of in which it was perpetrated, dealt a serious blow to the communal harmony and peace in the country. It had adverse in-

ternational repercussions as well. A number of Hindu temples were demolished in Pakistan and Bangladesh in reprisal of the demolition at Ayodhya. It was difficult in this situation to ask the minorities in the four States to have any faith in the neutrality of these four administrations. It was absolutely necessary, say the counsel, to recreate the feeling of security among the Muslims. They required to be assured of the safety and security of their person and property. It was not possible with the B.J.P. governments in power. They had to go. 225. The learned Counsel for the respondents submitted further that the R.S.S. was banned on December 10,1992. The Chief Ministers of Himachal Pradesh and Madhya Pradesh were said to be the members of the R.S.S. and adhering to its tenets. In such circumstances, the respective Governors were of the opinion that the said Chief Ministers cannot be expected to, or relied upon to, implement the ban sincerely. It cannot be said to be an unreasonable or unfounded opinion. It was also necessary to create a sense of confidence in the people in general and in the minorities, in particular, that the governments would be acting promptly and sternly to prevent communal incidents. Following December 6 incident, there were reports of destruction of a large number of temples in the adjoining countries. These reports, it was apprehended, may add fuel to the fire. The situation was deteriorating. What happened on December 6 was no ordinary event. It had touched the psyche of the minority community. The entire nation was put in turmoil. Allowing a party which had consciously and actively brought about such a situation to continue in office in these three States would not have helped in restoring the faith of people in general and of the minorities in particular in the resolve of the central government to abide by and implement the constitutional values of equality, peace and public order. It is no answer to say that disturbance took place on a much larger scale in certain states ruled by Congress (I) party (in particular in Maharashtra) and that no action was taken against those governments. Stating the proposition in such simplistic terms is neither acceptable nor realistic. One should look at the totality of the picture,say the counsel, and not to the isolated incidents which took place either before or after the demolition. It is not even a question of punishing the governments for what happened on December 6, 1992. The real question was who created this turmoil in the life of the nation and who put the nation's soul in torment. The immediate need was the restoration of the faith of the people in the impartiality of the administration, in the secular credentials of the nation and to ensure not only that the ban on the alleged communal organisations is effectively implemented but also to ensure that the administration acts promptly and impartially in maintaining- the law and order. The center government, submitted the counsel, acted with this perception and it cannot be said either that the said action was outside the purview of Article 356 or that it was malafide or that there was no material on which the President could be reasonably satisfied that the dismissal of these State Government was indeed called for, submitted the learned Counsel for Union of India and other respondents. 226. With a view to demonstrate his submission that judicial approach and judicial processes are not appropriate to judge the various situations calling for action under Article 356, Sri Parasaran gave the following

scenario: the Union Council of Ministers was apprehensive of the safety of the disputed structure once the B.J.P. came to power in Uttar Pradesh. It was repeatedly reminding the State Government in that behalf. All the time, the State Government and its Chief Minister were assuring the Union of India, the National Integration Council and even the Supreme Court, through statements, affidavits and representations that the State Government was committed to the safety of the disputed structure and that it would ensure that no harm comes to it. The Central Government was sceptical of these assurances. But suppose it had taken action under Article 356, dismissed the Government of Uttar Pradesh some time prior to December 6, 1992 on the ground that it did not have any faith in those assurances, the Court could well have found fault with the action. The Court would have said that there was no basis for their apprehension when the State government itself represented by the Chief Minister and other high officials was repeatedly assuring everyone including the Supreme Court that they will protect the structure. There was no reason no to believe them and that the action taken under Article 356 is, therefore, unjustified, being based upon mere suspicion. But, in the event, the Central Government did not take, action and the disputed structure was demolished with enormous consequences and repercussions. This only shows, says Sri Parasaran, that these matters cannot be weighed in golden scales and that judicial approach and assumptions are ill-suited to such situations. 227. Having given our earnest consideration to the matter, we are of the opinion that the situation which arose in these three States consequent upon the demolition of the disputed structure is one which cannot be assessed properly by the court. Sri Parasaran is right in his submission that what happened on 6th December, 1992 was no ordinary event, that it was the outcome of a sustained campaign carried out over a number of years throughout the country and that it was the result of the speeches, acts and deeds of several leaders of B.J.P. and other organisations. The event had serious repercussions not only within the country but outside as well. It put in doubt the very secular credentials of this nation and its government -and those credentials had to be redeemed. The situation had many dimensions, social, religious, political and international. Rarely do such occasions arise in the life of a nation. The situation was an extraordinary one; its repercussions could not be foretold at that time. Nobody could say with definiteness what would happen and where? The situation was not only unpredictable, it was a fast-evolving one. The communal situation was tense. It could explode anywhere at any time. On the material placed before us, including the reports of the Governors, we cannot say that the President had no relevant material before him on the basis of which he could form the satisfaction that the B.J.P. governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot dissociate themselves from the action and its consequences and that these governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of the disputed structure, cannot be dissociated from the acts and deeds of the leaders of B.J.P. In the then prevailing situation, the Union of India thought it necessary to ban certain organisations including R.S.S. and here were governments which were headed by persons who “swore by the values and traditions of

the R.S.S." and were giving "overt and covert support to the associate communal organisation" (vide report of the Governor of Madhya Pradesh). The Governor of Himachal Pradesh reported that "the Chief Minister himself is a member of R.S.S.". The Governor of Rajasthan reported that the ban on R.S.S. and other organisations was not being implemented because of the intimate connection between the members of the government and those organisations. The three Governors also spoke of the part played by the members of the government in sending and welcoming back the kar sevaks. They also expressed the opinion that these governments cannot be expected, in the circumstances, to function objectively and impartially in dealing with the emerging law and order situation, which had all the ominous makings of a communal conflagration. If the President was satisfied that the faith of these B.J.P. government in the concept of secularism was suspect in view of the acts and conduct of the party controlling these governments and that in the volatile situation that developed pursuant to the demolition, the government of these State cannot be carried on in accordance with the provisions of the Constitution, we are not able to say that there was no relevant material upon which he could be so satisfied. The several facts stated in the counter affidavits and the material placed before us by the Union of India cannot be said to be irrelevant or extraneous to the purpose for which the power under Article 356 is to be exercised. As pointed out by us supra (under the heading 'Judicial Review') we cannot question the correctness of the material produced and that even if part of its is not relevant to the action, we cannot interfere so long as there is some relevant material to sustain the action. If the President was satisfied that the governments, which have already acted contrary to one of the basic features of the Constitution, viz., secularism, cannot be trusted to do so in future, it is not possible to say that in the situation then obtaining, he was not justified in believing so. This is precisely the type of situation, which the court cannot judge for lack of judicially manageable standards. The Court could be well advised to leave such complex issues to the President and the Union Council of Ministers to deal with. It was a situation full of many imponderables, nuances, implications and intricacies. There were too many if's and but's which are not susceptible of judicial scrutiny. It is not correct to depict the said proclamations as the outcome of political vendetta by the political party in power at the center against the other political party in power in some States. Probably in such matters, the ultimate arbiter is the people. The appeal should be to the people and to people alone. The challenge to the proclamation relating to these three States is, therefore, liable to fail. 228. We may summarise our conclusion now: (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

precondition. 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 re-activated. 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/Legislation 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 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 concerned official 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 Section 123. (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 malafide or based on wholly irrelevant or extraneous grounds. The deletion of Clause (5) (which was introduced by 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. It's 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 re-activate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such 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. (9) The Constitution of India has created a federation but with a bias in favour of the center. Within the sphere allotted to the States, they are supreme. (10) Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the state, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356. (11) The proclamation dated April 21, 1989 in respect of Karnataka (Civil Appeal No. 3645 of 1989) and the proclamation dated October 11, 1991 in respect of Meghalaya (Transferred Case Nos. 5 and 7 of 1992) are unconstitutional. But for the fact that fresh elections have since taken place in both the states - and new Legislative Assemblies and governments have come into existence - we would have formally struck down the proclamations and directed the revival and restoration of the respective governments and Legislative Assemblies. The Civil Appeal No. 3645 of 1989 and Transferred Case Nos. 5 and 7 of 1992 are allowed accordingly. Civil Appeal Nos. 193 and 194 of 1989 relating to Nagaland are disposed of in terms of the opinion expressed by us on the meaning and purport of Article 74(2) of the Constitution. (12) The proclamations dated January 15, 1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in Civil Appeal Nos. 1692, 1692A- 1692C of 1993, 4627-4630 of 1990, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The Civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P. (C) No. 237 of 1993 is set aside. The Transferred Cases are dismissed. 229. In the light of the reasons given and conclusions recorded hereinabove, we find ourselves in agreement with the conclusions 1, 2 and 4 to 7 in the judgment of our learned brother Sawant, J. delivered on behalf of himself and Kuldip Singh, J. We are also in broad agreement with conclusion No. 8 in the said judgment. 230. No orders on Interlocutory Applications. 231. There shall be no order as to costs in these matters. K. Ramaswamy, J. 232. The ap-

peals and transferred cases raise questions of far-reaching consequences in the working of the federal structure under the Constitution of India. Whether the President of India can keep fiddling like Emperor Nero while Roma was burning or like Hamlet, Prince of Denmark of Shakespear keep the pendulum oscillating between "to be or not to be" for the issuance of the proclamation under Article 356 of the Constitution dismissing the State Government and dissolving the State Legislatures and to bring the administration of the State under his rule. If he so acts, the scope and width of the exercise of the power and parameters of judicial review, by this Court, as centinal quivive, under Article. 32 or Article. 136 or High Court under Article 226 to consider the satisfaction, reached by the President under Article 356: When the actions of one State Government found seismeic vibrations in other states governed by the same political party, (in the language of S/Sri Parasaran and P.P. Rao, learned senior counsel, 'common thread rule' are also liable to be brought under the President Rule need to be critically examined and decided for successful working of the democratic institutions set up by the suprema lex. Though the need to decide these questions practically became academic due to conducting elections to the State Assemblies and the new legislative assemblies were constituted in the States of U.P., Rajasthan, Madhya Pradesh and Himachal Pradesh, all the counsel requested us to decide the questions regardless of the relief to be granted in this case. As stated earlier since the decision on these questions is of paramount importance for successful working of the Constitution, we acceded to their prayer. 233. In S.R. Bhommai's appeal the facts are that on March 5, 1985 elections held to the Karnataka State Legislative Assembly and the Janta Dal won 139 seats out of 225 seats and the Congress Party was the next largest party securing 66 seats. Sri R.K. Hedge was elected as the leader of Janta Dal and became the Chief Minister. Due to his resignation on August 12, 1988, Sri S.R. Bhommai's was elected as leader of the party and became the Chief Minister. As on February 1, 1989 the strength of Janta Dal was 111 and the Congress was 65 and Janta Party was 27, apart from others. On April 15, 1989 his expanding the Ministry caused dissatisfaction to some of the aspirants. One Kalyan Molakery and others defected form Janta Dal and he wrote letters on April 17 and 18, 1989 to the Governor enclosing the letters of 19 others expressing want of confidence in Sri Bhommai. On April 19, 1989 the Governor of Karnataka sent a report to the President. On April 20, 1989, 7 out of 19 M.L.As. that supported Kalyan Molakery, wrote to the Governor that their signatures were obtained by misrepresentation and reaffirmed their support to Sri Bommai. On the same day the cabinet also decided to convene the Assembly session on April 27, 1989 at 3.30 P.M. to obtain vote of confidence and Sri Bommai met the Governor and requested him, to allow floor test to prove his majority and he was prepared even to advance the date of the session. In this scenario the Governor sent his second report to the President and exercising the power under Article. 356 the President issued proclamation, dismissed Bhommai Government and dissolved the Assembly on April 21, 1989 and assumed the administration of the State of Karnataka. When a writ petition was filed on April 26, 1989, a special bench of three Judges of the High Court of Karnataka dismissed the writ petition (re-

ported in S.R. Bhommai and Ors. v. Union of India AIR (1990) Karnataka p.5. Thus this appeal by special leave. 234. In the elections held in February 1990, the Bhartiya Janta party, for short BJP, emerged as majority party in the legislative assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the Governments in the respective states. Due of the programmes of the B.J.P. was to construct a temple for Lord Sri Rama at his birth place Ayodhya. That was made an issue in its manifesto for the elections to the legislative assemblies. On December 6, 1992 Ram Janambhoomi Babri Masjid Structure (there is a dispute that after destroying Lord Sri Rama temple Babar, the Moghal invader, built Babri Masjid at the birth place of Lord Sri Rama, it is an acutely disputed question as to its correctness.)However Ram Janambhoomi Babri Masjid structure was demolished by the Kar Sewaks gathered at Ayodhya, as a result of sustained momentum generated by BJP, Vishwa Hindu Parishad for short VHF, Rashtriya Swayamsewak Sangh, for short RSS. Bajrang Dal for short BD. Shiv Sena for short SS and other organisations. Preceding thereto when the dispute was brought to this Court, the Govt. of India was made to act on behalf of the Supreme Court and from time to time directions were issued to the State Government who gave an assurance of full protection to Sri Ram Janambhoomi Babari Masjid Structure. On its demolition though the Govt. of Uttar Pradesh, resigned, the President of India by proclamation issued under Article. 356 dissolved the state legislature on December 6, 1992. The disastrous fall out of the demolition was in the nature of loss of precious lives of innocents, and property throughout the country and in the neighbouring countries. The President, therefore, exercised the power under Article. 356 and by the proclamations of December 15, 1992, dismissed the State Governments and dissolved the legislative assemblies of Rajasthan Madhya Pradesh and Himachal Pradesh and assumed administration of the respective states. 235. Sri Soli Sorabjee, the learned senior counsel appearing for Sri Bommai contended that power of the President under Article. 356 is not unfettered nor unlimited; its exercise is dependent upon the existence of the objective fact, namely a situation has arisen in which the Govt. of the State cannot be carried on in accordance with the provisions of the Constitution. This condition precedent is sine quo non to exercise the power and issuance of the proclamation under Article. 356. The proclamation must set forth the grounds and reasons for reaching the satisfaction supported with the materials or the gist of the events in support thereof. The grounds and reasons should be cogent and credible and must bear proximate nexus to the exercise of the power under Article. 356. The break down of the constitutional machinery is generally capable of objective determination. The power under Article 356 cannot be exercised on the basis of the report of the Governor or otherwise of an inefficient or malfunctioning of the Government or mere violation of some provisions of the constitutions. It could be exercised only when the Govt. misuses its power contrary to the basic scheme and purpose of the Constitution or for its inability to discharge its basic constitutional duties and functions due to political or economic crises which have led to completely paralysing the State administration. 236. The federal character of the Constitution carries by its implication an obligation to exercise the power under Article

356 only when there is a total break down of the administration of the State. In interpretating Article 356 the Court should need in view the legislative and constitutional history of Article 356 and corresponding provisions of Government of India Act 1935. The exercise of the power under Article 356 impinges upon federalism and visits with great political consequences. Therefore, court should exercise the power of judicial review and interdict and restrict wide scope of power under Article 356. The scope of judicial review would be on the same or similar grounds on which the executive action of the state is challengeable under constitutional or administrative law principles evolved by this court, namely non-compliance with the requirements of natural justice, irrational or arbitrary, perverse, irrelevant to the purpose or extraneous grounds weighed with the President, misdirection in law or mala fide or colorable exercise of power, on all or some of the principle. The Petitioner has to satisfy the court only prima facie that the proclamation is vitiated by any one or some of the above grounds and burden then shifts on the Council of Ministers to satisfy the Court of the legality and validity of the Presidential proclamation issued under Article 356. The prohibition of Article 74(2) has to be understood and interpreted in that background. The legal immunity under Article 74(2) must be distinguished from the actions done by the President in discharge of his administrative functions under Article 356. The executive cannot seek shelter under "or other information" mentioned in Article 356(1) as an embargo under Article 361 to state reasons or as a shield to disclose all the materials in their custody preventing court to exercise judicial review. Only the actual advice or part of the advice tendered by the Minister or Council of Ministers alone would be beyond the ken and scrutiny of judicial review. The administrative decision taken by the Council of Ministers is entirely different from the advice rendered to the President, and the later cannot be equated with the grounds or the reasons for presidential proclamation. The former are not part of the advice tendered to the President by the Council of Ministers. 237. Sri Shanti Bhushan, learned senior counsel, while adopting the above contentions argued that the exercise of the power under Article 356 must be regarded as arbitrary when there was no constitutional break down. Every act of the Stats Govt. cannot be regarded as violation of the provisions of the Constitution or constitutional break down. The power under Article 356 must be exercised only when there was actual break down of the constitutional machinery and not mere opinion in that behalf of the Council of Ministers. The Govt., to justify its action, must place all relevant materials before the Court and only when court is satisfied that the cases relate to actual break down of the constitutional machinery in the State the proclamation may be upheld. The burden of proof is always on the Government to establish the validity or legality of the proclamation issued under Article 356. Sri Ram Jethmalani tracing historical evidence from the debates that took place on the floor of the constituent assembly, contended that the keywords for construction are "cannot be carried on" and "failure of machinery". The provisions of Article 356 would be strictly construed so as to preserve the federal character of the constitution. The State is a sovereign and autonomous entity in its own field and intervention by the center would be permissible only when there is no other

way for the center to perform its duties under Article 356 It cannot be invoked for the sake of good governance of the State or to prevent misgovernance of the State. The words "cannot be carried on" are not to be confused with and are vitally different from the words "is not being carried on." The significance of the keyword gets accentuation from the marginal note of the Article "failure of the constitutional machinery" and the Legislative history of Sections 45 and 93 of the Government of India act must be kept in view for proper construction of Article 356. According to the learned Counsel, Article 356 gives an indication that extreme step of proclamation under Article 356 could be invoked sparingly only when all the alternatives are exhausted. Secularism part of the preamble is not a part of the Constitution and Religion is fundamental right to every citizen who composes of a political party. The election law prohibits election prospects on religious grounds if the other candidate's religion is attacked. It cannot be tested on vague secularism nor be buttressed into religion right at particular to a political party. There is no pleading founded by factual base in these cases that BJP had used Hindutva as a ground, or criticised Islamic faith. It used in its manifesto the need for construction of Sri Ram Temple at his birth place by demolishing Babri Masjid with most respectful and dignified language. Even otherwise Section 29A and 123(3A) of R.P. Act. are ultra vires of Article 25. The consistent view of this Court that corrupt practice on grounds of religion is only of the other candidate and not of the petitioner much more so to a political party. Sri K. Parasanan, learned senior counsel for the Union and Sri P.P. Rao, learned Counsel for the State of Madhya Pradesh refuted the contentions. 238. The crux of the question is the width of the President's power under Article 356. It finds its birth from a family of emergency provisions in Part XVIII of the Constitution. Article 355 imposes duty on the Union to protect States against external aggression and internal disturbance and to ensure that Govt. of every State is carried on in accordance with the provisions of the Constitution. As a corollary when the Government of the State is not being carried or in accordance with the provisions of the Constitution, a constitutional duty and responsibility is put on the Union to set it right. The foundational factual metrics is the report of the governor or other information in possession of the union received otherwise to reach a satisfaction that a situation has arisen for the intervention by the Union of India. Then comes the exercise of the power under Article 356 by the President. On the receipt of a report from the Governor of a State or otherwise if the President (the Council of Ministers with Prime Minister as its head) is satisfied that a situation has arisen in which the Govt. of a State cannot be carried on in accordance with the provisions of the Constitution, the President may by proclamation: (a) assume to himself all or any of the function of the Govt. of the State and all or any of the power vested in or exercised by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers or the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental or consequential provisions as appear to the President to be necessary or desirable for given effect to the objects of the proclamation including provisions for suspending in whole or in part the operation of any provisions

of the Constitution relating to any body or authorities in the State. By operation of the proviso to Clause I of Article 356, the President shall not 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 provisions for the Constitution relating to High Courts. 239. Clause 2 of Article 356 controls the President's exercise of power, if the proclamation is not revoked or varied by a subsequent proclamation in other words, the President, through the Council of Ministers have been given full play to reconsider the question and may revoke it before the Parliament's approval is sought. It shall remain in operation for a period of two months unless it is either revoked by another proclamation or approved by the Parliament. Clause 3 guarantees built in check and control on the exercise of the power. It postulate that every proclamation issued under Clause I shall be laid before each house of Parliament and shall,ex-cept where it is a proclamation revoking a previous proclamation, ceases to operate at the expiration of two months unless before the expiration of that period it has been approved by a resolution of both Houses of Parliament. In other words, The question of the operation of the proclamation issued by the President was limited only for a period of two months from the date of issue of such proclamation. 240. Unless it is revoked or disapproved by the Parliament in the meanwhile. It costs an obligation to lay the proclamation on the floor of both Houses of Parliament in accordance with the provisions of the Constitution and the business rules. This clearly meant that it was to operate upto the time of two months and when it was in force it carries with its necessary implication that all acts done or actions taken under the proclamation during the period are legal and valid. 241. Under the proviso to Clause 3 of Article 356 if any such proclamation not being a proclamation revoking a previous proclamation is issued at a time when House of People is dissolved or the dissolution of the House of people takes place during the period of of two months referred to in the clause and if a resolution approving the proclamation has been passed by the Council of State but no resolution with respect to such proclamation has been passed by the House of People before the expiry of that period, the proclamation shall cease to operate at the expiration of 30 days from the date on which the House of People first sits after its reconstitution unless before the expiration of the said period of 30 days a resolution approving the proclamation has been also passed by the House of people. 242. By operation of Clause 4 of Article 356 a proclamation so approved under proviso to Clause 3 shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of proclamation provided that if and so often as a resolution approving the continuance in force of such 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 it would otherwise have ceased to operate and no such proclamation shall in any case remain in force for more than only year with second approval. The second proviso adumbrates that if the resolution of the House of 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 People during the said date the proclamation shall cease to operate at the expiration of 30 days from the date on which the House of the People first sits after the reconstitution unless before the expiration of the said period of 30 days a resolution approving the continuance in force of the proclamation have also been passed by the House of the People. The third proviso is not material for the purpose of this case. Hence omitted under Clause 5 for continuance of the proclamation beyond one year and not more than three years, two conditions are necessary i.e. (1) existence of emergency issued under Article 352 in the whole of Indian or whole or part of the State at the time of passing the resolution and (11) the Certificate of the Election Commissioner of its inability to hold elections to the Assembly of that State. Article 357 provides the consequential exercise of legislative power by the Parliament or delegation thereof to the president to exercise them under Article 123 etc. FEDERALISM AND ITS EFFECT BY ACTS DONE UNDER ARTICLE 356 243. The polyglot Indian society of wide geographical dimensions habiting by social milieu, ethnic variety or cultural diversity, linguistic multiplicity, hierarchical caste structure among Hindus, religious pluralism, majority of rural population and minority urban habitus, the social and cultural diversity of the people furnish a manuscript historical material for and the founding fathers of the Constitution to lay federal structure as foundation to integrate India as an united Bharat. Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the center and the States which are the structural units operating on balancing wheel of concurrence and promise to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people. Article 1 is a recognition of the history that Union of Indian's territorial limits are unalterable and the States are creatures of the Constitution and they are territorially alterable constituents with single citizenship of all the people by birth or residence with no right to cessation. Under Articles 2 and 4 the significant feature is that while the territorial integrity of India is fully ensured and maintained, there is a significant absence of the territorial integrity of the Constituent States under Article 3. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or part of States or uniting any territory to a part of any State or by increasing area of any State or diminishing the area of any State or alter the boundary of any State. 244. IN RE: THE BERUBARI UNION AND EXCHANGE OF ENCLAVE REFERENCE UNDER ARTICLE 143 OF THE Constitution of India - [1960] 3 SCR 250 & 285 Gajendragadkar, J. speaking for (8 Judges Bench) held that: Unlike other federations, the Federation embodied in the said Act was not the result of a pack or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty . The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the India Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution

were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the India States. In fact is is well-known that as a result of the states Reorganisation Act, 1965 (Act XXXVII of 1956), in the place of the original 27 States and one Area which were mentioned in part in the first Schedule to the constitution, there are now only 14 states and 6 other areas which constitute the Union Territory mentioned in the first Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution. 245. The same was reiterated in State of West Bengal v. Union of India [1964] 1 SCR 321 and State of Karnataka v. union of India . 246. Union and States Relations under the Constitution Tagore Law Lectures by M.C. Setalwad at page 10 stated that: ....one notable departure from the accepted ideas underlying a federation when the power in the Central Government to redraw the boundaries of States or even to destroy them. 247. The Constitution decentralises the governance of the States by a four tier administration i.e. Central Government. State Government, Union territories, Municipalities and Panchayats. See Constitution for Municipalities and Panchayats: Part IX (Panchayats) and Part IX-A (Municipalities) introduced through the Constitution 73rd Amendment Act, making the peoples participation in the democratic process from grass root level a reality. Participation of the people in governance of the State is sine qua non of functional democracy. Their surrender of rights to be governed is to have direct encounter in electoral process to choose their representatives for resolution of common problems and social welfare. Needless interference in self- governance is betrayal of their faith to fulfil self-governance and their democratic aspirations. The constitutional culture and political morality based on healthy conventions are the fruitful soil to nurture and for sustained growth of the federal institutions set down by the Constitution. In the context of the Indian Constitution federalism is not based on any agreement between federating units but one of integrated whole as pleaded with vision by Dr. B.R. Ambedkar on the floor of the constituent assembly at the very inception of the deliberations and the Constituent Assembly unanimously approved the resolution of federal structure. He poignantly projected the pitfalls flowing from the word “federation. 248. The federal state is a political convenience intended to reconcile national unity and integrity and power with maintenance of the state's right. The end aim of the essential character of the Indian federalism is to place the nation as a whole under control of a national Government, while the states are allowed to exercise their sovereign power within its legislative and co- extensive executive and administrative sphere. The common interest is shared by the center and the local interests are controlled by the state. The distribution of the legislative and executive power within limits and coordinates authority of different organs are delineated in the organic law of the land, namely the Constitution itself. The essence of the federalism, therefore, is distribution of the force of the state among its coordinate bodies. Each is organised and controlled by the constitution. The division of the power between the union and the states

is made in such a way that whatever has been the power distributed, legislative and executive, be exercised by the respective units making each a sovereign in its sphere and the rule pi law requires that there should be a responsible Government. Thus the state is a federal status. The state qua the center has quasi-federal unit. In the language of Prof. K.C. Wheare in his Federal Government, 1963 Edition, at page 12 to ascertain the federal character, the important point is,"whether the powers of the Government are divided between coordinate independent authorities of not", and at page 33 he stated that" the systems of Government embody predominantly on division of powers between center and regional authority each of which in its own sphere is coordinating with the other independent as of them, and if so is that Govt. federal?" 249. Salmond in his Jurisprudence. 9th edition brought about the distinction between unitary type of Govt. and federal form of Govt. According to him a unitary or a simple state is one which is not made up of territorial division which are states themselves. A composite state on the other hand is one which is itself an aggregate or groups of constituent states. Such composite states can be called as imperial, federal or confederate. The Constitution of India itself provided the amendments to territorial limits from which we discern that the federal structure is not obliterated but regrouped with distribution of legislative powers and their scope as well as the co-extensive executive and administrative powers of the Union and the States. Articles 245 to 255 of the Constitution deal with relative power of the Union and the States legislature read with Schedule Seven of the Constitution and the entries in List I preserved exclusively to the Parliament to make law and List II confines solely to the state legislature and List III concurrent list in which both the Parliament as well as the state legislature have concurrent jurisdiction to make law in the occupied field, with predominance to the law made by the Parliament, by operation of proviso to Clause (2) of Article 254. Article 248, gives residuary legislative powers exclusively to the parliament to make any law with respect to any matters not enumerated in the concurrent list of the state list including making any law, imposing a tax not mentioned in either of those lists. The relative importance of entries in the respective lists to the Seventh Schedule assigned to the Parliament or a State Legislature are neither relevant nor decisive though contended by Sri K. Parasaran. Indian federalism is in contra distinction to the federalism prevalent in U.S.A., Australia and Canada. 250. In regard to distribution of executive powers Constitution itself made demarcation the Union and the States. Article 73(1) read with proviso and Article 162 read with proviso bring out this demarcation. The executive power of the Union and the State are co-extensive with their legislative powers. However, during the period of emergency Articles 352 and 250 envisaged certain contingencies in which the executives power of the concerned state would be divested and taken over by the Union of India which would last upto a period of 6 months, after that emergency in that area is so lifted or ceased. 251. The administrative relations are regulated by Articles 256 and 258A for effective working of the Union executive without in any way impeding or impairing the exclusive and permissible jurisdiction of the State within the territory. Articles 268 and 269 enjoin the Union to render financial

assistance to the states. The Constitution also made the Union to depend on the States to enforce the union law within concerned states. The composition of Rajya Sabha as laid down by Article 80 makes the legislature of the state to play its part including the one for ratifying the constitutional amendments made by Article 368. The election of the President through the elected representative of the State legislature under Article 54 makes the legislature of federal unit an electoral college. The legislature of the state has exclusive power to make laws for such state or any part thereto with respect to any of the enumerated matters in List II of the Seventh Schedule by operation of Article 246(3) of the Constitution. 252. The Union of India by operation of Articles 340 and 245, subject to the provisions of the Constitution, has power to make laws for the whole or any part of the territory of India and the said law does not eclipse, nor become invalid on the ground of extra- territorial operation. In the national interest it has power to make law in respect of entries mentioned in List II. State List, in the penal field, as indicated in Article 249. With the consent of the state, it has power to make law under Article 252. The Union judiciary, the Supreme Court of India, has power to interpret the Constitution and decide the disputes between Union and the states and the states inter se. The law laid down by the Supreme Court is the law of the land under Article 141. The High court has judicial power over territorial jurisdiction over the area over which it exercises power including control over lower judiciary. Article 261 provides full faiths and credit to the proceedings of public acts or judicial proceedings or the union and of the States throughout the territory of India as its fulgrum. Indian judiciary is unitary in structure and operation. Articles 339, 344, 346, 347, 353, 358, 360, 365 and 371-C(2) give power to the Union to issue directions to the States. Under Article 339(2) the Union has power to issue directions relating tribal welfare and the state is enjoined to implement the same. In an emergency arising out of war or aggression or armed rebellion, contemplated under Articles 352 or emergency due to failure of the Constitutional machinery in a state envisaged under Articles 356 or emergency in the event of threat to the financial stability or credit of India. Article 360 gives dominant power to the Union. During the operation of emergency Article 19 of the Constitution would become inoperative and the center assumes the legislative power of a State unit. Existence of All India Services under Article 312 and establishment of inter-state councils under Article 263 and existence of financial relations in part 12 of the Constitution also indicates the scheme of distribution of the revenue and the primacy to the Union to play its role. Establishment of financial Commission for recommendations to the President under Article 280 for the distribution of the revenue between the Union and the States and allocation of the respective shares of such inter- state trade and commerce envisaged in Part 13 of the Constitution and primacy to the law made therein bring out, though strongly in favour of unitary character, but suggestively for balancing operational federal character between the Union and the States make the Constitution a quasi-federal. 253. As earlier stated, the organic federalism designed by the founding fathers is to suit the parliamentary from the the Govt. to suit the Indian conditions with the objective of promoting mutuality and common

purpose rendering social, economic and political justice, equality of status and opportunity; dignity of person to all its citizens transcending regional, religious, sectional or linguistic barriers as complimentary units in working the Constitution without confrontation. Institutional mechanism aimed to avoid friction to promote harmony to set constitutional culture on firm foothold for successful functioning of the democratic institutions, to bring about matching political culture adjustment and distribution of the roles in the operational mechanism are necessary for national integration and transformation of stagnant social order into vibrant egalitarian social order with change and continuity economically, socially and culturally. In the State of West Bengal v. Union of India , this Court laid emphasis that the basis of distribution of powers and between union and the States is that only those powers and authorities, which are concerned with the regulation of local problems are vested in the state and those which tend to maintain the economic nature and commerce, unity of the nation are left with the Union. In Shumsher Singh v. Union of India , this Court held that parliamentary system of quasi-federalism was accepted rejecting the substance of Presidential style of executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is. "both unitary as well as federal according to the requirement of time and circumstances". He also further stated that the center would work for common good and for general interest of the country as a whole while the states work for local interest. He also refuted the plea for exclusive autonomy of the States. It would thus appear that the overwhelming opinion of the founding fathers and the law of the land is to preserve the unity and territorial integrity of the nation and entrusted the common wheel to the Union insulating from future divisive forces or local zealotrds to disintegrating India. It neither leaned heavily in favour of wider powers in favour of the Union while maintaining to preserve the federal character of the States which are integral part of the Union. The Constitution being the permanent and not self destructive, the Union of India is indestructable. The democratic form of Govt. should nurture and work within the constitutional parameters provided by the system of law and balancing wheel has been entrusted in the hands of the union judiciary to harmonise the conflicts and adopt constitutional construction to subserve the purpose envisioned by the Constitution. ROLE OF THE GOVERNOR 254. The key actor in the center-State relations is the Governor, a bridge between the Union and the State. The founding fathers deliberately avoided election to the office of the Governor, as is in vogue in U.S.A. to insulate the office from linguistic chauvinism. The President has been empowered to appoint him as executive head of the state under Article 155 in Part VI. Chapter II. The executive power of the State is vested in him by Article 154 and exercised by him with the aid and advice of the Council of Ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the oath "to protect and defend the Constitution and the law". The office of the Governor, therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the Constitution by the elected executive and given him an umpire's role. When a Gandhian economist Member of the Constituent Assembly wrote a letter to

Gandhiji of his plea for abolition of the office of the Governor, Gandhiji wrote to him for its retention, thus: "The Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional dead-lock in the State and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crises would be resolved in the State." The Governor thus should play an important role, in his dual undivided capacity as an head of the State he should impartially assist the President. As a constitutional head of the State Govt. in times of constitutional crisis he should bring about soberiety. The link is apparent when we find that Article 356 would be put into operation normally based on Governor's report he should truthfully and with high degree of constitutional responsibility, in terms of oath, inform the President that a situation has arisen in which the constitutional machinery in the State has failed and the Government of State cannot be carried on in accordance with the provisions of the constitution, with necessary detailed factual foundation. The report normally is the foundation to reach the satisfaction by the President. So it must furnish material with clarity for later fruitful discussion by the parliament. When challenged in a constitutional court it gives insight into the satisfaction reached by the President. The Governor therefore, owes constitutional duty and responsibility in sending the report with necessary factual details and it does require the approval of the council of ministers; equally not with their aid and advice. DEMOCRACY AND SECULARISM 255. Democracy stands for freedom of conscience and belief, tolerance and mutual respect. India being a plural society with multi- religious faiths, diverse creeds, castes and cultures, secularism is the bastion to build fraternity, and amity with dignity of person as its constitutional policy. It allows diverse faiths to flourish and make it a norm for tolerance and mutual respect between various sections of the people and to integrate them with dignity and fulfilment of cravings for self-realisation of religious belief with larger national loyalty and progress. Rule of law has been chosen as an instrument for social adjustment in the event of clash of interests. In a tree society, law interacts between competing claims in a continuing process to establish under with stability. Law should not only reflect social and religious resilience but has also to provide a lead by holding forth the norms for continuity for its orderly march towards an ideal egalitarian social order envisioned in the preamble of the Constitution the culture of the law, in the Indian Democratic Republic, should be on secular lines. A balance, therefore, has to be struck to ensure an atmosphere of full faith and confidence. Charles Broadlaugh in Seventeenth century for the first time used secularism as antagonistic to religious dogma as ethical are moral finding force. This western thought, in course of time gained humanistic acceptance. The word secularism defined in Oxford dictionary means that "morality should be based solely in regard to the well-being of the mankind in the present life to the exclusion of all considerations drawn from the belief in God or a future study": In Encyclopaedia Britannica secularism is defined as "branch of totalitarian ethics, it is for the physical, moral and social improvement of mankind which neither affirms nor denies theistic problems of religion". Prof. Goethinysem of the Berlin University

writing on secularism in the Encyclopaedia of the Social Sciences (1939 ED.) defined it as "the attempt to establish autonomous sphere of Knowledge purged of supernatural, fideistic pre-suppositions". He described it, in its philosophical aspect, "as a revolt against theological and eventually against metaphysical absolutes and universals". He pointed out that "the same trend may be charted out in the attitudes towards social and political institutions", so that men in general broke away from their dependence upon the Church which was regarded as the guardian of an eternal welfare which included that in this world as well as that in the next, and , therefore, was considered entitled to primacy or supremacy over transient secular authorities. He indicates how this movement expanded in the second half of the eighteenth century, into a secularised universalism, described as "Enlightenment", which conceived of man on earth as the source of all really significant and verifiable knowledge and the light. It was increasingly realised that man depended for his welfare in this world upon his own scientific knowledge and wisdom and their applications and upon a socio-economic system of which, willy-nilly, he found himself a part. He had, therefore, argued that the man has to take the responsibility for and bear the consequence of his own follies and inequities and not look upon them as a part of some inscrutable design of external powers or beings controlling his destiny. G.L. Holyoake, and associate of Charles Broadlaugh in his "Principles of Secularism" in 1859 advocated for secularism which received approval and acceptance by celebrated political philosopher J.B. Mill. Jeremy Bentham's Principles of Legislation formulated in the eighteenth century stand on moral based politics and defined law from the point of view of human welfare sought through democratic liberal channels and intended to attain "the greatest happiness of the greatest number", a maxim bear to democratic utilitarian political philosophers. 256. Secularism became means and consciously pursued for full practical necessities of human life to liberate the human spirit from bondage, ignorance, superstition which have held back humanity. The goal of every civilised democratic society is the maximisation of human welfare and happiness which would be best served by a hobby organisation. 257. Freedom of faith and religion is an integral part of social structure. Such freedom is not a bounty of the State but constitutes the very foundation on which the state is erected. Human Liberty sometimes means to satisfy the human needs in one's own way. Freedom of religion is imparted in every free society because it is a part of the general structure of the liberty in such a society and secondly because restrictions imposed by one religion would be an obstacle for others. In the past religious beliefs have become battle grounds for power and root cause for suppression of liberty. Religion has often provided a pretext to have control over vast majority of the members of the society. Democratic society realises folly of the vigour of religious practices in society. Strong religious consciousness not only narrows the vision but hampers rule of law. The founding fathers of the Constitution, therefore, gave unto themselves "we the people of India" the fundamental rights and Directive Principles as State policy to establish an egalitarian social order for all sections of the society inn the supreme law of the land itself. Though the concept of the "secularism" was not expressly engrafted while making the constitution, its sweep, operation

and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man. Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the Society. Religion in the positive sense, is an active instrument to allow citizen for full development of his person, not merely in the physical and material but in the non-material and non- secular life. 258. Prof. Goethinysem in his Article referred to hereinbefore outlined the process of secularism to life and thoughts by which religious sectarianism comes into contact in daily social and economic spheres of life and he summarises with "the ideal of human and social happiness through secularisation of life all the groups of people in the country striving by most enlightened methods to establish the maximum of social justice and welfare in the world. According to Pt. Jawaharlal Nehru democracy necessarily implies rigorous self-discipline without which democracy cannot succeed, Swami Vivekanand explaining the Vedantic ideas of God and religion in comparison with western thoughts stated that the religious attitude is always to seek the dignity inside of his ownself as a natural characteristic of Hindu religion and religious attitude is always presented by making the subject close his eye looking inward. Dr. Thouless in his"Introduction to the Psychology of Religion" after analysing diverse elements and definitions of religion defined religion as "a felt practical relationship with what is believed in a super human being or beings". The process of secularisation of life and thought consistently increasing the withdrawal and separation of religion properly so called from other spheres of life and thought which are governed by independent form above rules and standards. According to Sir James Freezer in his "Golden Bough" religion consists largely of not only of methodological and rituals dominated by all aspects of his life, social, economic, political, legal, cultural, ethical or moral, but also technological. The interaction of religion and secular factors in ultimate analysis is to expose the abuses of religion and of belief in God by purely partisan, narrow or for selfish purpose to serve the economic or political interest of a particular class or group or a country. The progress of human history is replete with full misuse of religious notions in that behalf. But the scientific and analytical spirit characterises the secularism as saviour of the people from the dangers of supposed fusion of religion with political and economic activities and inspire the people. The secularism, therefore,

represents faiths born out of the exercise of rational faculities. It enables people to see the imperative requirements for human progress in all aspects and cultural and social advancement and indeed for human survival itself. It also not only improves the material conditions of human life, but also liberates the human spirit from bondage of ignorance, supression, irrationality, injustice, fraud, hypocracy and oppressive exploitations. In other words, through the whole course of human history discloses an increasing liberation of mankind, accomplished thought, all is covered by the term secularism. Trever Ling's Writing on Bhudhism spoke of it as a secular religion, which teaches eight-fold path of his mastery and virtuous conduct of ceaseless, self critical endeavour for right belief, right aspiration, right speech, right conduct, right modes of livelihood, right efforts, right mindedness and right scrupture. Bhudhism rationalises the religion and civilisation to liberate individual from blind fold adherence to religious belief to rationalisation, in the language of Trever Ling "flat alluvial expansion of secularism". Dr. Ambedkar believed that Bhudhism is the best religion suited to the Indian soil. Mahatma Gandhiji, father of the nation, spoke for the need of religion thus, "the need of the mankind is not one of religion, but mutual respect and tolerance of the devotees of different religions. We want to reach not a data level, but unity in diversity. The soul of all religion is one, but it is encased in the multitude of forms. The latter will persist to the end of the time." 259. Dr. S. Radhakrishnan, the Philosopher, former President of India, in his Discovery of Faith stated that the religious impartiality of the Indian state is not to be confused with the secularism or ethism. Secularism as defined here is in accordance with the enormous religious traditions of India. It is for living in harmony with each other. This fellowship is based on the principle of diversity in unity which alone has all quality of creative-ness. In his foreword to Dr. Abid Hussain's "The National Culture of India", Dr. S. Radhakrishnan remarked that the secularism does not mean licence or a thrust of material comfort. It lays thrust on universal of the supreme fellow which may be attained by variety of ways. Indian concept of secularism means "the equal status to all religions". He said that "no-one religion should be given preferential status or unique distinction and that no-one religion should be accorded special privileges in national life". That would be violative of basic principles of democracy. No group of citizen can so arrogate itself the right and privilege which he denies to others. No person shall suffer any form of disability or discrimination because of his religion, but also alike should be free to share to the fullest degree in the common life. This is the basic principle in separation of religion and the State. Granvelle Austin in his "The Indian Constitution the cornerstone of a Nation" stated that the Constitution makers were intended to secure secular and socialist goals envisaged in the preamble of the Constitution. In Ziyauddin Burhamuddin Bukhari v. Brijmohan Ramdass Mehra and Ors. [1975] Suppl. SCR 281 at 297, this Court held that: The Secular State rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Maitland had pointed out that such a state has to ensure, through its laws, that the existence or exercise of a

political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practice of any particular religion. It was further pointed out: Our Constitution and the laws framed thereunder leave citizens free to work out happy and harmonious relationships between their religions and the quite separable secular fields of law and politics. But, they do not permit an unjustifiable invasion of what belongs to one's sphere by what appertains really to another. It is for courts to determine in a case of dispute, whether any sphere was or was not properly interfered with, in accordance with the Constitution, even by a purported law. Thereby this Court did not accept the wall of separation between law and the religion with a wider camouflage to impress control of what may be described exploitative parading under grab of religion. Throughout ages endless stream of humans of diverse creeds, cultures and races have come to India from outside regions and climate and contributed to the rich cultural diversity. Hindu religion developed resilience to accommodate and imbibe with tolerance the culture richness with religious assimilation and became a land of religious tolerance. 260. Swami Vivekanand stated that right of religious system and ideals is the Same morality; one thing is only preached: Myself, say "Om"; others one says "Johova" another " Allaha ho Mohammad", another cries" Jesus". Gandhiji recognised that all religions are imperfect and because they are imperfect they require perfecting themselves rather than conducting individually. He stated:"the separate religions - Hinduism, Islam, Christianity, Budhism are different rights converging on the same point even as the tree has the single trunk but many branches and leaves so there one perfect religion but it becomes many as it passes through the human medium. The Allaha of Muslims is the same as the God of Christians and Ishwara of Hindus". 261. Making of a nation state involves increasing secularisation of society and culture. Secularism operates as a bridge to across over from tradition to modernity. The Indian state opted this path for universal tolerance due to its historical and cultural background and multi-religious faiths. Secularism in the Indian context bears positive and affirmative emphasis. Religions with secular craving for spiritual tolerance have flourished more and survived for linger period in the human history than those who claimed to live in a non-human existent world of their own. Positive secularism., therefore, separates the religious faith personal to man and limited to material, temporal aspects of human life. Positive secularism believes in the basic values of freedom, equality and fellowship. It does not believe in hark back either into country's history or seek shelter in its spiritual or cultural identity dehors the man's need for his full development. It moves mainly around the state and its institution and, therefore, is political in nature. At the same time religion does not include other socio-economic or cultural social structure. The state is enjoined to counteract the evils of social force, maintaining internal peace and to defend the nation from external aggression. Welfare State under the Constitution is enjoined to provide means for well-being of its citizens; essential services and amenities to all its people. Morality under positive secularism is a pervasive force in favour of human freedom or secular living. Prof. Holyoake as stated earlier, who is the father of modern secularism stated

