

**NATIONAL COMMISSION TO REVIEW THE
WORKING OF THE CONSTITUTION**

A
Consultation Paper*
on

ARTICLE 356 OF THE CONSTITUTION

May 11, 2001
VIGYAN BHAWAN ANNEXE, NEW DELHI – 110 011
Email: <ncrwc@nic.in> Fax No. 011-3022082

Advisory Panel

on

Union-State Relations

Member-In-Charge & Chairperson

Justice Shri R.S. Sarkaria

Members

- Justice Shri B.P. Jeevan Reddy
- Dr. M.G. Rao
- Shri G.V. Ramakrishna

Member-Secretary

Dr. Raghbir Singh

ACKNOWLEDGEMENT

This Consultation Paper on 'Article 356 of the Constitution' is based on a paper prepared by Justice Shri B.P. Jeevan Reddy, Member of the Commission.

The Commission places on record its profound appreciation of and gratitude to Justice Shri B.P. Jeevan Reddy for his contribution.

CONTENT

	Pages
I. Emergency Provisions of the Constitution	927
II. Historical Background of article 356	929
III. The Federal Spirit and article 356: A fine Balance	931
IV. Judicial Interpretation of article 356	932
V. Dissolution of Legislative Assembly of a State under article 356	934
VI. Views of the Sarkaria Commission	937

VII.	Article 356 in action	939
VIII.	Whether the power under article 356 can be limited to non-compliance with the directions given under article 365	941
IX.	Need for amending article 356	942
X.	Suggestions	942
	Questionnaire	946

I. Emergency Provisions of the Constitution

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

1.2 Article 352(1) says that "If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation". The words "in respect of the whole of India ... in the proclamation" were added by the Constitution (42nd Amendment) Act, 1976 while the words "armed rebellion" were substituted by the Constitution (44th Amendment) Act, 1978 for the words "internal disturbance". In this paper we do not propose to deal with the emergency of the kind contemplated by article 352. Indeed no such emergency has been proclaimed after 1977. In any event, we think that the article as amended by the 44th Amendment Act eliminates any room for abuse and needs no further change. Similarly, we need not deal with article 360, financial emergency, inasmuch

as no defect or inadequacy therein has been brought to our notice. The said article has not also been invoked till date. We would thus be dealing only with the power of the President to impose the President's rule in the States as provided in article 356.

1.3 Article 355 imposes an obligation upon the Union "to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution". The Constitution does not expressly provide as to how the duty of the Union to protect a State against external aggression and internal disturbance is to be carried out; obviously, it is left to the judgment of the Union how to meet any such situation, as and when it arises, but it does provide, in article 356, the manner in which it has to perform its duty to ensure that the government of every State is carried on in accordance with the provisions of the Constitution.

1.4 Article 356 carries the marginal heading "Provisions in case of failure of constitutional machinery in States". But neither clause (1) nor for that matter any other clause in the article employs the expression "failure of constitutional machinery". On the other hand, the words used are similar to those occurring in article 355, namely, "a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution". If the President is satisfied that such a situation has arisen, whether on the basis of a report received from the Governor of the State or otherwise, he may, by proclamation, take any or all of the three steps mentioned in sub-clauses (a), (b) and (c). It would be appropriate to read the entire clause (1) of article 356 at this stage:

"(1) 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 this Constitution, the President may by Proclamation –

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts."

Clause (2) says that such a Proclamation may be revoked or varied by a subsequent Proclamation. Clause (3) provides a check upon the power contained in clause (1). It says that "every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament" (The proviso to clause (3) provides certain details which it is not necessary to notice for the purpose of this paper). Clause (4) provides that "a Proclamation approved by both the Houses of Parliament shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation (The 44th Amendment Act reduced the period in this clause from one year to six months). The proviso to clause (4), however, empowers such Proclamation to be extended,

beyond six months subject to the approval of Parliament for a further period of six months at a time subject to an outer limit of three years. The second proviso to clause (4) provides for a specific situation which it is not necessary to refer to for the purpose of this paper. The third proviso to clause (4) is applicable to the State of Punjab and provides for a particular situation and is of no general relevance. Clause (5) has been substituted altogether by the 44th Amendment Act. The said clause was in fact inserted by the Constitution (38th) Amendment Act, 1975 with retrospective effect. The clause inserted by 38th Amendment Act barred judicial review of the Proclamation issued under clause (1). Inasmuch as, it has been substituted by the present clause (5), it is not necessary to deal with the language or effect of clause (5) as originally inserted. The present clause (5) provides certain details concerning the approval contemplated by clause (3) and is in fact a continuation of clause (4).

1.5 Article 357 contains certain consequential provisions relating to exercise of legislative powers under Proclamation issued under article 356. It is not necessary to notice them in any detail. It is, however, necessary to refer to a few more articles relevant in this behalf.

1.6 Article 365 which occurs in Part XIX - Miscellaneous - provides that "where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". In the light of the language employed in article 365, namely, non-compliance with "directions given in the exercise of executive power of the Union under any of the provisions of this Constitution", it is necessary to refer to articles 256 and 257 which provide for giving of such directions. The said articles occur in Chapter II - 'Administrative Relations - General' in Part XI which deals with relations between the Union and the States. Article 256 which carries the heading "Obligation of States and the Union" provides that "the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose". Article 257 which carries the heading "Control of the Union over States in certain cases" provides in clause (1) that "the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose". Clause (2) of article 257 provides that "the executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance". The proviso to clause (2) says that nothing in the said clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or to give appropriate directions to the States for their maintenance. Clause (3) says that the executive power of the Union to give directions extends to the measures to be taken for the protection of the Railways within the State. Clause (4) provides for reimbursement of the cost incurred by the State in complying with or carrying out the directions given under clauses (2) and (3). It is not really necessary to refer to articles 258 and 258A. article 258 empowers the President to entrust certain executive functions of the Union to the States with their consent. Similarly, article 258A provides for the States entrusting their executive functions to the Union with its consent.

