

EMERGENCY PROVISIONS

We have discussed earlier that the Constitution of India is federal in nature having a unitary bias. On the one hand, it has all the characteristic features of a federation while, on the other hand, the centre is more powerful than the States.

When the Constitution of India was being drafted, we were passing through a period of stress and strain. Partition of the Country, Communal riots, the problem concerning the merger of princely states including Kashmir and many more problems of such nature created an abnormal atmosphere which was full of apprehensions. Therefore, the Constitution-makers thought it proper to equip the Central government with the necessary authority, so that, in the hour of emergency, when the security and stability of the country or any part thereof is threatened, the Central Government may act effectively to handle any such grave situation. Therefore, some emergency provisions have been made in the Indian Constitution to safeguard and protect the security, integrity and stability of the country.

Part XVIII of the Constitution speaks of emergency provisions. The emergency provisions therein can be classified into three categories: (a) Articles 352, 353, 354, 358 and 359 which relate to National Emergency, (b) Articles 355, 356 and 357 which deal with imposition of President's rule in States in a certain situation and (c) Article 360 which speaks of financial emergency.

NATIONAL EMERGENCY

According to **Article 352(1)** 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.

Procedure

- ❑ The President can declare such emergency only if the Cabinet recommends in writing to do so.
- ❑ Such a proclamation of emergency has to be approved by both the Houses the Parliament within one month; otherwise the proclamation ceases to operate. In case the Lok Sabha stands dissolved at the time of proclamation of emergency or is not in session, the Presidential proclamation has to be approved by the Rajya Sabha within one month and later on by the Lok Sabha also within one month of the start of its session.
- ❑ The approval the Parliament shall be by a majority of not less than two- third of its members present and voting and absolute majority of the Houses sitting separately.
- ❑ Once approved by the Parliament, the emergency remains in force for a period of six months from the date of proclamation. In case it is to be extended beyond six months, another resolution has to be passed by the Parliament.

Effects of National Emergency

The declaration of National Emergency has far-reaching effects both on the rights of individuals and the autonomy of the States in the following manner.

(i) Extension of the Executive Power of the Union [Article 353(a)] :

Article 353(a) provides that while a Proclamation of Emergency is in operation, the executive power of the Union extends to giving directions to any State as to the manner in which the executive power of the State is to be exercised.

(ii) Legislative Power of Parliament extends to State Matters [Articles 250 and 353(b)]:

In accordance with Article 250, the authority of the Centre increases and the



Parliament assumes the power to make laws for the entire country or any part thereof, even in respect of subjects mentioned in the State List. In other words, The State list is converted into Concurrent list.

Clause (b) of Article 353 further empowers the Parliament to make laws with respect to any matter notwithstanding that it is one, which is not enumerated in the Union List. In the exercise of this law making power of Parliament may confer powers and impose duties upon the Union or its officers and authorities even though the law pertains to a matter not contained in the Union List.

(iii) **Extension in Duration of Lok Sabha and State Legislative Assemblies (Article 83 and Article 172):** Article 83 provides that while a proclamation of emergency is in operation, the life of the Lok Sabha may be extended for a period of one year at a time. It may further be extended by law by Parliament each time for another one year, but the same cannot be extended beyond six months after the proclamation ceases to operate.

Proviso to clause (1) of Article 172 provides that the tenure of State Assemblies can also be extended in the same manner.

(iv) **Alteration in distribution of Revenue [Article 354(1)]:** Clause (1) of Article 354 provides that while a proclamation of Emergency is in operation, the President is empowered to alter or modify the provisions contained under Article 268 to 279 regarding distribution of revenues between the Union and the States. Every Order made under Clause (1) of Article 354 is required to be laid before each House of Parliament. Such an order or the modification so effected in the financial arrangements, would not remain in force beyond the end of the financial year in which the proclamation of Emergency ceases to operate.

(v) **Suspension of Fundamental Rights mentioned in Article 19 (Article 358):** According to Article 358, the Fundamental Rights under Article 19 are automatically suspended when the National Emergency

is proclaimed on the grounds of war or external aggression.

The **Constitution (Forty- Fourth Amendment) Act, 1978** has made following two important changes restricting the scope of Article 358-

Firstly, Article 19 will be suspended under Article 358 only in case a Proclamation of Emergency is made on ground of **"war"** or **"external aggression"** and not in case of a Proclamation of Emergency issued on the ground of **"armed rebellion"**.

Secondly, Article 358 will not protect any law (violative of Article 19) which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made.

(vi) **Suspension of enforcement of other Fundamental Rights (Article 359):** According to Article 359, the President by a separate proclamation can suspend all Fundamental Rights except those under Articles 20 and 21.

From the above discussion, it becomes quite clear that emergency not only suspends the autonomy of the States but also converts the federal structure of India into a unitary one. Still it is considered necessary as it equips the Union Government with vast powers to cope up with the abnormal situations.

Focus On

Proclamation of National Emergency till date

- (i) October 26, 1962 to January 10, 1968- External aggression
- (ii) December 3, 1971 to March 1977- External aggression
- (iii) June 25, 1975 to Mar 1977- Internal disturbance.