that"morality should be based on regard for well being or the mankind in the person, to the exclusion of all considerations drawn from the belief in God or a future state." Morality to him was a system of human duty commencing from man and not from God as in the case of religion. He distinguished his secularism from Christianity, the living interest of the world that is prospects of another life. Positive secularism gives birth to biological and social nature of the man as a source of morality. True religion must develop into a dynamic force for integration without which the continued existence of human race itself would become uncertain and unreal. Secularism teaches spirit of tolerance, catholicity of outlook, respect for each other's faith and willingness to abide by rules of self-discipline. This has to be for both as an individual and as a member of the group. Religion and secularism operate at different planes. Religion is a matter of personal belief and mode of worship and prayer, personal to the individual while secularism operates, as stated earlier, on the temporal aspect of the state activity in dealing with the people professing different religious faiths. The more a devoted person in his religious belief, the greater should be his sense of heart, spirit of tolerance, adherence of secular path Secularism, therefore, is not anti-thesis of religious devout-ness. Swami Vivekanand and Mahatma Gandhiji, though greatest Hindus, their teachings and examples of lives give us the message of the blend of religion and the secularism for the good of all the men. True religion does not teach to hate those professing other faiths. Bigotry is not religion, nor can narrow minded favouritism be taken to be an index of one's loyalty to his religion. Secularism does not contemplate closing each other voices to the sufferings of the people of other community nor it postulates keeping mum when his or other community make legitimate demands any group of people are subjected to hardship or sufferings, secularism always requires that one should never remain insensitive and aloof to the feelings and sufferings of the victims. At moments of testing times people rose above religion and protected the victims. This cultural heritage in India shaped that people of all religious faith, living in different parts of the country are to tolerate each other's religious faith or beliefs and each religion made its contribution to enrich the composite Indian culture as a happy blend or synthesis. Our religious tolerance received reflections in our constitutional creed. 262. The preamble of the Constitution inter alia assures to every citizen liberty of thought, expression, belief, faith and worship. Article 5 guarantees by birth citizenship to every Indian. No one bargained to be born in a particular religion, cast or region. Birth is a biological act of parents. Article 14 guarantees equality before the law or equal protection of laws. Discrimination on grounds of religion was prohibited to by Article 15. Article 16 mandates equal opportunity to all citizens in matters relating to employment or appointment to any office or post under the State and prohibits discrimination on grounds only of inter alia religion. Article 25 while reassuring to all persons freedom of conscience and the right to freely profess, practice and propagate his religion, it does not affect the operation of any existing law or preventing the State from making any law regulating or restricting any social, financial, political or other secular activity which may be associated with the religious practice. It is subject to

provide a social welfare and reform or throwing open all Hindu religious institutions of public character to all classes of citizens and sections of Hindus. Article 26 equally guarantees freedom to manage religious affairs, equally subject to public order, morality and health. Article 27 reinforces the secular character of Indian democracy enjoining the State from compelling any person or making him liable to pay any tax, the proceeds of which are specifically prohibited to be appropriated from the consolidated fund for the promotion or maintaining or any particular religion or religious denomination. Taxes going into consolidated funds should be used generally for the purpose of ensuring the secular purposes of which only some are mentioned in Articles 25 and 26 like regulating social welfare etc. Article 28(1) maintains that no religious instruction shall be imparted in any educational institutions wholly maintained out of the State funds or receiving aid from the State. Equally no person attending any educational institution recognised by the state or receiving aid from the State funds should be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless person or in the case of a minor person his guardian has given his consent thereto. By Article 30(2) the State is enjoined not to discriminate, in giving aid to an educational institution, on the ground that it is a minority institution whether based on religion or language. It would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, state is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provide equal protection to all religions subject to regulation and actively acts on secular part. 263. In Radial Pannachand Gandhi v. State of Bombay [1954] SCR 1035, this Court defined the religion that it is not necessarily atheistic and , in fact, there are well-known religions in India like Budhism and Jainism which do not believe in the existence of God or caste. A religion undoubtedly has different connotations which are regarded by those who profess that religion to be conducive to their spiritual well-being but it would not be correct to say or seems to have been suggested by the one of the learned brothers therein that matters of religion are nothing but matters of religious faith and religious belief. The religion is not merely only a doctrine or belief as it finds expression in acts as well. In Commissioner of Madras v. Sri Lakshmindra Thirtha Swamiar [1954] SCR 1005, know as Sirurmath case, this Court interpreted religion in a restricted sense confining to personal beliefs and attended ceremonies or rituals. The restriction contemplated in Part-Ill of the Constitution are not the control of personal religious practices as such by the State but to regulates their activities which are secular in character though associated with religions, like management of property attached to religious institutions or endowment on secular activity which are amenable to such regulation. Matters such as offering food to the deity etc. are essentially religious and the State does not regulate the same, leaving to the individuals for their regulation. The caste system though formed the Kernal of Hinduism, and as a matter of practice, for millenniums l/4th of the Indian

population (Scheduled castes and Scheduled Tribes) were prohibited entry into religious institutions like temples, maths etc. on grounds of untouchability; Article 17 outlawed it and declared such practice an offence. Article 25 and 26 own open all public places and all places of public to all Hindu religious denominations or sects for worship offering prayers or performing any religious service in the places of public worship and no discrimination should be meted out on grounds of caste or sect or religious denomination. In Keshevanand Bharati's case [1973] Suppl. 1 SCR II and Indira Gandhi v. Raj Narain , this Court held that secularism is a basic feature of the constitution. It is true that Schedule-Ill of the Constitution provided the form of oath being taken in the name of God. This is not in recognition that he has his religion or religious belief in God of a particular religion but he should be bound by the oath to administer and to abide by the Constitution and laws as a moral being, in accordance with their mandate and the individual will ensure that he will not transgress the oath taken by him. It is significant to not that the Oath's Act. 1873 was repealed by Oath's Act, 1966 and was made consistent with the constitutional scheme of secularism in particular, Sections 7 to 11. 264. Equally admission into an educational institution has been made a fundamental right to every person and he shall not be discriminated on grounds only of religion or caste. The education also should be imparted in the institutions maintained out of the State fund or receiving aid only on secular lines. The State, therefore, have a missionary role to reform the Hindu society, Hindu social order and dilute the beliefs of caste hierarchy. Even in matters of entry into religious institutions on places of public resort prohibition of entry only on grounds of caste or religion is outlawed. 265. Dr. S. Radhakrishnan, stated that "Religion can be identified with emotion, sentiments, intensity, cultural, profession, conscious belief of faith". According to Gandhiji "By religion I do not mean formal religion or customary religion but that religion which underlies all religions". The religion to him was spiritual commitment just total but intentionally personal. In other words, it is for only development of the man for the absolution of his consciousness in certain direction which he considered to be good. Therefore, religion is one of belief to the Individual which binds him to his conscience and the moral and basic principles regulating the life of a man had had constituted the religion, as understood in our Constitution. Freedom of conscience allows a person to believe in particular religious tenets of his choice. It is quite distinct from the freedom to perform external acts in pursuance of faith, freedom of conscience means that a person cannot be made answerable for rights of religion. Undoubtedly, it means that no man possess a right to dictate to another what religion he believes in; what philosophy he holds, what shall be his politics or what views he shall accept etc. Article 25(1) protects freedom of conscience and religion of members of only of an organised system of belief and faith irrespective of particular affiliations and does not march out of concern itself as a part of the right to freedom of conscience and dignity of person and such beliefs and practices which are reasonable. The Constitution, therefore, protects only the essential and integral practices of the religion. The religious practice is subject to the control of public order, morality and health which includes

economic, financial or other secular activities. Could the religious practice control over members to vote or not to vote, to ignore the national flag, national anthem, national institutions? Freedom of conscience under Article 25 whether guarantees people of different religious faiths the right to religious procession to antagonise the people of different religious faiths or right to public worship? It is a fact of social and religious history in India that religious processions are known to ignite serious communal riots, disturb peace, tranquillity and public order. The right to free profession of religion and exercising right to organise religious congregations docs not carry with it the right to make inflammatory speeches, nor be a licence to spread violence, nor speak religious intolerance as an aspect of religious faiths. They are subject to the State control. In order to secure constitutional protection, the religious practices should not only be an essential part but should also be an integral part of proponent's religion but subject to slate's control. Otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be quoted as religious form and make a claim for being treated as religious practices. Law as social engineer provides the means as well as lays down the rules for social control and resolution of conflicts of all kinds in a human society. But the motive force for social, economic and cultural transformation comes from individuals who comprise the society. They are the movers in the mould of the law as the principle instrument of an orderly transient to a new socio- economic order or social integration and fraternity among the people. The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. I respectfully in agreement with our Brethren Sawant and Jeevan Reddy, JJ. in this respect. Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of moral well being, fulfilment of material prosperity and political justice. SEPARATION OF POLITICS AND RELIGION 266. Black's Law Dictionary (6th Edn.) page 1158: defined politics as pertaining or relating to the policy or administration of the Government, State or national; pertaining to or incidental to exercise all the functions vest in those with the conduct of the Government; relating to the management of State as political force all are pertaining to exercise the rights and privileges or the consensus by which the individuals of a State seek to determine or control its public policy having to do with the kind of individual parties or interest they seek to control and action of those who manage affairs of a State. Political Party was defined as an association of individuals for Parliamentary purpose to promote or accomplishing elections or appointments to public offices, positions or jobs. A political party, association or organisation which makes contributions for the purpose of influencing or attempt to influence the electoral process of any individual or political party whose name is presented for election to any State or local elected public office, whether or not such individual is elected. Politics in positively secular State is to get over their religion, in other words, in politics a political party should neither invoke religion nor be dependent on it for support or sustenance. Constitution ensures to the individual to protect religion right to belief or propagate teachings conducive for secular living, later to be controlled by the State

for betterment of human life and progress. Positive secularism concerns with such aspects of human life. The political conduct in his "Political Thought by Dr. Ambedkar compiled by R.K.. Kshersagar, Intellectual Public House Edition 1992 at page 155, stated that: In India the majority is not a political majority. The majority is born but not made, that is the difference between a communal majority and a political majority. A political majority is not a purely majority, it is the majority which is always made, unmade and remade. A communal majority is unalterable majority in its ethics, its attitudes."Whether the Hindu communal majority was prepared to accept the views of the minorities whether it was prepared to conceive the Constitutional safeguards to the minorities". The problems according to Dr. Ambedkar should be solved by adopting right principles which should be evolved and applied equally without fear or favour. According to him the majority community should accept a relative majority and it should not claim absolute majority. Communal majority is not a political majority and in politics the principle of one vote one value should be adopted irrespective of related considerations. According to Abdul Kalam Azad:"India is a democracy secular where every citizen whether he is Hindu, Muslim or Sikh has equal rights and privileges. Rise of fundamentalism and communalisation in national or regional politics are anti- secular and tends to encourage separatist and divisive forces laying the seeds to disintegrate the Parliamentary democratic system. The political parties or candidates should be stopped to run after vote banks and judicial process must promote the citizens' active participation by interpretation of the Constitution and the laws in proper perspective in order to maintain the democratic process on an even keel. 267. For a political party or an organisation that seeks to influence the electorates to promote of accomplishing success at an election for governance of Parliamentary form of Government, the principles are those embedded in the Directive Principles of the Constitution vis-a-vis the fundamental rights and the fundamental duties in Part IV(A) and should abide by the Constitution and promote tolerance, harmony and the spirit of commonness amongst all the people of India transcending religious, linguistic regional or sectional diversities and to preserve the rich heritage of our composite culture, to develop humanism, spirit of reformation and to abstain violence. Therefore, the manifesto of a political party should be consistent with these fundamental and basic features of the Constitution, secularism, socio-economic and political justice, fraternity, unity and national integrity. 268. Under Section 29A of the Representation of Peoples' Act, 1951 for short 'R.P. Act' registration of a political party, or a group of individual citizens of India calling itself a political party has been given right to make an application to the Election Commission constituted under Article 324 for its registration as political party with a copy of the memorandum or rules or regulations of the association of the body signed by its Chief Executive Officer. The applicant shall contain a specific provision that the association or the body shall bear true faith and allegiance to the Constitution of India as by law established and its members shall be bound by the socialism, secularism and democracy and would uphold the sovereignity and integrity of India. It is, therefore, a mandatory duty of very political party, body of individuals or association and its members to abide by the Constitution

and the laws; they should uphold secularism, socialism and democracy, uphold sovereignity and integrity of the nation. Section 123(3) prohibits use of religion or caste in politics and declares that promotion or attempt to promote violence and hatred between different classes of citizens of India on groups of religion and caste for the furtherance of the prospect at the election of the candidate or for effecting the election of any candidate was declared to be a corrupt practice. As per Sub-section 3A of Section 123 the promotion of, or attempt to promote feeling of enemity or hatred between different classes of India citizens, on grounds of religion, etc. by a candidate, his election agent or any person with his consent to further the election prospects of that candidate or for prejudicially affecting the election of any candidate was declared as corrupt practice. A political party, therefore, should not ignore the fundamental features of the Constitution and the laws. Even its manifesto with all sophistication or felicity of its language, a political party cannot escape constitutional mandate and negates the abiding faith and solemn responsibility and duty undertaken to uphold the Constitutional and laws after it was registered under Section 29A. Equally it/they should not sabotage the same basic features of the Constitution either influencing the electoral process or working the Constitution or the law. The political party or the political executive securing the governance of the State by securing majority in the legislature through the battle of ballot throughout its tenure by its actions and programmes, it is required to abide by the Constitution and the laws in letter and spirit. 269. Article 25 inhibits the Government to patronise a particular religion as State religion overtly or covertly. Political party is, therefore, positively enjoined to maintain neutrality in religious beliefs and prohibit practices derogatory to the Constitution and the laws. Introduction of religion into politics is not merely in negation of the Constitutional mandates but also a positive violation of the Constitutional obligation, duty, responsibility and positive prescription of prohibition specially enjoined by the Constitution and the R.P. Act. A political party that seeks to secure power through a religious policy or caste orientation policy disintegrates the people on grounds of religion and caste. It divides the people and disrupts the social structure on grounds of religion and caste which is obnoxious and anthema to the constitutional culture and basic features. Appeal on grounds of religion offends Secular Democracy. 270. An appeal to the electorates on the grounds of religion offends secular democracy. In S. Veerabadran Chettiar v. E.V. Ramaswami Naicker and Ors. [1959] SCR 1211 at 1217 & 1218, this Court held that the Courts would be cognizant to the susceptibilities of class of persons to which the appeal to religious susceptibility is made and it is a corrupt practice. Interpreting Section 123(3A) this Court held that "the section has been intended to respect the religions irrespective of persons of different religions or groups.... very circumspect in such matters and to pay due regards to feelings of different class of persons with different beliefs irrespective of the Constitution whether or not they share those beliefs or whether the revisionary or otherwise". 272. This Court in Shubnath Deogram v. Ramnarain Prasad , held that: it would appear that the pleasure of the deities is indicated through the cock taking the food that is given to it and that the deities only thereafter accept the sacrifice of the cock. Therefore, when

the leaflet stated that food should be given to the cock in the shape of votes what was meant was that the deities would be pleased if votes were cast in the box with the cock symbol. In Z.B. Bukhari v. Brijmohan [1975] Suppl. SCR 281 at 288, this Court held thus: Our Constitution makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order in which the conditions of freedom and their progressive expansion lor all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotion depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed. In another case S. Harcharan Singh v. S. Sajjan Singh , This Court fully discussed the question of what constitutes an appeal on grounds of religion falling within the scope of Section 123(3) and Section 123(3A) of the R.P. Act, when there is an appeal on the ground of religion. Section 123(3) of R.P. Act should not be permitted to be circumvented to resort to technical arguments as to interpretation of the Section as our Constitution is one of secular democracy. In S. Veerabadran Chettiar's case this Court held thus : In our opinion, placing such restricted interpretation on the words of such general import, is against all established cannons of construction. Any object, however, trivial or destitute of real value in itself, if regarded as sacred by any class of people would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshiped. An object may be held sacred by a class of persons without being worshipped by them. It is clear, therefore, that the courts below were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant claims to belong. The Section has been intended to respect the religious susceptibilities of persons of different religious persuations or creeds. Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court. 273. In Sri Mullapudi Venkata Krishna Rao v. Sri Vedula Suryanarayana at 172 this Court held thus: There is no doubt in our mind that the offending posted is a religious symbol. The depiction of anyone, be it N.T. Rama Rao or any other person, in the attire of Lord Krishna blowing a 'shanku' and quoting the words from the Bhagavad Gita addressed by Lord Krishna to Arjuna that his incarnation would be born upon the earth in age after age to restore dhrama is not only to a Hindu by religion but to every Indian symbolic by the Hindu religion. The use by the candidate of such a symbol coupled with the printing upon it of words derogatory of rival political party must lead to the conclusion that the religious symbol was used with a view to prejudicially affect the election of the candidate of the rival political party. 274. The contention

of Sri Ram Jethmalani that the interpretation and applicability of Sub-sections (3) & (3A) of Section 123 of R.P. Act would confined to only cases in which individual candidate offends religion of rival candidate in the election contest and the ratio therein cannot be extended when a political party has espoused, as part of its manifesto a religious cause is totally untenable. This Court laid the law though in the context of the contesting candidates, that interpretation lends no licence to a political party to influence the electoral prospects on grounds of religion. In a secular democracy, like ours, mingling of religious with politics is unconstitutional, in other words a flagrant breach of constitutional features of secular, democracy. It is, therefore, imperative that the religious and caste should not be introduced into politics by any political party, association or an individual and it is imperative to prevent religious and caste pollution of politics. Every political party, association of persons or individuals contesting election should abide by the constitutional ideals, the Constitution and the laws thereof. I also agree with my learned brethren Swant and Jeevan Reddy, JJ., in this behalf. 275. Rise of fundamentalism and communalisation of politics are anti-secularism. They encourage separatist and divisive forces and become breeding grounds for national disintegration and fail the Parliamentary democratic system and the constitution. Judicial process must promote Citizens active participation in electoral process uninfluenced by any corrupt practice to exercise their free and fair franchise. Correct interpretation in proper perspective would be in the defence of the democracy and to maintain the democratic process on an even keel even in the face of possible friction, it is but the duty of the Court to interpret the Constitution to bring the political parties within the purview of constitutional parameters for accountability and to abide by the Constitution, the laws for their strict adherence. SCOPE OF JUDICIAL REVIEW OF ARTICLE 356 276. In the judicial review in the field of administrative law and the constitutional law, the courts are not concerned with the merits of the decision, but with the manner in which the decision was taken or order was made. Judicial review is entirely different from an ordinary appeal. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority or the Tribunal to which he has been subjected to. It is no part of the duty or power of the Court to substitute its opinion for that of the Tribunal or authority or person constituted by law or administrative agency in deciding the matter in question. Under the thin guise of preventing the abuse of power, there is a lurking suspicion that the court itself is guilty of usurping that power. The duty of the court, therefore, is to confine itself to the question of legality, propriety or regularity of the procedure adopted by the Tribunal or authority to find whether it committed an error of law or jurisdiction in reaching the decision or making the order. The judicial review is, therefore, is a protection, but not a weapon. The Court with an avowed endeavour to render justice, applied principles of natural justice with a view to see that the authority would act fairly. Therefore the grounds of illegality, irrationality, unreasonableness, procedural impropriety and in some cases proportionality has been applied, to test the validity of the decision or order apart from its ultra vires, mala fides or unconstitutionality. Initially in the process of judicial review

the court tested the functions from the purview of the "source of power". In the course of evolution of judicial review it tested on the "nature of the subject matter", "the nature of the power" "the purpose" or "the indelible effect" of the "order or decision on the individual or public. The public element was evolved, confining initially judicial review to the actions of State, Public authority or instrumentality of the State but in its due course many a time it entrenched into private law field where public element or public duty or public interest is created by private person or corporate person and relegated purely private issues to private law remedy. This Court relaxed standing in favour of bona fide persons or accredited Associations to espouse the cause on behalf of the under privileged or handicapped groups of persons. Interpreting Articles 14 and 21, tested administrative orders or actions or process on grounds of arbitrariness, irrationality, unfairness or unjustness. It would thus be apparent that in exercising the power of judicial review, the constitutional Courts in India testing the constitutionality of an administrative or constitutional acts did not adopt any rigid formula universally applicable to all occasions. Therefore, it serves no useful purpose to elaborately consider various decisions or text-books referred to us during the course of hearing. Suffice to state that each case should be considered, depending upon the authority that exercises the power, the source the nature or scope of the power and indelible effects it generates in the operation of law or effects the individual or society without laying down any exhaustive or catalogue of principles. Lest it would itself result in standardised rule. To determine whether a particular policy or a decision taken in furtherence thereof is a fulfilment of that policy or is a accordance with the Constitution or the law, many an imponderable feature will come into play including the nature of the decision, the relationship of those involved on either side before the decision was taken, existence or non-existence of the factual foundation on which the decision was taken or the scope of the discretion of the authority or the functionary. Supervision of the court, ultimately, depend upon the analysis of the nature of the consequences of the decision and yet times upon the personality of the authority that takes decision or individual circumstances in which the person was called upon to make the decision; acted on and the decision itself. 277. The scope of judicial review of the presidential proclamation under Article 356 was tested for the first time by this Court in State of Rajasthan v. Union of India . In that case Clause (5) inserted by the Constitution 38th Amendment Act prohibited judicial review of the presidential proclamation, which was later on substituted by the Constitution 44th Amendment Act, was called into operation. Before its substitution the constitutionality of the letter issued by the Home Minister and dissolution of the Assemblies of Northern India States were in question. The reason for the dissolution was that the Congress party was routed completely in 1977 Parliamentary elected in all those states and thereby the people's mandate was against the legitimacy of the Governments of the States represented by the Congress Party to remain in office. Suits under Articles 133 and Article so were filed in this Court. In that context this Court held that though the power of the judicial review was excluded by Clause (5) of Article 356, as then stood, judicial review was open on limited grounds, namely mala fides, wholly extraneous

