CHAPTER XIII

EMERGENCY PROVISIONS

SYNOPSIS

A. INTRODUCTORY

A notable feature of the Indian Constitution is the way in which the normal peace-time federalism can be adapted to an emergency situation. The framers of the Constitution felt that, in an emergency, the Centre should have overriding powers to control and direct all aspects of administration and legislation throughout the country.

The Constitution envisages three types of emergencies:

(i) emergency arising from a threat to the security of India;

(ii) breakdown of constitutional machinery in a State;

(iii) financial emergency. Each of these emergencies is discussed below.

Proclamation of an emergency is a very serious matter as it disturbs the normal fabric of the Constitution and adversely affects the rights of the people. Such a proclamation should, therefore, be issued only in exceptional circumstances and

not merely to keep an unpopular government in office as happened in June 1975 when an emergency was declared on the ground of internal disturbance without there being adequate justification for the same.

As a consequence thereof, the emergency provisions (especially Arts. 352 and 356) have been extensively amended by the Constitution (Forty-fourth Amendment) Act, with a view to introduce a number of safeguards against abuse of power by the executive in the name of emergency. Amendments have thus been made by the Forty-fourth Amendment to the emergency provisions of the Constitution to make repetition of the 1975 situation extremely difficult, if not impossible.[1]

B. PROCLAMATION OF EMERGENCY

Under Art. 352(1), if the President is 'satisfied' that a grave emergency exists whereby the security of India or any part thereof is threatened, whether by war, or external aggression, or armed rebellion, he may, by proclamation, make a declaration to that effect. Such a proclamation may be made in respect of the whole of India, or such part of the Indian territory as may be specified in the proclamation.

Article 352(1) thus means that the proclamation need not extend to the whole of India. It may be restricted to a part of the Indian territory.

A proclamation of emergency under Art. 352(1) may be made before the actual occurrence of war, external aggression or armed rebellion.[2]

Before 1978, an emergency could be declared because of war, external aggression or 'internal disturbance'. The expression 'internal disturbance' was too vague and broad. The 44th Constitutional Amendment substituted the words 'armed rebellion' for 'internal disturbance' with a view to exclude the possibility of an emergency being proclaimed on the ground of 'internal disturbance' only not involving armed rebellion, as happened in 1975. This change has somewhat restricted the scope of what may be called as internal emergency.

As the Supreme Court has explained in the following case,[3] the expression "internal disturbance" has a wider connotation than "armed rebellion" in the sense that "armed rebellion" is likely to pose a threat to the security of the country, or a part thereof, while "internal disturbance", though serious in nature, would not pose a threat to the security of the country, or a part thereof.

The intention underlying the substitution of the words 'internal disturbance' by the words "armed rebellion" is to limit the invocation of Art. 352 only to more serious situations where there is a threat to the security of the country, or a part thereof. The reason underlying restricting the scope of Art. 352 is that a proclamation of emergency under Art. 352 has a very serious impact on the powers of the States as well as the Fundamental Rights of the people.[4]

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1. Also see, *infra*, Ch. XXXIII, Sec. F; Ch. XLII.
2. *Expls*. to Art. 352(1).
3. *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431 : (1998) 2 SCC 109.
4. For discussion on this aspect, see *infra*, Ch. XXXIII, Sec. F.

A proclamation issued under Art. 352(1) may be varied or revoked by a subsequent proclamation [Art. 352(2)].

The 44th Amendment has introduced a clause, *viz.,* Art. 352(3), to the effect that the President shall not issue a proclamation of emergency [under Art. 352(1)], or a proclamation varying the same, unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Art. 75) that such a proclamation may be issued has been communicated to him in writing. This means that the decision to issue such a proclamation has to be arrived at collectively by the Cabinet and not by the Prime Minister alone without consulting the Cabinet. It so happened in 1975 that the President proclaimed emergency on the advice of the Prime Minister alone and the Council of Ministers was later presented with a *fait accompli*. It is to avoid any such situation in future that Art. 352(3) has been introduced in the Constitution.

Every proclamation issued under Art. 352(1) is to be laid before each House of Parliament [Art. 352(4)]. It ceases to operate (except when it is a proclamation revoking the previous proclamation) at the expiration of one month unless, in the meantime, it has been approved by resolutions of both Houses of Parliament [Art. 352(4)]. Thus, the purport of Art. 352(1) is that Parliament must be convened within a month to consider the proclamation of emergency.

A proclamation will automatically cease after one month if not approved by Parliament in the meantime. Formerly, the period allowed for parliamentary approval of the proclamation was two months. The 44th Amendment has reduced it to one month.

If, however, at the time of the issue of the proclamation or thereafter, Lok Sabha is dissolved without approving the proclamation, and the Rajya Sabha approves it, then the proclamation ceases to operate 30 days after the Lok Sabha sits again after fresh elections, unless in the meantime the new Lok Sabha passes a resolution approving the proclamation [Proviso to Art. 352(4)].

Another significant safeguard introduced by the 44th Amendment is to lay down that a resolution approving the proclamation of emergency (or one varying it) has to be passed by each House by a majority of the total membership of each House and not less than two-thirds of the majority of the members present and voting in each House [Art. 352(6)].

Before the 44th Amendment, passage of such a resolution by a simple majority in each House was sufficient. Art. 352(6) introduces a very wholesome safeguard. Since a proclamation of emergency virtually results in amending the Constitution for the period of the emergency (Fundamental Rights are suspended[5] and, from the legislative point of view, it becomes practically unitary)[6], it is desirable that the proclamation of emergency be approved by the same majority in Parliament as is required for amendment of the Constitution.[7]

Once approved by Parliament, the proclamation remains in force, unless revoked earlier, only for six months from the date of the passing of the later of the

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5. *Ibid.*

6. See, *infra,* under "Consequences of a Proclamation of Emergency".
Also see, Ch. XXXIII, Sec. F, *infra.*

7. For the Amendment of the Constitution see *infra,* Ch. XLI.

resolutions [Art. 352(5)]. For continuance of the emergency beyond that period, parliamentary approval is needed again. Thus, each time Parliament approves the proclamation, its life is extended for six months [Proviso to Art. 352(5)]. In this way, the question whether the emergency should continue in force or not must periodically come before both Houses of Parliament.

This provision has also been added by the 44th Amendment. Previously, once approved by the two Houses, the proclamation could remain in force as long as the executive desired. There was no provision for periodical parliamentary review of the need for continuance of the emergency. This is a very wholesome provision. Each resolution of approval is to be passed by Parliament by the special majority mentioned above [Art. 352(6)]. It may however be noted that the Central Executive can revoke the proclamation at any time it likes.

Another safeguard introduced by the 44th Amendment is that the President is obliged to revoke a proclamation of emergency issued under Art. 352(1) (or one varying the same) if the House of People passes a resolution disapproving the same [Art. 352(7)]. This resolution is to be passed by a simple majority of the members of the House present and voting. Formerly the power to revoke the proclamation vested in the executive and the House had no say in the matter. Now, the executive has to withdraw the emergency if the Lok Sabha so desires.

The Forty-fourth Amendment introduced another innovation: where a notice in writing, signed by not less than 1/10th of the total members of the Lok Sabha has been given, of their intention to move a resolution disapproving the proclamation of emergency, to the Speaker if the House is in session, or to the President, if the House is not in session, a special sitting of the House is to be held within 14 days from the date on which such notice is received by the Speaker or the President, as the case may be, for the purpose of considering such resolution [Art. 352(8)]. Thus, it does not lie within the power of the government to convene or not a session of the House to consider the resolution in question.

According to Art. 352(9), the President has power to issue different proclamations on different grounds, "being war or external aggression, armed rebellion or imminent danger of war or external aggression or armed rebellion whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation."

This provision was introduced in 1975 by the 38th Amendment after the proclamation was issued on the ground of internal disturbance. There was already in existence at the time a proclamation of emergency (issued in 1971)[8] on the ground of external aggression. The provision was to ensure that there might be no legal hurdle in the way of having two proclamations of emergency on two different grounds operating at one and the same time. The 44th Amendment has continued this provision.

(a) JUSTICIABILITY OF PRESIDENT'S DISCRETION

According to Art. 352(1), the President may make a proclamation of emergency only when he is satisfied as to the existence of a threat to the security of India, or a part thereof. Thus, the question whether the security of India is threatened or not lies within the subjective satisfaction of the President acting on the

8. *Infra*, Ch. XXXIII, Sec. F.

advice of the Cabinet. The question has arisen from time to time whether this satisfaction of the President is justiciable or not.

In *Bhut Nath v. State of West Bengal*,[9] the Supreme Court refusing to hold the continuance of the emergency under Art. 352 'void' stated that the question is "a political, not justiciable issue and the appeal should be to the polls and not to the courts."

Nevertheless, to put the matter beyond any shadow of doubt, the Constitution (Thirty-eighth Amendment) Act, 1975[10] amended the Constitution by adding clause 5 to Art. 352 which declared that the "satisfaction" of the President mentioned in Art. 352(1) and (3) "shall be final and conclusive" and "shall not be questioned in any court on any ground." It was further declared that "neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of—(i) a declaration made by proclamation by the President to the effect stated in clause (1); or (ii) the continued operation of such proclamation." The 'satisfaction' of the President in declaring the emergency, and, thus, the proclamation of emergency under Art. 352, were thus sought to be placed beyond the ken of judicial scrutiny.

In *Bhut Nath*, that was the view taken by the Supreme Court when it said that the proclamation of emergency was not a justiciable issue but was essentially a political matter in substance. The amendment sought to put this judicial view in the form of a constitutional provision lest the court might change its opinion at some future date. Now, the Forty-fourth Amendment of the Constitution has repealed Art. 352(5).[11] The position has thus been restored to what it was before the 38th Amendment. It is therefore for the Supreme Court to decide whether it will treat the 'satisfaction' of the President to issue a proclamation of emergency, or to vary it or to continue it, as 'final' and 'non-justiciable', or as being subject to judicial review on some grounds.

Since the passage of the Forty-fourth Amendment of the Constitution, the question of judicial review of the discretion of the President to declare or not to declare an emergency has not arisen as no emergency has been declared after 1975. In *Minerva Mills*,[12] however, BHAGWATI, J., did express the view that whether the President in proclaiming the emergency under Art. 352 had applied his mind, or whether he acted outside his powers, or acted *mala fide* in proclaiming the, emergency could not be excluded from the scope of judicial review.[13]

BHAGWATI, J., also observed that the 38th Amendment which barred the satisfaction of the President from being called into question in a court could be declared unconstitutional as being violative of the basic structure of the Constitution.[14] Judicial review has now come to be regarded as a basic feature of the Constitution.[15] Further after the Supreme Court decision in *Bommai*,[16] in which the

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9. AIR 1974 SC 806 : (1974) 1 SCC 645.
10. See, Ch. XLII, *infra*, for 38th Amendment.
11. See, Ch. XLII, *infra*, for 44th Amendment.
12. AIR 1980 SC 1789 : (1980) 2 SCC 591.
For discussion on the case, see, *infra*, Ch. XLI "Amendment of the Constitution".
13. AIR 1980 SC, at 1840.
14. *Ibid*., at 1838.
15. For discussion on this doctrine, see, *infra*, Ch. XLI.
16. *Infra*, Sec. D.

Supreme Court did go into the validity of a proclamation issued by the President under Art. 356, it can now be safely asserted that a proclamation of emergency under Art. 352 is reviewable by the Court on the grounds mentioned by BHAGWATI, J., in *Minerva Mills.*

The Constitution seeks to control the exercise of power to proclaim an emergency in two ways:

(i) The President must act on the advice of the Central Cabinet and not in his own subjective satisfaction and also not on the advice of the Prime Minister alone. Thus, the effective power to declare an emergency lies with the Cabinet.

(ii) The democratic control over the executive power in respect of proclaiming an emergency has been strengthened in so far as parliamentary approval is necessary for the proclamation immediately after it is made and, then, after every six months.

But these safeguards may prove tenuous in practice because the government of the day enjoys support of the majority party, and the Cabinet functions on the principle of collective responsibility.[17] A strong willed Prime Minister may have his way as he may dominate his Cabinet as well as the party and, thus, mobilise support for the emergency even though, in effect, there may be no need for the same. A pliant Parliament may support the Government making any parliamentary control of the emergency fictitious. It therefore appears to be essential that a limited judicial review of the exercise of the power to proclaim emergency remains available. This extra-Parliamentary check is extremely important for safeguarding democracy in the country.

(b) CONSEQUENCES OF A PROCLAMATION OF EMERGENCY

The following drastic consequences follow from the issue of the proclamation of emergency under Art. 352(1).

(a) There is a transformation in the behaviour of the Indian federalism. The normal fabric of the Centre-State relations undergoes a fundamental change. Parliament becomes empowered to make a law with respect to any matter in the State List, and such a law operates till six months after the proclamation ceases to operate [Art. 250].[18]

It thus means that the normal peace-time distribution of legislative powers is practically suspended so far as Parliament is concerned. The State Legislatures continue to function as usual and may make any law in their assigned area, *viz.*, Lists II and III, but Parliament becomes empowered to legislate even in the exclusive State sphere (List II) as a result of the Proclamation of emergency.

Parliament can meet the emergency by passing any law that it may regard necessary without being trammelled by the scheme of distribution of powers [Art. 250(1)], and a Central law would override a State law even with respect to a matter in the State List [Art. 251].[19] Article 359 provides for suspension of the enforcement of the rights conferred by Part III during emergencies. However, by the Constitution (Forty-fourth Amendment) Act, 1978, it has been provided that

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17. See, Ch. III, Sec. B(d), *supra.*
18. *Supra*, Ch. X, Sec. E.
19. *Supra*, Ch. X, Sec. J.

even during emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended.[20]

The life of a law made by Parliament which it would not be competent to enact, but for the issue of a proclamation of emergency, comes to an end to the extent of the emergency on the expiry of 6 months after the proclamation of emergency cases to operate, except for things done or omitted to be done before the expiry of this period [Art. 250(2)].