1.7 It is evident that article 355 insofar as it speaks of the obligation of the Union to protect the States from external aggression and internal disturbance appears to be influenced by article IV Section 4 of the United States Constitution which provides: "the United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion, and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence". That part of article 355 which speaks of the obligation of the Union to ensure that the government of the States is carried on in accordance with the provisions of the Constitution appears to have been inspired both by article IV(4) of the U.S. Constitution and by section 61 of the Australian Constitution Act, which empowers the federal government to "maintain" the Constitution (see the Constituent Assembly debates - Vol. 9, Page 150 onwards), though the language was altered to make it more clear and specific, having regard to the Indian context. However, as stated hereinabove, our Constitution does not set out the manner in which the Union shall perform its obligation to protect the

States against external aggression and internal disturbance. The American Constitution too does not prescribe the manner in which the federal government shall perform its three obligations contained in article IV(4).

II. Historical Background of article 356

2.1 Article 356, it is obvious, is inspired by sections 93 of the Government of India Act, 1935. Section 93 of the 1935 Act provided that if a Governor of a province was satisfied that a situation has arisen in which the government of the province cannot be carried on in accordance with the provisions of the said Act, he could, by proclamation, assume to himself all or any of the powers vested in or exercisable by a provincial body or authority including the Ministry and the Legislature and to discharge those functions in his discretion. The only exception was that under this section the Governor could not encroach upon the powers of the High Court. (Section 45 conferred a similar power upon the Governor-General with respect to the Central Government/Central Legislature). It is well-known that the said two provisions were incorporated in the 1935 Act to meet certain purposes and exigencies. The 1935 Act contemplated, for the first time, delegation of certain powers of governance to the Ministries formed by Indian political parties and constitution of Legislatures elected, no doubt, on a restricted franchise. The colonial powers were not inclined to trust these Ministries even with limited powers probably in view of the fact that not only the political parties in India were ambiguous regarding entering the Legislatures and Ministries created under the said Act but some of them were also proclaiming that even if they entered the Ministries they would try to break the governments from within. The said sections therefore provided that if at any time the Governor or Governor-General felt that the Ministry in the province or at the Centre was not acting in accordance with the provisions of said Act, he could resume their powers and exercise the same in his discretion. (The provisions of the said Act relating to Central Government were not brought into operation partly because of the onset of World War II.)

Even though article 356 was patterned upon the controversial section 93 of the 1935 Act - with this difference that instead of the Governor, the President is vested with the said power - it was yet thought necessary to have it in view of the problems that the Indian republic was expected to face soon after independence. The socio-political experience of the framers of the Constitution made them acutely aware that security of the Nation and the stability of its polity could not be taken for granted. The road to democracy was not expected to be smooth. The vast difference in social, economic and political life, the diversity in languages, race and region were expected to present the nascent republic with many a difficult situation.

difference in social, economic and political life, the diversity in languages, race and region were expected to present the nascent republic with many a difficult situation. (It is interesting to note that with respect to Union territories, a provision similar to article 356 is found enacted in section 51 of Government of Union Territories Act enacted in 1963 and that it was indeed invoked on as many as on 13 occasions). The Constituent Assembly debates disclose these sentiments. They also disclose that several members strongly opposed the incorporation of article 356 (draft article 278) precisely for the reason that it purported to reincarnate an imperial legacy. However, these objections were overridden by Dr. Ambedkar with the argument that no provision of any Constitution is immune from abuse as such and that mere possibility of abuse cannot be a ground for not incorporating it. He stated:

2.2 Even though article 356 was patterned upon the controversial section 93 of the 1935 Act - with this difference that instead of the Governor, the President is vested with the said power - it was yet thought necessary to have it in view of the problems that the Indian republic was expected to face soon after independence. The socio-political experience of the framers of the Constitution made them acutely aware that security of the Nation and the stability of its polity could not be taken for granted. The road to democracy was not expected to be smooth. The vast

"In fact I share the sentiments expressed by my Hon'ble friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope

the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces."

He added: "I hope the first thing he will do would be to issue a clear warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution."

2.3 It should also be remembered that adult franchise and a full-fledged democratic rule was being introduced for the first time in India, parts of which comprised princely States where elections or democratic rule were unknown. Even in what was known as British-India, the democratic experiment was a limited and a brief one, the founding fathers must have envisaged that the transition from a feudal rule to a democratic rule would not be easy and that several situations may arise in States which may call for intervention of the Central Government - a helping and guiding hand. Even so, the enormity of the power conferred by this article has to be appreciated and envisioned. This understanding is and must be central to any debate about article 356 and the various issues connected with it. The power to dismiss the duly elected government of a State, even while it is enjoying the confidence of the Legislative Assembly, and the very dissolution of a duly elected Legislative Assembly (which not only includes the party of the government but the Opposition and independents as well who may themselves be responsible for bringing to light the misgovernance of the government) by the Executive of the Union, is a concept which no believer in democracy can easily accept.

May be that the British Parliament thought of, while enacting the 1935 Act, providing a 'controlled democracy' or 'restricted democracy' in India but surely our Founding Fathers could not have envisaged or intended to import any such concept into our Constitution, as would be evident from the speeches of Dr.Ambedkar and Shri Alladi Krishnaswami Ayyar while the draft articles 277-A and 278 (corresponding to articles 355 and 356) were being debated in the Constituent Assembly.