or irrelevant grounds without nexus between power exercised and the reasons in support thereof. The contention of Sri Parasaran, learned Counsel for the Union, as stated earlier, is that though judicial review is available, he paused and fell upon the operation of Article 74(2), and contended that the Union of India need not produce the records; burden is on the writ petitioners to prove that the orders are unconstitutional or ultra vires; the exercise of power by the President under Article 356 is constitutional exercise of the power life one under Article 123 or Legislative Process and the principles evolved in the field of administrative law are inapplicable. It should be tested only on the grounds of ultra vires or unconstitutionality. The reasons in support of the satisfaction reached by the President are part of the advice tendered by the Council of Ministers. Therefore, they are immuned from judicial scrutiny though every order passed by the President does not receive the protection under Article 74(2) or Section 123 of the Evidence Act. 278. The question, therefore, is what is the scope of judicial review of the presidential proclamation under Article 356. Though the arm of the Court is long enough to reach injustice wherever it finds and any order or action is not beyond its ken, whether its reach could be projected to Constitutional extraordinary functionary of the coordinate branch of the Government, the highest executive, when it records subjective satisfaction to issue proclamation under Article 356. The contention of S/Sri Shanti Bhushan. Soli Sorabji and Ram Jethmalani that all the principles of judicial review of administrative action would stand attracted to the presidential proclamation under Article 356 cannot be accepted in toto. Equally the wide proposition of law convassed by Sri Parasaran also is untenable. At the cost of repetition it is to reiteration that judicial review is the basic feature of the Constitution. This Court has constitutional duty and responsibility, since judicial review having been expressly entrusted to it as a constituent power, to review the acts done by the co-ordinate branches, the executive or the legislature under the Constitution, or under law or administrative orders within the parameters applicable to a particular impugned action. This Court has duty and responsibility to find the extend and limits of the power of the co-ordinate authorities and to find the law. It is the province and duty of this Court, as ultimate interpreter of the Constitution, to say what the law is. This is a delicate task assigned to the Court to determine what power Constitution has conferred on each branch of the Government. Whether it is limited to and if so what are the limits and whether any action of that branch transgresses such limits. The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. Sri T.R. Andhyarujina the learned Advocate General of Maharashtra, contended that though the presidential proclamation is amenable to judicial review, it is in the thicket of political question and is not generally justiciable. Applying self imposed limitations this Court may be refrained to exercise judicial review. This contention too need to be qualified and circumscribed. 279. Judicial review must be distinguished from justiciability. The two concepts are not synonymous. The power of judicial review goes to the authority of the Court, though in exercising the power of judicial review, the Court in an appropriate case may decline to exercise the power as being not

justiciable. The Constitution is both the source of power as well as it limits the power of the an authority. Ex necissitate. Judiciary has to decide the source, extent, limitations of the power and legitimacy in some cases of the authority exercising the power. There is no hard an fast fixed rules as to justiciability of a controversy. The satisfaction of the President under Article 356(1) is basically subjective satisfaction based on the material on record. It may not be susceptible to scientific verification hedged with several imponderables. The question, therefore, may be looked at from the point of view of common sense limitation, keeping always that the Constitution has entrusted the power to the highest executive, the President of India, to issue proclamation under Article 356, with the aid and advice of the Council of Ministers, again further subject to his own discretion given in proviso to Article 74(1). Whether the question has raised for decision is judicially based on manageable standards? The question relating to the extents scope and power of the President under Article 356 though wrapped up with political thicket, per se it does not get immunity from judicial review. 280. However, a distinction be drawn between judicial review of the interpretation of the order or the extent of the exercise of the power by the President under Article 356. In the latter case the limits of the power of the President in issuing the proclamation under Article 356 and the limits of judicial review itself are to be kept in view. The question of justiciability would in either case mutually arise for decision. In this behalf, the question would be whether the controversy is amenable to judicial review in a limited area but the later depends upon the nature of the order and its contents. The question may be camouflaged with a political thicket, yet since the Constitution entrusted that delicate task in the scheme of the Constitution itself to this Court, in an appropriate case, the Court may unwrap the dressed up question, to find the validity thereof. The doctrine of political thicket is founded on the theory of separation of powers between the executive, the legislature and the judiciary. The Constitution of the United States of America, gave no express power of judicial review to the Supreme Court of USA. Therefore, the scope of political question, when came up for consideration in Baker v. Can (1962) 2 7 L.Ed. 2nd 663 at 686, It was held in a restricted sense, but the same was considerably watered down in later decision of that Court. Vide Gillegan v. Morgan (1973), 37 L.Ed. 2nd 407 at 416. But in deciding the political question the Court must keep in forefront whether the Court has judicially discoverable and manageable standards to decide the particular controversy placed before it, keeping in view that the subjective satisfaction was conferred in the widest term to a co-ordinated political department, by the Constitution itself. 281. In the State of Rajasthan's case Chandrachud, J., as he then was, held at p.61 that"probing at any greater dept. into the reasons given by the Home Minister is to enter a field from which Judges must scrupulously keep away. The field is reserved for the politicians and the Courts must avoid trespassing into it". Bhagwati. J., as he then was, speaking per himself as Gupta, J., held at p.81 that"it is not a decision which can be based on what the Supreme Court of United States has described as judicially discoverable and manageable standards. It would largely be a political Judgment based on assessment of diverse and varied factors, fast

changing situation, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour an a host of other considerations in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic Government. It cannot, therefore, by its very nature be a fit subject matter for judicial determination and hence it is left to the subjective legislation of the Central Government which is best in a position to decide it." Utwalia. J., at p.94 laid down that "Even if one were to assume such a fact in favour of the Plaintiff or the Petitioner, the facts disclosed undoubtedly lie in the field or an area purely of a political nature which are essentially non-justiciable. It would be legitimate to characterise such a field as prohibited area in which it is neither permissible for the Courts to enter, nor should they ever take upon themselves the hazardous task of entering into such an area." Fazal Ali, J. reiterating the same view held, that "it is manifestly clear that the Court does not possess resources which are in the hands of the Government to find out the political needs that they seek to subserve and the feelings or the aspirations of the nation that require a particular action to be taken at a particular time. It is difficult for the Court to embark on an enquiry of that type." Beg, C.J. at p.26 held that "In so far as Article 356(1) may embrace matters of political and executive policy and expediency, Courts cannot interfere with these unless and until it is shown what constitutional provision the President is going to contravene." 282. We respectfully agree that the above approach would be the proper course to tackle the problem. Yet another question to be disposed of at this stage is the scope of Article 74(2). In the cabinet system of the Government the Council of Ministers with the Prime Minister as the head would aid and advise the President to exercise the functions under the Constitution except where the power was expressly given to the President to his individual discretion. The scope thereof was considered vis-a-vis the claim of privilege under Section 123 of the Evidence Act. At the outset we say that Section 123 of Evidence Act is available to the President to claim privilege. In R.K. Jain v. Union of India [1993] 4 SCC 119, in paragraph 23 at page 143 it was held that the President exercises his executive power through the Council of Ministers as per the rules of business for convenient transaction of the Government business made under Article 77(3). The Government of India (Transaction of Business) Rules, 1961 provides the procedure in that behalf. After discussing the scope of the cabinet system of Government in paragraphs 24 to 28 it was held that the cabinet known as Council of Ministers headed by the Prime Minister is the driving and steering body responsible for the governance of the country. They enjoy the confidence of the Parliament and remain on office so long as they maintain the confidence of the majority. They are answerable to the Parliament and accountable to the people. They bear collective responsibility. Their executive functions comprises of both the determination of the policy as well as carrying its executive, the initiation of legislation, maintenance of order, promotion of social and economic welfare and direction of foreign policy. In short the carrying on or supervision of the general administration of the affairs of the Union which includes political activity and

carrying on all trading activities, etc. and they bear collective responsibility of the Constitution. It was also held therein that subject to the claim of privilege under Section 123 of the Evidence Act, the Minister was constitutionally bound under Article 142 to assist the court in producing the documents before the court and the court has to strike a balance between the competing interest of public justice and the interest of the State before directing to disclose the documents to the opposite party. But the documents shall be places before the court for its perusal in camera. 283. Article 74(2) provides that the question whether any, and if so what, service was rendered by Ministers to the President shall not be inquired into in any Court. In other words it intends to give immunity to the Council of Ministers to withhold production of the advice for consideration by the Court. In other words it is a restrictive power. Judicial review is a basic and fundamental feature of the Constitution and it is the duty and responsibility of the constitutional court to exercise the power of judicial review. Article 142, in particular, gives power to this Court in its exercise of the jurisdiction to make any necessary order "for doing complete justice in any cause or matter pending before it" and shall be enforceable throughout the territory of India is such manner as prescribed by or under any law made by the Parliament and subject to such law. The said restriction is only in matter of procedure and does not effect the power under Article 142. This Court has all or every power to make any order to secure the "attendance of any person, discovery or production of any documents or"investigation". Thereby the power of this Court to secure or direct production of any document or discovery is a constitutional power. The restrictive clause under Article 74(2) and the wider power of this Court under Article 142 need to be harmonised. 284. In R.K. Jain's case it was held that the court is required to consider whether public into is so strong to over-ride the ordinary right and interest of the litigant that he shall be able to lay before a court of justice the relevant evidence in balancing the competing interest. It is the duty of the court to see that there is a public interest and that harm shall not be done to the nation or to the public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding the documents which must be produced, if justice is to be done. It is, therefore, the paramount right and duty of the court, not of the executive, to decide whether the document will be produced or withheld. The court must decide which aspect of the public interest predominates, in other words which public interest requires that the document whether should be produced for effectuating justice and meaningful judicial review performing its function and/or should it not be produced. In some cases, therefore, the court must, in a clash of competing public interests of the State and administration of justice, weigh the scales and decide where the balance lies. The basic question to which the court would, therefore, has to address itself for the purpose of deciding the validity of the objection would be, whether the document relates to affairs of the State, in other words, is of such a character that is disclosure would be, against the interest of the State or the public service and if so whether public interest in its non-disclosure is so strong that it must prevail over the public interest in administration of justice. On that account it should

not be allowed to be disclosed. (vide paras 16 & 17) 285. When public interest immunity against disclosure of the State documents in the transaction of the business by the Council of Ministers of a class character was claimed, in the clash of this interest, it is the right and duty of the court to weigh1 the balance in that case also and that the harm shall not be done to the nation or the public service and in the administration of justice each case must be considered on its backdrop. 286. The President has no implied authority under the Constitution to withhold the document. On the other hand it is his solemn constitutional duty to act in aid of the court to effectuate judicial review. (Vide paragraphs 54 and 55). That was a case of statutory exercise of power, in accordance with the business rules in appointing the President of CEGAT and considering the facts in that case, it was held that it was not necessary to direct disclosure of the documents to the other side. In view of the scheme of the Constitution and paramount judicial review to be complete justice it must be considered in each case whether record should be produced. But by operation of Article 74(2) only the actual advice tendered by the Council of Ministers gets immunity from production and the court shall not incurred into the question whether and if so what advice was rendered by the Minister. In other words, the records other then the advice tendered by the Minister to the President, if found necessary, may be required to be produced before the constitutional court. This restrictive interpretation would subserve the wider power under Article 142 given to this Court and the protection accorded by Article 74(2) maintaining equl-balance. 287. Article 74(2) creates bar of enquiry and not a claim of privilege for decision in the exercise of the jurisdiction whether and, if so, what advice was tendered by the Council of Ministers to the President. The power of Article 74(2) applied only to limited cases where the matter has gone to the President for his orders on the advice of the Council of Ministers. Exercise of personal discretion calling the leader of a political party that secured majority to form the Government or the leader expressing his inability, to explore other possibilities is not liable to judicial scrutiny. Action based on the aid and advice also restricted the scope, for instance, the power of the President to grant pardon or appointing a Minister etc., is the discretion of the President. Similarly prorogation of the Parliament or dissolution of the Parliament done under Article 85 is not liable to Judicial review. The accountability is of the Prime Minister to the people though the President acts in his discretionary power, with the aid and advice of the Prime Minister. Similarly, the right of the President to address and send message to the Lok Sabha and Rajya Sabha as under Article 86 are also in the area of the discretion with the aid and advice of the Council of the Ministers. The power of President to promulgate an ordinance under Article 123 and the assent of the Bills under Article 200, are reserved for consideration under Article 201. As stated earlier, the discretion of the President on the choice of the Prime Minister is his personal discretion though paramount consideration in the choice would be of the person who should command the majority in the House. Equally when the Government has lost its majority in the House and refuse to lay down the office, it is his paramount duty to dismiss the Government. Equally as said earlier, the dissolution of the Lok Sabha would be on aid and advice of the Prime

Minister, the President while dissolving the Lok Sabha without getting involved in politics would exercise his discretion under Article 85, but the ultimate responsibility and the accountability for such advice is of the Prime Minister and the President would act consistent with the conventions with an appeal to the people of the necessity to dissolve the House and their need to express their will at the Polls. In this area the communication of the aid and advice whether receives confidentiality and bar the enquiry as to the nature of the advice or the record itself. Therefore, the enquiry under Article 74(2) is to the advice and if so, what advice was tendered to the President would be confined to limit power but not to the decision taken on administrative routine though expressed in the name of the President under Article 73 read with Article 71 of the Constitution. 288. The matter can be looked at from a different perspective that under Article 361. the President shall not be answerable to any Court for the exercise or the performance of his power and duty of his office or for any act purported to have been done by him in the exercise and performance of those powers and duties. When the President acts not necessarily on the aids and advice of the Council of Ministers but only"or otherwise i.e. "on any other information" under Article 356(1) his satisfaction is a subjective one that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution and issues the proclamation required under Article 356(1) of the Constitution. When it was challenged and asked to give his reasons, he is immuned from judicial process. The Union of India will not have a say for the exercise or the satisfaction reached by the President on otherwise self satisfaction:" for his issuing his proclamation under Article 356. Then no one can satisfy the Court the grounds for the exercise of the powers by the President. Therefore, we are of the considered view that the advice and, if so, what advice was tendered by the Council of Ministers for exercise of the power under Article 356(1) would be beyond the judicial enquiry under Article 74(2) of the Constitution. Nevertheless, the record on the basis of which the advice was tendered constitute the material. But, however, the material on record, the foundation for advice or a decision, does not receives total protection under Article 74(2). Normally the record may not be summoned by "rule nisi" or "discovery order nisi". Even if so summoned it may not be looked into unless a very strong case is made out from the pleadings, the order of proclamation if produced and other relevant material on record. If the court after due deliberation and, reasoned order by a High Court, issues "discovery order nisi" the record is liable to be reproduced pursuant to discovery order-nisi issued by this Court or the High Court subject to the claim under Section 123 of Evidence Act to examine the record in camera. 289. At this juncture we are to reiterate that judicial review is not concerned with the merits of the decision but with the decision making process. This is on the premise that modern democratic system has chosen that political accountability is more important than other kinds of accountability and the judiciary exercising its judicial review may be refrained to do so when it finds that the controversy is not based on judicially discoverable and manageable standards. However, if a legal question camouflaged by political thicket has arisen, the power and the doors, of constitutional Court are not closed, nor

can they be prohibited to enter in the political field under the grab of political thicket in particular, when the Constitution expressly has entrusted the duty to it. If it is satisfied that a judicially discoverable and manageable issue arises, it may be open to the court to issue discovery order nisi and consider the case and then issue rule nisi. It would thus be the duty and responsibility of this Court to determine and found law as its premise and lay the law in its duty entrusted by the Constitution, as ultimate interpretor of the Constitution, though it is a delicate task and issue appropriate declaration. This Court equally declare and determine the limit, and whether the action is in transgression of such limit. Interpretation of the Constitution and Scope of value orientation. 290. Before discussing the crucial question it. may be necessary to preface that the Constitution is intended to endure for succeeding generations to come. The best of the vision of the founding fathers could not visualise the fit falls in the political governance, except the hoary history of the working of the emergency provisions in the Government of India Act and wished that Article 356 should not be "put to operation" or be a 'dead latter' and at best "sparingly" be used. In working the Constitution, Article 356 has been used 90 times so far a daunting exercise of the power. But it is settled law that in interpretating the Constitution neither motives nor bad faith nor abuse of power be presumed unless in an individual case it is assailed and arise for consideration on that premise. Section 114(e) of the Evidence Act raises statutory presumption that official acts have been regularly performed. 291. Prof. Bork in his "Neutral Principles and Some First Amendments Problems", 47 Ind. Law Journal, p. 1 at p. 8, 1971 Edn. stated that the choice of fundamental values by the courts cannot be justified. When constitutional materials do not clearly specify the value to be preferred, there is no principle weighing to prefer any claimed human value to any other. The Judge must stick close to the text and the history and their fair implications and not to constant new rights. The same Neutral Principle was preferred by Prof. Hans Linde in his Judges "Critics and Realistic Traditions" 82 Yale Law Journal 127 at 254 (1972) that "the judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text. Prof. Ely in his"Wages of Crying Wolf a comment on the Reo v. Ved (1982) Yale Law Journal, 1920 at (1949) and (1973) stated that a neutral principle if it lacks connection with any value, the Constitution marks it as special. It is not a constitutional principle and the court has no business in missing it. In Encyclopedia of the American Constitution by Leonard W. Levy at p. 464 it is stated that "the Constitution is a political document it serves political ends; its interpretations are political acts." Any theory of constitutional interpretation therefore presupposes a normative theory of the Constitution itself- a theory, for example, about the constraints that the words and intentions of the adopters should impose on those who apply or interpret the Constitution. As Ronald Dworkin observed. "Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed the acts of the people the theory designates as Framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular". The courts an in-

terpreters are called upon to fill was significant constitutional gaps in variety of ways. The court should vigorously describe, as determiners, of public values as and small revolution and principles. Their source of moral foundation, available at the time when momentus issues based on ethical or moral principles arise. What is left for the other social decision makers, the state, the legislative and the executive? Where does the non-original political process fit in? Prof. Neil K. Komuser in his "The Features of Interpreting Constitution" North Western Law Review. (1986-87) p. 191 at p. 202 to 210 stated that the non-originalist interpreters leave the above questions largely unanswered. He says, they seem or busy of timing to convince the world that one cannot and should not have a non narrow originalist approach" nor that one or another branch of philosophy of language should prevail for they have failed to address an essential-to my mind, the essential question of constitutional law. Who decides? None of the non-originalists vaguely phrased assignments for the judiciary, such as "search for public or traditional values", or "protection of principles" or "evolution of morals" tell us what the courts should do or hold or describe, what they actually do." The judiciary can be seen as doing everything or nothing under these schemes. If the judiciary is meant merely to list values or principles that might be considered by political process, the judicial role is toothless. The list of values or principles that might be justiciably considered is virtually infinite. Anyone with the slighest sophistication can find some benefit, value or justiciable principles virtually in any legislation. That is how the minimal scrutiny or rational review techniques of judicial review generally have been employed. This level of review is no review at all. On the other hand one close up to the tenor of the arguments that the non-originalists can be seen as giving the judicial task of balancing the conflicting public values for proclamation which principles triumph. Here the judiciary becomes the central societal decision makers. The resolution of conflicts among public values is coterminous with social decision making. It is what the legislature, the executive and even the judiciary do. Put simply, the value formulations of the non-originalists do not address the essential issue raised by the earlier discussions. How shall responsibility for decisions be allocated in a word of highly imperfect decision makers? How would these scholars have judiciary (let alone the other institution) face such terms as distrust, uncertainty and ignorance? One does not have to be hostile to a substantial role for judicial review to be concerned when so much constitutional scholarship skirts so central an issue. Indeed, one could allow for significantly more judicial activism than our constitutional history reveals without approaching the limits inherent in the nebulous formulations of the various non-originalists positions. As a general matter even in the most activist spirit, for example "the Lochner and Warran's Courts Eras", the judiciary seems to have decided, not to decide more questions leaving the discovery of the public values or moral evolution in more areas to other societal decision makers. Although such things are within the measures, it seems that there is legislative, executive and to a greater extent administrative agencies, interpreters, have actively influenced only a small percentage of public decision making. This it seems to me the non-originalists literature threatens to be largely irrelevant to "constitutional analysis" so long