This provision means that a law enacted by Parliament during an emergency in the exclusive State sphere ceases to exist six months after the emergency comes to end. This means that six months after the ending of the emergency, the normal scheme of distribution of legislative powers is fully restored.

(b) Further, the Centre becomes entitled to give directions to a State as to the manner in which it is to exercise its executive power [Art. 353(a)]. Since Parliament can make a law even in the exclusive State field, it means that the Centre can give directions even in the area normally allotted to the States.[21] Parliament may confer powers and impose duties upon the Centre or its officers and authorities even though the law pertains to a matter not in the Union List [Art. 353(b)].

(c) When emergency is declared not in the whole of India but only in a part of India, the executive power of the Centre to give directions, and the power of Parliament to make laws as mentioned above, extend not only to the State in which the territory under emergency lies, but also to any other State "if and so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation" [Proviso to Art. 353].

This provision means that in such a case, directions may be issued by the Centre to the States which are not included in the Proclamation of Emergency. This provision has been inserted in the Constitution in order to make emergency effective in the area where it has been imposed, by restricting undesirable activities in the adjoining areas. Miscreants could not be allowed to take advantage of the fact that the Proclamation does not relate to the particular spot where such activities are, for the time being, being carried on.

(d) While the proclamation of emergency is in operation, the President may by order direct that any provision (Arts. 268 to 279) relating to the distribution of revenue between the Centre and the States,[22] shall take effect subject to such exceptions or modifications as he thinks fit [Art. 354(1)].

This provision frees the Centre from its obligation to transfer revenue to the States so that its own financial capacity remains unimpaired to deal with the emergency.

An order suspending distribution of revenue is to be laid before both Houses of Parliament, [Art. 354(2)] and it would not remain in force beyond the end of the financial year in which the proclamation of emergency ceases to operate [Art. 354(1)].

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20. See *infra*. See also *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1, at page 109 : AIR 2007 SC 861.

21. See, *Supra*, Ch. XII, for these provisions.

22. See, *Supra*, Ch. XI, Sec. K, for these provisions.

(e) During an emergency, Parliament can also levy any tax which ordinarily falls in the State List [Art. 250].[23]

Thus, although the State Governments continue to operate, the Central Government becomes omnipotent and the normal distribution of legislative, executive and taxing powers, and the scheme of distribution of revenue between the Centre and the States, all are undone so far as the Centre is concerned. The reason is that during an emergency, the Central financial needs become greater than its peace-time commitments and, therefore, the normal financial arrangements between the Centre and the States cannot continue to function. The war-time experiences of Canada and Australia will bear out the wisdom of these provisions. In both these countries, the Centre had to exclude the States from the field of Income-tax.[24]

(f) As has already been pointed out, during the operation of the proclamation of emergency, the life of the Lok Sabha may be extended beyond its normal five year period by Parliament by law for a year each time, up to a period not extending beyond six months after the proclamation of emergency ceases to operate.[25]

Parliament continues to function normally during the emergency. However, to avoid any confusion which might arise from holding fresh elections during the period of the emergency, if the life of Lok Sabha comes to an end, this provision enables the same to be extended for the period of emergency.

(g) Parliament may by law extend the life of the State Legislatures by one year each time during an emergency, subject to a maximum period of six months after the emergency ceases to operate [Proviso to Art. 172].[26]

(h) The proclamation of emergency also affects the operation of the Fundamental Rights. The matter has been discussed in detail in another part of the book.[27]

(c) EMERGENCY PROVISIONS IN OTHER CONSTITUTIONS

The kind of emergency provisions as exist in the Indian Constitution are not to be found in the U.S.A., Canada and Australia, and at first sight may even appear to be drastic and out of place in a democratic and federal country. But it is not entirely so if the matter is probed into somewhat deeply and is viewed in the light of adjustments and developments which come about in other federations under the impact of an emergency like war when these federations undergo a kind of a silent metamorphosis.

Federalism, says DICEY, is a weak government because of the distribution of powers between the Centre and the units, but the war-time experiences of the U.S.A., Canada and Australia have shown that this is not necessarily so and that a federation can very well stand the test of time. As CORWIN has asserted, "Federalism as a system of counterpoise is no longer viable in the field of war-making," and that there is "incompatibility between the requirements of total war and principles thus far deemed to be fundamental to government under the Constitution".[28]

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23. *Supra*, Ch. X, Sec. J; Ch. XI, Secs. C, D, E.
24. *Supra*, Ch. XI, Sec. I.
25. Proviso to Art. 83(2); *supra*, Ch. II, Sec. I(c).
26. *Supra*, Ch. VI, Sec. B(ii).
27. *Infra* Ch. XXXIII, Sec. F.
28. TOTAL WAR AND THE CONSTITUTION, 70, 130.

These federations have faced the emergency of two world wars [1911-14 and 1939-45]. In the U.S.A. and Australia, the emergency was met by the courts giving an expansive and liberal interpretation to the 'war' or the 'defence' power of the Centre and, thus, giving it a greater area of operation than its peace-time ambit so as to enable it to do all those things which are necessary for the safety of the country, or the effective prosecution of war.[29]

In Canada, the 'general power' of the Centre was interpreted by the courts broadly and so the Centre became more powerful during the war-time than it would be in the peace-time.[30]

During the war crisis, the Constitutions of the U.S.A., Canada and Australia functioned very differently from their normal peace-time behaviour. As WHEARE points out:[31]

> "While it is the essence of federalism to be pluralistic, it is the essence of the war power to be unitary, to be centralised and regimented, to be, in the modern word, 'totalitarian'. There is an immediate contrast between the multiplicity of federalism with its divisions of authority, and the unity necessary if war is to be conducted efficiently."

And, further, he observes:[32]

> "War leads to the transformation of a federal government into a unified state, with its plurality and multiplicity of jurisdictions co-ordinated for the unitary and totalitarian process of war."

The Indian Constitution seeks to achieve the same result in the area of federalism but in a different way. In the three foreign constitutions, the final word rests with the courts to decide whether a particular act of the Centre is justifiable under the 'war', 'defence' or 'emergency' power. Thus, necessary adjustments in the Centre-State power balance in response to the emergency are effectuated through the process of judicial interpretation. This, however, is a somewhat uncertain process as one cannot be sure which way a judicial decision may go in a particular disputed fact-situation, and the area of operation of the Centre depends on the view the courts take at the time. In India, on the other hand, the method provided to meet an emergency is more overt, more direct, and simpler because it depends on the Central executive issuing the necessary proclamation, and the incidents flowing therefrom are settled by the Constitution itself without making them dependent on the judicial attitude or inter-pretation.

A reason underlying the Indian approach may be that owing to the elaborate nature of the distribution of powers, there was not much room left for the judiciary to make necessary adjustments in emergency situations. Moreover, the Indian Constitution envisages certain emergency situations which are not to be found in the three federal constitutions, *e.g.,* a financial emergency. But it needs to be underlined that the powers of the Centre in the three other federations do not extend to such an extent as they do in India whereas peace-time federalism undergoes a drastic change.

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29. *Supra,* Ch. X, Sec. L.
30. *Ibid.* Also see, MURPHY, The War Power of the Dominion, 30 Can B.R. 791, 798 (1952).
31. FEDERAL GOVERNMENT, 197, (1953).
32. *Ibid., at 220.*

Also, in the other federations, the powers of the Centre during emergency extend on sufferance of the judiciary. The courts have to agree to what extent the Centre can expand its powers. This is, therefore, a built-in control mechanism. In India, the control mechanism over the executive and the Parliament is rather weak during an emergency, as it rests, primarily, with Parliament and, secondarily, with the judiciary.

(d) INVOCATION OF ART. 352

Article 352 has been invoked three times so far.

A proclamation of emergency was issued under Art. 352, for the first time, on October 26, 1962, in the wake of conflict with China. It remained in force during the Indo-Pakistan conflict in 1965, and was revoked only in January, 1968.

Emergency was proclaimed again in December, 1971, as a result of the Indo-Pakistan dispute, on the ground of external aggression.

While the 1971 proclamation was still effective, another proclamation was issued on June 26, 1975. This time the proclamation was issued on the ground of "Internal disturbance" threatening the security of India. Both these proclamations were revoked in March, 1977. Thus, from June 26, 1975 to March, 1977, two emergency proclamations were in force simultaneously.

The proclamation of 1975 on the ground of internal disturbance proved to be the most controversial. There was violation of the Fundamental Rights of the people on a large scale; drastic press censorship was imposed. A large number of persons were put in preventive detention.[33] The reasons for imposing the emergency were explained by the Central Government in a White Paper, dated July 21, 1975, and the two Houses of Parliament approved the proclamation on the same day. The general public perception was that issuing of this proclamation amounted to misuse of power on the part of the Central Government of the day insofar as there was no real emergency. The public reaction to the proclamation was so intense that when elections were held in 1977 for the Lok Sabha after the proclamation ceased to exist, the Congress Party, which was responsible for the proclamation, lost its majority and the Janata Government came to power.

The Janata Government appointed the Shah Commission to probe into the circumstances which led to the declaration of the emergency in 1975. This Commission in its report held that there was no evidence of any circumstances which could warrant the declaration of the emergency in 1975. There was no unusual event, or even a tendency in that direction, to justify the imposition of the emergency. There was no threat at all to the well-being of the nation from external or internal sources.

One of the direct results of the proclamation of the emergency in 1975 was the amendment of Art. 352 by the 44th Constitutional Amendment so as to introduce some more safeguards therein against any unwarranted declaration of emergency in future.[34] The idea underlying the 44th Constitutional Amendment is that it ought to be ensured that what happened in 1975 is not repeated in future.

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33. For discussion on this aspect, see, *infra*, Ch. XXXIII, Sec. F.

34. For provisions of this Constitutional Amendment, see *infra* Ch. XLII; also see, *supra*, Sec. B.

C. CENTRE'S DUTY TO PROTECT THE STATES

Article 355 imposes a twofold duty on the Centre:—

(i) to protect every State against external aggression and internal disturbance, and

(ii) to ensure that the government of every State is carried on in accordance with the provisions of the Constitution.

The two limbs of Art. 355 are not interdependent as constitutional break-down can take place in a State even without there being a situation of 'external agression" or "internal disturbance".

A provision of this type is to be found in other federal constitutions as well. The American Constitution places a duty on the Central Government to guarantee to every State a Republican form of government and to protect a State against invasion, and, on application of the State Legislature, or, of the Executive (when the Legislature cannot be convened), against domestic violence.[35] A vast potential is rooted in this clause. This clause does not mention the manner in which the guarantee as regards the Republican form of Government may be enforced in a State.

S. 119 of the Australian Constitution provides in express terms that the Centre shall protect every State against invasion, and, on application of the State Executive, against domestic violence.

An important distinction between the Australian and the American provisions, on the one hand, and the Indian provision, on the other, is that while, in the former, application by the State to the Centre is necessary for protection against domestic violence, no such condition is laid down in India.

The first limb of Art. 355, that of protecting the States, does not stipulate that a State should request the Centre before it could send its forces into a State to counter the breakdown of law and order therein. On the other hand, the parallel provisions, as stated above, in other federations, do stipulate that request from the State is necessary to protect it against domestic violence.

The U.S. Supreme Court has, however, held that if internal disturbance in any State interfered with the operation of the National Government itself, or with the movement of inter-State commerce, the Centre can send force on its own initiative, without waiting for the application of the State authorities.[36] As the Court said, "the entire strength of the Nation may be used to enforce in any part of the land, the full and free exercise of all national powers and security of all rights entrusted by the Constitution to its care." After this ruling the requirement of an application by the affected State for aid for suppression of internal violence has lost its importance. In 1963, the Central Government in the U.S.A. did not hesitate to deploy the national militia in Little Rock to quell racial disturbances, and to enforce the decisions of the Supreme Court on racial integration. This was done very much against the wishes of the State concerned.[37]

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35. Art. IV, Sec. 4.
36. In *Re Debs.*, 158 US 564 (1895).
37. KELLY & HARBINSON, THE AMERICAN CONSTITUTION, 864.

Under Art. 355, mentioned above, the obligation of the Centre to protect a State arises in the following three situations:

(i) external aggression;

(ii) internal disturbance, and

(iii) when the State Government cannot be carried on in accordance with the Constitution.

The word "aggression" has been construed to be a word of very wide import not limited only to war but as comprising many other acts which cannot be termed as war. A "bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State" could constitute aggression under Article 355. Thus, it was found that the State of Assam is facing "external aggression and internal disturbance" on account of large-scale illegal migration of Bangladeshi nationals[38]

Article 355 uses the term "internal disturbance", while Art. 352 uses the term "armed rebellion". The term "armed rebellion" is narrower in scope than "internal disturbance" which is certainly broader. This means that a mere "internal disturbance" short of armed rebellion cannot justify a proclamation under Art. 352. Further, Art. 356 only talks of "breakdown of constitutional government in the State. This means that mere "internal disturbance" does not justify a proclamation under Art. 356 unless it results in the constitutional breakdown in the State.[39]

In India, law and order is a State subject[40] and, therefore, Central intervention under Art. 355 would be justifiable only in case of aggravated form of disturbance, which a State finds beyond its means to control. Although not laid down in the Constitution, a convention has arisen that ordinarily the Centre sends help to a State on request by the State Government. In view of the specific constitutional obligation placed on the Centre, it will be unjustifiable for the Centre to refuse to help a State when requested by it. It cannot, however, be asserted that the Centre shall never intervene in a State *suo motu* without its request, though it may be a difficult question to decide when it would do so. The final decision appears to rest with the Centre. The controversy between the Centre and some of the States regarding deployment of the Central Reserve Police to protect Central Government property in these States without consulting them has already been referred to.[41]

To get over these problems, the 42nd Amendment of the Constitution added a new provision, Art. 257A, into the Constitution enabling the Centre to deploy any armed forces of the Union, or any other force under its control, for dealing with any grave situation of law and order in any State. Any such force had to act subject to the control and directions of the Centre and not of the concerned State Government.