2.4 May be that the British Parliament thought of, while enacting the 1935 Act, providing a 'controlled democracy' or 'restricted democracy' in India but surely our Founding Fathers could not have envisaged or intended to import any such concept into our Constitution, as would be evident from the speeches of Dr.Ambedkar and Shri Alladi Krishnaswami Ayyar while the draft articles 277-A and 278 (corresponding to articles 355 and 356) were being debated in the Constituent Assembly. Article 356 was supposed to be an exceptional measure to be invoked to meet a grave and dangerous situation. It should also be remembered that clause (3) does not require a special majority; a simple majority is enough. Ordinarily, the Council of Ministers does command a majority in the Lok Sabha. The difficulty only arises when the Council of Ministers cannot command a majority in the Rajya Sabha. If, however, they command a majority in Rajya Sabha also, then the cost is clear. The Central Government can, if it is so inclined, simply play with the lives of the State Governments and the State Legislative Assemblies, as indeed it is said, by many, to have happened on several occasions in the past. Some people may argue that under our Constitution, the

Centre is superior to States and that the central dominance over States is implicit in the several provisions including 256, 257, 355, 365 besides 356 itself. (For a discussion of this aspect, see paras 209 to 211 at pages 2052 to 2055 and paras 65 and 66 at pages 1976 to 1979 of S.R. Bommai versus Union of India, (AIR 1994 S.C. 1918). At the same time, it cannot be forgotten as affirmed by Dr. Ambedkar (his speech in the Constituent Assembly, quoted in para 53, page 1961 of S.R. Bommai ibid) that the States are supreme - in the words of Dr.Ambedkar, "sovereign" - in the field allotted to them and that notwithstanding a bias in favour of the Centre in our Constitution, ours is a federation - that too a democratic federation.

III. The Federal Spirit and article 356: A fine Balance

It needs to be remembered that only the spirit of "cooperative federalism" can preserve the balance between the Union and the States and promote the good of the people and not an attitude of dominance or superiority. Under our constitutional system, no single entity can claim superiority. Sovereignty doesn't lie in any one institution or in any one wing of the government. The power of governance is distributed in several organs and institutions - a sine qua non for good governance.

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

3.2 Unfortunately, however, it so happened that over the years, the Centre has not always kept in mind the concept of co-operative federalism or the spirit and object with which the article was enacted while dealing with the States and has indeed grossly abused the power under article 356 on many occasions. Between 1950 and 1994, the said power was exercised on more than 90 occasions. The facts and figures contained in Chapter Six of the Sarkaria Commission Report read with Annexure VI (1 to 4) appended to the said chapter and the decision of the Supreme Court in S.R. Bommai v. UOI (reported in AIR 1994 SC 1918) amply bear out the truth of our assertion. The said Annexure shows that on several occasions, the State Governments were dismissed even when they enjoyed the majority in the Assembly; on some occasions, they were dismissed without giving them an opportunity to prove their strength on the floor of the House. The very instance of S.R. Bommai, who was the Chief Minister of Karnataka, is proof positive of such abuse. In spite of his asking the Governor to allow him to prove his majority, within a very short period, on the floor of the Assembly, the Governor did not give him that opportunity and recommended the dismissal of his ministry. The said action of the governor naturally invited strong condemnation at the hands of the Supreme Court.

Between 1950 and 1994, the said power was exercised on more than 90 occasions.

IV. Judicial Interpretation of article 356

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

4.2 Clause (1) of article 356 - indeed the whole article - has been the subject-matter of elaborate consideration at the hands of the Supreme Court in two of its decisions, namely, State of Rajasthan v. UOI (AIR 1977 SC 1361) and S.R. Bommai v. UOI referred to hereinabove. The first mentioned decision is by a Constitution Bench of seven judges while the latter is by a Constitution Bench of nine judges. In view of the fact that in certain respects, S.R. Bommai departs from State of Rajasthan, it would be sufficient to refer to the holdings in S.R. Bommai alone. In S.R. Bommai, the majority opinions are two, one was rendered by P.B. Sawant J. on behalf of himself and Kuldeep Singh J. The other was rendered by B.P. Jeevan Reddy J. for himself and S.C. Agarwal J. and with whose reasoning and conclusions S.R. Pandian J. agreed fully. (They also agreed with conclusions 1, 2 and 4 to 7 in the opinion of Sawant J.). The principle of article 356 has been set out in the said decision in the following words:

"The crucial expressions in Art.356(1) are - if the President, "on the receipt of report from the Governor of a State or otherwise" "is satisfied" that "the situation has arisen in which the government of the State cannot be carried on" "in accordance with the provisions of the Constitution". The conditions precedent to the issuance of the proclamation, therefore, are: (a) that the President should be satisfied either on the basis of a report from the Governor of the State or otherwise, (b) that in fact a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. In other words, the President's satisfaction has to be based on objective material. That material may be available in the report sent to him by the Governor or otherwise or both from the report and other sources. Further, the objective material so available must indicate that the government of the State cannot be carried on in accordance with the provisions of the Constitution. Thus the existence of the objective material showing that the government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the President issues the proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question. However, if there is no such objective material before the President, or the material before him cannot reasonably suggest that the government of the State cannot be carried on in accordance with the provisions of the Constitution, the proclamation issued is open to challenge. It is further necessary to note that the objective material before the President must indicate that the government of the State "cannot be carried on in accordance with the provisions of the Constitution". In other words, the provisions require that the material before the President must be sufficient to indicate that unless a proclamation is issued, it is not possible to carry on the affairs of the State as per the provisions of the Constitution. It is not every situation arising in the State but a situation which shows that the constitutional Government has become an impossibility, which alone will entitle the President to issue the proclamation. These parameters of the condition precedent to the issuance of the proclamation indicate both the extent of and the limitations on, the power of the judicial review of the proclamation issued."

(opinion of P.B. Sawant J.)