National Emergency has been declared in our country three times so far. For the first time, emergency was declared on 26 October 1962, when China attacked our borders in the North East. This National Emergency lasted till 10 January 1968 long after the hostilities ceased.



For the second time, it was declared on 3 December 1971 in the wake of the second India- Pakistan War and was lifted on 21 March 1977. While the second emergency, on the basis of external aggression, was in operation, third National Emergency was imposed on 25 June 1975. This emergency was declared on the ground of "internal disturbances".

There was no justification or imposing this emergency as the government was already armed with the power provided during the second National Emergency of 1971 which was still in operation. Some of the critics point out that during that period the power was misused; all democratic norms were flouted; leaders of the opposition parties were put behind the bars; elections were put off and the term of the Lok Sabha was extended and the press was gagged. It was on the basis of this misuse of power that when the Janata Government came to power in 1977, it went ahead with the 44th Amendment to the Constitution which provides many safeguards against the arbitrary use of emergency powers.

Article 352 and Constitution (Forty- Fourth Amendment) Act, 1978-

- ❑ The expression internal disturbance being a vague one was substituted by a concrete expression i.e., armed rebellion.
- ❑ Now the proclamation of National emergency by the President can be made only on the written advice of the cabinet.
- ❑ Earlier national emergency was to be approved by the Parliament within two months, now it has to be approved within one month.
- ❑ Earlier the proclamation of National Emergency was to be approved by a simple majority. Now it is to be approved by a majority under Article 368.
- ❑ Earlier once the Parliament approves National Emergency it was to be enforced till revoked by the President. Now it is only 6 months at a time.
- ❑ Earlier there was no provision for the withdrawal of National Emergency. Now if the Lok Sabha passes a resolution with a simple majority in a special session conveying on the request of 1/10th of the

members national emergency can be withdrawn.

- ❑ Earlier under Article 358, the Fundamental Rights under Article 19 were to be automatically suspended for all types of National Emergency whether proclaimed on the ground of War, External Aggression or Internal Disturbance. But now the Fundamental Rights under Article 19 can be automatically suspended only when the National Emergency is proclaimed on the grounds of War or External aggression.
- ❑ Earlier under Article 359, the president was empowered to suspend all other Fundamental Rights, but now, the Presidential power to suspend the right to move the Court for the enforcement of a fundamental right cannot be exercised in respect to the fundamental rights secured by Articles 20 and 21. In other words, the operation of Articles 20 and 21 cannot be suspended during the proclamation of a National Emergency.

STATE EMERGENCY

Article 355 casts a duty on the Union Government towards the States and it is in the fulfillment of this duty that the Centre is authorized to interfere in the administration of the affairs of the State. However, this Article is not the only source of power for interference with the functioning of the State Governments. It merely provides justification for the measures to be adopted by the Centre under Articles 356 and 357. A provision similar to Article 355 occurs in other Constitutions (Article IV of the U.S. Constitution and Sec. 119 of the Australian Constitution) as well.

Article 355 provides that It shall be the duty of the Union "to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

Proclamation of the State Emergency: Failure of Constitutional Machinery in States

According to **Article 356(1)** "If the President, either on receipt of a 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, he may make a Proclamation to that effect."

Article 365 which occurs in Part XIX - Miscellaneous - provides 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". In the light of the language employed in article 365, namely, non-compliance with "directions given in the exercise of executive power of the Union under any of the provisions of this Constitution", it is necessary to refer to articles 256 and 257 which provide for giving of such directions. The said articles occur in Chapter II - 'Administrative Relations - General' in Part XI which deals with relations between the Union and the States. Article 256 which carries the heading "Obligation of States and the Union" provides that "the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and 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". Article 257 which carries the heading "Control of the Union over States in certain cases" provides in clause (1) that "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 purpose". Clause (2) of article 257 provides that "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". The proviso to clause (2) says that nothing in the said clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or to give appropriate directions to the States for

their maintenance. Clause (3) says that the executive power of the Union to give directions extends to the measures to be taken for the protection of the Railways within the State. Clause (4) provides for reimbursement of the cost incurred by the State in complying with or carrying out the directions given under clauses (2) and (3). It is not really necessary to refer to articles 258 and 258A. Article 258 empowers the President to entrust certain executive functions of the Union to the States with their consent. Similarly, article 258A provides for the States entrusting their executive functions to the Union with its consent.

Procedure

- ❑ Every Proclamation under Article 356 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.

- ❑ 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. It can be further extended by the parliament by another six month.
- ❑ If the Proclamation has to be extended beyond One Year, two conditions are to be fulfilled:



- (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 is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.*

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:

- ❑ If the State emergency has to be continued beyond three years, an amendment of the Constitution is required.

Consequences of State Emergency

The following consequences ensue on the issuance of a Proclamation of the President under Article 356(1)-

1. The Council of Ministers is dismissed.
2. The State Legislative Assembly is either dissolved or is kept under suspended animation.
3. The President may 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.