Under Art. 257A, the Centre could act without the concurrence of the concerned State Government. However, the Law Minister gave an assurance on the

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38. *Sarbananda Sonowal v. Union of India,* (2005) 5 SCC 665, at page 709 : AIR 2005 SC 2920.
39. For Art. 356, see, *infra,* Sec. D.
40. *Supra,* Ch. X, Sec. E.
41. *Supra,* Ch. XII.

floor of Parliament that the power under Art. 257A would be used only in exceptional situations and in consultation with the concerned State Government. To give full effect to Art. 257A, some changes were made in the legislative entries in the three Lists. A new entry, 2A, was added to List I to the following effect:

> "2A: Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

Consequent changes were made in entries 1 and 2 of List II to exclude any such force from the purview of the States.[42]

Article 257A raised a good deal of controversy and was vehemently criticised. The States regarded it as causing diminution in their autonomy. The 44th Amendment, therefore, repealed Art. 257A, but entry 2A still remains a part of List I, giving legislative and executive power to take necessary action to deploy armed forces in a State in aid of civil power. This power vested in the Centre can be justified with reference to Art. 355.

Also, the fact that Art. 352 permits declaration of emergency in a part of the country because of armed rebellion means that the Centre has to take all possible steps necessary to maintain law and order in any part of the country if there is a serious breakdown thereof. It appears that even under entry 2A, List I, the Centre is entitled to deploy forces *suo motu* in a State to put down internal disturbance in a State and restore peace therein.

The words "in aid of the civil power" in entry 2A mean in aid of State instrumentalities responsible for maintenance of law and order. Thus, the Centre uses its forces to help the law enforcing authorites in the State. But the above-mentioned words do not necessarily imply that the Centre cannot introduce its forces, if need be there, without the request of the State. If there is serious breakdown of law and order in a State, the Centre will be justified to send its forces to meet the situation without receiving any State request for the purpose. This result emerges by reading entry 2A, List I, along with Art. 355.

Article 355 also imposes a duty on the Centre "to ensure that the government of every State is carried on in accordance with the provisions of the Constitution". The exact significance of this provision is not clear. It is in fulfilment of this obligation that the Centre takes over the Government of a State (Art. 356) in case of breakdown of the constitutional machinery therein.[43]

Recently, in the notable decision in *Sarbananda Sonowal*, the Supreme Court held that since the State of Assam is facing "external aggression and internal disturbance" on account of large-scale illegal migration of Bangladeshi nationals, it was the duty of the Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. The Illegal Migrants (Determination by Tribunals) Act, 1983 (Act 39 of 1983) was held to be ineffective in comparison to the Foreigners Act, 1946 in dealing with the influx of illegal immigration from Bangladesh. Therefore, the Court struck down the Illegal Migrants (Determina-

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42. *Supra*, Ch. X, Sec. D and E .
43. See, Sec. D, *infra.*

tion by Tribunals) Act, 1983 (Act 39 of 1983) as being ultra vires the Constitution as it "clearly negated the constitutional mandate contained in Article 355".[44]

A parallel to this provision is to be found in the American Constitution which places the Centre under a duty to maintain the republican form of the government in each State,[45] or in the provision in the Australian Constitution which provides that the central executive power extends to the execution and maintenance of the Constitution.[46] There is, however, no specific provision in any of the three federal constitutions enabling the Centre to take over the Government of a State in case of breakdown of the constitutional machinery therein. The Indian provision stipulates, in essence, that the form of the government prescribed in the Constitution must be maintained in the States.

INQUIRY INTO COMPLAINTS AGAINST STATE CHIEF MINISTERS

An interesting and significant question arising out of the obligation of the Centre to ensure that a State Government is carried on in accordance with the Constitution is whether the Centre can take cognisance of complaints made from time to time regarding the deeds of omission or commission, bordering on corruption, against State Chief Ministers.

It has been a common feature of the Indian political life that such complaints are usually made to the Centre against State Chief Ministers. Whether the Centre should take cognisance of these charges, or leave the matter to the State Government concerned?

The difficulty in following the second course is that justice is not seen to have been done when charges against the Chief Minister are referred to the very Chief Minister against whom they have been made. If no action is taken then people are bound to lose faith in the democratic system of government based on rule of law. On the other hand, if the Centre intervenes, it may be accused of interfering too much in State matters and its *bona fides* may become suspect if the parties controlling the State and the Centre happen to be of different political complexion.

On several occasions, the Centre has moved against the State Chief Ministers. It appointed a commission of enquiry to go into certain charges against the Chief Minister of Punjab who later resigned because of an adverse report by the commission.[47] Then, the Chief Minister of Orissa resigned when a committee of the Central Cabinet held that he had been guilty of administrative impropriety. In these cases, matters were somewhat easy because all belonged to one and the same party, *viz.,* the Congress Party. But things may be very difficult when the Central and the State Governments belong to different political parties. The Centre can easily be accused of political motives in such a situation.

In 1973, a centrally appointed commission, consisting of a Judge of the Supreme Court, was appointed to enquire into some complaints against the members of the Karunanidhi Ministry in Tamil Nadu which was dismissed earlier by the President under Art. 356.[48] The Chief Minister had earlier asserted on the

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44. *Supra* at p. 716; See further *Sarbananda Sonowal (II) v. Union of India,* (2007) 1 SCC 174 : (2006) 13 SCALE 33.
45. Art. IV, Sec. 4.
46. Sec. 61.
47. A.K. CHANDA, *Federalism in India*, 127-33.
48. For Art. 356, see below, Sec. D.
Also see, *infra*, pp. 993-994.

floor of the State Legislature that, under the Constitution, the Centre had no right to interfere in the powers conferred on the State under List II. The State cabinet was responsible only to the State Assembly which was supreme in so far as the affairs of the State were concerned.[49] These arguments did not, however, prevail with the Centre. Later the legality and constitutionality of the appointment of the commission was challenged in the Supreme Court but the Court upheld the same.[50]

On the question of ministerial corruption, it may be worthwhile to take note of the following:

(1) On several occasions, the State governments have appointed enquiry commissions to probe into allegations of corruption and misuse of power against their ex-ministers and ex-chief ministers. The legality and constitutionality of appointing such commissions has been judicially upheld in several cases.[51] But nothing concrete appears to have been achieved by such an exercise as no conviction has ever resulted as a result of the reports of these commissions.

(2) For the first time, in 1984, a State minister was dismissed from office in Andhra Pradesh on the charge of corruption.[52]

(3) A very significant chapter has been added to the legal and constitutional history of India by the criminal prosecution of A.R. Antulay, ex-Chief Minister of Maharashtra, under the Prevention of Corruption Act on a private complaint. The Supreme Court ruled that a private citizen can launch a prosecution against the ex-Chief Minister on charges of corruption.[53]

Earlier, the Governor of Maharashtra had given permission to launch the prosecution. But a crucial question was raised during the trial: whether an M.L.A. was a public servant and whether the permission of the legislature concerned would be necessary to prosecute him? The Supreme Court had ruled that an M.L.A. was not a public servant under S. 21 of the I.P.C., and, therefore, the question which authority must give sanction to prosecute him was merely an academic one.[54] But the Court has now changed its view on this question.[55]

In 1977, the Central Government appointed a commission of inquiry under S. 3 of the Commission of Inquiry Act to probe into certain allegations of corruption, favouritism and nepotism against the Chief Minister and a few Ministers of the State of Karnataka.[56] The State filed a suit in the Supreme Court under Art.

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49. *The Times of India*, 16-12-1972.

50. *M. Karunanidhi v. Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431; *supra*, Ch. X. Sec. H.

51. *State of Jammu & Kashmir v. Bakshi Gulam Mohamed*, AIR 1967 SC 122 : 1966 Supp SCR 401; *Krishna Ballabh Sahay v. Commission of Inquiry*, AIR 1969 SC 258 : (1969) 1 SCR 385; *P.V. Jagannath Rao v. State of Orissa*, AIR 1969 SC 215 : (1968) 3 SCR 789.
Also see, BHARATIYA, Central Inquiry of State Ministers' Accountability, (1976) 18 *JILI* 56.
For the text of some of these cases, and author's comments thereon, see, JAIN, CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW, III.

52. *The Overseas Hindustan Times*, dated 3-3-1984.

53. *A.R. Antulay v. R.S. Nayak*, AIR 1984 SC 718 : (1984) 2 SCC 500.

54. *R.S. Nayak v. A.R. Antulay*, AIR 1984 SC 684 : (1984) 2 SCC 183.

55. *P. V. Narasimha Rao v. State of Andhra Pradesh*, AIR 1998 SC 2120 : (1998) 4 SCC 626.
Also, *supra*, Ch. II, Sec. L(i)(a).

56. The Central Government belonged to the Janata Party while the Congress Party was in power in the State. The Chief Minister at the time was Devraj Urs.

131 of the Constitution[57] for a declaration that the appointment of such an inquiry commission was illegal and *ultra vires*. An important question raised was whether the Centre could appoint a commission of inquiry to probe into the allegations of corruption and misuse of power by the State Ministers, and whether S. 3 of the Commissions of Inquiry Act was constitutional?

The Supreme Court ruled in *Karnataka v. Union of India*[58] (6 : 1) that the appointment of the inquiry commission was valid and that S. 3 of the Inquiry Commission Act under which the commission was appointed was constitutional. The Court argued that the commission of inquiry is a fact-finding body having no power to pronounce a binding or definitive judgment. Its function is to ascertain facts, or to establish responsibility of Ministers for particular decisions. Therefore, the appointment of an inquiry commission to probe into allegations of corruption, etc., against the State Ministers does not constitute interference with the executive functions of the State Government. Such an inquiry commission does not raise directly or indirectly the subject of Centre-State relationship. When the Centre takes some action on the commission's report, then will be the time to assess the constitutional validity of what the Centre proposes to do.

Parliament has power to enact the Commission of Inquiry Act under entries 94 of List I and 45 of List III, read with entry 97 of List I,[59] and the Central Government has the executive power to appoint a commission to inquire into matters relating to the entries in List II. A justification for appointment of such an inquiry commission can be found in Art. 356. Whether a State Government or its Chief Minister is or is not carrying out the trust placed in their hands so as to determine whether use of power under Art. 356 is called for or not is certainly a matter lying within the Centre's power and is also a matter of public importance as envisaged by S. 3 of the Act in question.

The Indian Federalism has a "strong unitary bias" and the Central Government has powers to 'supervise', and even to supersede, in certain circumstances, a State Government temporarily to restore normalcy or to inject honesty and integrity into the State administration where these essentials of good government may be lacking.

Over a period of time, the Courts have, in a sense, facilitated this "unitary bias" as far as allegations of corruption against Chief Ministers of a State are concerned. In *M.C. Mehta v. Union of India*,[60] the CBI was directed to take appropriate steps for holding an investigation against the Chief Minister of Uttar Pradesh, Ms Mayawati. The CBI was also directed upon conclusion of the inquiry to submit a self-contained note to the Chief Secretary to the Government of Uttar Pradesh as well as to the Cabinet Secretary, Union Government. Again in *Vishwanath Chaturvedi (3) v. Union of India*[61], the Court directed an enquiry by the CBI into alleged acquisition of wealth by Mulayam Singh Yadav, Chief Minister of Uttar Pradesh and to submit a report to the Union of India. On receipt of such report, the Union of India was permitted to take further steps depending upon the outcome of the preliminary enquiry.

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57. *Supra*, Ch IV, Sec. C(iii)(b).
58. AIR 1978 SC 68 : (1977) 4 SCC 608.
59. *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279; *supra*, Ch. X, Sec. D, Jain, *Cases*, Vol. III.
60. (2003) 8 SCC 696, at page 703 : AIR 2004 SC 800.
61. (2007) 4 SCC 380, at page 394 : (2007) 4 JT 144.

The doctrine of 'implied prohibitions' has been rejected by the Supreme Court and is not applicable in India.[62]

The doctrine of collective responsibility of the State Ministers to the State Legislature does not give them any immunity from such an inquiry.[63] Collective responsibility represents ministerial accountability to the legislature. If a minister uses his office as a cloak for corruption, nepotism, or favouritism the entire council of ministers could not be held collectively responsible to the legislature. Appointment of the commission does not make ministers less answerable to the legislature. Maintenance of honesty and integrity in the State administration is democratic and not anti-democratic.

KAILASAM, J., alone ruled against the inquiry on the ground that it would impinge on the right of the State to function in its limited sphere allowed to it by the Constitution. According to his ruling: "As there is no specific Article in the Constitution enabling the Union Government to cause an inquiry into the governmental functions of the State the power cannot be assumed by ordinary legislation but resort must be had to a constitutional amendment." He also stated that the word 'inquiries' in entry 45, List III,[64] should not be given a wide meaning as conferring on the Union and the State Governments powers to enact a provision to embark on an enquiry as to the misuse of governmental powers by the other.

One interesting development in this matter was that anticipating the appointment of an inquiry commission by the Centre, the State Government had itself appointed an inquiry commission of its own. Thus, two commissions, one Central and one State, came into existence to probe into the conduct of the State Ministers. Under S. 3(b) of the Commissions of Inquiry Act, the Centre could not appoint a commission of inquiry into a matter which was already the subject of inquiry by a State-appointed commission. Thus, the question was whether the Central Commission could function after the State Commission had been appointed. The Supreme Court concluded that both the Commissions could continue to function as they were to inquire into different matters.

Although the Supreme Court referred to Art. 356 as a justification for appointing the said commission by the Centre, it appears to be more appropriate to relate such an inquiry commission to Art. 355 which obligates the Centre to ensure that State Governments are carried on in accordance with the constitutional provisions. Certainly a corrupt State Government cannot be regarded as a government being carried on in accordance with the Constitution. In the opinion of the author, even Art. 356 emanates from Art. 355, and not *vice versa*.

D. FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE

Articles 356 and 357 provide for meeting a situation arising from the failure of the constitutional machinery in a State.[65]

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62. *Supra*, Ch. XI, Sec. J(ii).
63. *Supra*, Ch VII, Sec. B.
64. *Supra*, Ch. X, Sec. F.
65. SHETTY, President's Power under Art. 356 of the Constitution—Theory and Practice, in ILI, CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE, 335 (1975), ILI, PRESIDENT'S RULE IN THE STATES; REPORT OF THE SARKARIA COMMISSION.

If the President, 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 the Constitution, the President may by proclamation—

(*a*) assume to himself all or any of the functions of the State Government, or the powers of the Governor, or any body or authority in the State other than the State Legislature;

(*b*) declare that the powers of the State Legislature are to be exercised by Parliament;

(*c*) make such incidental provisions as may appear to him to be necessary or desirable for giving effect to the provisions of the proclamation; the President may even suspend in whole or in part the provisions of the Constitution relating to any body or authority in the State [Art. 356(1)].

The President is not, however, authorised to assume the powers of the High Court, or to suspend any constitutional provision pertaining to it [Proviso to Art. 356(1)]. Such a proclamation may be revoked or varied by a subsequent proclamation [Art. 356(2)].

Every proclamation under Art. 356(1) is to be laid before each House of Parliament, and it ceases to operate (except the one which revokes the earlier one), after two months, unless in the meantime, it has been approved by resolutions of both Houses of Parliament [Art. 356(3)]. Parliament can thus discuss at this time whether the proclamation should or should not have been made by the Central Government.[66]

If at the time of issuing the proclamation (other than revoking an earlier proclamation), or thereafter, the Lok Sabha is dissolved without approving it, and if the Rajya Sabha approves the proclamation, then it ceases to operate thirty days after the date on which the Lok Sabha first sits after the general elections unless a resolution approving the proclamation is passed by it before that period.[67]

The normal operative period for the proclamation is six months from the last of the days on which the Houses pass resolutions approving the same. The life of the proclamation may be extended by six months each time by both Houses passing resolutions approving its continuance. In this way, each time Parliament ratifies the proclamation, its life is extended for another six months.[68]

In case Lok Sabha is dissolved within any period of six months, the proclamation remains in force for thirty days from the date the Lok Sabha first sits after its reconstitution within which period it can pass the necessary resolution. The Rajya Sabha should, however, pass the necessary resolution within the stipulated period.[69]

The idea behind periodic parliamentary ratification of continuance of the proclamation under Art. 356 is to afford an opportunity to Parliament to review

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66. But the power under Article 356 is not legislative in character. See *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1, at page 123 : AIR 2006 SC 980.

67. Proviso to Art. 356(3).

68. The 42nd Amendment had raised the period of six months to one year. Thus, once approved by the two Houses, the proclamation could remain in force for one year. The Forty-fourth Amendment again reduced this period to six months : See, *infra,* Ch. XLII.

69. Second Proviso to Art. 356(4).

for itself the situation prevailing in the concerned State so that the Central Executive does not feel free to keep the proclamation in force longer than what may be absolutely necessary. The Central Government is responsible and accountable for all its actions to Parliament. A safeguard against any misuse of power by the Executive is that the ultimate authority to decide whether a proclamation under Art. 356 is to be continued or not lies in Parliament.

The maximum period for which a proclamation can remain in force in a State is three years.[70] Thereafter, the President's rule must come to an end, and the normal constitutional machinery restored in the State.

The Forty-fourth Amendment has introduced a new provision to put restraint on the power of Parliament to extend a proclamation issued under Art. 356 beyond one year. No House of Parliament is to pass a resolution approving continuance of such a proclamation beyond one year unless the following two conditions are satisfied:

(i) there is a proclamation of emergency (under Art. 352) in operation at the time of passing of such a resolution in the whole of India, or the concerned State, or a part of the State; and

(ii) the Election Commission certifies that the continuance in force of the proclamation under Art. 356 during the period specified in such resolution is necessary on account of difficulties in holding general elections to the concerned State Legislative Assembly.[71]

The effect of the clause is that normally a proclamation under Art. 356 remains in force in a State for one year at the most, but, under special circumstances mentioned above, it can remain in force up to three years which is the absolute maximum ceiling.

From the above discussion, it appears that a proclamation issued under Art. 356(1) expires in any of the following modes:

(a) After two months of its making if it is not presented for approval before both Houses of Parliament [Art. 356(3)].

(b) Even before two months, if the proclamation on presentation to the Houses of Parliament fails to get approval from any House [Art. 356(3)].

(c) After 6 months from the date of the proclamation, in case no further resolution is passed by the House of Parliament after the passage of the initial resolution approving the said proclamation [Art. 356(4)].

(d) After the expiry of 6 months from the passage of the last resolution of approval passed by the two Houses of Parliament subject to an overall maximum limit of 3 years from the date of the proclamation. Continuance of the proclamation beyond one year is subject to the fulfilment of the conditions laid down in Art. 356(5), and mentioned above.

(e) The date on which the President issues a proclamation of revocation [Art. 356(2)].

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70. First Proviso to Art. 356(4).

71. Art. 356(5).

For the 44th Amendment of the Constitution, see, Ch. XLII, *infra.*

Under Art. 356(1), the President acts on a report of the Governor, or on information received *otherwise*. In view of the fact that Art. 355 imposes an obligation upon the Centre to ensure that each State Government is carried on in accordance with the Constitution, and Art. 356 is designed to strengthen the hands of the Centre to discharge this obligation and to protect a State, the framers of the Constitution felt it necessary not to bind the Centre to act under Art. 356 merely on the Governor's report. A situation may develop in a State when, though the Governor may not make a report, the Centre may yet feel that its intervention has become necessary. The Centre thus has freedom to act even without the Governor's report when, on the basis of the facts within its knowledge, it thinks that it ought to act in fulfilment of its constitutional obligation.

The Governor makes his report under Art. 356(1) in his discretion. On the face of it, it may seem to be somewhat incongruous that the Governor, who as the constitutional head of the State, acts on the aid and advice of his Ministers, also reports against them to the President. This is a case of the Governor reporting against his own government. But, under the Constitution, the Governor has a dual capacity—he is the constitutional head as well as the Centre's representative in the State. He is appointed by the President and he takes the oath prescribed by Art. 159, to preserve, protect and defend the Constitution. It is this obligation which requires him to report to the President the acts of omission or commission of his Ministers which, in his opinion, have created the situation when the State Government cannot be carried on in accordance with the constitutional provisions and which, as the constitutional head, he is not able to check. Thus, the Governor acts as the head of the State as well as the holder of an independent constitutional office under oath to protect and preserve the Constitution.

(a) LEGISLATION FOR THE STATE

When a proclamation under Art. 356(1) declares that the powers of the State Legislature are to be exercised by or under the authority of Parliament, Parliament can then confer on the President the power of the State Legislature to make laws. The President may also be authorised by Parliament to delegate the power so conferred on him, to any other authority specified by him subject to such conditions as he may impose [Art. 357(1)(a)].

The President may authorise, when the Lok Sabha is not in session, expenditure from the State Consolidated Fund pending its sanction by Parliament [Art. 357(1)(c)].

A law made under these provisions by Parliament or the President, or the authority in which the power to make laws is vested under Art. 357(1)(a), may confer powers and impose duties upon the Union officers or authorities [Art. 357(1)(b)]. Such a law continues to have effect, to the extent it could not have been made but for the issue of the proclamation under Art. 356(1), even after the proclamation ceases. Such a law may, however, be altered, repealed or amended by the State Legislature [Art. 357(2)].

It is thus clear from the above that the life of a law made by Parliament or the President during the operation of Art. 356 proclamation is not co-terminus with the subsistence of the proclamation. The law does not come to an end automatically as soon as the proclamation is revoked. This provision means that though the power of the Union to make laws for the State concerned on the subject

within the State List ceases as soon as the proclamation under Art. 356(1) comes to end, the laws made during the existence of the proclamation continue to remain in force until they are altered or repealed by the State Legislature. In other words, an action by the State Legislature is necessary to change these laws.

(b) ART. 356 *V.* ART. 352

Article 352 differs from Art. 356 in several material respects.

While Art. 352 restricts Central intervention to a situation of war, external aggression, or armed rebellion, Art. 356 applies to a situation of failure of constitutional machinery in a State. Art. 352 gives no authority to suspend the Constitution in a State. The State Governments and Legislatures continue to function normally and exercise the powers assigned to them under the Constitution. All that happens under Art. 352 is that the Centre gets concurrent powers of legislation in State matters and thus it can make the States follow a uniform all-India policy. On the other hand, under Art. 356, the State Legislature ceases to function as it is either dissolved or kept in suspended animation. Laws for the State are made by Parliament and the Governor administers the State on behalf of the President. Further, while Art. 352 affects Fundamental Rights,[72] Art. 356 does not.

Under Art. 352, the relationship of all the States with the Centre undergoes a change, but under Art. 356, the relationship of only one State (where the action is taken) with the Centre is affected.

The powers of the Centre under Art. 356 as well as under Art. 352 are rigorously controlled by the Constitution. The proclamation under Art. 356 is to be approved by Parliament first within two months, and thereafter every six months, and the maximum period for which it can remain in force is three years. On the other hand, a proclamation under Art. 352 has to be approved by Parliament within a month and thereafter every six months, but there is no maximum duration prescribed for the operation of such a proclamation.

Though the scope and purpose of Arts. 352 and 356 are very different, yet there may be a situation when Art. 356 may have to be invoked to effectuate Art. 352, *e.g.*, when a State Government does not co-operate with the Centre in defence, or in quelling internal disturbance, or when it encourages the same.

(c) CONSEQUENCES OF INVOKING ART. 356

Article 356(1) has been invoked a number of times since the advent of the Constitution.[73] Reading Art. 356 along with Art. 357 a pattern has thus come into existence, whenever the Centre takes over a State Government. Hitherto, the Centre has acted only when the Governor has reported failure of the Constitutional machinery in the State and in no case has the Centre acted 'otherwise'. The Governor makes his report to the President in his discretion and he is under no constitutional obligation to act in this matter on the advice of the Council of Ministers.[74]

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72. *Infra*, Ch. XXXIII, Sec. F.

73. President's rule has been imposed over a hundred times till 2000. See further Gopal Subramanium : Emergency Provisions Under the Constitution : Supreme but not infallible; Oxford.

74. *Supra*, Ch. VII, Sec. C.

The proclamation issued by the President under Art. 356(1) is placed before Parliament. If it is expected to remain in force only for two months, then no further action is necessary. But if it is proposed to keep it in force for a longer period, it is to be ratified by both Houses when a discussion is held on the circumstances leading to the issue of the proclamation and on the advisability or otherwise of the Central intervention.

Under Art. 356(1)(*a*), the President can assume to himself the powers of the Governor. One of the Governor's powers is to dissolve the Legislative Assembly.[75] Consequently, when the President issues a proclamation and assumes the Governor's powers, the power to dissolve the Assembly and hold fresh elections is automatically transferred to the President. Therefore, the Presidential proclamation may dissolve the State Legislature and arrangements for holding fresh elections are set afoot. But it is not inevitable to dissolve the State Legislature whenever a proclamation is issued. Several times, the State Legislature has been kept in suspended animation rather than dissolved.

In the meantime, Parliament becomes entitled to exercise the authority and the powers of the State Legislature whether it is suspended or dissolved. Parliament being a busy body finds it extremely burdensome to itself exercise the legislative power for the concerned State, and pass all the legislative measures needed for the State concerned. Necessary time would not be available to Parliament for the purpose and measures of all-India importance would be held up. Therefore, under Art. 357(1)(*a*), Parliament passes an Act and delegates the legislative power for the State concerned for the duration of the emergency to the President, *i.e.*, the Central Executive. The President can then enact President's Acts for the State concerned whether Parliament is in session or not.

Each President's Act is laid before Parliament which may direct any modifications to be effected therein and the President would carry out the same by enacting an amending Act. Provision is usually made in the delegating Act for appointment of a Parliamentary Committee for consultation in the legislative work.[76] All members in Parliament, from the State concerned are appointed members of this committee.

As mentioned above, under Art. 356(1)(a), the President may assume to himself all or any function of the Sate Government and all or any of the powers exercisable by the Governor. Usually, the President, after assumption of the powers of the State Government, exercises these powers through the State Governor. The administration of the State, under the proclamation under Art. 356(1), is carried on by the State Governor as a delegate of the Centre. In effect, the Governor acts on the advice of the Union Ministry and not the State Ministry. The Governor becomes responsible to the Central Government which is responsible to Parliament.[77] The Council of Ministers in the State does not remain in office. It usually resigns *suo motu* in anticipation of the Centre's action. If it does not do so, it can be dismissed from office.

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75. *Supra*, Ch. VI, Sec. E; Ch. VII, Sec. C.

76. Non-consultation with the Committee before enacting the President's Act does not render the Act invalid. The words of the statute usually are: The President may 'whenever he considers it practicable' consult the Committee before enacting an Act for the concerned State.
Saiyedbhai Kaderbhai v. Saiyed Intajam Hussen, AIR 1981 Guj 154.

77. *Badrinath v. Govt. of Tamil Nadu*, (2000) 8 SCC 395, 413 : AIR 2000 SC 3243.

(d) WHEN IS ART. 356 INVOKED?

The sweep of the phrase, "the government of the State cannot be carried on in accordance with the provisions of this Constitution" in Art. 356(1) has indefinite connotations. Failure of the constitutional machinery in a State may arise because of various factors; these factors are diverse and imponderable. Nevertheless, some situations of the breakdown of the constitutional machinery may be as follows:

(1) No party in the Assembly has a majority in the State Legislative Assembly to be able to form the government.

(2) A government in office loses its majority due to defections and no alternative government can be formed.

(3) A government may have majority support in the House, but it may function in a manner subversive of the Constitution. As for example, it may promote fissiparous tendencies in the State.

(4) The State Government does not comply with the directions issued by the Central Government under various constitutional provisions.[78]

(5) Security of the State may be threatened by a widespread breakdown of law and order in the State.