4.3 "The power conferred by article 356 is a conditioned power; it is not an absolute power to be exercised in the discretion of the President. The condition is the formation of satisfaction - subjective, no doubt- that a situation of the type contemplated by the clause has arisen. This satisfaction may be formed on the basis of the report of the Governor or on the basis of other information received by him, or both. The existence of relevant material is a pre-condition to the formation of satisfaction. The use of the word "may" indicates not only a discretion but an obligation to consider the advisability and necessity of the action. It also involves an obligation to

consider which of the several steps specified in sub-clauses (a), (b) and (c) should be taken and to what extent? The dissolution of the Legislative Assembly - assuming that it is permissible - is not a matter of course. It should be resorted to only when it is necessary for achieving the purposes of the proclamation. The exercise of the power is made subject to approval of the both Houses of Parliament. Clause (3) is both a check on the power and a safeguard against abuse of power.

Clause (1) opens with the words "if the President is satisfied". These words are indicative of the satisfaction being a subjective one.... Having regard to the nature of the power and the situation in which it is supposed to be exercised, principles of natural justice cannot be imported into the clause. It is evident that the satisfaction has to be formed by the President fairly, on a consideration of the report of the Governor and/or other material, if any, placed before him. Of course, the President under our Constitution being, what may be called, a constitutional President obliged to act upon the aid and advice of the council of ministers (which aid and advice is binding upon him by virtue of clause (1) of Art.74), the satisfaction referred to in Art.356(1) really means the satisfaction of the union council of ministers with the Prime Minister at its head. Clause (1) requires the President to be satisfied that a situation has arisen in which the government of the State "cannot" be carried on "in accordance with the provisions of this Constitution". The words "cannot" emphasise the type of situation contemplated by the clause. These words read with the title of the article "provisions in case of failure of constitutional machinery in States" emphasise the nature of the situation contemplated.... It must, however, be remembered that it is not each and every non-compliance with a particular provision of the Constitution that calls for the exercise of the power under Art.356(1). The non-compliance or violation of the Constitution should be such as to lead to or give rise to a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution. It is indeed difficult - nor is it advisable - to catalogue the various situations which may arise and which would be comprised within clause (1). It would be more appropriate to deal with concrete cases as and when they arise. The satisfaction of the President referred to in clause (1) maybe formed either on the receipt of the report(s) of the Governor or otherwise.... He (the Governor) takes the oath, prescribed by Art.159, to preserve, protect and defend the Constitution and the laws to the best of his ability. It is this obligation which requires him to report to the President the commissions and omissions of the government of his State which according to him are creating or have created a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution.... Since he (Governor) cannot himself take any action of the nature contemplated by Art.356(1), he reports the matter to the President and it is for the President to be satisfied - whether on the basis of the said report or on the basis of any other information which he may receive otherwise - that situation of the nature contemplated by Art.356(1) has arisen. It is then and only then that he can issue the proclamation. Once the proclamation under Art.356(1) is issued or simultaneously with it, the President can take any or all the actions specified in clauses (a), (b) and (c)."

(opinion of B.P. Jeevan Reddy J.)

V. Dissolution of Legislative Assembly of a State under article 356

5.1 Notwithstanding the fact that article 356 does not expressly speak of dissolution of the Legislative Assembly, the majority opinions held, keeping in view the scheme and intendment of the

relevant constitutional provisions and the practice obtaining since 1950, that in exercise of the power under article 356 it is open to the President to dissolve a Legislative Assembly but that such a power can be exercised only after both Houses of Parliament approve the proclamation as contemplated by clause (3). (See: the discussions in paras 219 to 222 at pages 2057 to 2059 (Jeevan Reddy J.) and paras 73 and 74 at pages 1983 to 1985 (Sawant J.)) Until then, it is held, he can only keep the Legislative Assembly in suspended animation. It is further pointed out that in case the Houses of Parliament disapprove or do not approve the proclamation as contemplated by clause (3), the Legislative Assembly springs back to life. (Of course there can be no question of dissolving the Legislative Council wherever it exists in any State.)

5.2 Instead of referring to each aspect of the said article it would be appropriate to set out the conclusions contained in the aforesaid two opinions in S.R. Bommai:

I. The validity of the proclamation issued by the President under Art.356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the *mala fide* exercise of the power. When a *prima facie* case is made out in the challenge to the proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.

II. Art.74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

III. When the President issues proclamation under article 356(1), he may exercise all or any of the powers under sub-clauses (a), (b) and (c) thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation.

IV. Since the provisions contained in clause (3) of article 356 are intended to be a check on the powers of the President under clause (1) thereof, it will not be permissible for the President to exercise powers under sub-clauses (a), (b) and (c) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under article 174(2)(b) read with article 356(1)(a) till at least both the Houses of Parliament approve of the proclamation.

V. If the proclamation issued is held invalid, then notwithstanding the fact that it is approved by both Houses of the Parliament, it will be open to the court to restore the *status quo ante* to the issuance of the proclamation and hence to restore the Legislative Assembly and the Ministry.

VI. In appropriate cases, the court will have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the proclamation to avoid the *fait accompli* and the remedy of judicial review being rendered fruitless. However, the court will not interdict the issuance of the proclamation or the exercise of any other power under the proclamation.

VII. While restoring the *status quo ante*, it will be open for the court to mould the relief suitably and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

VIII. Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the government of the State cannot be carried on in accordance with the provisions of the Constitution."
(Opinion of P.B. Sawant J.)

"(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the article is subjective in nature.

(2) The power conferred by Art.356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report(s) of the Governor - is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Art.356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Art.356, it must be held, having regard to the overall constitutional scheme, that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the proclamation.

(4) The proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State government in office. There cannot be two Governments in one sphere.

(5)(a) Clause (3) of article 356 is conceived as a control on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the proclamation, the proclamation lapses at the end of the two-months period. In such a case, government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation gets re-activated. Since the proclamation lapses - and is not retrospectively invalidated - the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the government/Legislative Assembly or other competent authority.

