



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Misuse of Article 356: Presidential Takeover of State Government Vis-À-Vis Indian Federalism

Muskan Khandelwal^a

^aSymbiosis International University, Pune, India

Received 26 May 2021; Accepted 07 June 2021; Published 10 June 2021

Article 356 has always been in controversy because of its alleged misuse. It has acquired quite some notoriety due to its frequent use although it was supposed to be a dead letter. This Article gives the President the power to suspend the legislative assembly when the State isn't acting as per the Constitution through a Proclamation. President's rule is another term for it.

This paper talks about how this provision has been grossly misused by The Union on various occasions and how it threatens the Federal structure of our Constitution. It also talks about various steps that can be taken to check the abuse of power. It also critically analyzes the suggestion given by The Sarkaria Commission and S.R. Bommai Case. It also sheds light on the justiciability of this Article and how it has changed over time. The author provides some recommendation which can be applied to curb the misuse.

Keywords: *emergency, president, proclamation, misuse.*

INTRODUCTION

Article 356¹ of Indian Constitution is enforced when there is failure of constitutional machinery in a state. The President has the power to suspend the legislative assembly by issuing a

¹ Constitution of India, art 356

Proclamation of Emergency when the Government of that State cannot be carried on in as per the Constitutional provisions. The Governor prepares a report and sends it to the President and on the aid and advice from the Council of Ministers and Prime Minister, President takes over the state government which is also known as President's rule. This Article gives Union great power over State and thus, the scope for misuse arises of the said power. And such gross misuse of power goes against the principle of Federalism. Indian Constitution has a federal structure with a strong centre. In the words of Granville Austin, India has Cooperative Federalism. "Article 355 imposed a duty on the Union to protect States against external aggression and internal disturbance."² In furtherance of this duty, Article 356 gives Union the power to protect the States but it leads to the question that whether it affects the State autonomy. It has been used for political reasons and due to this constant abuse, deletion of this Article has always been in question. But deletion would lead to further chaos and thus, there's a lot of ambiguity as to what should be done. This issue is a very sensitive one as it affects the Centre-State relations and thus should be dealt with utmost care. While it is true that it is being used as a tool by the Centre to control State government, we cannot overlook the fact the rationale behind this provision is completely apprehensible. It is not the statutory mandate that is at fault but the executive authorities.

STATEMENT OF PROBLEM

Article 356 has been misused quite a few times since 1950. A provision that was incorporated as a dead letter has been used more than 120 times since its incorporation. For the imposition of emergency, President satisfaction is crucial. If the President is satisfied that there has been a breakdown of Constitutional Machinery then he can issue a Proclamation of Emergency but President is just a nominal head and under Article 74(1)³ he is bound to follow the advice provided by the Council of Ministers and Article 74(2)⁴ bars judicial review of such advice thus, the Presidential Satisfaction becomes immune to judicial review and therefore scope for misuse comes into the picture. Since the advice cannot be questioned in a court of law, The Union has

² Constitution of India, art 355

³ Constitution of India, art 74, cl 1

⁴ *Ibid* cl 2

been taking advantage of this provision to take power over State Government. Reviewability of this provision has always been in a struggle. This paper wants to address this issue by critically analyzing various instances of said misuse and finding ways to prevent it. This paper focuses on finding the ways through which misuse can be avoided. This paper wants to shed the light on the constant and gross misuse of Emergency Provision and ways to prevent it. This issue needs to be addressed because it negates Indian Federalism.

LITERATURE REVIEW

To broaden the understanding of Article 356, the following articles were reviewed:

1. Presidential Takeover of State Government⁵ - by Dr Anil Kumar Dubey:

This article provides an in-depth analysis of Article 356. The author has given the rationale behind the provision and explained its constitutional contour. It has examined the complexity in Centre-State relations and why there is a need for Article 356. It has also scrutinised the improper invocations of this provision by analysing the report given by Sarkaria Commission and S.R. Bommai judgement. The author is of the view that Article 356 should be amended.

2. EXECUTIVE DISCRETION AND ARTICLE 356 OF THE CONSTITUTION OF INDIA: A *Comparative Critique*⁶ - by K. Jayasudha Reddy and Joy V. Joseph:

This research paper talks about the development of Article 356 from Article 93 of the Government of India act, 1935 to the present situation. How it has evolved and changed. The author has also presented a comparative analysis with emergency provisions of the United States of America and the Malaysian Constitution. The author believes that neither deletion nor amendment of the Article would solve the problem. According to him, history should take its course and public opinion against the misuse will develop.