(6) It may be debatable whether Art. 356(1) can be invoked when there are serious allegations of corruption against the Chief Minister and the Ministers in a State.

Reading Arts. 355 and 356 together, it can be argued plausibly that the constitutional machinery breaks down in the State when the government indulges in corruption.

Article 356 has been invoked in the State of Uttar Pradesh because it did not appear to be feasible to form a stable government. In the general elections held for the State Legislature, the public gave a fragmented verdict with no party having a majority in the House; and no party wanted to support any other party to form the government. The leader of the Samajwadi Party staked his claim as the single largest party to form the government. He claimed that he would prove his majority on the floor of the House. Implicit in the statement was the fact that being in power, it would be easier for him to engineer defections from the other parties. The Governor was not satisfied with his claim. On the recommendation of the State Governor, the Central Government imposed the President's rule in the State on March 9, 2002. This is an instance of President's rule being invoked in a State because it was not possible to form a viable government in the State due to the politically fragmented legislature.

In a number of cases, Central intervention has taken place in the States because of the instability of the State Governments. When the existing Ministry either resigns, or is defeated on the floor of the Legislature, and no viable alternative Ministry is in sight, the Centre takes over the State administration and carries it through the Governor. Accordingly, Art. 356(1) was invoked in 1951 in Punjab, in 1953 in Pepsu, in 1954 in Andhra, in 1956 in Travancore-Cochin and in 1961 in Orissa.

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78. *Supra*, Ch. XII, Sec. E.

In 1966, consequent upon the Centre's decision to bifurcate the State of Punjab into the States of Punjab and Haryana, to smoothen the process of partition, the Ministry resigned and President's rule was imposed. The Legislature was not dissolved but suspended, for it was thought desirable that the Legislature of the composite State be broken into two parts so as to constitute the Legislatures of Punjab and Haryana till new Legislatures could be elected.

During the period 1967-69, Art. 356(1) had to be invoked rather frequently. The reason was that, in the wake of the fourth general election, there was a proliferation of political parties in the State Legislatures, and stable governments became very difficult. Parties with disparate programmes came together to form coalition governments but they could not stay in office for long because of internal tensions. In 1967, because of the difficulties in Ministry-making in Rajasthan, the State Legislature was suspended and Presidential rule imposed under Art. 356. After some time, normal machinery was restored when it became possible to instal a Ministry in office.

In 1968, due to instability of coalition Ministries, the Uttar Pradesh Legislature was first suspended and later dissolved. In 1968, the Bihar and Punjab Legislatures were dissolved under Art. 356 owing to Ministerial crisises.[79] In the same year, West Bengal Legislature had to be dissolved because its functioning became impossible due to the intransigent attitude of the Speaker.[80] In 1973, the Congress Ministry of Andhra Pradesh resigned on the advice of the Congress High Command, and Presidential rule imposed, so that the situation arising out of a public agitation for creation of a separate Telengana State could be adequately handled. The State Legislature was not dissolved but kept in suspended animation. It was revived when the Centre was able to find a political solution to the demand being raised.

In 1974, the Gujarat Assembly was dissolved following the resignation of the Ministry. Though the Ministry was in a majority in the Legislature, yet it left office because there was a wide spread public agitation against it. In November, 1975, Art. 356 was invoked in Uttar Pradesh when Bahuguna Ministry resigned. A new Ministry was installed in January, 1976. Gujarat was placed under the President's rule in March, 1976, when the Patel Ministry resigned after being defeated in the House on a budget demand. Such instances may be multiplied.

Invocation of Art. 356(1), in a situation mentioned above, becomes necessary, and at times, even inevitable. But use of Art. 356 becomes very controversial and questionable when a Ministry in a State having majority support in the State Legislature is dismissed from office for certain reasons. For the first time, such a situation arose in Kerala in 1959. In 1957, a Communist Ministry commanding a majority of two in the State Assembly of 127 members took office. Within two years, there was wide spread discontent and mass upsurge in the State against the policies of the Ministry. Law and order situation in the State practically broke down and there was every indication that the agitation might take a violent turn.

Accusations were made that the State Government was subverting the Constitution by transplanting party cells in police, administration and co-operatives in the State. The financial position of the State very much deteriorated. The Prime

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79. *Supra*, Ch. VI, Sec. C.
80. *Supra*, Ch. VI, Sec. C; Ch. VII, Sec. B.

Minister advised the State Ministry to resign and dissolve the House so that fresh elections could be held, but the Ministry did not heed this advice. In the circumstances, on receipt of the Governor's report, the Centre invoked Art. 356, dismissed the State Ministry and dissolved the Legislature. After fresh elections were held to the State Legislature, a new State Government took office in early 1960. The proclamation thus remained in force for nearly six months.

The Kerala episode brought into sharp focus the question of the scope of Art. 356 and the circumstances under which it could be invoked. What is the significance of the words "in accordance with the provisions of the Constitution" in Arts. 355 and 356? Do these words mean merely the letter of the Constitution or include as well the democratic spirit, conventions and fundamental assumptions on which the Constitution is based?

On the one hand, it could be argued that since in Kerala there was a government in office enjoying the confidence of the majority in the Legislature, theoretically, the administration was being carried on in accordance with the 'provisions' of the Constitution. On the other hand, it could be argued that the words 'provisions, of the Constitution' should be interpreted not in a narrow literal sense to signify only the formal written words in the Constitution but also comprising the conventions, usages and the democratic spirit underlying the Constitution. If forms of the Constitution are used to subvert its spirit, then the Constitution can be regarded as having broken down in the State. As the Preamble to the Constitution declares India as a Sovereign Democratic Republic, subversion of democracy in any State may be regarded as being against the 'provisions' of the Constitution and action may be taken on that basis.[81]

The Communist Party characterized the Central Government's action as political intolerance on the part of the Congress Government at the Centre towards a Communist Government in a State. The Central Government justified its action on the ground that law and order had broken down, that Rule of Law and the Constitution had been subverted in the State, and that the action was inevitable if democratic institutions were to be protected from being destroyed. The Presidential proclamation was approved by Parliament by a huge majority.[82] In the context, therefore, Central intervention could not be characterised as unwarranted or unjustified.

It would be difficult to argue that the Centre should remain a passive spectator when the entire constitutional fabric is being subverted in a State. This would amount to a violation of Art. 355 on the part of the Central Government. Kerala, it may be noted, was a chronic case for some time as it fell under the President's rule several times. On September 10, 1964, again the President assumed the governance of the State, consequent upon the resignation of the Ministry. A general election held in March, 1965, again resulted in a fragmented House, with no prospect of a stable government. After consulting the party leaders, the Governor reported to the President that it was not possible to form the Council of Ministers in the State. The State Legislature was dissolved again and President's rule imposed. A writ petition challenging the Central action on the ground that the State Legislature could not have been dissolved without its meeting at all, was rejected

81. See, Ch. I, *supra.*
82. See, REPORTS OF THE LOK SABHA DEBATES, Aug. 18-21, 1959.

by the Kerala High Court. The Court also rejected the contention that the action of the President was *mala fide*.[83]

Again in Haryana, in 1967, the Ministry in office was dismissed and the State Legislature dissolved because of large scale defections of members of the Assembly from one party to another. Defections reached to such a farcical level that about 20 members had defected 20 times, 6 members twice, 2 members thrice and 2 members four times.

The Governor in his report to the President pointed out that defections "had made a mockery of the Constitution and had brought democracy to ridicule," and that the State administration had been totally paralysed by frequent defections and change of loyalties by the legislators. The Ministry had sought to maintain itself precariously in power by creating too many Ministers to reward defectors which was "an abuse of constitutional power." In an Assembly of 79, thirty-seven members had defected one way or the other, some three or four times. With such large scale and frequent defections, it was impossible to find out whether the will of the majority in the legislature represented the will of the people. Central interference in these circumstances appears to be justifiable as it may be regarded as an attempt to discourage opportunistic politicians oscillating across the floor of the House without any principle but only for self-aggrandisement. The Ministry was seeking to maintain its majority in the House by dubious means, and it could not, therefore, be maintained that the State Government was being carried on in accordance with the Constitution.[84]

Another case of this type occurred in 1976, when the D.M.K. Ministry in Tamil Nadu was dismissed, the State Legislature dissolved, and President's rule imposed. The D.M.K. Ministry enjoyed a majority in the Assembly, but the Governor in his report charged the Ministry with corruption, maladministration, misuse of power for partisan ends, and misuse of emergency powers. The Governor also recommended the appointment of a high powered commission to enquire into the several serious allegations against the Ministry and the Ministers involved. The Central Government accordingly invoked Art. 356 and appointed an enquiry commission.[85]

A very dramatic invocation of Art. 356 occurred in 1977. In the general elections held for Lok Sabha in 1977, after the revocation of the emergency imposed in 1975, people gave vent to their anger against the imposition of the emergency. This led to a landslide victory of the Janata Party which formed the Central Government. The Congress Party was badly routed. There were at the time 9 Congress Party-ruled States. The Janata Government at the Centre invoked Art. 356 in April, 1977, and dismissed the 9 State Governments, dissolved the State Assemblies and held fresh elections thereto.

History repeated itself in 1980. Fresh elections were held for the Lok Sabha in 1980. As a result of the general elections held in that year, the Congress Party again secured majority in Lok Sabha. The Congress Party which had been routed in 1977 elections was victorious this time and formed its government at the Centre with Indira Gandhi as the Prime Minister. The Congress Government dismissed under Art. 356 the Janata Governments in nine States where there were

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83. *K.K. Aboo v. Union of India*, AIR 1965 Ker 229.
84. This episode gave rise to a court case; see, footnote 11, Sec. E, *infra.*
85. *Supra*, Sec. C.

non-congress governments in office. These government were installed in office in 1977. The nine States were: Uttar Pradesh, Bihar, Tamil Nadu, Rajasthan, Madhya Pradesh, Maharashtra, Punjab, Orissa and Gujarat. These States were subjected to direct Central rule pending fresh elections. Now, the Congress Government at the Centre took the plea that the existing State Governments did no longer reflect the wishes of the electorate. It had the 1977 precedent to fall back upon to support its action.[86]

The propriety of the wholesale use of Art. 356 first in 1977, and again in 1980, has been widely questioned. These proclamations were not based on any report from the Governors of the States concerned. Commenting on the use of Art. 356(1) in a wholesale manner in these 18 cases, the Sarkaria Commission has observed:[87]

> "In our opinion, these 18 cases are typical instances of wholesale misuse of Art. 356 for political purposes, extraneous to the one for which the power has been conferred by the Constitution".

The fact is that the defeat of the party in power in a State in the election to the Lok Sabha cannot amount to the breakdown of constitutional machinery in the concerned State. The federal structure in India clearly envisages the situation of different political parties being in power in different States and at the Centre. Upto the year 2000, Art. 356 has been invoked as many as 100 times.

In April, 1992, the Governor of Nagaland dissolved the State Legislative Assembly on the advice of the then Chief Minister retaining him as the Chief Minister till fresh elections were held.

The Governor had done so in exercise of his power under Art. 174(2)(b) without consulting the Centre before taking such an action.[88] The Central Government did not approve of this action of the Governor. Accordingly, the Centre imposed the President's rule in the State under Art. 356 on April 2, and dismissed the Governor soon thereafter. The Centre's justification for taking the action was that the Chief Minister had already lost his majority in the Legislature when he advised the Governor to dissolve the House. The Opposition parties in Parliament described Centre's action as an attack on the federal character of the Constitution.

This episode does bring to the forefront two issues of crucial importance to the Indian federalism: (1) Is the Governor a constitutional authority in his own right or is he bound to seek the consent of the Centre before exercising the powers vested in him by the Constitution? (2) Use of Art. 356 in a State.

On the first question, theoretically speaking, as per the constitutional provisions, the Governor should be entitled to decide in his own judgment whether the powers vested in him by the Constitution should be exercised or not at a particular moment. Theoretically speaking, it should not be necessary for him to seek the Centre's consent to his proposed exercise of any such power. Therefore, in theory, in the instant case, the Governor may not have done anything wrong or improper in exercising his power under Art. 174 and dissolving the House. But, then, hitherto, the practice has developed in a different manner. Governors rarely

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86. For comments on this case see: ILI, PRESIDENT'S RULE IN THE STATES, *supra*, Ch. III.
87. REPORT, 175.
88. See, Chs. VI, Sec. E and VII, Sec. C, *supra.*

act in their own judgment independently of the Centre's views. They usually act either at the behest of, or with the consent, express or implied, of the Centre.

On question No. 2, the Opposition parties criticised the use of Art. 356 in the State in the instant case. Presidential rule had been imposed by the Centre *suo motu* without any such recommendation having been made by the Governor. The State Government dismissed from office was a non-Congress Government and, therefore, use of Art. 356 in the instant case became a controversial matter. Centre's ostensible justification for imposing the President's rule was that it was no longer possible to carry on the administration in the State in accordance with the provisions of the Constitution as there was political instability in the State. An unsavoury aspect of the Nagaland party system has been that 40 MLAs out of the 60 member Assembly had changed their party affiliations some time or the other.

On December 6, 1992, the Ram Janmabhoomi—Babri Masjid disputed structure was demolished by the volunteers of the B.J.P. and its sister organisations. Consequently, the BJP Government in the State of U.P. resigned. The Central Government invoked Art. 356 and also dismissed the B.J.P. Governments in Madhya Pradesh, Rajasthan and Himachal Pradesh, dissolved the Assemblies therein and issued proclamation under Art. 356(1) in respect of these States. This step taken by the Centre was supported by all the opposition parties in Parliament except the B.J.P. of course.[89]

The various episodes, mentioned above, show that the Centre takes a broad view of Art. 356 and feels justified in intervening in a State in case of constitutional breakdown, gross mismanagement of affairs or abuse of powers or perversion of democracy by a State government, and, at times, to promote the political interests of the political party in power at the Centre.