(b) However, if the proclamation is approved by both the Houses within two months, the government (which was dismissed) does not revive on the expiry of period of proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of proclamation or on its revocation.

(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the Ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and section 123 of the Evidence Act cover different fields. It may happen that while defending the proclamation, the Minister or the concerned official may claim the privilege under section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of section 123.

(7) The proclamation under article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be *mala fide* or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) [which was introduced by the Constitution (38th Amendment) Act, 1975] by the Constitution (44th Amendment) Act, 1978 removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.

(8) If the court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.

(9) The Constitution of India has created a federation but with a bias in favour of the center. Within the sphere allotted to the States, they are supreme.

(10) Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the State, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any State Government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Art.356."

(opinion of B.P. Jeevan Reddy J.)

VI. Views of the Sarkaria Commission

6.1 The Sarkaria Commission examined this issue in Chapter Six of its Report. It pointed out in the first instance that the use of article 356 has been rising with the passage of time. Whereas between 1950 and 1954, it was invoked only on 03 occasions, 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. The Commission examined the historical background to articles 355 and 356 and explained that the said provisions are not unprecedented. It referred to similar provisions in the U.S. Constitution and in the Government of India Act, 1935. It also quoted the speech of Dr. Ambedkar (which has been quoted

hereinbefore) pointing out that the possibility of abuse cannot be a ground for not incorporating such a provision and the hope expressed by him that the said two articles will never be called into operation and that they would remain a dead letter. The Commission observed: "6.2.14 - In sum, the Constitution-framers conceived these provisions as more than a mere grant of overriding powers to the Union over the States. They regarded them as a bulwark of the Constitution, an ultimate assurance of maintaining or restoring representative government in States responsible to the people. They expected that these extraordinary provisions would be called into operation rarely, in extreme cases, as a last resort when all alternative correctives fail. Despite the hopes and expectations so emphatically expressed by the framers, in the last 37 years, article 356 has been brought into action no less than 75 times". The Commission then examined the scope and effect of article 355 as well as article 356. While examining article 355, it referred to similar provisions in the Swiss and West German Constitutions as well. It then opined that where a State is confronted with external aggression or 'internal disturbance' (the expression occurring before the 44th Amendment Act), it is open to the Union to adopt all alternative courses available to it to perform its duty of protecting the State. So far as the last mentioned duty in article 355 is concerned, the Commission opined that it has to be discharged in accordance with article 356. It then examined the scope and effect of article 356 and pointed out that it is necessary in the first instance to understand the true import and ambit of this provision. The Sarkaria Commission noted that it is not each and every departure from the provisions of the Constitution that attracts the said article but only a situation where it can be said that there has been a "failure of the constitutional machinery". A liberal interpretation of article 356, the Commission pointed out, will reduce the States to mere dependencies and would cut at the root of the democratic, parliamentary, federal form of government. The Commission then pointed out that 'failure of constitutional machinery' can be examined under four heads, namely, (a) political crisis, (b) internal subversion, (c) physical breakdown and (d) non-compliance with constitutional directions of the Union Executive. It examined each of the said situations and opined that in case of political crisis, it would be the duty of the Governor to explore all possibilities for installing a viable government and if he finds that it is not possible to do so, and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry to continue as a caretaker government provided it was not defeated on the grounds of mal-administration and corruption; he should then dissolve the Assembly. The Commission also warned that invoking article 356 for solving the political crises in the ruling party was an instance of misuse. Regarding internal subversion, it said that if any State government deliberately pursues an unconstitutional policy it would be a case calling for the invocation of this power but after giving due warnings and opportunity for corrective measures. It then gave instances of physical breakdown such as internal disturbance leading to the paralysis of the State administration, and natural calamities. Coming to non-compliance with constitutional directions of the Union Government, the Commission pointed out that if the State Government does not comply with any directions issued under article 256, 257 or 339(2) - or under article 353 during an emergency - in spite of due warnings, it may invite the power under article 356. Similarly, the Commission pointed out, if a public disorder of a significant magnitude endangering the security of the State takes place, it is the duty of the State Government to inform the Centre of such development and if it fails to do so, it may again invite article 356, subject of course to prior warnings. The Commission set out certain illustrations where it can be said that it is a case of improper invoking of article 356. It then dealt with the wholesale dismissal of Assemblies in 1977 and 1980 and also analysed the decision of the Supreme Court in State of Rajasthan. So far as the recommendations made by the Sarkaria Commission are concerned, they are being dealt with elsewhere.

6.2 The views of the Sarkaria Commission that the extraordinary provisions contained in article 356 would be called into operation rarely, in extreme cases, as a last resort when all alternative correctives fail find echo in the views expressed by the founding fathers. The abuse of this article can be prevented only by way of reverting to the narrow sense in which it had been explained and understood by them. The narrow sense of this article emerges very clearly from the words of Shri Alladi Krishnaswamy Ayyar:

"The primary thing concerning the nation and the Union Government is 'to maintain the Constitution'. If the import of that expression is fully realised, it will be noticed that there cannot be any intention to interfere with the provincial constitution, because the provincial constitution is a part of the Constitution of the Union. Therefore, it is the duty of the Union Government to protect (the States) against external aggression, internal

disturbance and domestic chaos and to see that the Constitution is worked in a proper manner both in the States and in the Union. If the Constitution is worked in a proper manner in the provinces or in the States, that is, if responsible government as contemplated by the Constitution functions properly, the Union will not and cannot interfere ." [C.A.D. Vol IX, page 150].

6.3 The views expressed in the Constituent Assembly and reiterated by the Sarkaria Commission get support from the Supreme Court in relation to the cases about the interpretation of the provisions of the Constitution. The following observations of the Supreme Court can very well be cited in support of the proposition that the provisions of article 356 should be interpreted literally and in a narrow sense:

"An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion; but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view." [per S.R. Das J. in Keshavan v. State of Bombay AIR 1951 S.C. 128 at p.129].