as it does not consider with greater care under what circumstances the usually passive mode of judicial interpretation is to be replaced by the less common, but more important active mode. Bennion on statutory interpretation at p. 721 stated that since constitutional law is the framework or the state it is not to be altered by a side wind. A caveat is needed to be entered here. In interpreting the constitution, to give effect to personal liberty or rights of a section of the society, a little play provides teeth to operate the law or filling the yearning gaps even "purposive principle" would be adaptable which may seek to serve the law. But we are called to interpret the constitutional operation in political field, whether it would be permissible is the question. SATISFACTION OF THE PRESIDENT AND JUSTICIABILITY 292. The satisfaction of the President that a situation has arisen in which the Government of the State cannot be carried out in accordance with the of the Constitution is founded normally upon from the Governor or any other information which the President has in possession, in other words, the "Council of Ministers", "the President" reached a satisfaction. Normally, the report of the Governor would form basis. It is already stated that the Governor's report should contain material facts relevant to the satisfaction reached by the President. In an appropriate case where the Governor was not inclined to report to the President of the prevailing situation contemplated by Article 356. the President' may otherwise have information through accredited channels of communications and have it is their custody and on consideration of which the President would reach a satisfaction that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions. "OTHERWISE" 293. The word "otherwise" in Article 356(i) was not originally found in the Draft Article 278, but it was later introduced by an amendment. Dr. Ambedkar supported the amendment on the floor of the Constituent Assembly stating that, "the original Article merely provided that the president could on the report of the Governor,"or otherwise" was not there. Now it is felt that in view of the facts that Article 277A (now Article 355) which precedes the Article 278 (Article 356 imposed a duty and obligation upon the center. That it would not be proper to restrict and confine action of the President which undoubtedly he will be taking in the fulfillment of the duty, the report made by the Governor of the province. It may be that the Governor does not make the report. I think as a necessary consequence to the effectuation of Article 277A we must give liberty to the President to act even when there is no report of the Governor and when the President got certain facts even from his knowledge that he thinks he ought to have acted in fulfillment of his duty." The width of the power is very wide, the satisfaction of the President is subjective satisfaction. It must be based on relevant materials. The doctrine that the satisfaction reached by an administrative officer based on irrelevant and relevant grounds and when some irrelevant grounds were taken into account, the whole order gets vitiated has no application to the action under Article 356. Judicial review of the Presidential proclamation is not concerned with the merits of the decision, but to the manner in which the decision had been reached. The satisfaction of the President cannot be equated with the discretion conferred upon an administrative agency of his subjective satis-

faction upon objective material like in detention cases administrative action or by subordinates legislation. The analogy of the provisions in the Government of India Act or similar provision in the Constitution of Pakistan and the interpretation put upon it by the Supreme Court of Pakistan do not assist us. The exercise of the power under Article 356 is with the aid and advice of the Council of Ministers with the Prime Minister as its head. They are answerable to the Parliament and accountable to the people. 294. To test the satisfaction reached by the President there is no satisfactory criteria for judicially discoverable and manageable standards that what grounds prevailed with the President to reach his subjective satisfaction. There may be diverse, varied and variegated considerations for the President to reach the satisfaction. The question of satisfaction basically a political one, practically it is an impossible question to adjudicate on any judicially manageable standards. Obviously the founding fathers entrusted that power to the highest executive. The President of India, with the aid and advice of the Council of Ministers. The satisfaction of the President being subjective, it is not judicially discoverable by any manageable standards and the court would not substitute their own satisfaction to that of the President. The President's satisfaction would be the result of his comprehending in his own way the facts and circumstances relevant to the satisfaction that the Government of the State cannot be carried on in accordance with the provisions of the constitution. There may be wide range of situations and sometimes may not be enumerated, nor there be any satisfactory criteria, but on a conspectus of the facts and circumstances the President may reach the satisfaction that the Government of the State cannot be carried on in accordance with the provisions of the constitution. Therefore, the subjective satisfaction is not justiciable on any judicially manageable standards. Moreover, the executive decision of the President receives the flavour of the legislative approval after both Houses of the Parliament approved the proclamation and executive satisfaction ceases to be relevant. Article 100 of the Constitution protects the parliamentary approval from assailment on any ground. The judicial review becomes unavailable, that apart a writ petition under Article 226, if is maintainable to question the satisfaction, equally a declaration that a situation has arisen in the state to clamp emergency or to declare President Rule by judicial order is permissible and cannot be wished away. Could it be done? 295. The use of the world "may" in Clause (1) of Article 356 discerns discretion vested in the President (Council of Ministers) to consider whether the situation contemplated under Article 356 has arisen and discernable from the report submitted by the Governor or other information otherwise had necessitated to dismiss the State Government and dissolve the Assembly to take over the administration of a State or any one of the steps envisaged in Sub-clauses (a) to (c) of Clause 1. The issuance of proclamation is subject to approval which includes (disapproval in inappropriate case) by both Houses of Parliament. In other words, the issuance of the proclamation and actions taken in furtherance thereof re subject to the Parliamentary control which itself is a check and safeguard to protect the Federal character of the State and democratic form of Government. The President is not necessarily required to approve the advice given by the Council of Ministers to exercise the power

under Article 356. The proviso to sub-Article (i) of Article 74, brought by Constitution 44th Amendment Act, itself is a further assurance that it was issued after due and great deliberations. It also assures that the President actively applied his mind to the advice tendered and the material placed before him to arrive at his subjective satisfaction. In an appropriates case be may require the Council of Ministers to reconsider such advice, either generally or he may himself suggest an alternative course of action to the proposed advice tendered by the Council of Ministers. By necessary implication it assures that the President is an active participant nor merely acted as a constitutional head under Article 73, but also active participant in the decision making process and the proclamation was issued after due deliberations. The court cannot, therefore, go behind the issue of proclamation under Article 356 and substitute its own satisfaction for that of the President./p> "CANNOT BE CARRIED ON" - MEANING AND SCOPE 296. We are to remind ourselves that application of "principle of the source" from Part 18, the family of emergency provisions conveniently employed or the grammarian's rule would stultify the operation of Articles 356 wisely incorporated in Constitution. Instead placing it in the spectrum of "purposive operation" with prognosis would yield its efficacy for succeeding generations to meet diverse situations that may arise in its operation. The phrase "cannot be carried on" in Clause 1 of Article 356 does not mean that it is impossible to carry on the Government of the State. It only means that a situation has so arisen that the Government of the State cannot be carried on its administration in accordance with the provisions of the Constitution. It is not the violation of one provision or another of the Constitution which bears no nexus to the object of the action under Article 356. The key word in the marginal note of Article 356 that "the failure of Constitutional machinery" open up its mind of the operational area of Article 356(1) Suppose after general elections held, no political party or coalition of parties or groups is able to secure absolute majority in the legislative assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be a case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the legislatures. It would be a case of failure of constitutional machinery. After formation of the ministry, suppose due to internal dissentions, a deliberate dead-lock was created by a party or a group of parties or members and the Governor recommends to the President to dissolve the assembly, situation may be founded on imponderable variable opinions and if the President satisfied that the Government of the State cannot be carried on and dissolved the assembly by proclamation under Article 356, would it be judicially discoverable and based on manageable standard to decide the issued? On a ministry is voted by motion of no confidence but the Chief Minister refuses to resign or he resigns due to loss of support and no other political party is in a position to form an alternative Government or a party having majority refuses to form the Ministry would not a constitutional dead-lock be created ? When in situations the Governor reported to the President, and President issued proclamation could it be said that it would be unreasonable or mala fides exercise

of power ? Take another instance where the Government of a State, although enjoying the majority support in the assembly, it has deliberately conducted, over a period of time, its administration in disregard of the Constitution and the law and while ostensibly acting within the constitutional form, inherently flouts the constitutional principles and conventions as a responsible Government or in secret collaboration with the foreign powers or agencies creates subvertive situation, in all the cases each is a case of failure of the constitutional machinery. 297. While it is not possible to exhaustively catalogue diverse situation when the constitutional break down may justifiably be inferred from, for instance (i) large scale break down of the law and order or public order situation; (ii) gross mismanagement of affairs by a State Government; (iii) corruption or abuse of its power; (iv) danger to national integration or security of the state or aiding or abetting national disintegration or a claim for independent sovereign status, and (v) subversion of the Constitution while professing to work under the Constitution or creating disunity or disaffection among the people to disintegrate democratic social fabrics. 298. The Constitution itself provides indication in Article 365 that on the failure of the State Government to comply with or to give effect to any directions given by the Union Government in exercise of its executive powers and other provisions of the Constitution it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. For instance, the State failed to preserve the maintenance of means of communication declared to be of national or material means envisaged under Article 257(2) of the Constitution and despite the directions, the State Govt. fails to comply with the same. It would be an instance envisaged under Article 356. Similarly protection of the railways within the State is of paramount importance. If a direction issued under Article 257(3) was failed to be complied with by the State to protect the railways, it would be another instance envisaged under Article 365. In these or other analogous situations the warning envisaged by Dr. Ambedkar need to be given and failure to comply with the same would be obvious failure of the constitutional machinery. During proclamation of emergency under Art, 352 if directions issued under Article 353A were not complied with or given effect to, it would also be an instance under Article 365. Equally directions given under Article 360(3) as to observance of financial propriety or the proclamation as to financial emergency is yet another instance envisaged by Article 365. The recent phenomena that the Chief Minister gets life size photo published in all national and regional dailies everyday at great public expenditure. Central government has responsibility to prevent such wasteful expenditure. Sufficient warning given yielded no response nor the Chief Minister desisted to have it published it is not a case for action under Article 356? These instances would furnish evidence as to the circumstances in which the President could be satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. These instances appear to be of curative in nature. In these cases forward may be called for before acting under Article 356. 299. Take another instance that under Article 339(2) of the Constitution the Union of India gives direction to the State to

draw and execute the schemes specified therein for the welfare of the Scheduled Tribes in that state and allocated funds for the purpose. The state, in defiance, neither grew the plans nor execute the schemes, but diverted the finances allocated for other purposes. It would be failure of the constitutional machinery to elongate the constitutional purpose of securing socio-economic justice to the tribals envisaged in the directive principles warranting the President to reach his satisfaction that the Government of the state is not carried on in accordance with the provisions of the constitution. Where owing to armed rebellion or extra-ordinary natural calamity, like earth-quake, the Government of the State is unable to perform its duty in accordance with the provisions of the Constitution, then also satisfaction of the president that the government of the State is unable to perform as a responsible Government in accordance with the provisions of the Constitution is not justiciable. 300. Conversely, on the resignation of the Chief Minister the Governor without attempting or probing to form an alternative Government by an opposition parly recommends for dissolution of the Assembly, it would be an obvious case of highly irrational exercise of the power. Where the Chief Minister himself express inability to cope with his majority legislators, recommends to the Governor for dissolution, and dissolution accordingly was made, exercising the power by the President, it would also be a case of highly irrational exercise of the power. Where the Governor recommends to the President to dissolve the Assembly on the ground that the Chief Minister belongs to a particular religion, caste on creed, it would also be a case that the President reached satisfaction only on highly irrational consideration and does not bear any nexus or correlation to the approximate purpose of the Action. It is clearly unconstitutional. Take an instance that national language is Hindi. center directs a non-Hindi speaking state to adopt Hindi in the Devnagari script as state language, though predominantly 95% of the population do not know Hindi, nor have need to adopt it as lingua franca, the violation of the directives does not entail with imposition of President rule. 301. The exercise of power under Article 356 by the President through Council of Ministers Places a great responsibility on it and inherent therein are the seeds of bitterness between the Union of India and the states. A political party with people's mandate of requisite majority or of coalition with value based principles or programmes and not of convenience are entitled to form Government and carry on administration for its full term unless voted down from power in accordance with the Constitution. We have multi-party system and in recent past regional parties are also emerging. So one political party would be in power at the center and another at the State level. In particular, when the Union of India seeks to dismiss a State Ministry belonging to a different political party, there bound to exist friction. The motivating factor for action under Article 356(1) should never be for political gain to the party in power at the center, rather it must be only when it is satisfied that the constitutional machinery has failed. It is to reiterate that the federal character of the Government reimposes the belief that the people's faith in democratically elected majority or coalition government would run its full term, would not be belied unless the situation is otherwise unavoidable. The frequent elections would belie the people's belief and faith in parliamentary

form of Government, apart from enormous election expenditure to the State and the candidates. It also generates disbelief in the efficacy of the democratic process which is a death knell to the parliamentary system itself. It is, therefore, extremely necessary that the power of proclamation under Article 356 must be used with circumspection and in a non-partisan manner. It is not meant to be invoked to serve political pain or to get rid of an inconvenient State Governments for good or bad governance, but only in cases of failure of the constitutional machinery of the State Government. 302. As stated earlier, the constitutional and political features should be nurtured and set conventions be laid by consensus among the political parties either by mutual agreement or resolution passed in this behalf. It is undoubted that Sarkaria Commission appointed by the Union of India and Rajamannar commission appointed by the State Govt. of Tamilnadu suggested certain amendments to Article 356, distinguished Judges gave guidelines. Though they bear weight, it is for the consideration of the political parties or Governments, but Judicially it would not be adapted as guidance as some of them would be beset with difficulties in implementation. However, their creases could be ironed out by conference or by consensus of the political parties. As regards horse-trading by the legislators, there are no judicially discoverable and manageable standards to decide in judicial review. A floor test may provide impetus for corruption and rank force and violence by muscle men or wrongful confinement or volitional captivity of legislators occur till the date of the floor test in the House to gain majority on the floor of the House. 303. At some quarters it is believed that power under Article 356 was mis-used. We are not called to examine each case. A bird's eye view of the proclamations issued by the president under article 356 it would appear that on three occasions the Speaker if the legislative assembly created dead-lock to pass the financial bills. The power was used to resolve the deadlock. When there was break down of law and order and public order due to agitations for creation of a separate states for Telangana and Andhra, the Andhra Pradesh legislative assembly was dissolved and the Congress Ministry itself was dismissed while the same party was in power at the center. Similar instance would show that the power under Article 356 was used when constitutional machinery failed. This would establish that the width of the power under Article 356 cannot be cut down, clipped or crapped. Moreover, the elected representatives from that State represent in the Parliament and do participate in the discussion of the presidential proclamation when its approval was sought and the transaction of legislative business concerning that state and express their dissent when it was mis-used, though temporarily the democratic form Government was not in the governance of that State. The basic feature of the Constitution, namely democracy is not affected for the governance by the elected executives temporarily at times maximum period of three years. 304. The President being the highest executive of the State, it is impermissible to attribute personal mala fides or bad faith to the President. The proviso to Article 74(1) presumptively prohibits such a charge unless established by unimpeachable evidence at the threshold. For the exercise the power under Article 356 the Prime Minister and his Council of Ministers, he/they are collectively responsible to the Parliament and accountable to the

people. The only recourse, in case of misuse or abuse of power by the President, is to take either impeachment proceedings under Article 61 against the President or seek confidence of the people at the polls. 305. These conclusions do not reach the journey's end. However, it does not mean that the court can merely be an onlooker and a helpless spectator to exercise of the power under Article 356. It owes duty and responsibility to defend the democracy. If the court, upon the material placed before it finds that the satisfaction reached by the President is unconstitutional, highly irrational or without any nexus, then the court would consider the contents of the proclamation or reasons disclosed therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the proclamation. In that event the court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently proclamation issued under Article 356 would be declared unconstitutional. The court cannot go into the question of adequacy of the material or the circumstances justifying the declaration of the President Rule. Roscoupoun in his Development of the Constitutional Guarantees of liberty, 1963 Edn. quoted Jahering that, "Form is sworn enemy of caprice, the twin sisters of liberty, fixed forms are the school of discipline and order and thereby of liberty itself. The exercise of the discretion by the President is hedged with the constitutional constraint to obtain approval or the Parliament within two months from the date of the issue, itself is an assurance of proper exercise of the power that the President exercises the power properly and legitimately that the administration of the state is nor carried on in accordance with the provisions of the Constitution. SCOPE OF REINDUCTION OF THE DISMISSED GOVERNMENT, RENOTIFICTION AND REVIVAL OF DISSOLVED ASSEMBLY AND ITS EFFECT 306. Contention was raised that until all avenues of preventing failure of the machinery by appropriate directions by the Central Government failed or found it absolutely impossible for the State Govt. to carry on the administration in accordance with the provisions of the Constitution or by dual exercise of the power partly by state and partly by the President or alternatively with dissolution of the Assembly should be deferred till approval by the Parliament is given and stay the operation of the Presidential proclamation till that time have been convassed by the counsel for the States. It is already considered that warnings are only in limited areas in the appropriate cases of financial mismanagement, but not in all the other situations. CONSTITUTIONAL CONVENTIONS PROVIDE FLESH WHICH CLOTHES DRY BONES OF LAW 307. Ever since Article 356 was put in operation convention has been developed that the legislative Assembly is dissolved, the State Government is removed and the executive power assumed by the President is entrusted to the Governor to carry on the executive actions with the aid and advice of the appointed AdvisOrs. The Parliament exercises the legislative powers of the entries in List II of the Schedule and delegates legislative power to the President. The President makes incidental and consequential provisions. The Government of the State is thus under the ad-

ministration of the Union Government. The Constitution though provided an elaborate procedure with minute details, that in the event of the Parliament did not approve the proclamation issued under Article 356, the contingency of restitution of removed government and restoration of dissolved Assembly, obviously with the fond hope that Article 356 would remain a"dead letter" or it will "not be put to operation", or at best "sparingly" used. Dr. Ambedkar in his closing speech in the constituent Assembly stated that "The Conventions and political morality" would held successful working of the constitution. Constitution cannot provide detailed rules for every eventuality. Conventions are found in all established Constitutions. The Conventions are meant to bring about Constitutional development without formal change in the law. Prof. K.C. Wheare in his book "the Statute of Westminster and Dominion status" (fourth Edition) defined the conventions thus: The definition of conventions may thus be amplified by saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied. 308. Sir W. Ivon Jennings, in his "Law and the Constitution" (Fifth Edition) elaborated the constitutional convention: Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow. 309. The Constitutional conventions provide the flesh which clothes the dry bones of the law; they make the Constitution work; they keep it in touch with the growth of ideas. A Constitution does not work itself; it has to be worked by men. It is an instrument of national cooperation which is as necessary as the instrument. The conventions are the rules elaborated for effecting that cooperation. Convention entrust power granted in the Constitution from one person to the other when the law is exercised by whom they are granted, they are in practice by some other person or body of persons. The primary role of conventions is to regulate the exercise of the discretion facing that irresponsible abuse of power. 310. K.C. Wheare in his book "Modern Constitutional" (1967 edition) stated that : "The conventions not only give discretionary powers to the Government but also in executive governance and a legislature or executive relations, where such rules and practice operate. They may be found in other spheres of constitutional activities also". He stated that: "A course of conduct may be persisted over a period of time and gradually attain first persuasive and then obligatory force. A convention may arise much more quickly than that. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct". Sir W. Ivor Jennings had stated that "The law provides only a framework; these who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow, and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed." One of us, learned brother Kuldip Singh. J. had elaborately considered the scope of conventions which obviated the need to tread the path once over and held in the Supreme Court

Advocates on Record Association and Ors. v. Union of India, JT (1993) 5 SC 479 that: The Written Constitution cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow by the passage of time, conventions are vital in so far a they fill-up the gaps in the Constitution itself, help, solve problems of interpretation and allow for the future development of the Constitutional frame work. Whatever the nature of the Constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulate the exercise of that discretion. 311. The convention in working Article 356 of the Constitution has been established and became the constitutional law filling the interstices of legislative process. The actions done by the President in accordance with the choice left to him by Sub-clauses (a) to (c) of Article 356 and by Parliament under Article 357, i.e. dissolution of the legislative assembly, removing the State Government, assumption of administration and entrustment of the administration and the executive power to the Governor of that State with the aid and advice of the appointed Advisors and to take over legislative functions by the Parliament and the power of promulgation of Ordinance by the President, etc. by operation of Article 357 and making all incidental and consequential provisions for convenient administration of executive Government of the State attained status of constitutional law. This constitutional convention firmly set the working of the Constitution on smooth working base and is being operated upon all these years. We hold that that upsetting the settled convention and the law and adopting value oriented interpretation would generate uncertainty and create constitutional crises in the administration and the Government and would lead to failing the Constitution itself. PRESIDENTIAL PROCLAMATION - SO FAR PARLIAMENT DID NOT DISAPPROVE 312. The proclamation issued under Article 356 requires to be laid before each House of Parliament within two months from the date of its issue. Unless it receives the approval, it shall cease to operate at the expiration of two months. The legal consequences of the proclamation, as stated earlier, is that the State Government is removed, the legislative Assembly is dissolved and in exercising the power mentioned in Sub-clauses (a)(b) & (c) of Clause (1) of Article 356 the President takes either steps mentioned therein and the Parliament exercises the power under Article 357 conferring the Legislative power on the President and arrangement for convenient administration made while exercising legislative powers in the entries in List II of Schedule VII of the Constitution. The contention is that till expiry of two months the legislative assembly should not be dissolved and on the approval received from both the Houses of Parliament the President should dissolve it. If the President fails to get the approval then the dissolved Assembly must be revived and the dismissed Ministry should be reinducted into office. We find it difficult to give acceptance to this contention and if given acceptance it would beset with grave incongruities and result in operational disharmony. The Parliament did not disapprove any proclamation so far issued. There is no express provision engrafted in the Constitution to fill in this contingency. In Rajasthan's case this Court considered the contingency and

held that dissolution of the Legislative Assembly is part of the same proclamation or by a subsequent order and that even if the Parliament does not approve the proclamation the dissolved Assembly and the removed Ministry cannot be restored. We respectfully agree with the view for the reasons we independently give hereinunder. FUNCTIONAL INCONGRUITY AND DISHARMONY 313. The executive power of the Union or the State is co-extensive with their legislative powers respectively. When the President assumed administration of the State under Article 356, without dissolving the Legislative Assembly could the President discharge the executive powers without legislative powers being armed with by the Parliament? Could the President discharge the duties under the directions of the State Legislature, if need arises for passing appropriate legislative sanctions. By cameral operation of the legislative and executive powers both by the State legislature and Parliament in List II of VII Schedule is an anthema to the democratic principle and constitutional scheme. The question of conflict of parliamentary supremacy and executive over-bearing is more imaginary than actual or real. 314. The reinduction of the government of the State also besets with several incongruities. It cannot be assumed that the President lightly removed the State government. It must be for formidable grounds, though not judicially discoverable nor discernable to strict judicial scrutiny. All the proclamations so far issued were not disapproved by the Parliament. The dismissed Government, if restituted into power, may violate with impunity the provisions of the Constitution and Laws for the balance period taking advantage of majority in the legislature and full scale corruption or other unconstitutional acts will have their free play. The political party itself and all their members of the legislature should collectively own responsibility for the removal of their Government and their unconstitutional governance writes its own death warrant. Restitution thereby puts a premium on failing the Constitution. The political party must seek afresh mandate from the electorates and establish their credibility by winning majority seats. The existence of the legislative council which is not dissolvable, like Rajya Sabha, cannot by itself transact any business, in particular the finance bills or appropriate bills or annual financial statements. Therefore, its continuance shall render no criteria to the continuance of legislature or to assume it be not dissolved on grammarian rule to reconstitute the dissolved legislative assembly of which the majority members belong to the same party. No doubt dissolution of the legislature literally would include legislative council but not every State has a council. No distinction between two types of States, one with Council and another without Council and the former would be eligible for revival and later per force would not be, was not meant by the Constitution. Grammarian rules carries no consistance. Moreover this problem could also be tested from the expediency and functional efficacy. The possibility of reinduction creates functional hiatus. Suppose the court grants stay till the Parliament approves the proclamation, if urgent need arose to issue ordinance or transact legislative or financial business, who would do it? The suspended Assembly cannot do nor the Parliament. The dismissed Ministry cannot transact the legislative business. Even if permitted to function and ultimately the proclamation is approved by the Parliament, what would happen to the validity