Theoretically, invocation of Art. 356 can be justified on the ground that temporarily a bigger democracy, *viz.,* the Central Government takes over a smaller democracy, *viz.* the State Government. Parliament is a representative body elected on adult suffrage on an All India basis, in which the particular State in which Art. 356 is applied is also represented. Thus, in a way, under Art. 356, the whole of India becomes responsible for the good administration of one of its constituent parts. The State administration is run subject to the supervision of the Central Cabinet which is responsible to Parliament. Nevertheless, there is no gainsaying the fact that the power placed by Art. 356 in the hands of the Central Government is very significant and places a great responsibility on it, and inherent therein are the seeds of conflict between the Centre and the States, particularly, when the Central Government seeks to dismiss a State Ministry belonging to a different political party.

It may be that, at times, the Centre is motivated by political, rather than mere constitutional, considerations in using its power under Art. 356(1). The way the power is used is bound to have an abiding effect on the growth of the Indian Federalism, which envisages co-existence of governments of different political complexion. It is, therefore, extremely necessary that the power under Art. 356 is used with circumspection and in a non-partisan manner. Art. 356 is meant to be invoked not lightly to serve political ends, or to get rid of an inconvenient State

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89. For further discussion on this episode see, the *Bommai* case, *infra*, Sec. E(b).

Government, but only in an extreme case of demonstrable breakdown of the Constitution in a State.

While it is not possible to exhaustively catalogue all the various situations when the constitutional provision can be justifiably invoked, some of these, however, appear to be: political breakdown in a State with no possibility of a stable Ministry taking office; breakdown of the law and order situation; gross mismanagement of affairs by a State Government; corruption or abuse of its powers; danger to national security; non-compliance of Central directives (Art. 365);[1] subversion of the Constitution, or of the democratic social fabric.[2] However, the ground of maladministration by a State Government enjoying majority is not available for invoking power under Article 356.[3] Restraints on the Centre to act under Art. 356 are the enlightened public opinion both within and outside Parliament, political realities of the situation, prudence and sagacity of the Central Government, the effectiveness of the Parliamentary control, and, ultimately, judicial review of the proclamation under Art. 356.[4]

There has been frequent criticism of the use of Art. 356. The purport of the criticism has been that, more often than not, Art. 356 has been misused by the political party in power at the Centre to promote its own political interests in the State rather than to meet the situation arising out of the breakdown of the constitutional machinery therein. It needs to be emphasized that in exercising this power, the Centre ought to be very careful otherwise an injury may be caused to the federal fabric which envisages different political parties being in power at the Centre and the States.

An alternative expedient to deal with the situation arising in a State from the Ministry losing confidence of the House is to invoke the Governor's power to dissolve the House, hold fresh elections and keep the Ministry in office in the meantime as a caretaker government.[5] This is the method which will have to be followed at the Centre, in case of a ministerial crisis because there is no constitutional provision for Presidential rule at the Centre such as there is for the States.[6] But, somehow, at the State level, political parties find it more acceptable to invoke Art. 356, rather than to take recourse to the other method, for the reason that no political party likes to see another political party in office when elections are being held in the State.

It may be pointed out that since the day Art. 356 was used for the first time by the Nehru Government in 1959 against the Communist Ministry in Kerala, use of Art. 356 has been a very controversial matter in India. The question of invocation of Art. 356 was looked into by the Sarkaria Commission which said in its report:[7]

> "Art. 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 breakdown of constitutional machinery in the State. All attempts should be made to resolve

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1. *Supra*, Ch. XII, Sec. E.

2. Because of the deteriorating law and order situation, President's rule was imposed in Punjab on Oct. 6, 1983. Through a constitutional amendment, the government was empowered to extend the President's rule in Punjab for one more year: *supra*.
Also see, Ch. XLII, *infra.*

3. *Rameshwar Prasad (VI) v. Union of India* ,(2006) 2 SCC 1, at page 129 : AIR 2006 SC 980.

4. See, Sec. E, *infra* on this point.

5. *Supra*, Ch. VI, E.

6. *Supra*, Ch. III, Sec. A.

7. *Report*, 178.

the crisis at the State level before taking recourse to the provisions of Art. 356….."

Alternatives may be "dispensed with in a case of extreme urgency, where failure on the part of the Union to take immediate action under Art. 356 may lead to disastrous consequences."

The purpose of Art. 356 is that the Centre can take remedial action to put the State Government back in its place so that it can function according to the Constitution. Any misuse or abuse of power by the Central Government will damage the fabric of federalism.

In the present day political configuration at the Centre, it seems that the invocation of Art. 356(1) by the Centre in a State has become very difficult. The reason is that while the ruling alliance at the Centre (NDA) enjoys a majority support in the Lok Sabha, it does not enjoy a majority in the Rajya Sabha. This means that it is not possible for the Central Government to have the proclamation approved in the Rajya Sabha unless there is national consensus in its favour. This happened recently in case of Bihar. In 1999, the Central Government invoked Art. 356(1) in Bihar because of serious breakdown of law and order in the State. The State Government was dismissed but the State Legislature was suspended and not dissolved. The Proclamation was approved by the Lok Sabha. But the Government was not in a position to have it approved in the Rajya Sabha because of the opposition by the Congress Party. Consequently, the Government revoked the proclamation and restored the State Government.

E. JUSTICIABILITY OF THE PROCLAMATION UNDER ART. 356

From time to time, attempts have been made to bring the matter of invocation of Art. 356(1) before the courts for scrutiny but such attempts have not succeeded.

In 1968, the ex-Chief Minister of Haryana challenged the action of the Centre through a writ petition, but the High Court dismissed the same for the following reasons:[8]

(1) The court cannot go into the validity or legality or propriety of the proclamation because the President had issued the same in pursuance of his constitutional powers under Art. 356(1) which is not an executive action of the Union, and the President himself is not amenable to the jurisdiction of the court in view of Art. 361(1).[9]

(2) The consideration of the proclamation has been specifically vested by the Constitution in Parliament and this excludes the jurisdiction of the courts.

(3) Regarding the argument of *mala fides* against the Home Minister, the Court held that it could not enquire into the advice given by him to the President in view of Art. 74(2).[10]

(4) The conclusions reached by the Governor in his report to the President cannot be questioned in the court as those are matters for the consideration of the

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8. See, *supra*, Sec. D(d), for the circumstances in which Art. 356 was invoked in the State.
9. *Supra*, Ch. III, Sec. A.
10. *Supra*, Ch. III, Sec. A(iii)(a).

President and Parliament. The court has no jurisdiction to require disclosure of material forming the basis of the President's satisfaction.[11]

In *Jyotirmoy Bose v. Union of India*,[12] the Calcutta High Court rejected a writ petition challenging the President's proclamation issued on March 19, 1970, under Art. 356. It was argued *inter alia* that in making the proclamation, the President should have acted in his discretion and not on ministerial advice. Rejecting this plea, the Court emphasised that in the matter of making a proclamation under Art. 356, the President acts as a constitutional head and must act as advised by the Council of Ministers. "To say that the power given under Art. 356 is a discretionary power to the President is ..... wholly misconceived."

Bijayanand v. President of India,[13] is a highly instructive decision rendered by the Orissa High Court in relation to Art. 356. The Government of Nandini Satpathy fell in 1973 because of defections from the Congress Party. At that time, Bijayanand Patnaik, the leader of the Pragti Party, commanded a strength of 70 in a House of 140 (139 excluding the Speaker). The Governor did not invite Bijayanand to form the government. He took the view that political defection in the State had become common and had adversely affected the political life of the State. Defection was harmful to democracy. The Governor thought that the government formed by Bijayanand would not remain in office for long and be stable. He, therefore, recommended to the Centre that the President's rule be imposed in the State under Art. 356. The President, accordingly, issued the proclamation.

Bijayanand and his colleagues in the Pragti Party challenged the President's proclamation in the Orissa High Court. The High Court rejected the challenge but in the process enunciated certain very important propositions in relation to Art. 356. The Court ruled that in sending his report to the President under Art. 356, the Governor is to act directly and not with the aid and advice of the Council of Ministers.[14] Whether the Governor's report is *mala fide* or based on any extraneous facts cannot be questioned in a court of law. It is not justiciable as against the Governor because of the protection and immunity under Art. 361(1).[15]

In exercising powers under Art. 356, the President is to act with the aid and advice of his Council of Ministers.[16] Under Art. 356, the source of information on which the President would reach his 'satisfaction' is very wide. He may act on the Governor's report or any other information. The amplitude and undefined character of the information on which the President acts, and is to be satisfied, "indicates that the satisfaction and the source thereof are not justiciable."

The satisfaction of the President under Art. 356 and the basis thereof "are subjective and are not subject to objective tests by judicial review. The question involves high executive and administrative policy and the court will find out no standard for resolving it judicially."

The Andhra High Court also asserted that the satisfaction of the President under Art. 356 was not a justiciable matter. The President can act under this Article in a number of situations. The Constitution does not enumerate these circum-

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11. *Rao Birinder Singh v. India*, AIR 1968 Punj 441.
12. AIR 1971 Cal 122.
13. AIR 1974 Ori 52.
14. *Supra*, Ch. VII, Sec. C.
15. *Supra*, Ch. III, Sec. A(i); Ch. VII, Sec. A(i).
16. *Supra*, Ch. III, Sec. B(a).

stances. There is no satisfactory criteria for a judicial determination of what are relevant considerations and this makes the question of satisfaction an intrinsically a political one and beyond the reach of the court.[17]

These cases settled the point that it was practically impossible to question President's or Governor's or Central Government's action under Art. 356. The only control over the exercise of this power lies in Parliament as noted above. The matter was placed beyond any shadow of doubt when the Constitution (Thirty-Eighth Amendment) Act, 1975, declared that the 'satisfaction' of the President mentioned in Art. 356(1) "shall be final and conclusive and shall not be questioned in any court on any ground." But this clause has now been withdrawn by the Forty-fourth Amendment of the Constitution.

In *Bijayanand*,[18] the Orissa High Court criticised the conduct of the Governor in so far as he recommended President's rule in the State without first calling upon Bijayanand to form the government. After taking note of the conventions of the British Constitution, the Court observed that by not calling upon the leader of the Opposition to form the government after the resignation of the Satpathy Government, the Governor failed to honour the conventions prevalent in Great Britain. What the Court suggested was that, on the fall of the Ministry, the Governor should automatically ask the leader of the opposition to form the government and that the Governor should not be concerned whether the government formed by him would be stable or not. It was for the leader of the opposition to decide whether he should form the government or not and, ultimately, it was for the House to decide whether his government would remain in office or not. In saying so, however, the Court failed to give due weight to the vice of defections prevailing in the body polity. Even in the instant case, defections were the order of the day. It thus stands to reason whether the British conventions, if followed automatically in India, would not encourage defections from one side to another and whether that will be a happy situation. The situation has not been redeemed much in this regard even by the Anti-Defection Law, for while this law illegalises defection by a single member, defection of a group of members of the Assembly is still possible.[19]

The British conventions have evolved in the context of a well-established two party system where defection of a member of one party to the other is indeed a rarity. In India, the party system is as yet fluid and has not yet stabilised. There is a danger that if the members know that, as soon as they leave the ruling party and join the opposition, the leader of the opposition would be called upon to form the government, defections from the ruling party would be promoted. There is no such provision as Art. 356 in England and there a Council of Ministers must always remain in office. That convention will be applicable at the Central level. But different considerations arise under Art. 356 and it is difficult to accept the theory that the British conventions should apply automatically under Art. 356.

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17. *In re A. Sreeramulu*, AIR 1974 AP 106. For detailed comments on these cases see, ILI, PRESIDENT'S RULE IN THE STATES, 128-53.

18. *Supra*, footnote 13.

19. *Supra*, Chs. II, Sec. F and VI, Sec. B(iv). The view of the learned author has not found favour with the Supreme Court which has said that: "The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1)". *Rameshwar Prasad (VI) v. Union of India*, (2006) 2 SCC 1, at page 129 : AIR 2006 SC 980.

Further, in England, a Prime Minister who had a majority, can claim dissolution of the House on being defeated in the House.[20] In the instant case, the Chief Minister, Nandini Satpathy, on defections from her party, while tendering resignation of her office, advised dissolution of the House. According to the British conventions, she could have sought dissolution of the House and remained in office till the new House was elected. If instead of that, the Governor dissolved the House under Art. 356, as suggested by the out-going Chief Minister, no objection could possibly be taken to that course.

In 1975, the Thirty Eighth Constitutional Amendment introduced cl. 5 in Art. 356 barring judicial review of a Proclamation under Art. 356(1) on any ground. The clause made presidential 'satisfaction' to issue a Proclamation under Art. 356(1) as 'final and conclusive' which "shall not be questioned in any court on any ground'. This clause was however withdrawn by the Constitution (44th Amendment) Act, 1978.

(a) *RAJASTHAN V. INDIA*

A constitutional controversy of great significance *vis-a-vis* Art. 356 was raised in *State of Rajasthan v. Union of India*.[21]

When the general elections for Lok Sabha were held in the country in 1977, after the lifting of the emergency of 1975, the Congress Party was badly routed in several States by the Janata Party which won a large number of seats in the Lok Sabha and, thus, formed the government at the Centre. In these States, Congress Ministries were functioning at the time and they still had some more time to run out for completion of the full term.

The Central Home Minister, Charan Singh, wrote a letter to each of the Chief Ministers of these States suggesting that he should seek dissolution of the State Legislature from the Governor and obtain fresh mandate from the electorate. The State of Rajasthan (along with several other States) filed an original suit in the Supreme Court against the Union of India under Art. 131 praying the Court to declare this 'directive' of the Home Minister as unconstitutional and illegal. It was argued that the letter in question was a prelude to the invocation of Art. 356 in these States and that the dissolution of the State Legislatures on the ground mentioned in the said letter was *prima facie* outside the purview of Art. 356. In substance, the suit was designed to forestall the invocation of Art. 356 in the several States.

