
THE MISUSE OF ARTICLE 356: EXPLORING PROCLAMATION OF STATE EMERGENCY AND ITS IMPACT ON INDIAN FEDERALISM

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INTRODUCTION

The invocation of Article 356¹ of the Indian Constitution is reserved for instances where the state's constitutional functioning is found to be inadequate. Under this provision, the President holds the authority to invoke a Proclamation of Emergency and dissolve the legislative assembly in a state when the state government fails to operate in accordance with constitutional provisions. Upon receipt of a report from the Governor, the President, acting upon the counsel of the Council of Ministers and Prime Minister, assumes control over the state government, commonly referred to as President's Rule. This grants the central government significant power over the state, leaving room for potential misuse. Any such abuse of power goes against the fundamental principle of Federalism, as enshrined in the Indian Constitution which has a strong centre and decentralized structure. In the eloquent words of Granville Au, the Indian Constitution embodies a federal structure with a commanding centre."² Article 356 affords the Union with the power to safeguard the States, however, the burning question remains: Does it impede State autonomy?

Its frequent misuse for political gains has resulted in calls for its removal. However, such a drastic step could lead to further upheaval, leaving the matter fraught with uncertainty. Undoubtedly, this topic holds great sensitivity as it directly impacts the relationship between the Centre and the States, thus demanding careful handling. While it is undeniable that the Centre has been exploiting this provision to exert control over State governments, we cannot negate the justifications behind its inclusion. The issue does not lie in the legal framework, but rather in the actions of the executive authorities.

¹ Constitution of India, art. 356

² Constitution of India, art. 355

HISTORICAL BACKGROUND:

1. The Government of India Act, 1935

Article 356 draws its roots from Article 93 of the Government of India Act, 1935. This provision was introduced by the British government at a time when they were gradually devolving powers to the Indian Ministries. However, they were wary of giving them absolute control as they feared that the Indian Ministries would attempt to gain dominance over the British Government. Therefore, Article 93 granted the governor the authority to take charge of a province if they were satisfied that the government was not functioning in accordance with the Act. The governor was then empowered to exercise their authority at their own discretion. This power was also extended to the governor-general through Article 45 in relation to the Central Government.

Article 356 draws its origins from Article 93 of the Government of India Act, 1935, which was a time of transition for the British government and its relationship with India. During this period, the British government was gradually granting powers to the Indian Ministries, but they were also wary of giving too much control. In order to maintain some level of authority, Article 93 provided the governor with the ability to intervene and assume control of a province if they believed that the government was not functioning in accordance with the Act. This provision was also mirrored in Article 45, which granted similar powers to the governor-general over the Central Government. By borrowing these provisions, Article 356 serves as a reminder of the evolving dynamic between the British government and India during this critical period of history.³

2. Incorporation of Article 356 by Drafting Committee of the Constituent Assembly

Despite being derived from Article 93 and 45 of the Government of India Act, 1935, Article 356 serves a distinct purpose. In a country as diverse as India, with vast differences in social, economic, and political aspects, it was inevitable that these differences would create complications in democracy. The variations in language, race, and religion often lead to political conflicts, posing a threat to the federal structure. To safeguard against such

³ National Commission to Review the Working of the Constitution, 'A Consultation Paper on Article 356 of the Constitution' (*The Hindu Centre*, 2002)https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf accessed 19 May 2021

circumstances, the power to assume control over the State Government in extreme cases was granted to the President instead of the Governor. The drafting of Article 278, which later became Article 356, sparked controversy in the Constituent Assembly. Some of the drafters vehemently opposed this article, fearing it would replicate an imperialistic legacy. However, these objections were eventually overcome.

The author holds the belief that this Article will ultimately have no practical application, and even if it is enacted, the President will exercise caution and provide a warning to the State. This provision was included to facilitate a smooth transition from feudal to democratic leadership. The framers envisioned the central government serving as a mentor or aid in this transformation.

3. Federalism and Article 356

In their exploration of the Indian political system, Austin and A.H. Birch coined the term "Cooperative federalism" to describe its unique nature - a hybrid of both federal and unitary principles. This concept highlights the crucial need for a delicate balance between Article 356 and Federalism. The Indian Constitution adheres to the principle of separation of powers, ensuring that governance is dispersed among various organs and institutions - an essential element for effective governance. While the Central Government holds a certain degree of superiority over state governments, this is intended to uphold cooperative federalism, not for any ulterior motives. The power conferred by Article 356 is an example of such dominance but it should be noted that it should be used only under extreme situations. "For the common good of all the members of a federal system, it is necessary for the individual States to sacrifice some of their powers to the Union."⁴ And it is the responsibility of the Union not to abuse such power and preserve the integrity of the Constitution.