of the executive and legislative acts done in the intreghum. As stated, is there no possibility of large scale abuse of office for personal or political gain? If the orders ate issued by the Courts on value based opinion, where is the finality and at what point a stop is to be put? If stay is granted, by a High Court and writ petition is not disposed of and the term of the legislative Assembly expires what would happen to the Ministry in office? Whether it would continue by order of the Court? How elections are to be conducted by the Election Commission? Is it under the orders of the Court or by the Exercise of the power under Article 324. Is day to day executive, legislative and administrative actions are to be done under the writ of the Court? If a High Court issues a direction to allow the dissolved assembly its full course of balance period including the suspended period what would happen? Is it not violative of Article 172? Whether it could be prevented to be done? If such Order is not complied with, is not the President liable to contempt of the Court and if so what happens to the protection of Article 361? Instead of solving the problems, does not the writ of the court creates constitutional crisis? Giving deep and anxious consideration and visualising the far reaching constitutional crisis, we are firmly of the view that the self restraint constitutions us to express no value opinion, leaving to the Parliament to ponder over and if deemed necessary amend Article 356 suitably. 315. The Constitution was amended more than 77 times and Article 356 itself was amended six times through the Constitution Section 38th Amendment Act; 42nd Amendment Act: 44th Amendment Act; 59th Amendment Act; 64th Amendment Act and 68th Amendment Act. Apart from the Congress Party, three non congress political parties were in power at the center during these 44 years and no amendment was brought to Article 356(3) that on disapproval of the proclamation by the Parliament the dissolved Assembly stands revived and removed Government stood reinducted. The statutory construction fortifies this conclusion. CASUS OMISSUS - WHETHER PERMISSIBLE TO SUPPLY 316. The question, further arises whether by interpretative process, would it be permissible to fill in the gaps. Though it is settled law that in working the law and finding yearning gaps therein, to give life and force to the legislative intent, instead of blaming the draftsman, the Courts ironed out the creases by appropriate technique of interpretation and infused life into dry bones of law. But such an interpretation in our respectful view is not permissible, when we are called upon to interpret the organic Constitution and working the political institutions created therein. When Parliament has had an opportunity to consider what exactly is going wrong with the political system designed by the Constitution but took no steps to amend the Constitution in this behalf, it is a principle of legal policy, that the law should be altered deliberately, rather than casually by a sidewind only, by major and considered process. Amendment of the Constitution is a serious legislative business and change in the basic law, carefully workout, more fundamental changes are brought out by more through going and indepth consideration and specific provisions should be made by which it is implemented. Such is the way to contradict the problem by the legislative process of a civilised State. It is a well established principle of construction that a statute is not to be taken as affecting Parliamentary alteration in the general

law unless it shows words that are found unmistakably to that conclusion. No motive or bad faith is attributable to the legislature. Bennion at page 336 extracting from the Institute of the Law of Scotland vol. 3 Page 1 of The Practice by David Maxwell at page 127 abstracted that "where a matter depends entirely on the construction of the words of a statute, there cannot be any appeal to the nobile officium." He stated at page 344 that "where the literal meaning of the enactment goes narrower than the object of the legislator, the court may be required to apply a rectifying construction. Nowadays it is regarded as not in accordance with public policy to allow a draftsman's ineptitude to prevent justice being done. This was not always the case". Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aid, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the function of the court to add words or expressions merely to suit what the courts think is the supposed intention of the legislature. In American Jurisprudence 2d Series, vol. 73 at page 397 in para 203 it is stated that, "It is a general rule that the courts may not, by construction insert words or phrases in a statute or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law". Under such circumstances new provisions or ideas may not be interpolated in a statute or engrafted thereon. At page 434 in para 366 it is further stated that "While it has been held that it is duty of the courts to interpret a statute as they find it without reference to whether its provisions are expedient or unexpedient. It has also been recognised that where a statute is ambiguous and subject to more than one interpretation, the expediency of one Constitution or the other is property considered. Indeed, where the arguments are nicely balanced, expediency may tip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that statute leads to unwise results is not sufficient to justify the court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of a statute. By the same taken, an omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the courts to interpret a statute as they find it without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived". 317. Craies on Statute Law, 7th Edition, at page 69 states that the second consequence of the rule of casus omissus is that the statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made. In Construction of Statutes by Crawford at page 269 in paragraph 169 it is stated that omissions in a statute cannot, as a general rule, be supplied by construction. Thus, if a particular case is omitted from the terms of a statute, even though such a case is within the obvious purpose of the statute and the omission appears to have been due to accident or inadvertence, the court cannot

include the omitted case by supplying the omission. This is equally true where the omission was due to the failure of the legislature to foresee the missing case. As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature. In construing the Constitution we cannot look beyond the letter of the Constitution to adopt something which would command itself to our minds as being implied from the context. In State of Tasmania v. The Commonwealth of Australia and State of Victoria [1904] 1 CLR 329, 358-59, Connor. J. dealing with the question observed thus: It appears to me the only safe rule is to look at the Statute itself and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of the danger described by Pollack, O.B., in Mille v. Salomons., If he says, 'the meaning of the language be plain and clear, we have nothing to do but to obey it is to administer it as we find it; and , I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation. Some passages were cited by Mr. Glynn from Black on the 'Interpretation of laws', which seem to imply that there might be a difference in the rules of interpretation to be applied to the Constitution and those to be applied to any other Act of Parliament, but there is no foundation for any such distinction. The intention of the enactment is to be gathered from its word. If the words are plain, affect must be given to them; if they are doubtful, the intention of legislature is to be gathered from the other provisions of the statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances - to the history of the law, and you may gather from the instrument itself the object of the Legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing of law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same. You may deduce the intention of the Legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it. If that limitation is to be applied in the interpretation of an ordinary act of Parliament, it should at least be as stringently applied in the interpretation of an instrument of this kind, which not only is a statutory enactment, but also embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble Union. 318. In Encyclopedia of the American Judicial System the Constitutional Interpretation by Craig R. Ducat it is stated that the standard for assessing constitutionality must be the words of the Constitution, not what the judges would prefer the Constitution to mean. The constitutional supremacy necessarily assumes that a superior rule is what the Constitution says, it is not what the judges prefer it to be, vide page 973,. (emphasis supplied) In judicial tributes balancing the competing interest Prof. Ducat quoted with approval the statement of Bickel at page 798 trust: The judicial process is top principle-phone and principle-pound - it has to be, there is no other justification or explanation for the role it plays, it is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible

to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive, it has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, on it lags, its pace hardly even seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy. 319. In the Modes of Constitutional Interpretation by Craig R. Ducat, 1978 Edition at p.125. he stated that the judges decision ought to mean society values not their own. He quoted Cardozo's passage from the Nature of Judicial process at page 108 that, "a judge, I think would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief." The court when caught in a paralysis of dilema should adopt self-restraint, it must use the judicial review with greatest caution. In clash of political forces in political statement the interpretation should only be in rare and auspicious occasions to nullify ultra vires orders in highly arbitrary or wholly irrelevant proclamation which does not bear any nexus to the pre-dominant purpose for which the proclamation was issued, to declare it to be unconstitutional and no more. 320. Frankfurter, J. Says in Dennis v. United States,341 US 494, 525. [1951] thus: But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?–who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures .... 321. Regionalism, legalism and religious fundamentalism have become divisive forces to weaken the unity and integrity of the country. Lingualistic chaunism aiding its fuel to keep the people poles apart. Communalism and castism for narrow political gains are creating foul atmosphere. The secessionist forces are working from within and out side the country threatening national integration. To preserve the unity and integrity of the nation, it is necessary to sustain the power of the president to wisely use Article 356 to stem them out and keep the Government of the state function in accordance with the provisions of the Constitution. Article 356 should, therefore, be used sparingly in only cases in which the exercise of the power is called for. It is not possible to limit the scope of action under Article 356 to specific situations, since the failure of the constitutional machinery may occur in several ways due to diverse causes be it political, internal subversion or economic causes and no straight- jacket formula would be possible to evolve. The founding fathers thus confided the exercise of the power in the highest executive, the President of India, through his Council of Ministers headed by the Prime Minister of the country who is accountable to the people of the country. STAY OF ELECTIONS WHETHER COULD BE MADE: 322. Under Article 168 for every State there shall be Legislative

Assembly and in some states legislative council. Article 172(1) provides that every Legislative Assembly of every State, unless sooner dissolved shall continue for five years from the date appointed for its first meeting and "no longer" and the expiration of such period of five years shall operate as dissolution of the Assembly. The proviso to Clause (1) or Sub-clause (2) are not relevant. It is thereby declared the constitutional policy that five years tenure of the Legislature starts running from the date appointed for its first meeting and expiration of the period operates constitutionally as date of dissolution of the Assembly. The phrase " no longer" reinforces its mandatory character. Article 324(1) enjoins the Election Commission to conduct elections to the Parliament and to the Legislature of every State, etc. The R.P. Act, Rules and the instructions prescribes the procedure to conduct and complete elections four months before the expiry of the date of dissolution. Article 329(b) issues an injunction that "no election to either House of Parliament or to the House of the Legislature of a State shall be called in question" except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. In other words, the election process once set in motion should run its full course and all election disputes shall be resolved in accordance with the procedure established by R.P. Act. 323. In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [1952] SCR 2181. at the earliest Constitution Bench of this Court held that having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections shall be concluded as early as possible according to the time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted. In Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman [1985] Suppl. 1 SCR 493, another Constitution Bench considered the effect of interim stay of general elections to West Bengal legislative Assembly granted by the Calcutta High Court in a writ proceeding, held that the High Court must observe self imposed limitation on their power to act under Article 226 by refusing to pass orders or giving directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of election within the meaning of Article 329(b) of the Constitution. It is the duty of the court to protect and preserve the integrity of the Constitutional institutions which are devised to foster democracy and when the method of their functioning is questioned, which is open to the citizen to do, the court must examine the allegations with more than ordinary care. Vary often the exercise of jurisdiction especially the writ jurisdiction involves questions of propriety rather than of power. The fact that the court has power to do a certain thing does not mean that it must exercise that power regardless of consequences. Holding the elections to the legislatures and holding them according to law are both matters of paramount importance and is the constitutional obligation imposed by Article 168. The

pragmatic approach was couched at 523 thus: ... India is an oasis of democracy, a fact of contemporary History which demands of the Courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass order or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within meaning of Article 329(b) of the Constitution.... 324. There are plethora of precedents in this behalf, but suffice for the limited purpose to say that the exercise of the power either under Article 226 or Article 32 or Article 136 staying the elections to the dissolved Assembly under Article 356 not only flies in the face of the constitutional mandates and the law laid down by this Court, but creates uncertainty and constitutional crises as stated hereinbefore. Enlightened public opinion both inside or outside the Parliament, informed public objective criticism, objective assessment of the ground realities would inhibit misuse of power and hinder highly irrational exercise of the power. 325. The question, finally emerges is whether issuance of the proclamation under Article 356 without affording a particular Chief Minister to test his majority support of his party in the Legislatures of Janta Dal or coalition on the floor of the House is arbitrary and bears no reasonable nexus or irrational. Having given our anxious consideration to the facts in Bommai's case and in the light of the discussion made hereinbefore that the fluid situation prevailing during the relevant period appears to have persuaded the president that he had constitutional duty to maintain the purity of the democratic process and required to stamp out horse-trading among the Legislatures which had resulted in the failure of the constitutional machinery, satisfied himself that necessitated to issuance of the proclamation under Article 356. Though the majority strength of the ruling party or coalition in the legislative Assembly may be tested on the floor of the House and may be a salutary principle as recommended by the Conference of the governors, it would appear that in its working there emerged several pitfalls and so it was not found enforceable as a convention. It is for the political parties or the Chief Ministers conference to take a decision in that behalf and it is not judicially manageable for the Court to give any declaration in this behalf. In regard to dissolution of U.P. Assembly, though there is no writ petition filed, since the Government machinery of that Government had failed to prevent destruction of Sri Ram Janambhoomi-Babri Masjid disputed structure and failed to protect the religious property, be it belong to Hindus or Muslims and in that surged atmosphere when it was done, it cannot be concluded that the President acted unconstitutionally or that there is no proximate nexus between the action and the demolition to exercise the power under Article 356. Equally regarding dissolution of Legislative Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh, the reports of the Governors do disclose that some of the Ministers and some Chief Ministers actively associated or encouraged Kar Sewaks to participate in the demolition of Ram Janambhoomi-Babri Masjid disputed structure

and also criticised the imposition of ban on R.S.S. The law and order situation or public order situation do not appear to have been brought under control. The common thread of breach of secularism ban through the events and with prognosis action was taken. Our learned brother Jeevan Reddy, J. elaborately considered the pleadings of the parties and arguments by the respective counsel. He also deduced the conclusions. The need for discussion once over is thereby redundant. We respectfully agree with him and in case of Meghalaya also. We conclude that the satisfaction reached by the President cannot be adjudicated with any judicially discoverable and manageable standards, but one stark fact that emerged is that due to sustained campaign by the BJP and other organisations Sri Ram Janambhoomi-Babri-Masjid disputed structure was destroyed. Consequential situation that has arisen due to which the President satisfied that Governments of the States of Madhya Pradesh , Rajasthan and Himachal Pradesh cannot be carried on in accordance with the provisions of the Constitution and they breached the basic features of the Constitution, namely secularism. Therefore the satisfaction reached by the President cannot be said to be irrelevant warranting interference. As regards Meghalaya is concerned, though a declaration may possibly be made on the validity of the Presidential proclamation, since the elections have already been held. Its need became fiat accompli. CONCLUSIONS 326. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The state is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by the Parliament. Neither the relative importance of the legislative entries in Schedule VII, List I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The state qua the Constitution as federal in structure and independent in the exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignity. Qua the union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism. 327. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure. Unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution. 328. The office of the Governor is a vital link and a channel of impartial and objective communication of the working of the Constitution by the State Government to the President of India. He is to ensure protection and sustenance of the constitutional process of the working of the Constitution in the State playing an impartial role. As head of the executive he should truthfully with high degree of constitutional responsibility inform the President that a situation has arisen in which the constitutional machinery has failed and the State cannot be carried on in accordance with the provisions of

the Constitution with necessary factual details in a non-partisan attitude. 329. The Union of India shall protect the State Government and as corollary under Article 356 it is enjoined that the Government of every state should be carried on in accordance with the provisions of the Constitution. On receipt of a report from the Governor or otherwise the President (Council of Ministers) on being satisfied that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the constitution, is empowered to issue proclamation under Article 356(1) and impose President rule in the State in the manner laid down in Clauses (a) to (c) of Article 356(1) of the Constitution. 330. The exercise of the power under Article 356 is an extraordinary one and need to be used sparingly when the situation contemplated by Article 356 warrants to maintain democratic form of Government and to prevent paralysing of the political process. Single or individual act or acts of violation of the Constitution for good, bad or indifferent administration does not necessarily constitute failure of the constitutional machinery or characterises that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The exercise of power under Article 356 should under no circumstance be for a political gain to the party in power in the Union Govt. It should be used sparingly and with circumspection that the Govt. of the State function with responsibility in accordance with the provisions of the Constitution. 331. Rule of law has been chosen as an instrument of social adjustment and resolution of conflicting social problems to integrate diverse sections of the society professing multi-religious faiths, creed, caste or region fostering among them fraternity, transcending social, religious, linguistic or regional barriers. Citizenship is either by birth or by domicile and not as a member of religion, caste, sect, region or language. Secularism has both positive and negative contents. The Constitution struck a balance between temporal parts confining it to the person professing a particular religious faith or belief and allows him to practice, profess and propagate his religion, subject to public order, morality and health. The positive part of secularism has been entrusted to the State to regulate by law or by an executive order. The State is prohibited to patronise any particular religion as State religion and is enjoined to observe neutrality. The State strikes a balance to ensue an atmosphere of full faith and confidence among its people to realise full growth of personality and to make him a rational being on secular lines, to improve individual excellence, regional growth, progress and national integrity. Religion being susceptible to the individuals or groups of people professing a particular religion, antagonistic to another religion or groups of persons professing different religion, brings inevitable social or religious frictions. If religion is allowed to over-play, social disunity is bound to erupt leading to national disintegration. Secularism is a part of the basic features of the Constitution. Political parties, group of persons or individual who would seek to influence electoral process with a view to come to political power, should abide by the Constitution and the laws including secularism, sovereignity, integrity of the nation. They/he should not mix religion with politics. Religious tolerance and fraternity are basic features and postulates of the Constitution as a scheme for national integration and sectional

or religious unity. Programmes or principles evolved by political parties based on religion amounts to recognising religion as a part of the political governance which the Constitution expressly prohibited it. It violates the basic features of the Constitution. Positive secularism negates such a policy and any action in furtherance thereof would be violative of the basic features of the Constitution. Any act done by a political party or the Government of the State run by that party in furtherance of its programme or policy would also be in violation of the Constitution and the law. When the President receives a report from a Governor or otherwise had such information that the Government of the State is not being carried on in accordance with the provisions of the Constitution, the President is entitled to consider such report and reach his satisfaction in accordance with law. 332. A person who challenges the presidential proclamation must prove strong prima facie case that the presidential proclamation is unconstitutional or invalid and not in accordance with law. On the Court's satisfying that the strong prima facie case has been made out and if it is a High Court, it should record reasons before issuing "discovery order nisi", summoning the records from the Union of India. The Government is entitled to claim privilege under Section 123 of the Indian Evidence Act and also the claim under Article 74(2) of the Constitution. The Court is to consider the records in camera before taking any further steps in the matter. Article 74(2) is not a barrier for judicial review. It only places limitation to examine whether any advice and if so what advice was tendered by the Council of Ministers to the President. Articles 74(2) receives only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of Ministers is subject to judicial scrutiny. 333. The Union of India, when discovery order nisi is issued by this Court, would act in aid of the Court under Article 142(2) and is enjoined to produce the material, the foundation for action under Article 356. As held earlier before calling upon the Union to produce the material, the Court must first find strong prima facie case and when the records are produced they are to be considered in camera. 334. Judicial review is a basic feature of the Constitution. This Court/High Courts have constitutional duty and responsibility to exercise judicial review as centinal quevive. Judicial review is not concerned with the merits of the decision, but with the manner in which the decision was taken. The exercise of the power under Article 356 is a constitutional exercise of the power, the normal subjective satisfaction of an administrative decision on objective basis applied by the Courts to administrative decision by subordinate officers or quasi-judicial or subordinate legislation does not apply to the decision of the President under Article 356. 335. Judicial review must be distinguished from the justiciability by the Court. The two concepts are not synonymous. The power of judicial review is a constituent power and cannot be abdicated by judicial process of interpretation. However, justiciability of the decision taken by the President is one of exercise of the power by the Court hedged by self-imposed judicial restraint. It is a cardinal principle of our Constitution that no-one, howsoever lefty, can claim to be the sole judge of the power given under the Constitution. Its actions are within the confines of the powers given by the Constitution. 336. This Court as final orbiter in interpreting the Constitution,

declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this Court/High court to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. The Judicial review, therefore, extends to examine the constitutionality of the proclamation issued by the President under Article 356. It is a delicate task, though loaded with political over-tones, to be exercised with circumspection and great care. In deciding finally the validity of the proclamation, there cannot be any hard and fast rules or fixed set of rules or principles as to when the President's satisfaction is justiciable and valid. 337. Justiciability is not a legal concept with a fixed content, nor is it susceptible of scientific verification. Its use is the result of many pressures or variegated reasons. Justiciability may be looked at from the point of view of common sense limitation. Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the political questions are always justiciable. The Courts must have judicially manageable standards to decide a particular controversy, Justiciability on a subjective satisfaction conferred in the widest terms to the political co-ordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President. 338. The provision to Article 74(1) re-enforces that on the advice tendered by the Council of Ministers to the President, the latter actively applies his mind and reaches the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The word "otherwise" enlarges the width and ambit of satisfaction reached by the President. In some cases such satisfaction lacks judicially manageable standards for resolution. The abuse of the power by high constitutional functionaries cannot be assumed, but must be strictly proved. It also cannot be assumed that the presidential proclamation was lightly issued. The exercise of discretionary satisfaction may depend on diverse varied and variegated circumstances. The Constitution confided exercise of the power under Article 356 in the highest executive of the land, the President of India aided and advised by the Council of Ministers at its head by the Prime Minister. The Prime Minister and his Council of Ministers are collectively and individually responsible to the Parliament and accountable to the people. Confidence reposed on the highest executive itself is a circumstance to be kept in view in adjudging whether the satisfaction reached by the President is vitiated by law. It is impermissible to attribute bad faith or personal mala fides to the President in the face of constitutional prohibition of answerability by Article 361. But if the proof of mala fide abuse of power is available, appropriate remedy would be available in the Constitution under Article 61. 339. The decision can be tested on the ground of legal mala fides, or high irrationality in the exercise of the discretion to issue presidential proclamation. Therefore, the satisfaction reached by the President for issuing the proclamation under Article 356 must be tested only on