The Supreme Court, however, dismissed the suit unanimously. The broad position adopted by the Court was that it could not interfere with the Centre's exercise of power under Art. 356 merely on the ground that it embraced 'political and executive policy and expediency unless some constitutional provision was being infringed.' Art. 74(2) disables the Court from inquiring into "the very existence or nature or contents" of ministerial advice to the President.[22] Art. 356(5) makes it impossible for the Court to question the President's satisfac-

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20. *Supra*, Ch. II, Sec. I; Ch. VI, Sec. E; Ch. VII, Sec. C.

21. AIR 1977 SC 1361 : (1977) 2 SCC 592.
Also see, DHAVAN & JACOB, The Dissolution case: Politics at the Bar of the Supreme Court, (1977) 19 *JILI* 355-91; ILI, PRESIDENT'S RULE, *supra*, Ch. III.
Also see, *supra*, Ch. IV, Sec. C(iii)(b), *supra*, Sec. D(d).

22. See, Ch. III, Sec. A(iii)(a) *supra.*

tion on any ground unless and until resort to Art. 356 in a particular situation is shown to be so "grossly perverse and unreasonable" as to constitute "patent misuse of this provision or an excess of power on admitted facts".[23]

The second limb of Art. 355 would seem to cover all steps which are enough to ensure that the State Government is carried on in accordance with the provisions of the Constitution. In the words of BEG, C.J., the sweep of Art. 355 "seems quite wide. It is evident that it is this part of the duty of the Union towards each State which is sought to be covered by a proclamation under Art. 356..... It is a proclamation intended either to safeguard against the failure of the constitutional machinery in a State or to repair the effects of a breakdown. It may be either a preventive or a curative action."[24]

Article 356 can be used by the Centre for securing compliance with democratic norms by the States. The language of Art. 356 is quite wide and loose. As BHAGWATI, J., emphasized the satisfaction of the President under Art. 356 "is a subjective one and cannot be tested by reference to any objective tests", or by "judicially discoverable and manageable standards."[25] The court cannot go into the question of "correctness or adequacy" of the facts and circumstances on which the satisfaction of the Central Government is based. In the instant case, the possibility of the State Governments having lost the confidence of the people could not be ruled out. To continue these governments in office would be "purely undemocratic in character."

FAZL ALI, J., emphasized: "As our Constitution is wedded to the democratic pattern of government, if a particular State Government ceases to be democratic or acts in an undemocrate fashion, it cannot be said that the government of the State is carried on in accordance with the provisions of the Constitution." In the circumstances, "the second part mentioned in Art. 355 appears to have been *prima facie* satisfied."

As regards the privative clause contained in Art. 356(5),[26] BHAGWATI, J., asserted that this clause could not preclude the Court from examining extraneous grounds or whether it was based on no satisfaction at all. BHAGWATI, J., expressed himself on this point as follows:

> "The satisfaction of the President is a condition precedent to the exercise of power under Art. 356, Cl. (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. Of course by reason of Cl. (5) of Art. 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. On such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself."

The highlight of the decision, however, lies in the assertion by almost all the Judges that in spite of the broad ambit of the power under Art. 356, a presidential

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23. At this time Art. 356(5) declared the 'satisfaction' of the President as "final and conclusive". This clause was added by the 38th Constitution Amendment. But this clause has now been withdrawn by the 44 Amendment.
See, *supra*.

24. AIR 1977 SC at 1380 : (1977) 3 SCC 592.

25. *Ibid*, at 1414.

26. For this clause, see, *supra*, footnote 24.

proclamation could be challenged if power was exercised *mala fide*, or on "constitutionally or legally prohibited" grounds, or for "extraneous or collateral purposes." As BHAGWATI, J., stressed:

> "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 in which he is required to be satisfied."[27]

And if there is no satisfaction of the President, there could be no proclamation under Art. 356 as 'satisfaction' of the President is a condition precedent to the exercise of power under this constitutional provision.

It was also held that maintenance of democratic norms could not be regarded as a perverse or irrelevant ground for the exercise of power under Art. 356. The letter of the Home Minister was characterised as not being a directive but only advisory in nature. The grounds given in the letter were not *mala fide* or extraneous or irrelevant.

On the question of interpretation of Art. 356, the Court ruled that the State Legislative Assemblies could be dissolved without the President's proclamation having been approved by the Parliament. The proclamation comes into immediate effect and remains in force for two months without parliamentary approval.

(B) *BOMMAI*

The Supreme Court then rendered a landmark decision on Art. 356(1) in *S.R. Bommai v. India*.[28] The case arose in the context of the followings facts.

In 1989, the Janata Dal Ministry headed by Shri S.R. Bommai was in office in Karnataka. A number of members defected from the party and there arose a question mark on the majority support in the House for the Bommai's Ministry. The Chief Minister proposed to the Governor that the Assembly session be called to test the strength of the Ministry on the floor of the House. But the Governor ignored this suggestion. He also did not explore the possibility of an alternative government but reported to the President that as Shri Bommai had lost the majority support in the House, and as no other party was in a position to form the government, action be taken under Art. 356(1). Accordingly, the President issued the proclamation in April, 1989.

Bommai challenged the validity of the proclamation before the Karnataka High Court through a writ petition on various grounds. The High Court ruled that the proclamation issued under Art. 356(1) is not wholly outside the pole of judicial scrutiny; the satisfaction of the President under Art. 356(1) which is a condition present for issue of the proclamation ought to be real and genuine satisfaction based on relevant facts and circumstances. The scope of judicial scrutiny is therefore confined to an examination whether the disclosed reasons bear any rational nexus to the action proposed or proclamation issued. The courts may examine as to whether the proclamation was based on a satisfaction which was *mala fide* for any reason, or based on wholly extraneous and irrelevant grounds. In such a situation, the stated satisfaction of the President would not be a satisfaction in the constitutional sense under Art. 356. In the end, however, the High

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27. *Ibid.*, Also, UNTWALIA, J., at 1422; FAZL ALI, J., at 1441.
28. AIR 1994 SC 1918 : (1994) 3 SCC 1.

Court dismissed the petition holding that the facts stated in the Governor's report could not be held to be irrelevant, Governor's *bona fides* were not questioned and his satisfaction was based upon reasonable assessment of all facts. The Court also ruled that recourse to floor test was neither compulsory nor obligatory and was not a pre-requisite to the sending of the report to the President. Bommai appealed to the Supreme Court against the High Court decision.

Besides the Karnataka proclamation, the Supreme Court was also called upon to decide the validity of similar proclamations under Art. 356(1) in the States of Meghalaya and Nagaland.

Besides, there were three more proclamations before the Supreme Court for review—those made in Madhya Pradesh, Himachal Pradesh and Rajasthan in 1992 in the wake of the demolition of the disputed Babri structure in Ayodhya. The governments in these States belonged to the B.J.P. which was sympathetic to the organisations responsible for the demolition.[29] The M.P. High Court had held the Madhya Pradesh proclamation to be "invalid and beyond the scope of Art. 356". The Court had ruled that from the material placed before it no inference could be drawn that the State Government had disrespected or disobeyed any Central direction nor was there any specification of any alleged deeds or misdeeds on the part of the State Government in meeting the law and order situation. Merely because there was some worsening of the law and order situation in the State in the wake of Ayodhya incidents, no inference could be drawn that the State Government could not be carried on in accordance with the Constitution, or that the constitutional machinery had broken down in the State.

Needless to say that this was an unprecedented ruling as never before any proclamation issued under Art. 356(1) had been invalidated by any court. Accordingly, the Central Government appealed to the Supreme Court against the High Court verdict. There were also writ petitions pending in the respective High Courts challenging the proclamations under Art. 356, as mentioned above. All these writ petitions were transferred to the Supreme Court for a hearing. The great significance of *Bommai* can be gauged from the fact that the Supreme Court had to adjudged the constitutional validity of six proclamations issued under Art. 356(1) in six different States during 1989 to 1992.

It may be mentioned that by the time the *Bommai* case came before the Supreme Court, Art. 356(5) putting a ban on judicial review of Art. 356 proclamations had been repealed.[30]

The Supreme Court in its judgment by majority declared the Karnataka, Meghalaya and Nagaland proclamations as unconstitutional but the proclamations in Madhya Pradesh, Rajasthan and Himachal Pradesh as valid. Thus, both the High Court decisions mentioned above were overruled.

A Bench of nine Judges was constituted in *Bommai* to consider the various issues arising in the several cases, and seven opinions were delivered. While some of the Judges (AHMADI, VERMA, RAMASWAMY, JJ.) adopted a passive attitude towards judicial review of the presidential proclamation under Art. 356(1), others adopted somewhat activist stance. On the basis of consensus among the Judges,

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29. See, *supra*, Sec. C.
30. *Supra*, footnote 24.

the following propositions can be enunciated in relation to Art. 356(1) and the scope of judicial review thereunder:

1. The President exercises his power under Art. 356(1) on the advice of the Council of Ministers to which, in effect, the power really belongs though it may be formally vested in the President.
2. The question whether the incumbent State Chief Minister has lost his majority support in the Assembly has to be decided not in the Governor's Chamber but on the floor of the House. There should be test of strength between the government and others on the floor of the House before recommending imposition of the President's rule in the State.

   The Court ruled that the Karnataka High Court was wrong in holding that floor test was neither compulsory nor obligatory nor a pre-requisite to sending the report to the President recommending action under Art. 356(1).
3. The Governor should explore the possibility of installing an alternative Ministry, when the erstwhile Ministry loses support in the House.
4. The validity of the proclamation issued under Art. 356(1), is justiciable on such grounds as : 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, or was based *wholly* on extraneous and/or irrelevant grounds.
5. There should be material before the President indicating that the Government of the State cannot be carried on in accordance with the Constitution. The material in question before the President should be such as would induce a reasonable man to come to the conclusion in question.

   Once such material is shown to exist, 'the satisfaction' of the President based on such material will not be open to question. But if no such material exists, or if the material before the President cannot reasonably suggest that the State Government cannot be carried on in accordance with the Constitution, the proclamation made by the President is open to challenge.

   According to JEEVAN REDDY, J., Art. 356 confers upon the President conditioned power. "It is not an absolute power. The existence of material which may comprise of or include the report of the Governor—is a pre-condition. The President's satisfaction must be formed on relevant material."
6. When a *prima facie* case is made out against the validity of the proclamation, it is for the Central Government to prove that the relevant material did in fact exist. Such material may be the report of the Governor or any other material.
7. The dissolution of the Legislative Assembly in the State is not an automatic consequence of the issuance of the proclamation. The dissolution of the Assembly is also not a must in every case. It should be done only when it is found to be necessary for achieving the purposes of the proclamation.

8. The provisions in Art. 356(3) are intended to be a check on the powers of the President under Art. 356(1). If the proclamation is not approved within two months by the two Houses of Parliament, it automatically lapses. This means that the President ought not to take any irreversible action till the proclamation is approved by the Houses of Parliament. Therefore, the State Assembly ought not to be dissolved.

   The dissolution of the Assembly prior to the approval of the proclamation by the Parliament under Art. 356(3) will be *per se* invalid.[31] The State Legislative Assembly should be kept in suspended animation in the meantime. Once the Parliament has put its seal of approval on the proclamation, the State Assembly can then be dissolved. The Assembly which was suspended will revive and get reactivated if the proclamation is not approved by Parliament.

   Here a word of explanation is necessary. A view was expressed in *Rajasthan v. Union of India*,[32] that the proclamation is valid when issued under Art. 356(1), and the State Legislature can be dissolved by the Centre without waiting for its approval by the Houses of Parliament.[33] But, in *Bommai*, the Court has disagreed with this view and for a very good reason. If the proclamation is not approved by Parliament, it automatically lapses after two months. How is the State Government to run thereafter? It would be inevitable that the dissolved assembly be revived for no fresh elections can be held for the House within the short period of two months. *Bommai* view avoids any such embarrassment to the Central Government.

   Some time back, when in February, 1999, a proclamation under Art. 356(1) was issued in respect of Bihar, the State Government and the State Legislature were suspended. The proclamation was approved by the Lok Sabha on February 26, 99. But when it became clear that the Rajya Sabha would not approve it, because of the opposition by the opposition parties which were in a majority in that House, the Government revoked the proclamation on March 8, 99, in exercise of the powers under Art. 356(2). The State Government was installed in office and the State Legislature which had been suspended was then revived.

9. Once the proclamation is approved by Parliament, and then it lapses at the end of six months, or it is revoked earlier, neither the dismissed State Government, nor the dissolved legislature will revive.

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31. When in October, 1995, President's rule was imposed in the State of U.P., the State Assembly was first suspended and then dissolved ahead of the ratification of the proclamation by Parliament.

There was a Congress Government headed by P.V. Narasimha Rao at the Centre. The ostensible reason given for the step was that there was a possibility of "horse trading" of M.L.As in case of a suspended Assembly. The real reason, however, was that the Congress Government at the Centre wanted to kill the possibility of emergence of a B.J.P. Government in the State. The decision to dissolve the Assembly was purely a political decision which was not in consonance with the *Bommai* ruling.

32. *Supra.*

33. BEG, C.J., AIR 1977 SC at 1391; CHANDRACHUD, J, *ibid.* at 1398, BHAGWATI, J., *ibid,* at 1410.

10. If the Court invalidates the proclamation, even if approved by the Parliament, the action of the President becomes invalid. The State Government, if dismissed, is revived and the State Assembly, if dissolved, will be restored.

11. Art. 74(2) bars an inquiry into the question whether any or what advice was tendered by the Council of Ministers to the President.[34] Art. 74(2) "does not bar the Court from calling upon the Union Council of Ministers 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".

    According to JEEVEN REDDY, J., when called upon, the Union Government has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The Court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action taken. Even if some material was irrelevant, the court will not interfere so long as there was some material which was relevant to the action taken.[35]

Applying these principles, the Karnataka, Meghalaya and Nagaland proclamations were invalidated. In case of Karnataka, the Court ruled that the question of lack of majority support for the Ministry was not tested on the floor of the House. A duly constituted Ministry was dismissed on the *ipse dixit* of the Governor who made no effort to instal in office an alternative ministry. The Governor's report thus was faulty and clearly smacked of *mala fide*s. The proclamation based on such a report also suffered from *mala fides* and was liable to be struck down.