VII. Article 356 in action

7.1 In Chapter Six of its Report, the Sarkaria Commission has set out in detail the number of times the power under article 356 was used. It has classified them into four categories. The following statement from the said Report is apposite:

"Use of article 356

A-When Ministry Commanded Majority

President's Rule was imposed in 13 cases even though the Ministry enjoyed a majority support in the Legislative Assembly. These cover instances where provisions of article 356 were invoked to deal with intra-party problems or for considerations not relevant for the purpose of that article.

6.6.30 President's Rule was imposed in 13 cases even though the Ministry enjoyed a majority support in the Legislative Assembly. These cover instances where provisions of article 356 were invoked to deal with intra-party problems or for considerations not relevant for the purpose of that article. The proclamation of President's Rule in Punjab in June 1951 and in Andhra Pradesh in January 1973 are instances of the use of article 356 for sorting out intra-party disputes. The imposition of President's rule in Tamil Nadu in 1976 and in Manipur in 1979 were on the consideration that there was maladministration in these States.

B-Chance not given to form alternative Government

6.6.31 In as many as 15 cases, where the Ministry resigned, other claimants were not given a chance to form an alternative government and have their majority support tested in the Legislative Assembly. Proclamation of President's rule in Kerala in March 1965 and in Uttar Pradesh in October 1970 are examples of denial of an opportunity to other claimants to form a Government.

C-No caretaker Government formed

6.6.32 In 3 cases, where it was found not possible to form a viable government and fresh elections were necessary, no caretaker Ministry was formed.

D-President's rule inevitable

6.6.33 In as many as 26 cases (including 3 arising out of States Reorganisation) it would appear that President's rule was inevitable.

6.6.34 Situations arising out of non-compliance with directions of the type contemplated in article 365 have not occurred so far."

To the above four categories must be added another category of wholesale dismissal of State governments and State Legislative Assemblies. Soon after a new Lok Sabha came into existence following the general election held in March 1977, bringing into office the Janta Party government, State governments and Legislative Assemblies of nine States, Haryana, Punjab, Himachal Pradesh, Uttar Pradesh, Bihar, Orissa, West Bengal, Madhya Pradesh and Rajasthan, were dismissed/dissolved. Again after the Congress Party returned to power in 1980, State governments and Legislative Assemblies in nine States were dismissed/dissolved. The ground on which they were dismissed is identical in both cases, namely, that the elections to Lok Sabha have disclosed that people have lost faith in the parties which were holding office in those States. To wit, the argument in 1977 was that in the aforesaid nine States, the Congress Party has almost been totally rejected by the electorate in the elections to Lok Sabha which showed the disenchantment of the people with the Congress governments in those States. An identical argument was employed in 1980 against the non-Congress parties.

7.2 Article 356 was invoked in the following instances after the Sarkaria Commission Report was submitted: (a) Assam (27.11.1990 - deterioration of the law and order situation), (b) Nagaland (2.4.1992 - fluid party position and deteriorating law and order situation), (c) Nagaland (7.8.1988), (Karnataka - 21.4.1989) and Meghalaya (11.10.1991) - these three cases are dealt with by the Supreme Court in S.R. Bommai and held to be totally unconstitutional and unsupportable, (d) Bihar (28.3.1995 - process of election could not be completed; to facilitate passage of vote on account by Parliament) and U.P. (1996 - No clear majority in election); and (e) Tamil Nadu (30.1.88 - Deadlock due to death of Sri M.G. Ramachandran), Mizoram (7.9.1988 - Defections reduced the Government to minority), Jammu and Kashmir (18.7.1990 - Militancy), Karnataka (10.10.1990 - dissensions in the ruling party - floor-crossing), Goa (14.12.1990 - C.M. resigned consequent upon his disqualification by High Court - No other Government found viable), Tamil Nadu (30.1.1991 - alleged LTTE activities), Haryana (6.4.1991 - with the disqualification of three MLAs, Government lost majority, Ministry refused to face floor-test and recommended dissolution of House), Manipur (7-1-1992 - Government lost majority as a result of resignation of certain members), Tripura (11.3.1993 - Government resigned - no alternative viable), Manipur (31.12.1993 - 1000 persons died in controlling Naga-Kuki clashes - continuing violence), U.P. (18.10.1995 - Government lost majority - no viable alternative Government in sight); and Gujarat (1996 - Government reduced to minority due to defections).

It follows from the facts stated above that more often than not power under article 356 was exercised wrongly.

7.3 It follows from the facts stated above that more often than not power under article 356 was exercised wrongly. The Supreme Court proceeded to precisely check this abuse through its decision in S.R. Bommai. Though in the said decision no effective relief could be given to the State governments and the Legislative Assemblies which were wrongly dismissed/dissolved in view of the fact that pending the proceedings in the courts, fresh elections were held in those States, yet the court put the Central Government on notice that in case of a wrong dismissal of the State government and/or a wrong dissolution of the Legislative Assembly, the court does have the power, and that it will not hesitate, to restore such Government/Assembly back to life. Indeed it was indicated that that would be the normal and natural consequence of the finding that Art. 356 was wrongly invoked in the case. The result has been that since

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

-
-
-

VIII. Whether the power under article 356 can be limited to non-compliance with the directions given under article 365:

-
-

8.1 Article 365 expressly provides that “where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution”. We have pointed out hereinbefore that the “directions given in the exercise of executive power of the Union under any of the provisions of this Constitution” would naturally refer to articles 256 and 257 among others. Article 256 casts an obligation upon the States to so exercise their executive power as to ensure compliance with the laws made by Parliament and the existing laws. It further provides that it is open to the Union to issue directions in exercise of its executive power to ensure that the States exercise their executive power in the aforesaid manner. Article 257 goes further and states that the executive power of the State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union and that the executive power of the Union shall extend to give any appropriate directions to ensure the same. Clauses (2) and (3) of article 257 empower the Union Government to issue executive directions to States with respect to construction and maintenance of means of communication declared in the direction to be of national importance and with respect to railways. It is debatable whether the Union Government can issue executive directions under any other provision of the Constitution but one thing is beyond doubt – the Union Government cannot issue any executive directions to States to comply with any State laws.