"The power contained in Article 356 is both extraordinary and arbitrary, but it is an uncanny trait of extraordinary power that it tends to corrupt the wielder. Close scrutiny of the history of its application would reveal that Article 356 is no exception."⁵

⁴ James Madison, 'The Alleged Danger from the Powers of the Union to the State Governments Considered' (*Independent Journal*, January 1788) <https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493409> accessed 9 June 2021

⁵ Reddy (n. 6)

It has been grossly misused on several occasions for political reasons. Many times, governments were removed without being given the opportunity to prove their majority in the Floor test. It has been used to demolish opposition government. This gross misuse destroys the spirit of federalism the objective of this Article. A provision that was supposed to protect the federal spirit is the very provision destroying it.

4. The Sarkaria Commission Report, 1983⁶

Sarkaria Commission has examined Emergency Provisions in its Chapter 6. It has tried to remove the ambiguity present in the wording of Article 356 by explaining the Failure of Constitutional Machinery and giving illustrations of improper invoking of Article 356. It has explained the application and use of this Article.

5. Failure of Constitutional Machinery

Failure of Constitutional Machinery can be understood under four cases. The first such case is the Political crisis. When after general elections, no government can be formed or if the ministry resigns or loses majority and there is no alternate left then an emergency has to be imposed. At the point the government of a State acts in a disruption of the Constitutional provisions then there is a failure of Constitutional Machinery because of Internal Subversion. It happens when a government creates a deadlock deliberately or uses its power for unconstitutional reasons. Failure of Constitutional Machinery by Physical breakdown happens when a government is unable to deal with internal disturbance or natural calamity which paralyses the state administration or endangers the security of the state.

The Commission brought up that if the State Government does not follow the directions given by the Union government and the nature of such non-compliance is such that it affects the centre-state relations, then it constitutes to failure of Constitutional Machinery.

6. Improper Invocation of Emergency

After analyzing the Sarkaria Commission report, improper invocation of Article 356 can be categorised into 5 categories:⁷

⁶ Sarkaria Commission Report 1987, Ch VI

⁷ *ibid*

1. Non-issuance of Warning to Errant State,
2. Dismissal of Ministry Commanding Majority,
3. Denial of Opportunity to Claimant,
4. Non-formation of Caretaker Government and
5. Wholesale Dissolution of Assemblies.

It is crucial to issue a warning to delinquent states as a preventive measure, considering that Article 356 should only be invoked in dire circumstances and implementing it without prior notice would constitute a misuse of this provision. However, in cases where urgent action is necessary, the Union may forego giving a warning. The commission's analysis revealed that the majority of instances of misapplication involved using it to resolve internal party disputes. This is a concerning trend, especially when a well-established government is ousted solely on the grounds of corruption or mismanagement. Furthermore, relying solely on the governor's assessment that the ruling party has lost majority without allowing them the opportunity to demonstrate their confidence through a floor test is an insufficient basis for imposing presidential rule. The third category falls under the umbrella of denying opportunities to the inquirer. This type of abuse occurs when the government is prevented from taking office after an election, or when they are not given the chance to prove their majority or create an alternate government. In addition, another example of misuse is when no interim government is established. Two particularly notorious instances of Article 356 misuse took place in 1977 and 1980, when seven state assemblies were dissolved on two separate occasions. The commission deemed this a "bulk dissolution" of assemblies. It was during these events that the Emergency provision was invoked, due to conflicting ideologies between the state and central governments. This blatant exploitation of Article 356 for political gain is evident in this case.

7. Recommendations by the Commission

The commission recommended 8 safeguards and 4 amendments for this provision. Safeguards mainly included that Article 356 should be treated as a last resort after exhausting all the possible alternatives. A notice should be sent to the errant state as a precautionary measure. The commission pointed out that it is "the governor's responsibility to explore all the

possibilities of having a government enjoying majority support. If the installation of such a government is not possible and fresh elections can be held without avoidable delay, he should ask the outgoing ministry, if there is one, to continue as a caretaker government.”¹⁷ One of the most important safeguards is “that every proclamation should be placed before each house of Parliament at the earliest, in any case before the expiry of two-month period contemplated in cl. (3) of Article 356.”⁸

The commission suggested amending the article in such a way that assembly cannot be dissolved under Article 356(1) without being laid before the parliament. Another significant change that should be incorporated to make the cure of judicial review against mala-fides more meaningful is that the material facts and grounds on which presidential satisfaction is made is ought to be made a vital part of the proclamation.⁹

S.R. BOMMAI CASE

S.R. Bommai v. Union of India¹⁰ is a landmark judgment that attempted to curb the misuse of Article 356. Views of the judges expressed in this case, are quite similar to recommendations given by The Sarkaria Commission. The main contentions that were determined by the Supreme Court were, whether the Proclamation is justiciable and whether the powers of the President to invoke emergency is absolute.