In case of Meghalaya, after reviewing the circumstances leading to the issue of the proclamation, the Court ruled that *prima facie,* the material before the President was not only irrational but motivated by factual and legal *mala fides*".

In case of Nagaland, there was defection in the ruling Congress Party as 1/3rd of its members formed a new party. The Chief Minister resigned. The leader of the breakaway group claimed majority support but instead of allowing him to test his strength on the floor of the House, on the report of the Governor, the President issued the proclamation under Art. 356(1). The Court ruled that in the circumstances, the proclamation was unconstitutional. The Court emphasized that the Anti-Defection Law did not prohibit the formation of a new political party if it was backed by at least 1/3rd members of an existing legislature party.[36] The leader of the new party ought to have been given an opportunity to prove his majority on the floor of the House.

The case of the proclamations issued in case of Madhya Pradesh, Rajasthan and Himachal Pradesh fell in a different category. None of the State Governments had lost its majority. These proclamations were issued in the wake of the

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34. *Supra*, Ch. III, Sec. A(iii)(a).
35. Also see, *A.K. Kaul v. Union of India,* AIR 1995 SC 1403, at 1411 : (1995) 4 SCC 73.
36. *Supra*, Chs. II, Sec. F; VI, Sec. B(iv).

incidents at Ayodhya on December 6, 1992. But here the crucial question involved was that of upholding the basic constitutional value of secularism.[37]

The Court emphasized that the various constitutional provisions by implication prohibit the establishment of a theocratic State and prevent the State from 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 sects. Religion cannot be mixed with any secular activity of the state. In the words of RATNAVEL PANDIAN, J.: "In matters of State, religion has no place. No political party can simultaneously be a religious party and politics and religion cannot be mixed".

Secularism is a part of the basic structure of the Constitution.[38] If any State Government acts in a manner which is calculated to subvert or sabotage secularism, it can lawfully be regarded that a situation has arisen in which the State Government cannot be carried on in accordance with the constitutional provisions. The three proclamations were thus held valid on this ground. The decision of Madhya Pradesh High Court, mentioned above, was reversed.

In *Bommai,* the Supreme Court seeks to promote several basic and wholesome constitutional values, such as, parliamentary system, federalism, control over the executive and secularism. Bommai is a very fine example of judicial creativity.[39]

To promote parliamentary government, the Court has insisted that the question whether the incumbent State Chief Minister has lost majority support or not, must be decided on the floor of the House and not by the Governor himself. Further, the Governor ought to explore the possibility of installing an alternate Ministry before reporting failure of the constitutional machinery in the State to the President under Art. 356(1).[40]

Federalism has been designated as a basic value in the Indian Constitution.[41] Dismissal of a duly elected State Assembly by the Central Government is really a negalation of the federal concept. The power under Art. 356(1) has thus to be exercised sparingly, scrupulously and with circumspection. Abuse or misuse of this power will damage the federal fabric and disturb the federal balance.

The Court has emphasized that the President exercises the power under Art. 356(1) on the advice of the Central Ministry which is a political body. In a pluralistic democracy and federal structure, the parties in power at the Centre and the States may not be the same. Hence it is necessary to confine the exercise of power under Art. 356(1) strictly to the situation mentioned therein which is a condition precedent to its exercise.[42]

In this connection, the fact situation in the *Rajasthan* case may be referred to.[43] There the question was whether the nine Congress State Governments could be dismissed under Art. 356(1) in the wake of the Congress defeat in the recently held election for the Lok Sabha and installation of the Janata Government at the

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37. For discussion on the concept of "Secularism", see, *supra,* Ch. I; *infra,* Ch. XXIX, Sec. A.
38. For discussion on this concept, see, *infra,* Ch. XLI.
39. On judicial creativity, see, *infra,* Ch. XL.
40. AIR 1994 SC at 1986, 2100 : (1994) 3 SCC 1.
41. See, *infra,* Ch. XLI.
42. *Ibid,* at 1970.
43. *Supra*.

Centre. The Judges had expressed views supporting such a step. But in *Bommai*, several Judges expressed disapproval of what had happened, first in 1977 and, then in 1980. The Court has now firmly stated that so long as a State Government is functioning within the discipline of the Constitution and pursues an ideology consistent with the constitutional philosophy, its dismissal under Art. 356(1) solely on the ground that a different political party has come to power at the Centre is unwarranted and unjustified.

India has consciously adopted a pluralist democratic system which implies that different political parties may be in power in the various States and the Centre. "The mosaic of variegated pattern of political life is potentially inherent in a pluralist multi-party democracy like ours".[44] Accordingly, several Judges have expressed disapproval of the view that if the ruling party in the States suffers an overwhelming defeat in the election to Lok Sabha—however complete the defeat may be—it can be a ground for the issue of the proclamation under Art. 356(1). Simply because a political party had overwhelming majority at the Centre, it could not on that ground alone advise the President under Art. 356 of the Constitution to dissolve the State Assemblies of the opposition-ruled States. As SAWANT, J., has observed[25] in this connection:

> "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."[45]

Absolute power cannot be conceded to the Executive under Art. 356(1). The reason is that in the past the power has been used at times on "irrelevant, objectionable and unsound" grounds.[46]

Finally, the Court has laid a good deal of emphasis on secularism.[47] It is a part of the basic structure of the Constitution.[48] If any State Government acts in a manner which is calculated to subvert or sabotage secularism, it can lawfully be regarded that a situation has arisen in which the State Government cannot be carried on in accordance with the Constitution. A State Government may enjoy majority support in the Assembly, but if it subverts the basic value of secularism, it can be dismissed under Art. 356(1). Such a government may be regarded as not functioning in accordance with the provisions of the Constitution.[49]

Breakdown of the constitutional machinery in the State is the *sine qua non* for invoking Art. 356. What is the significance of the phrase "breakdown of the constitutional machinery." K. RAMASWAMY, J., in *Bommai* has elucidated the matter as follows:

> "The exercise of the power under Art. 356 is an extraordinary one and needs to be used sparingly when the situation contemplated by Art. 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 fail-

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44. SAWANT, J., *ibid*, at 1980.
45. *Ibid.*
46. SAWANT, J., *Ibid.* at 1980.
47. For a detailed discussion on Secularism, see, *infra*, Ch. XXIX, Sec. A.
48. See, *infra*, Ch. XLI, for discussion on this doctrine.
49. AIR 1994 SC at 2000, 2113**.**

ure of the constitutional machinery or characterises that a situation has arisen in which the government of the state can not be carried on in accordance with the Constitution."

(C) AFTER BOMMAI

It has become very difficult to invoke Art. 356 after the *Bommai* decision. The following incidents prove the point.

On Oct. 21, 1997, the Chief Minister of Uttar Pradesh obtained a vote of confidence on the floor of the House amidst pandemonium. This vote was sought by him as a result of the Supreme Court ruling to that effect.[50] Thereafter, the Governor in his report recommended imposition of the President's rule in the State under Art. 356(1) on the ground of breakdown of the constitutional machinery in the State. Accepting the Governor's report, the Central Cabinet recommended to the President the invocation of Art. 356, in the State, but under Art. 74(1), the President returned the recommendation for reconsideration of the Cabinet.[51] The President expressed a doubt about the constitutional correctness of the Governor reporting breakdown of constitutional government in the State immediately after the Chief Minister had seemingly won the vote of confidence in the House. Better sense prevailed with the Central Government which then withdrew its recommendation to the President to invoke Art. 356(1) in Uttar Pradesh. The matter came to an end at the Central level leaving Kalyan Singh Ministry intact in the State.

Again, in October, 1998, the Central Government recommended to the President invocation of Art. 356 in the State of Bihar. The Central Government had done so on the basis of the Governor's report in which had been listed a series of acts of commission and omission on the part of the State Government as constituting a breakdown of the constitutional machinery in the State—a *sine qua non* for the exercise of power under Art. 356(1). The main allegation against the State Government was the worsening of the law and order situation in the State. At this time, the State Government undoubtedly enjoyed the majority support in the Assembly.

The President considered the Governor's report and the recommendation of the Central Cabinet and then decided to refer back the matter to the Cabinet for reconsideration under Art. 74(1). The President took the view that the acts complained of did not constitute a breakdown of the constitutional machinery in the State so as to justify the use of his extraordinary power under Art. 356. Obviously, taking his cue from *Bommai*, the President distinguished between bad government and breakdown of constitutional machinery. The President's stand was in accordance with the letter and substance of the Supreme Court decision in *Bommai*.

For sometime, the Central Cabinet deferred the decision, but somewhat later it again revived its recommendation. The President cannot refer back the matter twice under Art. 74(1)[52] and, therefore, he fell in line with the Cabinet. The requisite proclamation under Art. 356(1) was issued. The State Government was dismissed and the State Legislature was suspended. The proclamation was approved by the Lok Sabha but the Government had to revoke it when it found that,

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50. *Supra*, Ch. VII, Sec. A(ii)(a).
51. *Ibid.*
52. *Supra*, Ch. III, Sec. B(a).

because of the hostility of the Congress Party, it would not be approved by the Rajya Sabha.[53]

After the revocation of the proclamation, the Governor invited the earlier Chief Minister Rabri Devi to form the government. The Governor, however, imposed a condition that the government must prove its majority on the floor of the House within ten days. This condition was challenged as unconstitutional. The Patna High Court however upheld the same saying that the Governor can impose such a condition in his discretion where there is doubt about the majority support enjoyed by the government in the House. The principle of collective responsibility means that the government must enyoy majority support in the House and how that majority support is to be ascertained is a matter left to the discretion of the Governor.[54]

In 2005, Legislative Assembly elections were held in the State of Bihar. Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's Rule over the State of Bihar and the Assembly was kept in suspended animation. The object of the proclamation imposing President's Rule was to give time and space to the political process to explore the possibility of forming a majority Government in the State through a process of political realignment.

Before even the first meeting of the Legislative Assembly, its dissolution was ordered on 23rd May, 2005 under Article 356 on the basis of the report of the Governor that attempts were being made to cobble a majority by illegal means and lay claim to form the Government in the State of Bihar. The Governor's report was in turn based on information gathered from the media, meeting with various political functionaries, as also intelligence reports. The Presidential notification formally dissolving the Bihar Assembly was challenged directly before the Supreme Court under Article 32.[55] The court followed the reasoning in Bommai saying that "the narrow minimal area of judicial review as advocated in State of Rajasthan case is no longer the law of the land in view of its extension in Bommai case".[56]

The notification was held to be unconstitutional on the ground that the drastic and extreme action under Article 356 cannot be justified "on mere *ipse dixit*, suspicion, whims and fancies of the Governor" without any verification of the authenticity of the information.

> "There was no material, let alone relevant, with the Governor to assume that there was no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means".[57]

F. FINANCIAL EMERGENCY

Article 360 makes provisions concerning financial emergency. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India, or any part thereof, is threatened, he may by a proclamation make a declaration to that effect [Art. 360(1)].

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53. *Supra.*
54. *Sapru Jayakar Motilal C.R. Das v. Union of India,* AIR 1999 Pat. 221.
55. *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.
56. *Ibid* paragraph 54.
57. *Ibid* at page 119.

When such a proclamation is in operation, the Centre can give directions to any State to observe such canons of financial propriety as may be specified in the directions. It may also give such other directions as the President may deem necessary and adequate for the purpose [Art. 360(3)]. Any such directions may provide for the reduction of salaries and allowances of all or any class of persons serving in the State [Art. 360(4)(*a*)(*i*)].

The Centre may require that all money bills, or financial bills or those which involve expenditure from the State Consolidated Fund, shall be reserved for the President's consideration after being passed by the State Legislature [Art. 360(4)(*a*)(*ii*)].

The President may also issue directions for reducing the salaries and allowances of persons serving the Union including the Supreme Court and the High Court Judges [Art. 360(4)(b)].

A proclamation issued under Art. 360(1) may be revoked or varied by a subsequent proclamation [Art. 360(2)(a)], and has to be laid before each House of Parliament [Art. 360(2)(b)]. The proclamation ceases to have effect after two months unless in the meantime it is approved by resolutions of both Houses of Parliament [Art. 360(2)(e)]. If at the time, the proclamation under Art. 360(1) is issued, Lok Sabha is dissolved it may be approved by the Rajya Sabha, and then approved by the Lok Sabha after elections within thirty days from its first sitting. If not so approved, the proclamation ceases to exist.[58]

The proclamation of financial emergency increases the supervision of the Centre on the States in financial matters. Perhaps, the framers of the Constitution adopted the idea underlying Art. 360 from the experiences of the federations of the U.S.A., Canada and Australia during the depression of the 1930's when the Central Government found itself very much handicapped in taking effective action to meet the situation. In fact, the argument given in the Constituent Assembly to support this constitutional provision was that during the depression, the U.S. Congress had passed the National Industrial Recovery Act which was declared unconstitutional by the Supreme Court,[59] and that the Central Government in India should face no such difficulty in coping with emergency economic problems.[60] The Government of India can take effective action under Art. 360 whenever an occasion arises for the same. There has not been any occasion so far for invoking Art. 360.

By the Thirty-Eighth Amendment of the Constitution, the Presidential 'satisfaction' in Art. 360(1) was declared to be 'final and conclusive' and not questionable in any court on any ground. No court was to have jurisdiction to entertain any question, on any ground, regarding the validity of—(*i*) a declaration made by proclamation by the President to the effect stated in Art. 360(1); or (*ii*) the continued operation of such Proclamation. This provision has now been deleted by the Forty-Fourth Amendment of the Constitution.[61]

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58. Proviso to Art. 360(2)(c).

59. *Schechter Poultry Corp. v. United States*, 295 US 495.
The Act in question was declared invalid in *Schechter* on the ground of involving an improper delegation of legislative power by the Congress to the President.

60. XCAD, 361-72.
Also, AUSTIN, THE INDIAN CONST., 209-16.

61. See, Ch. XLI, *infra.*