8.2 In the above situation, when it may be possible to say that a substantial non-compliance with the directions issued under articles 256 and 257 would attract article 365 and may furnish a ground for taking action under article 356, it cannot be said at the same time that “a situationin which the government of the State cannot be carried on in accordance with the provisions of this Constitution” cannot arise in any other way. To put it differently, the non-compliance with the provisions of the Constitution means what it says: non-compliance, i.e., substantial non-compliance with the provisions of the Constitution applicable to the governance of the State. Violation of the provisions of the Constitution may occur otherwise than by non-compliance with the laws made by Parliament and without trenching upon the executive power of the Union. Indeed it may be difficult - may be, inadvisable – to catalogue the situation wherein it can be said that the government of the State cannot be carried on in accordance with the provisions of the Constitution. The matter be best left to the wisdom and judgment of the appropriate authority subject, of course, to the provisions of the Constitution and their interpretation by the Supreme Court.

-

IX. Need for amending article 356

-
-

We are therefore not in favour of deleting article 356.

In any event, we feel that the stage has not yet arrived in our constitutional development, where we can recommend the deletion of Art. 356. What is required is its proper use and that has to be ensured by appropriate amendments to the article.

9.1 In the light of the above facts, the question arises whether article 356 needs to be amended. In fact there has been a strident demand for deletion of article 356 but if article 356 is deleted while retaining articles 355 and 365, the situation may be worse from the point of view of the States. In other words, the checks which are created by article 356 and in particular by clause (3) thereof, would not be there and the Central Government would be free to act in the name of redressing a situation where the government of a State cannot be carried on in accordance with the provisions of the Constitution. We are therefore not in favour of

deleting article 356. If, however, Art. 356 (and the consequential article 357) is to be deleted then certain other provisions too require to be deleted viz., (i) the words "and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution" in Art. 355; and (ii) Art. 365, in its entirety. But then what would one say regarding Art. 256 and 257*, which, no doubt, state the obvious, yet if they are deleted, the Courts may construe such deletion as bringing about a drastic change in Centre-State Relations. In any event, we feel that the stage has not yet arrived in our constitutional development, where we can recommend the deletion of Art. 356. What is required is its proper use and that has to be ensured by appropriate amendments to the article.

X. Suggestions

10.1 We, therefore, think it advisable to suggest that Art. 356 be amended to provide for the following:

- a) It should be provided that until both Houses of Parliament approve the proclamation issued under clause (1) of article 356, the Legislative Assembly cannot be dissolved. If necessary it can be kept only under animated suspension.
- b) Before issuing the proclamation under clause (1), the President/the Central Government should indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity of redressing the situation – unless the situation is such that following the above course would not be in the interest of security of State or defence of the country.
- c) Once a proclamation is issued, it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3). Even if a proclamation is substituted by another proclamation, the period prescribed in clause (3) should be calculated from the date of the first proclamation.
- d) The proclamation must contain (by way of annexure) the circumstances and the grounds upon which the President is satisfied that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution. Further, if the Legislative Assembly is sought to be kept under animated suspension or dissolved, reasons for such course of action should also be stated in the appropriate proclamation.
- e) Whether the Ministry in a State has lost the confidence of the Legislative Assembly or not, should be decided only on the floor of the Assembly and nowhere else. If necessary, the Central Government should take necessary steps to enable the Legislative Assembly to meet and freely transact its business. The Governors should not be allowed to dismiss the Ministry so long as it enjoys the confidence of the House. Only where a Chief Minister of

the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State Government.

- f) We wholeheartedly commend and reiterate the recommendations of the Sarkaria Commission Report in paragraphs 6.8.01 to 6.8.12, subject to the above. The recommendations of the Sarkaria Commission are to the following effect:

"6.8.01 Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State. All attempts should be made to resolve the crisis at the State level before taking recourse to the provisions of article 356. The availability and choice of these alternatives will depend on the nature of the constitutional crisis, its causes and exigencies of the situation. These alternatives may be dispensed with only in cases of extreme urgency where failure on the part of the Union to take immediate action under article 356 will lead to disastrous consequences.

(paragraph 6.7.04)

6.8.02 A warning should be issued to the errant State, in specific terms, that it is not carrying on the government of the State in accordance with the Constitution. Before taking action under article 356, any explanation received from the State should be taken into account. However, this may not be possible in a situation when not taking immediate action would lead to disastrous consequences.

(paragraph 6.7.08)

6.8.03 When an 'external aggression' or 'internal disturbance' paralyses the State administration creating a situation drifting towards a potential breakdown of the constitutional machinery of the State, all alternative courses available to the Union for discharging its paramount responsibility under article 355 should be exhausted to contain the situation.

(paragraph 6.3.17)

6.8.04 (a) In a situation of political breakdown, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. If it is not possible for such a government to be installed and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry, if there is one, to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and is agreeable to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker government should be allowed to function. As a matter of convention, the caretaker government should merely carry on the day-to-day government and desist from taking any major policy decision.

(paragraph 6.4.08)

(b) If the important ingredients described above are absent, it would not be proper for the Governor to dissolve the Assembly and install a caretaker government. The Governor should recommend proclamation of President's rule without dissolving the Assembly.