those grounds of unconstitutionality, but not on the grounds that the material which enabled him to reach the satisfaction was not sufficient or inadequate. The traditional parameters of judicial review, therefore, cannot be extended to the area of exceptional and extra-ordinary powers exercised under Article 356. The doctrine of proportionality cannot be extended to the power exercised under Article 356. The ultimate appeal over the action of the President is to the electorate and judicial self-restraint is called in aid, in which event the faith of the people in the efficacy of the judicial review would be strengthened and the judicial remedy becomes meaningful. 340. Under Article 356 as soon as the proclamation was issued, under Sub-clause (3) of Article 356, the President shall seek its approval from both Houses of Parliament within two months from the date of its issue unless it is revoked in the meanwhile. A consistent constitutional convention has been established that on issuing the proclamation the President on his assumption of the function of the Government of the State directs the Governor to exercise all the executive functions of the Government of the State with the aid and advice of the appointed AdvisOrs. He declares that the power of the legislature of the state shall be exercisable by or under the authority of the Parliament and makes incidental and consequential provisions necessary to give effect to the object of proclamation by suspending whole or any part of the operation of any provision of the Constitution relating to any body or authority of the State which includes dissolution of the Legislative Assembly and removal of the State Government. The Parliament exercises the legislative power thereon under Article 357 and in turn it confers on the President the powers relating to entries in List II of the VII Schedule. The governor of the State with the aid and advice of the advisors exercise the executive functions on behalf of the President. The convention attained the status of law. This consistent law has been operating without any constitutional hiatus. Granting of stay of operation of presidential proclamation creates constitutional and administrative hiatus and incongruity. The Union and the State simultaneously cannot operate the legislative and executive powers in List II of Schedule 7 of the Constitution. Thereby the simultaneous by cameral functions by the Union and the State is an anthema to the democratic principle and constitutional scheme. It would lead to incongruity and incompatability. 341. There is no express provision in the Constitution to revive the Assembly dissolved under the Presidential proclamation or to reinduct the removed Government of the State. In interpreting the Constitution on the working of the democratic institutions set up under the Constitution, it is impermissible to fill the gaps or to give directions to revive the dissolved assembly and to reinduct the dismissed government of the State into office. Equally stay cannot be granted of the operation of the presidential proclamation till both Houses of Parliament approve the presidential proclamation. The suspension without dissolution of the legislative Assembly of the State also creates functional disharmony leading to constitutional crisis. The grant of stay of elections to the legislative assembly, occasioned pursuant to the presidential proclamation, also creates constitutional crisis. Therefore, the courts should not issue such directions leaving it to the Parliament to amend the Constitution if need be. 342. The floor test, may be

one consideration which the Governor may keep in view. But whether or not to resort to it would depend on prevailing situation. The possibility of horse trading also to be kept in view having regard to the prevailing political situation. It is not possible to formulate or comprehend a set of rules for the exercise of the power by the Governor to conduct floor test. The Governor should be left free to deal with the situation according to his best judgment keeping in view the Constitution and the conventions of the Parliamentary system of Government. Though Sarkaria Commission and Rajamanner Commission, headed by two distinguished Judges of this land, recommended floor test, it could only mean that is consideration which must cross the mind of the Governor. It would be suffice to say that the Governor should be alive to the situation but the sole Judge on the question whether or not conditions are conducive to resort to floor test. 343. The satisfaction reached by the President in issuing presidential proclamation and dissolving the legislative assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot be faulted as it was based on the fact of violation of the secular features of the Constitution which itself is a ground to hold that a situation has arisen in which the Government of the concerned states cannot be carried on in accordance with the provisions of the Constitution. Therefore, the satisfaction cannot be said to be unwarranted. The appeals of the Union from the judgment of the Madhya Pradesh High Court is allowed accordingly and the judgment of the High Court is set aside. The dissolution of the Meghalaya Assembly though vulnerable to attack as unconstitutional, it has become infructuous due to subsequent elections and the newly elected state legislature and the Government of the State of Meghalaya are functioning thereafter. Therefore, no futile writs could be issued as the court does not act in vain. The appeal of Bommai's and the transferred petitions are accordingly dismissed, but in the circumstances without costs. Verma, J. 344. This separate opinion is occasioned by the fact that in our view the area of justiciability is even narrower than that indicated in the elaborate opinions prepared by our learned brethren. The purpose of this separate note is merely indicate the area of such difference. It is unnecessary to mention the facts and discuss the factors which must guide the exercise of power under Article 356 which have been elaborately discussed in the other opinions. Indication of these factors including the concept of secularism for proper exercise of the power does not mean necessarily that the existence of these factors is justiciable. In our view, these factors must regulate the issuance of a proclamation under Article 356 to ensure proper exercise of the power but the judicial scrutiny thereof is available only in the limited area indicated hereafter, the remaining area being amenable to scrutiny and correction only by the Parliament and the subsequent electoral verdict. 345. There is no dispute that the proclamation issued under Article 356 is subject to judicial review. The debate is confined essentially to the scope of judicial review or the area of justiciability in that sphere. It does appear that the area of justiciability is narrow in view of the nature of that power and the wide discretion which inheres its exercise. This indication appears also from the requirement of approval of the proclamation by the Parliament which is a check provided in the Constitution of scrutiny by political process of the deci-

sion taken by the Executive. The people's verdict in the election which follow is intended to be the ultimate check. 346. To determine the justiciable area, we prefer to recall and keep in view that which was said in K. Ashok Reddy v. The Government of India and Ors., 21. A useful passage from Craig's Administrative Law (Second Edition) is as under: The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise hereof... The traditional position has however now been modified by the decision in the G.C.H.Q. case. Their Lordships emphasised that the reviewability of discretionary power should be dependent upon whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory.... 22. In Council of Civil Service Unions and Ors. v. Minister for the Civil Service (1985) A.C. 374 [G.C.H.Q.], Lord Roskill stated thus: But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter or the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, The defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.... (at page 418) 23. The same indication of judicial self-restraint in such matters is to be found in De Smith's Judicial Review of Administrative Action, thus: Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants to wide discretionary powers which might have to be exercised on the basis of broad considerations of national policy....(at page 32) 347. It is also useful to refer to Puhlhofer and Anr. v. Hillingdon London Borough council (1986) Appeal Cases 484, wherein Lord Brightman with whom the other Law Lords agree, stated thus: Where the existence or non existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. 348. In our view, this principle is equally applicable in the present case to determine the extent to which alone a proclamation issued under Article 356 is justiciable. 349. The question now is of the test applicable to determine the situation in which the power of judicial review is capable of exercise or, in other words, the controversy is justiciable. The deeming provision in Article 365 is an indication that cases falling within its ambit are capable of judicial scrutiny by application of objective standards. The facts which attract the legal fiction that the constitutional

machinery has failed are specified and their existence is capable of objective determination. It is, therefore, reasonable to hold that the cases falling under Article 365 are justiciable. 350. The expression 'or otherwise' in Article 356 indicates the wide range of the materials which may be taken into account for the formation of opinion by the President. Obviously, the materials could consist of several imponderables including some matter which is not strictly legal evidence, the credibility and authenticity of which is incapable of being tested in law courts. The ultimate opinion formed in such cases, would be mostly a subjective political judgement. There are no judicially manageable standards for scrutinising such materials and resolving such a controversy. By its very nature such controversy cannot be justiciable. It would appear that all such cases are, therefore, not justiciable. 351. It would appear that situations wherein the failure of constitutional machinery has to be inferred subjectively from a variety of facts and circumstances, including some imponderables and inferences leading to a subjective political decision, judicial scrutiny of the same is not permissible for want of judicially manageable standards. These political decisions call for judicial hands of envisaging correction only by a subsequent electoral verdict, unless corrected earlier in Parliament. 352. In other words, only cases which permit application of totally objective standards for deciding whether the constitutional machinery has failed, are amenable to judicial review and the remaining cases wherein there is any significant area of subjective satisfaction dependent on some imponderables or inferences are not justiciable because there are no judicially manageable standards for resolving that controversy; and those cases are subject only political scrutiny and correction for whatever its value in the existing political scenario. This appears to be the constitutional scheme. 353. The test for adjudging the validity of an administrative action and the grounds of its invalidity indicated in The Barium Chemicals Ltd. and Anr. v. The Company Law Board and Ors. [1966] Supp. SCR 311, and other cases of that category have no application for testing and invalidating a proclamation issued under Article 356. The test applicable has been indicated above and the grounds of invalidity are those mentioned in State of Rajasthan and Ors. Etc. Etc. v. Union of India Etc. Etc. . 354. Article 74(2) is no bar to production of the materials on which the ministerial advice is based, for ascertaining whether the case falls within the justiciable area and acting on it when the controversy, is found justiciable, but that is subject to the claim of privilege under Section 123 of the Evidence Act, 1872. This is considered at length in the opinion of Sawant J. We, therefore, regret our inability to concur with the different view on this point taken in State of Rajasthan and Ors. v. Union of India etc. etc. , even though we agree that the decision does not require any reconsideration on the aspect of area of Justiciability and the grounds of invalidity indicated therein. 355. In the above view, it follows that no quia timet action would be permissible in such cases in view of the limited scope of judicial review: and electoral verdict being the ultimate check, courts can grant substantive relief only if the issue remains live in cases which are justiciable. In Kihoto Hollohan v. Zachillhu and Ors. [1992] Supp. SCC 651, it was stated thus: In view of the limited scope of judicial review that is available on account of the finality clause

in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. 356. It is also clear that mere parliamentary approval does not have the effect of excluding judicial review to the extent permissible. In Sarojini Ramaswami (Mrs.) v. Union of India and Ors. , it has been stated thus: 72. We may, however, add that the intervention of the parliamentary part of the process, in case a finding of guilty is made, which according to Shri Sibal would totally exclude judicial review thereafter is a misapprehension since limited judicial review even in that area is not in doubt after the decision of this Court in Keshav Singh. 73. At this stage, a reference to the nature and scope of judicial review as understood in similar situations is helpful. In Administrative Law (Sixth Edition) by H.W.R. Wade, in the chapter "Constitutional Foundation of the power of the Courts" under the heading 'The Sovereignty of Parliament', the effect of Parliament's intervention is started thus:(at page 29) ... There are many cases where some administrative order or regulation is required by statute to be approved by resolutions of the Houses. But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act. Whether the challenge is made before or after the Houses have given their approval is immaterial. Later at p. 411, Wade has said that ":in accordance with constitutional principle, parliamentary approval does not affect the normal operation of judicial review". At p. 870 while discussing 'judicial Review", Wade indicates the position thus: As these cases show, judicial review is in no way inhibited by the fact that rules or regulations have been laid before Parliament and approved, despite the ruling of the House of Lords that the test of unreasonableness should not then operate in its normal way. The Court of appeal has emphasised that in the case of subordinate legislation such as in Order in council approved in draft by both House, the Courts would without doubt be competent to consider whether or not the order was properly made in the sense of being intra vires'. 74. The clear indication, therefore, is that mere parliamentary approval of an action or even a report by an outside authority when without such approval, the action or report is ineffective by itself, does not have the effect of excluding judicial review on the permissible grounds. 357. Applying this principle, only the Meghalaya case is justiciable and that proclamation was invalid while those relating to Madhya Pradesh, Himachal Pradesh, Rajasthan and Karnataka are not justiciable. There is rightly no challenge to the proclamation relating to Uttar Pradesh. However, in view of the subsequent elections held in Meghalaya, that is no longer a live issue and, therefore, there is no occasion to grant any substantial relief, even in that case. 358. It is to this extent our view differ's on the question of justiciability. On this view, it is unnecessary for us to express any opinion on the remaining matters. According to us, except to the extent indicated, the decision in State of Rajasthan and Ors. Etc. Etc. v. Union of India Etc. Etc. , does not require reconsideration. A.M. Ahmadi, J. 359. I

have had the advantage of perusing the views expressed by my esteemed colleagues P.B. Sawant, K. Ramaswamy and B.P. Jeevan Reddy. JJ. and while I am largely in agreement with the 'conclusions' recorded by K. Ramaswamy, J. I would like to briefly indicate the area of my agreement. 360. In a country geographically vast, inhabited by over 850 million people belonging to different religions, castes and creeds, majority of them living in villages under different social orders and in abject poverty, with a constant tug of war between the organised and the unorganised sectors, it is not surprising that problems crop up time and again requiring strong and at times drastic state action to preserve the unity and integrity of the country. Notwithstanding these problems arising from time to time on account of class conflicts, religious intolerance and socio-economic imbalances, the fact remains that India has a reasonably stable democracy. The resilience of our Republic to face these challenges one after another has proved the peoples' faith in the political philosophy of socialism, secularism and democracy enshrined in the Preamble of our Constitution. Yet, the fact remains that the nation has had from time to time with increasing frequency to combat upheavals occasioned on account of militancy, communal and class conflicts, politico religious turmoils, strikes, bandhs and the like occurring in one corner of the country or the other, at times assuming ugly proportions. We are a crisis-laden country; crisis situations created by both external and internal forces necessitating drastic State action to preserve the security, unity and integrity of the country. To deal with such extraordinarily difficult situations exercise of emergency power becomes an imperative. Such emergency powers existed under the Government of India Act, 1935, vide Sections 93 and 45 of that enactment. However, when similar powers were sought to be conferred on the President of India by the Constitution, there was a strong opposition from many members of the Constituent Assembly, vide constituent assembly Debates on draft Articles 277 and 277A. Dr. Ambedkar pacified the members by stating: In fact I share the sentiments expressed... that the proper thing we ought to expect is that such Articles will never be called into operation and that they will remain a dead letter. If at all, they are brought into operation, I hope the President who is endowed with all these powers will take proper precautions before actually suspending the administration of the provinces. 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. Dr. Ambedkar's hope that in rarest of rare cases only there will be an occasion to invoke the emergency provisions was soon belied as we were told at the Bar that the provisions of Article 356 of the Constitution have had to be invoked over ninety times by now. What was, therefore expected to be a 'dead letter' has in fact become an oft-invoked provision. This is not the occasion to embark on an inquiry into the circumstances leading to the utilisation of this emergency power, but the fact remains that the President has had to invoked the power quite frequently. This may be on account of the degradation in the political environment of the country. Since I am not probing into the circumstances in which the said power had to be invoked, I do not express myself on the question whether or not there existed adequate justification for resorting

to this emergency power. 361. Although the emergency provisions found in Part XVIII of the Constitution are more or less modelled on the pattern of similar provisions contained in the Government of India Act, 1935, the exercise of that power under the said provisions cannot be compared with its exercise under the Constitution for the obvious reason that they operated under totally different conditions. Under the Government of India Act, 1935, the Governor General and the Governor exercised as representatives of the Crown near absolute powers, only limited powers were given to the elected governments and those too could be taken away if it was felt that the concerned Government could not be carried on in accordance therewith. So also reference to the British Joint Parliamentary Report is inapposite for the simple reason that the situation under the Constitution is not comparable with that which formed the basis for the Report. The Power conferred on the President of India under Article 356 has to be exercised in a wholly different political set up as compared to that obtaining under the Government of India Act, 1935. The constitutional philosophy of a free country is totally different from the philosophy, of a similar law introduced for the governance of a country by its colonial masters. It is, therefore, unnecessary to examine the case law based on the exercise of similar powers under the Government of India Act, 1935. FEDERAL CHARACTER OF THE CONSTITUTION 362. India, as the Preamble proclaims, is a Sovereign, Socialist, Secular, Democratic Republic. It promises liberty of thought, expression, belief, faith and worship, besides equality of status and opportunity. What is paramount is the unity and integrity of the nation. In order to maintain the unity and integrity of the nation our founding fathers appear to have leaned in favour of a strong center while distributing the powers and functions between the center and the States. This becomes obvious from even a cursory examination of the provisions of the Constitution. There was considerable argument at the Bar on the question whether our Constitution could be said to be 'Federal' in character. 363. In order to understand whether our Constitution is truly federal, it is essential to know the true concept of federalism. Dicey calls it a political contrivance for a body of states which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in formulation of the basic policies applicable to all and participate in the execution of decisions made in pursuance of such basic policies. Thus the essence of a federation is the existence of the Union and the States and the distribution of powers between them. Federalism, therefore, essentially implies demarcation of powers in a Federal compact. 364. The oldest federal model in the modern world can be said to be the Constitution of the United States of America. The American federation can be described as the outcome of the process of evolution, in that, the separate States first formed into a Confederation (1781) and then into a Federation (1789). Although the States may have their own Constitutions, the Federal Constitution is the suprema-lex and is made binding on the States. That is because under the American constitution, amendments to the Constitution are required to be ratified by three-fourths of the States. Besides under

that Constitution there is a single legislative list enumerating the powers of the Union and, therefore, automatically the other subjects are left to the States. This is evident from the Tenth Amendment. Of course, the responsibility to protect the States against invasion is of the Federal Government. The States are, therefore, prohibited from entering into any treaty, alliance, etc., with any foreign power. The principle of dual sovereignty is carried in the judicial set up as well since disputes under federal laws are to be adjudicated by federal courts, while those under State Laws are to be adjudicated by State Courts, subject of course to an appeal to the Supreme Court of the United States. The interpretation of the Constitution is by the United States Supreme Court. 365. We may now read some of the provisions of our Constitution. Article 1 of the Constitution says: India, that is Bharat, shall be a Union of States. Article 2 empowers Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Under Article 3 Parliament can by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increasing the area of any State; diminishing the area of any State; altering the boundaries of any State; or altering the name of any State. The proviso to that Article requires that the Bill for the purpose shall not be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. On a conjoint reading of these Articles, it becomes clear that Parliament has the right to form new States, alter the areas of existing States, or the name of any existing State. Thus the Constitution permits changes in the territorial limits of the States and does not guarantee their territorial integrity. Even names can be changed. Under Article 2 it is left to the Parliament to determine the terms and conditions on which it may admit any area into the Union or establish new States. In doing so, it has not to seek the concurrence of the State whose area, Boundary or name is likely to be affected by the proposal. All that the proviso to Article 3 requires is that in such cases the President shall refer the Bill to the legislatures of the concerned states likely to be affected 'to express their views'. Once the views of the States are known, it is left to Parliament to decide on the proposed changes. The Parliament can, therefore, without the concurrence of the concerned state or States change the boundaries of the State or increase or diminish its area or change its name. These provisions show that in the matter of Constitution of States, Parliament is paramount. This scheme substantially differs from the federal set up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a Federation unlike in India where the States were not independent sovereign units but they were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. It is well- known that since independence, new States have been created boundaries

of existing States have been altered, States have been renamed and individual States have been extinguished by Parliamentary legislation; 357. 2. Our founding fathers did not deem it wise to shake the basic structure of Government and in distributing the legislative functions they, by and large, followed the pattern of the Government of India Act, 1935. Some of the subjects of common interest were, however, transferred to the Union List, thereby enlarging the powers of the Union to enable speedy and planned economic development of the nation. The scheme for the distribution of powers between the Union and the States was largely maintained except that some of the subjects of common interest were transferred from the Provincial List to the Union List thereby strengthening the administrative control of the Union. It is in this context that this Court in 'State of West Bengal v. union of India ,observed: The exercise of powers, legislative and executive, in the allotted fields is hedged in by the numerous restrictions so that the powers of the States are not co-ordinate with the Union and are not in many respects independent. 358. In Union of India v. H.S. Dhillon (Paragraph 14) = , another feature in regard to the distribution of Legislative power was pointed out, in that, under the Government of India Act, 1935, the residuary power was not given either to the Union Legislature or to the provincial Legislatures, but under our Constitution, by virtue of Article 248, read with Entry 97 in List I of the VII Schedule, the residuary power has been conferred on the Union. This arrangement substantially differs from the scheme of distribution of powers in the United States of America where the residual powers are with the States. 359. The Preamble of our Constitution shows that the people of India had resolved to constitute India into a Sovereign Secular Democratic Republic and promised to secure to all its citizens Justice, Liberty and Equality and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. In the people of India, therefore vests the legal sovereignty while the political sovereignty is distributed between the Union and the States. Article 73 extends the executive power of the Union to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. The executive power which is made co-extensive with Parliament's power to make laws shall not, save as expressly provided by the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State also has power to make laws. Article 162 stipulates that the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make laws provided that in any matter with respect to which the legislature of State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. It may also be noticed that the executive power of every State must be so exercised as not to impede or prejudice the exercise of the executive power by the Union. The executive power of the Union also extends to giving such directions to a State as may appear to the Government of India to be necessary for those purposes and as to the construction, maintenance of

means of communication declared to be of national or military importance and for protection of railways. The States have to largely depend on financial assistance from the Union. Under the scheme of Articles 268 to 273, States are in certain cases allowed to collect and retain duties imposed by the Union; in other cases taxes levied and collected by the Union are assigned to the States and in yet other cases taxes levied and collected by the Union are shared with States. Article 275 also provides for the giving of grants by the Union to certain States. There is, therefore, no doubt that States depend for financial assistance upon the Union since their power to raise resources is limited. As economic planning is a concurrent subject, every major project must receive the sanction of the Central Government for its financial assistance since discretionary power under Article 282 to make grants for public purposes is vested in the Union or a State, notwithstanding that the purpose is one in respect to which Parliament or State Legislature can make laws. It is only after a project is finally sanctioned by the Central Government that the State Government can execute the same which demonstrates the control that the Union can exercise even in regard to a matter on which the State can legislate. In addition to these controls Article 368 confers powers on the Parliament to amend the Constitution, albeit by a specified majority. The power extends to amending matters pertaining to the executive as well as legislative powers of the States if the amendments are ratified by the legislatures of not less than one-half of the States. This provision empowers Parliament to so amend the Constitution as to curtail the powers of the States. A strong Central Government may not find it difficult to secure the requisite majority as well as ratification by one-half of the legislatures if one goes by past experience. These limitations taken together indicate that the Constitution of India cannot be said to be truly federal in character as understood by lawyers in the United States of America. 360. In State of Rajasthan v. Union of India A conspectus of the provisions of our Constitution will indicate that whatever appearances of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal. Further, in paragraph 52, the learned Chief Justice proceeded to add : In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government. Pointing out that national planning involves disbursement of vast amount of money collected as taxes from citizens spread over all the States and placed at the disposal of the Central Government for the benefit of the States, the learned Chief Justice proceeds to observe in paragraph 56 of the judgment : If then our Constitution creates a Central Government which is 'amphibian' in the sense that it can move either on the federal or unitary plane, according to the needs of the situation and circumstances of a case, the question which we are driven back to consider is whether on assessment of the 'situation' in which the Union