4. The President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.
5. The President may 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.

The President however cannot 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.

The Federal Spirit and Article 356

It needs to be remembered that only the spirit of "co-operative federalism" can preserve the balance between the Union and the States and promote the good of the people and not an attitude of dominance or superiority. Under our constitutional system, no single entity can claim superiority. Sovereignty doesn't lie in any one institution or in any one wing of the government. The power of governance is distributed in several organs and institutions - *a sine qua non* for good governance. Even assuming that Centre has been given certain dominance over the States, that dominance should be used strictly for the purpose intended, nor the oblique purposes. An unusual and extraordinary power like the one contained in article 356 cannot be employed for furthering the prospects of a political party or to destabilize a duly elected government and a duly constituted Legislative Assembly. The consequences of such improper use may not be evident immediately. But those do not go without any effect and their consequences become evident in the long run and may be irreversible.

Unfortunately, however, it so happened that over the years, the Centre has not always kept in mind the concept of co-operative federalism or the spirit



and object with which the article was enacted while dealing with the States and has indeed grossly abused the power under article 356 on many occasions. Between 1950 and mid 2009, the said power was exercised on more than 115 occasions. The facts and figures contained in Chapter Six of the Sarkaria Commission Report (as discussed in the chapter of Federalism) appended to the said chapter and the decision of the Supreme Court in *S.R. Bommai v. UOI* (reported in AIR 1994 SC 1918) amply bear out the truth of our assertion. The said Annexure shows that on several occasions, the State Governments were dismissed even when they enjoyed the majority in the Assembly; on some occasions, they were dismissed without giving them an opportunity to prove their strength on the floor of the House. The very instance of *S.R. Bommai*, who was the Chief Minister of Karnataka, is proof positive of such abuse. In spite of his asking the Governor to allow him to prove his majority, within a very short period, on the floor of the Assembly, the Governor did not give him that opportunity and recommended the dismissal of his ministry. The said action of the governor naturally invited strong condemnation at the hands of the Supreme Court.

Judicial Interpretation of article 356

Article 356, it may be remembered, occurs in the Part relating to emergency provisions. Though the article itself does not employ the expression emergency or any of its variants, the fact that it occurs in the chapter relating to emergency cannot be lost sight of. This is merely to emphasise the unusual character of the said provision and to remind ourselves of the hope expressed by Dr. Ambedkar that "such articles (articles 355 and 356) will never be called into operation and that they would remain a dead letter". Yet another indication is the marginal heading to the said article which speaks of "Failure of constitutional machinery".

Clause (1) of article 356 - indeed the whole article - has been the subject-matter of elaborate consideration at the hands of the Supreme Court in two of its decisions, namely, *State of Rajasthan v. UOI* (AIR 1977 SC 1361) and *S.R. Bommai v. UOI* referred to hereinabove. The first mentioned decision is by a Constitution Bench of seven

judges while the latter is by a Constitution Bench of nine judges. In view of the fact that in certain respects, *S.R. Bommai* departs from *State of Rajasthan*, it would be sufficient to refer to the holdings in *S.R. Bommai* alone. In *S.R. Bommai*, the majority opinions are two, one was rendered by Justice P.B. Sawant on behalf of himself and Justice Kuldeep Singh. The other was rendered by Justice B.P. Jeevan Reddy for himself and Justice S.C. Agarwal and with whose reasoning and conclusions Justice S.R. Pandian agreed fully. (They also agreed with conclusions 1, 2 and 4 to 7 in the opinion of Justice Sawant). The principle of article 356 has been set out in the said decision in the following words:

"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 from 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 issues 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." (Opinion of Justice P.B. Sawant)

"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. Clause (3) is

both a check on the power and a safeguard against abuse of power.

Clause (1) opens with the words "if the President is satisfied". These words are indicative of the satisfaction being a subjective one.... 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. 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" emphasize the type of situation contemplated by the clause. These words read with the title of the article "provisions in case of failure of constitutional machinery in States" emphasize the nature of the situation contemplated.... 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 give 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. The satisfaction of the President referred to in clause (1) maybe formed either on the receipt of the report(s) of the Governor or otherwise.... He (the Governor) 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 omissions 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.... Since he (Governor) cannot himself take any 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)." (Opinion of Justice B.P. Jeevan Reddy).

FINANCIAL EMERGENCY

Article 360 contains provisions concerning financial emergency.

According to **Article 360 (1)** *If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory*

thereof is threatened, he may by a Proclamation make a declaration to that effect.

The ground for the declaration of financial emergency is *"a threat to the financial stability or credit of India or any part of the territory of India."*

Duration of Financial Emergency

Clause (2) of Article 360 provides that a Proclamation issued under clause (1) of Article 360 may be revoked or varied by a subsequent Proclamation by him.

A Proclamation concerning financial emergency is required to be laid before each House of Parliament.

According to Article 360 (2) (c), the Proclamation 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:

Effects of Financial Emergency

(i) There may be made a provision for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State; it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

As yet, no occasion has arisen for the issuance of the Proclamation under Article 360(1).