1. Key Points of the Judgment

The judges, in their efforts to prevent the misuse of Article 356, provided useful guidelines. Emphasizing the importance of a floor test, they cautioned that a warning must be issued to the state as a precautionary measure, accompanied by a reasonable amount of time for the state to respond. They also placed restrictions on the President's power, highlighting that no irreversible actions or dissolution of the assembly can take place until the proclamation has been approved by Parliament. Additionally, the judges adhered to the recommendations of the Sarkaria Commission on the judicious use of Article 356. Ultimately, they concluded that center-state

⁸ *ibid*

⁹ *ibid*

¹⁰ *SR Bommai v. Union of India*, (1994) 3 SCC 1

relations should be protected and hence, the central government should use this article sparingly.

2. Justifiability of Article 356

The panel of judges came to the unanimous decision that the Presidential Proclamation is subject to judicial review. Upon discovering any evidence of malicious intent, the court has the authority to strike down the proclamation. Additionally, the court has the ability to examine the relevant materials used by the President in making their decision. The court clarified that this material is not considered privileged advice and therefore does not fall under the constraints of Article 74(2) of the Constitution. In cases of abuse, the court has the power to provide redress, specifically in relation to the misuse of Article 356. Furthermore, Section 123 of the Evidence Act may also be applicable under certain circumstances. This groundbreaking ruling marks a new era of judicial scrutiny and curbs flagrant abuse of this provision.

3. Bar on President's power

Article 356 grants the President with a powerful authority, but this power is not absolute. It is a subjective power that must be supported by relevant information. Additionally, the approval of both Houses is necessary for such a Proclamation to take effect. In the event that the Proclamation goes against the Constitution, the court has the capacity to intervene and reinstate the government. This safeguard ensures that the provision is not abused. Furthermore, even after being sanctioned by Parliament, the Proclamation can still be challenged in a court of law. This crucial decision strengthens the federal system and serves as a barrier against the arbitrary removal of a government for political gain.

CRITICAL ANALYSIS

“The Constitution of India has created a federation but with a bias in favour of the Centre. Within the sphere allotted to the States, they are supreme.”¹¹ The balance of powers defined by the Constitution between Centre and State is commendable. It has the perfect balance to protect the integrity and spirit of the nation. Article 356 does not affect the state autonomy rather it is important to maintain the federal structure.

¹¹ *ibid*

The use of this provision increased with time. As stated in RTI reply from the Ministry of Home Affairs (MHA)¹², Presidential rule has been enforced 115 times since 2016. While there had been only 3 occasions of state emergency between 1950 and 1954, “it was invoked on 09 occasions between 1965 and 1969; it rose to 21 instances during the period 1975-1979 and to 18 during the period 1980-1987.”¹³ It was being used as a political tool. After the Sarkaria commission and S.R. Bommai case, the frequency decreased gradually. Between 1991 and 2010, it was used 27 times which was still ‘high’ but only in 1991 and 1992, it was used 9 times. And now if we look at the present scenario, it was only used 5 times between 2011-2016 being 3 times in 2014 when BJP came into power. The positive impact of these guidelines can be seen clearly. The more pressing concern is that in only 60 cases emergency can be justified and the remaining are controversial.¹⁴ In more than half of the cases, the power has been grossly misused.

The question arises whether this Article should be deleted. The deletion of this Article would lead to a disastrous change in Centre- State relations and our nation is not ready for that yet. Instead of deletion, proper amendments should be done to ensure the correct use of this Article.

As far as the Judicial review is concerned, it not possible to follow a uniform rule for all the cases but the Rajasthan case and Bommai case has established that the Judiciary is the final interpreter of the Constitution and it has the power to interpret and protect the Constitution of India by any means necessary. The question of Judicial review first came in the case State of Rajasthan v. Union of India.¹⁵ It was a landmark case because judicial review of Presidential Satisfaction came into the picture even after the bar present in 74(2) and the clause 5 of Article 356 which was added by the Constitution (38th Amendment) Act, 1975 which was as follows: “Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in cl. (1) shall be final and conclusive and shall not be questioned in any court on any ground.” After this case, the Constitution (44th Amendment) Act, 1978 removed the absolute exclusion of judicial review of the Presidential by deleting clause 5.¹⁶ And following the Bommai case, we can conclude that Article 356 does not enjoy blanket immunity.