(paragraph 6.4.09)

6.8.05 Every proclamation should be placed before each House of Parliament at the earliest, in any case before the expiry of the two months period contemplated in clause (3) of article 356.

(paragraph 6.7.13)

6.8.06 The State Legislative Assembly should not be dissolved either by the Governor or the President before the proclamation issued under article 356(1) has been laid before Parliament and it has had an opportunity to consider it. Article 356 should be suitably amended to ensure this.

(paragraph 6.6.20)

6.8.07 Safeguards corresponding, in principle, to clauses (7) and (8) of article 352 should be incorporated in article 356 to enable Parliament to review continuance in force of a proclamation.

(paragraph 6.6.23)

6.8.08 To make the remedy of judicial review on the ground of mala fides a little more meaningful, it should be provided, through an appropriate amendment, that, notwithstanding anything in clause (2) of article 74 of the Constitution, the material facts and grounds on which article 356(1) is invoked should be made an integral part of the proclamation issued under that article. This will also make the control of Parliament over the exercise of this power by the Union Executive, more effective.

(paragraph 6.6.25)

6.8.09 Normally, the President is moved to action under article 356 on the report of the Governor. The report of the Governor is placed before each House of Parliament. Such a report should be a "speaking document" containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in article 356.

(paragraph 6.6.26)

6.8.10 The Governor's report, on the basis of which a proclamation under article 356(1) is issued, should be given wide publicity in all the media and in full.

(paragraph 6.6.28)

6.8.11 Normally, President's rule in a State should be proclaimed on the basis of the Governor's report under article 356(1).

(paragraph 6.6.29)

6.8.12 In clause (5) of article 356, the word 'and' occurring between sub-clauses (a) and (b) should be substituted by 'or'.

(paragraph 6.7.11)".

10.2 It will be seen immediately that the Sarkaria Commission has recommended only three amendments, namely those mentioned in Paras 6.8.07, 6.8.08 and 6.8.12, whereas we are inclined to suggest a few more in the light of the experience gained since the submission of Sarkaria Commission Report and in the light of the principles enunciated by the Supreme Court in S.R. Bommai. The recommendation in Para 6.8.08 of Sarkaria Commission Report has been reiterated by us. The other two suggestions in Paras 6.8.07 and 6.8.12 though not specifically suggested by us, yet we do commend them for acceptance.

10.3 Lastly, we may clarify that the suggestions mentioned hereinbefore in this paper are our tentative suggestions put forward with a view to invite debate. We request all the concerned members of the public, institutions and organisations to respond to the above suggestions. All your suggestions, criticism and opinions are welcome and they shall receive our respectful consideration. Your opinions would help us in finalizing our views on the subject.

10.4. The suggestions and opinions expressed hereinabove, it must be emphasized, are only provisional in nature and do not represent the final views of the Commission. We solicit views, opinions, suggestions and criticism of the suggestions from the public which will receive Commission's consideration. The final recommendations would be made only after a full and fair consideration of all the responses, keeping in mind the interest of the society and nation, consistently with the values of our Constitution.

QUESTIONNAIRE ON ARTICLE 356 OF THE CONSTITUTION

1. Should the Constitution provide that until both Houses of Parliament approve the proclamation issued in clause (1) of article 356, a State Legislative Assembly cannot be dissolved?

YES

NO

2. Do you agree that if necessary, the Legislative Assembly need only be kept under suspended animation?

YES

NO

3. Do you agree with the suggestion that before issuing a proclamation under clause (1) of article 356, the President/the Central Government should specifically indicate to the State Government the matters wherein the State Government is not acting in accordance with the provisions of the Constitution and give it a reasonable opportunity of redressing the situation – only exception being a situation where following the above course would not be in the interest of security of State or defence of the country?

YES

NO

4. Do you agree with the suggestion that once a proclamation is issued, it should not be permissible to withdraw it and issue another proclamation to the same effect with a view to circumvent the requirement in clause (3) of article 356?

YES NO

5. Do you agree that, even if a proclamation is substituted by another proclamation, the period prescribed in clause (3) should be calculated from the date of the first proclamation?

YES NO

6. Do you agree with the suggestion that a proclamation must contain (by way of annexure) the circumstances and the grounds upon which the President has reached the satisfaction that a situation has arisen where the government of the State cannot be carried on in accordance with the provisions of the Constitution?

YES NO

7. Do you agree with the suggestion that, whether the Ministry in a State has lost the confidence of the Legislative Assembly, it should be decided only on the floor of the Assembly and nowhere else?

YES NO

8. Do you agree that in a case where the confidence of the Legislative Assembly in the Ministry in a State has been lost, or not has not been tested on the floor of the House, it is advisable to the Central Government to take necessary steps to enable the Legislative Assembly to meet and freely transact its business?

YES NO

9. Further, do you agree, that the Governors should not be allowed to dismiss the Ministry so long as it enjoys the confidence of the House?

YES NO

10. Further, do you agree, that only where a chief minister of the Ministry refuses to resign after his Ministry is defeated on a motion of no-confidence, should the Governor dismiss the State government?

YES NO

11. Do you agree with the suggestion that safeguards corresponding, in principle, to clauses (7) and (8) of article 352 should be incorporated in article 356 to enable Parliament to review continuance in force of a proclamation?

YES NO

12. Do you agree with the suggestion that in clause (5) of article 356, the word 'and' occurring between sub-clauses (a) and (b) should be substituted by 'or'?

YES NO

13. Do you have any further suggestions to make on the issues discussed in this paper? If so please state them.



Not more
than 200
words

* There has been consistent demands from certain State Governments to delete Articles 256 and 257 along with Article 365 – a fact that is also referred to in the Report of Sarkaria Commission, Chapter III. We are, however, not going into this question in this paper. We proceed on the assumption, for the purposes of this paper, that these articles are very much a part of our Constitution.