Government should move either on the Federal or Unitary plane are matters for the Union Government itself or for this Court to consider and determine. When the Union Government issued a notification dated 23rd May, 1977 constituting a Commission of Inquiry in exercise of its power under Section 3 of the Commissions of Inquiry Act, 1952, to inquire into certain allegations made against the Chief Minister of the State, the State of Karnataka instituted a suit under Article 131 of the Constitution challenging the legality and validity of the notification as unjustifiable trespass upon the domain of State powers. While dealing with the issues arising in that suit The State of Karnataka v. Union of India , once again examined the relevant provisions of the Constitution and the Commission of Inquiry Act, 1952, and observed in paragraph 33 as under : In our country, there is, at the top, a Central or the Union Government responsible to Parliament, and there are, below it, State Governments, responsible to the State Legislatures, each functioning within the sphere of its own powers which are divided into two categories, the exclusive and the concurrent. Within the exclusive sphere of the powers of the State Legislature is local Government. And, in all States there is a system of local Government in both Urban and Rural areas, functioning under State enactments. Thus, we can speak of a three tier system of Government in our country in which the Central or the Union Government comes at the apex.... It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of Governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain Constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Government in emergency situations, vide Articles 352 to 360 of the Constitution. 361. It is common knowledge that shortly after we constituted ourselves into a Republic, the Princely States gradually disappeared leading to the unification of India into a single polity with duality of governmental agencies for effective and efficient administration of the country under Central direction and, if I may say so, supervision. The duality of governmental organs on the Central and State levels reflect demarcation of functions in a manner as would ensure the sovereignty and integrity of our country. The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution makers. It was perhaps for that reason that our founding fathers thought a strong center was essential to ward off separatist tendencies and consolidate the unite and integrity of the country. 362. A Division Bench of the Madras High Court in N. Karunanidhi v. Union of India , while dealing with the contention that the Constitution is a federal one and that the States are autonomous having definite powers and independent rights to govern, and the Central Government has no right to interfere in the governance of the State, observed as under : ... There may be a federation of independent States, as it is in the case of the United States of America. As the name itself denotes, it is a Union of States, either by

treaty or by legislation of the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To apply the meaning to the word 'federation' or 'autonomy' used in the context of the American Constitution, to our Constitution will be totally misleading. After tracing the history of the governance of the country under the British rule till the framing of our Constitution, the court proceeded to add as follows: The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relationship between the two. In a sense, if the word 'federation' can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the center and the States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union. Under our Constitution the State as such has no inherent sovereign power or autonomous power which cannot be encroached upon by the center. The very fact that under our Constitution, Article 3, Parliament may by law form a new State by separation of territory from any State or by uniting two or more State or parts of States or by uniting any territory to a part of any State, etc., militates against the view that the States are sovereign or autonomous bodies having definite independent rights of governance. In fact, as pointed out earlier in certain circumstances the Central Government can issue directions to States and in emergency conditions assume far-reaching powers affecting the states as well, and the fact that the President has powers to take over the administration of states demolishes the theory of an independent or autonomous existence of a State. It must also be realised that unlike the Constitution of the United States of America which recognises dual citizenship (Section 1(1), Fourteenth Amendment), the Constitution of India, Article 5, does not recognise the concept of dual citizenship. Under the American Constitution all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside whereas under Article 5 of the Indian Constitution at its commencement, every person domiciled in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. Article 9 makes it clear that if any person voluntarily acquires the citizenship of any foreign country, he will cease to be a citizen of India. These provisions clearly negative the concept of dual citizenship, a concept expressly recognised under the American Constitution. The concept of citizenship assumes some importance in a federation because in a country which recognises dual citizenship, the individual would owe allegiance both to the federal Government as well as the State Government but a country recognising a single citizenship does not face complications arising from dual citizenship and by necessary implication negatives the concept of State sovereignty.

363. Thus the significant absence of the expressions like 'federal' or 'federation' in the constitutional vocabulary, the Parliament's powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VII Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation 'federal' to the Indian Constitution. Said Prof. K.C. Where in his work 'Federal Government' What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament. 364. Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions. SECULARISM UNDER THE CONSTITUTION 365. India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance. This is the message which saints and Sufis spread in olden days and which Mahatma Gandhi and other leaders of modern times advocated to maintain national unity and integrity The British policy of divide and rule, aggravated by separate electorates based on religion, had added a new dimension of mixing religion with politics which had to be countered and which could be countered only if the people realised the need for national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mightly colonial rulers. As early as 1908, Gandhiji wrote in Hind Swaraj: India cannot cease to be one nation, because people belonging to different religions live in it. . . .In no part of the world are on nationality and on religion synonymous terms; nor has it ever been so in India. Gandhiji was ably assisted by leaders like Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad and others in the task of fighting a peaceful battle for securing independence by uniting the people of India against separatist forces. In 1945 pandit Nehru wrote: I am convinced that the future government of free India must be secular in the sense that government will not associate itself directly with any religious faith but will give freedom to all religious functions. 366. And this was

followed up by Gandhiji when in 1946 he wrote in Harijan: I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern. 367. The great Statesman-Philosopher Dr. Radhakrishnan said: When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that Secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all like should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of Church and State. (Recovery of Faith, New york, Harper brothers 1955, p. 202) (Emphasis supplied.) Immediately after we attained independence, the Constituent Assembly, aware of the danger of communalism, passed the following resolution on April 3, 1894: Whereas it is essential for the proper functioning of democracy and growth of national unity and solidarity that communalism should be eliminated from Indian life, this Assembly is of the opinion that no communal organisation which by its Constitution or by exercise of discretionary power vested in any of its officers and organs admits to, or excludes from, its membership persons on grounds of religion, race and caste, or any of them should be permitted to engage in any activities other than those essential for the bonafide religious, cultural, social and educational needs of the community, and that all steps, legislative and administrative, necessary to prevent such activities should be taken. 368. Since it was felt that separate electorates for minorities were responsible for communal and separatist tendencies, the Advisory Committee resolved that the system of reservation for minorities, excluding SC/ST, should be done away with. Pursuant to the goal of secularism, the Constituent Assembly adopted Clauses 13, 14 and 15 roughly corresponding to the present Articles 25, 26 and 27. During the debates Prime Minister Jawaharlal Nehru declared that secularism was an ideal to be achieved and that establishment of a secular state was an act of faith, an act of faith above all for the majority community because they will have to show that they can behave to others in a generous, fair and just way. When objection was sought to be voiced from certain quarters, Pandit Laxmikantha Mitra explained: By Secular State, as I understand, it is meant that the state is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious

faith. This means in essence that no particular religion in the state will receive any state patronage whatsoever. The state is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the state will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words, in the affairs of the State the preferring of any particular religion will not be taken into consideration at all. This I consider to be the essence of a secular State. At the same time we must be very careful to see that in this land of ours we do not deny to anybody the right not only to profess or practice but also propagate any particular religion. 369. This in brief was the notion of secularism and democracy during the pre-independence era and immediately before we gave unto ourselves the Constitution. We may now very briefly notice the provisions in the Constitution. 370. Notwithstanding the fact that the words 'Socialist', and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amenment, the concept of Secularism was very much embedded in our Constitutional philosophy. The term 'secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the Nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion etc., but permitted special treatment for Schedule Castes and Tribes, vide Articles 15 & 16. Article 25 next provided, subject to public order, morality and health, that all person shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds whereof are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. This is an important article which prohibits the exercise of State's taxation power if the proceeds thereof are intended to be appropriated in payment of expenses for the promotion and maintenance of any particular religion or religious denomination. That means that State's revenue cannot be utilised for the promotion and maintenance of any religion or religious group. Article 28 relates to attendance at religious instructions or religious worship in certain educational institutions. Then come Articles 29 and 30 which refer to the cultural and educational rights. Article 29 inter alia provides that no citizen will be denied admission to an educational institution maintained wholly or partly from State funds on grounds only of religion, etc. Article 30 permits all minorities, whether based on religion or language, to establish and administer educational institutions of their choice and further prohibits the State from discriminating against such institutions

in the matter of granting aid. These fundamental rights enshrined in Articles 15, 16 and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution. Besides, by the 42nd Amendment, Part IVA entitled 'Fundamental Duties' was introduced which inter alia casts a duty on every citizen to cherish and follow the noble ideals which inspired our national struggle for freedom, to uphold and protect the sovereignty, unity and integrity of India, to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and to value and preserve the rich heritage of our composite culture. These provisions which I have recalled briefly clearly bring out the dual concept of secularism and democracy, the principles of accommodation and tolerance as advocated by Gandhiji and other national leaders. I am, therefore, in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ, that secularism is a basic feature of our Constitution. They have elaborately dealt with this aspect of the matter and I can do no better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the Constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit. 371. After the demise of Gandhiji national leaders like Pandit Nehru, Maulana Azad, Dr. Ambedkar and others tried their best to see that the secular character of the nation, as bequeathed by Gandhiji, was not jeopardised. Dr. Ambedkar, Chairman of the Drafting Committee, aware of the undercurrents cautioned that India was not yet a consolidated and integrated nation but had to become one. This anxiety was also reflected in his speeches in the Constituent Assembly. He was, therefore, careful while drafting the Constitution to ensure that adequate safeguards were provided in the Constitution to protect the secular character of the country and to keep divisive forces in check so that the interests of religious, linguistic and ethnic groups were not prejudiced. He care fully weaved Gandhiji's concept of secularism and democracy into the constitutional fabric. This becomes evident from a cursory look at the provisions of the Constitution referred to earlier. JUDICIAL REVIEW AND JUSTICIABILITY: 372. Having noticed the nature of the federal structure under the Constitution, the possibility of different political parties ruling at the center and in one or more States cannot be ruled out. The Constitution clearly permits it. Therefore, the mere defeat of the ruling party at the center cannot by itself, without anything more, entitle the newly elected party which comes to power at the center to advise the President to dissolve the Assemblies of those States where the party in power is other than the one in power at the center. Merely because a different political party is elected to power at the center, even if with a thumping majority, is no ground to hold that 'a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution', which is the requirement for the exercise of power under Article 356(1) of the Constitution. To exercise power under the said provision and to dissolve the State Assemblies solely on the ground of a new political party having come to power at the center with a sweeping majority would, to say the least, betray intolerance on

the part of the Central Government clearly basing the exercise of power under Article 356(1) on considerations extraneous to the said provision and, therefore, legally malafide. It is a matter of common knowledge that people vote for different political parties at the center and in the State and , therefore, if a political party with an ideology different from the ideology of the political party in power in any State comes to power in the center, the Central Government would not be justified in exercising power under Article 356(1) unless it is shown that the ideology of the political party in power in the State is inconsistent with the constitutional philosophy and, therefore, it is not possible for that party to run the affairs of the State in accordance with the provisions of the Constitution. It is axiomatic that no State Government can function on a programme which is destructive of the Constitutional philosophy as such functioning can never be in accordance with the provisions of the Constitution. But where a State Government is functioning in accordance with the provisions of the Constitution and its ideology is consistent with the constitutional philosophy, the Central Government would not be justified in resorting to Article 356(1) to get rid of the State Government 'solely' on the ground that a different political party has come to power at the center with a landslide victory. Such exercise of power would be clearly malafide. The decision of this Court in The State of Rajasthan v. The Union of India , to the extent it is inconsistent with above discussion, does not, in my humble view, lay down the law correctly. 373. Since it was not disputed before us by the learned Attorney General as well as Mr. Parasaran, the learned Counsel for the Union of India, that a proclamation issued by the President on the advice of his Council of Ministers headed by the Prime Minister, is amenable to judicial review, the controversy narrows down to the determination of the scope and ambit of judicial review i.e. in other words, to the area of justiciability. The debate at the Bar was limited to this area; the learned Attorney General as well as Mr. Parasaran contending for the view that the law laid down in the Rajasthan case in this behalf was correct and did not require reconsideration while the counsel for the concerned State Governments which were superseded by exercise of power under Article 356(1) contending that the said decision required reconsideration. 374. Before I deal with the said issue I may dispose of the question whether the provision of Article 74(2) of the Constitution permits withholding of the reasons and material forming the basis for the ministerial advice tendered to the President. Article 74(1) ordains that the President 'shall' act in accordance with the advice tendered by the Council of Ministers. The proviso, however, entitles him to require the Council of Ministers to reconsider its advice if he has any doubts or reservation but once, the Council of Ministers has reconsidered the advice, he is obliged to act in accordance therewith. Article 74(2) then provides that 'the question whether any, and if so what, advice was tendered to the President shall not be inquired into in any Court'. What this clause bars from being inquired into is 'whether any, and if so what, advice was tendered' and nothing beyond that . This question has been elaborately discussed by my learned colleagues who have examined in detail its pros and cons in their judgments and therefore, I do not consider it necessary to traverse the same path. It would suffice to say

that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but I agree that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based. Of course the privilege available under the Evidence Act, Sections 123 and 124, would stand on a different footing and can be claimed de hors Article 74(2) of the Constitution. To the extent the decision in Rajasthan case conflicts with this view, I respectfully disagree. 375. That takes me to the question of the scope and extent of judicial review i.e. the area of justiciability insofar as the subjective satisfaction of the President under Article 356(1) of the Constitution is concerned. Part XVIII, which deals with Emergency Provisions provides for exercise of emergency powers under different situations. Article 352 provides that 'if the President is satisfied' that a grave emergency exists threatening the security of India or any part thereof, whether by war or external aggression or armed rebellion, the President may make a declaration to that effect specifying the area of its operation in the Proclamation. Notwithstanding the use of the language 'if the President is satisfied' which suggests that the decision would depend on the subjective satisfaction of the President, counsel agreed that such a decision cannot be made the subject matter of judicial scrutiny for the obvious reason that the existence or otherwise of a grave emergency does not fall within the purview of judicial scrutiny since the Courts are ill- equipped to undertake such a delicate function. So also under Article 360 the exercise of emergency power is dependent on the satisfaction of the President that a situation has arisen whereby the financial stability or credit of India or any part thereof is threatened. The decision to issue a proclamation containing such a declaration is also based on the subjective satisfaction of the President, i.e. Council of Ministers, but the Court would hardly be in a position to x'ray such a subjective satisfaction for want of expertise in regard to fiscal matters. These provisions, therefore, shed light on the extent of judicial review. 376. The marginal note of Article 356 indicates that the power conferred by that provision is exercisable 'in case of failure of constitutional machinery in the States'. While the text of the said article does not use the same phraseology, it empowers the President, on his being satisfied that, 'a situation has arisen' in which the Government of the State 'cannot' be carried on in accordance with the provisions of the Constitution, i.e. on the failure of the constitutional machinery, to take action in the manner provided in Sub-clause (a), (b) and (c) and Clause (1) thereof. This action he must take on receipt of a report from the Governor of the concerned State or 'otherwise', if he is satisfied therefrom about the failure of the constitutional machinery. Article 356(1) confers extra-ordinary powers on the President, which he must exercise sparingly and with great circumspection, only if he is satisfied from the Governor's report or otherwise that a situation has arisen in which the Government of the State cannot be carried out in accordance with the provisions of the Constitution. The expression 'otherwise' is of very wide import and cannot be restricted to material capable of being tested on principles relevant to admissibility of evidence in courts of law. It would be difficult to predicate the nature of material which may be placed before the President or which he may have come across before taking action under Article

356(1). Besides, since the President is not expected to record his reasons for his subjective satisfaction, it would be equally difficult for the court to enter 'the political thicket' to ascertain what weighed with the President for the exercise of power under the said provision. The test laid down by this Court in The Barium Chemicals Ltd. v. The Company Law Board and Ors. [1966] Suppl. SCR 311 and subsequent decisions for adjudging the validity of administrative action can have no application for testing the satisfaction of the President under Article 356. It must be remembered that the power conferred by Article 356 is of an extraordinary nature to be exercised in grave emergencies and, therefore, the exercise of such power cannot he equated to the power exercise in administrative law field and cannot, therefore, be tested by the same yardstick. Several imponderables would enter consideration and govern the ultimate decision, which would be based, not only events that have preceded the decision, but would also depend on likely consequences to follow and, therefore, it would be wholly incorrect to view exercise of the President's satisfaction on par with the satisfaction recorded by executive officers in the exercise of administrative control. The opinion which the President would form on the basis of the Governor's report or otherwise would be based on his political judgment and it is difficult to evolve judicially manageable norms for scrutinising such political decisions. It, therefore, seems to me that by the very nature of things which would govern the decision making under Article 356, it is difficult to hold that the decision of the President is justiciable. To do so would be entering the political thicket and questioning the political wisdom which the Courts of law must avoid. The temptation to delve into the President's satisfaction may be great but the courts would be well advised to resist the temptation for want of judicially manageable standards. Therefore, in my view, the Court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be malafide. Before exercise of the Court's jurisdiction sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President i.e. the executive must not be called upon to answer the charge. In this connection I agree with the observation of Ramaswamy, J. I am also in agreement with Verma, J. when he says that no quia timet action would be permissible in such cases in view of the limited scope of judicial review in such cases. I am, therefore, in respectful agreement with the view expressed in the Rajasthan case as regards the extent of review available in relation to a proclamation issued under Article 356 of the Constitution. In other words it can be challenged on the limited ground that the action is malafide or ultra vires Article 356 itself. 378. Applying the above test I am in agreement with the view that the proclamations issued and consequential action taken against the States of Madhya Pradesh, Himachal Pradesh, Rajasthan and Karnataka are not justiciable while the proclamation issued in connection with Meghalaya may be vulnerable but it is not necessary to issue any order or direction in that behalf as the issue is no more live in view of the subsequent developments that have taken place in that State after fresh election. I am, therefore, in respectful agreement with the final order proposed by Verma and Ramaswamy, JJ. I may also add that I agree with the view expressed by all the

three learned colleagues on the concept of secularism. 379. This also indicates the areas of agreement and disagreements with the views expressed by Sawant and Reddy, JJ. 380. Before concluding , I must express my gratitude for the excellent assistance rendered by the learned Attorney General and all the learned Counsel who appeared for the contesting parties. S. Ratnavel Pandian, J. 381. I have had the privilege of going through the erudite and scholarly judgments of my learned brothers making an exhaustive and indepth analysis, evaluating the constitutional mechanism and exploring the whole realm of constitutional imperatives as envisaged by the founding fathers of the Indian Constitution on Central-State relations and throwing abundant light on the controversial role of State Governors inviting President's Rule and the mode by which the Union Cabinet and Parliament discharged their responsibility in this regard with reference to Articles 74(2), 163, 355, 356, 357 and the other allied constitutional provisions. 382. I find myself in agreement with the opinion of P.B. Sawant, J. on his conclusion 1, 2 and 4 to 8 with which B.P. Jeevan Reddy, J. concurs in his judgment (speaking for himself and on behalf of S.C. Agrawal, J.) but so far as the reasoning and other conclusions are concerned, I agree fully with the judgment of B.P. Jeevan Reddy, J. Yet I would like to give my a brief opinion on the constitutional question of substantial importance in relation to the powers of the President to issue proclamations under Article 356(1) of the Constitution. 383. The Indian Constitution is both a legal and social document. It provides a machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal. 384. To what extent we have been successful in achieving the Constitutional ideals is a question with a wide spectrum which needs an elaborate debate. Harking back to the question involved in this case. The framers of the Constitution met and were engaged for months together with the formidable task of drafting the Constitution on the subject of center-State relationship that would solve all the problems pertaining thereto and frame a system which would ensure for a long time to come. During the debates and deliberations, the issues that seemed to crop up at every point was the States' rights vis-a-vis the Central rights. Some of the members seem to have expressed their conflicting opinions and different reasonings and sentiments on every issue influenced and inspired by the political ideology to which they were wedded. The two spinal issues before the Constituent Assembly were (1) what powers were to be taken away from the States; and (2) how could a national supreme Government be formed without completely eviscerating the power of the State. Those favouring the formation of a strong Central Government insisted that the said Government should enjoy supreme power while others supporting States' rights expostulated that view. The two sides took turns making their representations but finally realising that all might be lost, they reached a compromise that resolved the dead look on the key issue and consequently the present form of Government, more federal in structure, came into being instead of a unitary Government. 385. It is and undeniable fact that the Constitution of India was ordained and established by the people of India for themselves for their own governance and not for the governance of individual States. Resultantly, the

Constitution acts directly on the people by means of power communicated directly from the people. 386. In regard to the Central-State relationship there are various reports suggesting certain recommendations for the smooth relationship of both the Governments without frequently coming into conflicts thereby creating constitutional crisis. The reports suggesting recommendations are that of (1) Administrative Reforms Commission Report 1969; (2) Rajmanner Committee Report 1969; and (3) Sarkaria Commission Report 1987. 387. When the question with regard to the center-State relations stands thus, the publication issued by the Lok Sabha Secretariat giving an analytical tabular form with significant details pertaining to the President's proclamation made under Article 356(1) of the Constitution and under Section 51 of the Government of Union Territories Act 1963 during the last 41 years of the Republic, that is upto 1991, indicates the frequency of user of Article 356(1). It appears from the summary table given in the tabular form (Appendix IV) that on 82 occasions the President's Rule in States have been imposed by invoking or resorting to Article 356(1) and on 13 occasion the President's Rule have been imposed in Union Territories including erstwhile Union Territories which have become States under Section 51 of the Government of Union Territories Act 1963. All total upto 95 times, of which on 23 occasions the assemblies were dissolved on the advice of the Chief Ministers/or due to their resignations. It may be recalled that on 18 occasions the assemblies suspended were subsequently revived. The above statistics does not include the proclamations which are presently under challenge before us. We may hasten to add that the proclamations were made on different occasions on the advice of the Council of Ministers of the Central Government belonging to different political complexions. Some of the States, dissolved valiantly fought, honourably bled and pathetically lost their legal battle. 388. Since my learned brothers have elaborately dealt with the constitutional provisions relating to the issue of the proclamation and as I am in agreement with the reasoning given by B.P. Jeevan Reddy, J. it is not necessary for me to make further discussion on this matter except saying that I am of the firm opinion that the power under Article 356 should be used very sparingly and only when President is fully satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Otherwise, the frequent use of this power and its exercise are likely to disturb the Constitutional balance. Further if the proclamation is freely made, then the Chief Minister of every State who has to discharge his constitutional functions will be in perpetual fear of the axe of proclamation falling on him because he will not be sure whether he will remain in power or not and consequently he has to stand up every time from his seat without properly discharging his constitutional obligations and achieving the desired target in the interest of the State. 389. All the matters are disposed of accordingly with no order as to costs.