¹² Government of India, Ministry of Home Affairs, ‘President's Rule’ (*Factly.in*, 3 May 2016) <https://factly.in/wp-content/uploads/2018/06/MHA-Presidents-Rule.pdf> accessed 21 May 2021

¹³ Sarkaria Report (n. 15)

¹⁴ Dubey (n. 5)

¹⁵ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361

¹⁶ Dubey (n. 5)

Post Sarkaria Commission and Bommai case era, the abuse have reduced remarkably. In the case of **C.R. Das v. Union of India**¹⁷, the governor reported that there has been a breakdown of constitutional machinery because of degrading law & order in the state. The President refused this and said that bad governance does not amount to breakdown. The government sent a report and emergency was imposed but it was invoked because it could not pass through Rajya Sabha.

In **Rameshar Prasad v. Union of India**¹⁸, the court said that “the Proclamation of emergency cannot be imposed on whims and fancies of the Governor, the decision should be made on real and cogent grounds.” However, interim relief was not granted and elections were organized which means they did not follow the principles laid down by the Bommai case. Thus, the path of freedom from misuse was not simple and had its ups and downs.

The true out coming of the Bommai case was **Harish Singh Rawat v. Union of India**¹⁹, the state government had been discharged without a floor test. The governor had initially ordered a floor test but later Presidential rule was imposed. The question that arose was how no-confidence motion can be passed in when the assembly is in suspended animation. The High Court ordered that to conduct a floor test and result would declare the proclamation void ab initio.

There is one unconventional misuse of Article 356 which was never discussed before. The Union failed to invoke emergency during the Godhra train incident that happened in Gujarat in 2002. The central government and state government were of the same political beliefs therefore, they were biased in imposing emergency. Constitutional machinery was in a breakdown but the Union did not impose Presidential rule. The word ‘otherwise’ in Article 356 comes into play in this situation. But no decisions were taken by the President to improve the situation.

CONCLUSION

The power granted to the Central government under Article 356 holds great importance in upholding the values of our Constitution. Consequently, the deletion of this provision is not a

¹⁷ *CR Das v. Union of India*, AIR 1999 Pat 221

¹⁸ *Rameshar Prasad v. Union of India*, (2005) 7 SCC 149

¹⁹ *Harish Singh Rawat v. Union of India*, (2016) 16 SCC 757

viable option. Extensive research and analysis have revealed that this power has been misused in the past for political gain. Due to the Centre's dominant influence in the parliament, they can easily pass a proclamation and invoke a State Emergency in any state of their choosing. The lack of clear guidelines, safeguards, and ambiguity in the Article allows for this misuse to occur. In an attempt to protect their rights, states have attempted to resist this power whenever possible. The gravity of this power cannot be ignored, as it can significantly disrupt the functioning of a democracy. Therefore, extreme caution should be exercised before resorting to its use. Several commissions have recommended precautions to be taken before invoking Article 356.

The State of West Bengal²⁰ and a committee constituted by the State of Tamil Nadu demanded the deletion of Article 356. But this Article cannot be repealed because the use of this Article is inevitable in certain situations. Democracy will be in jeopardy without it.

Numerous efforts were undertaken to curb the misuse of power, but it wasn't until the Sarkaria Commission and the Bommai case that true progress was seen. The valuable contributions of these two entities cannot be overstated. The judiciary, with its power of review, showed that no one is above the law and that justice can be served. In multiple instances, the court succeeded in preventing misuse of power, solidifying the principle of judicial review. And let us remember, Article 356 is a vital component of our Constitution and it is the responsibility of those in executive positions to use their power in accordance with its principles.

“After all, the effectiveness of any law is entirely dependent on its proper enforcement in the proper perspective. Howsoever excellent and significant a law may be, it cannot serve the purpose, or it may not be prevented from being controversial unless and until it is implemented in its letter as well as spirit.”²¹

RECOMMENDATIONS

- To prevent the constant abuse of this Article, the following amendments are recommended:

- The proclamation should be approved by the Parliament before the dissolution of the

²⁰ West Bengal Government Document of 1 December 1977 (West Bengal Memorandum), para 10

²¹ Dubey (n. 5)

assembly to avoid ill consequences.

- If both the Houses do not approve the Proclamation then the government at the state should be restored.
- To review the continuance of the proclamation, safeguards should be incorporated similar to clauses (7) and (8) of Article 352. Proclamation of emergency will be invoked if the Lok Sabha passes a resolution disapproving it.
- Material facts and grounds which are the basis of Presidential satisfaction ought to be made an essential part of the proclamation to make the principle of judicial review more significant.

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