⁵ Anil Kumar Dubey, 'Presidential Takeover of State Government' [2018 Summer Issue] ILI Law Review

⁶ K Jayasudha Reddy & Joy V Joseph, 'Executive Discretion and Article 356 of The Constitution of India: A Comparative Critique' (2004) 8(1) EJCL

3. STATE EMERGENCY UNDER ARTICLE 356 VIS-À-VIS INDIAN FEDERALISM⁷ – by Anil Ghanghas:

This article has demonstrated state emergency in relation to federalism. The author has drawn a nexus between Article 356 and Indian Federalism. The author has emphasized on cooperative federalism and has explained that power given by Article 356 should strictly be used for the purpose intended and not to dismiss a duly elected government. It has critically analysed Centre-State relations and has come to the conclusion that Constitution has given more power to the Centre to ensure cooperative Federalism.

RESEARCH GAP

Review of the literature suggests that a lot of studies has been carried out to understand the misuse of Article 356. Some are of the opinion that the article should be amended while some are against it. Deletion of this Article is out of the question in the current times. Some States demanded the deletion when abuse was at its peak but now the situation has gotten better.

The scope of these literatures is limited to one topic only. Either it talks about misuse or Federalism or its development. There is a need to understand all these topics as a whole and come to a solution to prevent misuse.

This paper studies all these topics and tries to find ways to prevent the gross misuse of this provision. This paper has analysed all the aspects of this provision to get to the bottom of the misuse and identify required changes.

RESEARCH QUESTIONS

1. Whether the Proclamation passed by the President enshrined under Article 356 is justiciable?
2. Whether Article 356 violates the State Autonomy and thus, Indian Federalism?
3. Whether there has been any change in the use of Article 356 post S.R. Bommai and Sarkaria Commission?

⁷ Anil Ghanghas, 'State emergency under article 356 vis-à-vis Indian Federalism' (2018) 4 IJL 100-110

4. Whether there is a need to amend Article 356?

RESEARCH OBJECTIVE

1. To apprehend the loopholes in Article 356 that lead to misuse of this provision.
2. To understand the circumstances under which Article 356 should be invoked.
3. To uncover the changes that are required in Article 356.

LEGAL ASPECT

Historical Background:

The Government of India Act, 1935⁸ -

Article 356 has been borrowed from Article 93 of the Government of India Act, 1935. At that time, the British government had started giving some powers to the Indian Ministries but was afraid that if they gave absolute control to the Indian Ministries then they would try to gain control over the British Government. So, Article 93 gave them the power to assume control over the province in the event that the governor is fulfilled that the circumstances that the circumstances has emerged where the government of the province is not being carried on as per the said Act. "The governor can assume the control of their powers and exercise the same at discretion. Article 45 gave the same powers to the governor-general with respect to Central Government."⁹

Incorporation of Article 356 by Drafting Committee of the Constituent Assembly -

Though Article 356 is derived from Article 93 and 45 of the Government of India Act, 1935, its purpose is quite different. India is a country with a tremendous difference in social, economical and political life. And these differences were bound to create hindrance in the democracy. The difference in language, race and religion leads to political difference and thus, to protect the

⁸ Government of India Act 1935

⁹ 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

Federal structure, they gave President (instead of the Governor) the power to take control of the State Government in extreme conditions. The controversy regarding Article 356 (drafting Article 278) had started in Constituent Assembly itself. Some of the drafters were completely against this Article. They were worried that it would purport 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 the mere possibility of abuse cannot be a ground for not incorporating it."¹⁰

He believed that this Article will remain a dead letter and will not be used and even if a situation arises when it comes into operation, the President will take precautions and issue a warning to the State. To make the change from feudal leadership to a democratic leadership smooth, this provision was incorporated. Framers believed that the central government would play a role of a guide or a helper.

Federalism and Article 356 -

"Austin and A.H. Birch have used the term 'Cooperative federalism' for the Indian system, i.e., it is neither purely federal nor purely unitary, but a combination of both."¹¹ It is very important to have a fine balance between Article 356 and Federalism. Indian Constitution follows the concept of separation of powers. "The power of governance is distributed in several organs and institutions - a *sine qua non* for good governance."¹² Though Central Government has been given some dominance over state government it is to preserve cooperative federalism and not for oblique reasons. 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."¹³ And it is the responsibility of the Union not to abuse such power and preserve the integrity of the Constitution.

¹⁰ *Ibid*

¹¹ Roshni Duhan, 'Federal System in India and The Constitutional Provisions' [2017] IJSS 1-4

¹² Commission (n 9)

¹³ 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

“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.”¹⁴ 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.

The Sarkaria Commission Report, 1983¹⁵ -

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.

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.

¹⁴ Reddy (n 6)

¹⁵ Sarkaria Commission Report 1987, Ch VI

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.

Improper Invocation of Emergency -

After analysing the Sarkaria Commission report, improper invocation of Article 356 can be categorised into 5 categories: “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.”¹⁶

An admonition should be given to errant state as a precautionary measure because Article 356 is imposed in extreme situations and an emergency imposed without warning would be a misuse of this provision. A warning can be avoided only when immediate action is required by the Union.

The commission analysed that most instances of misuse were to sort out intra party disputes. When a majority holding government is removed just on the grounds of corruption or maladministration. Or when the governor’s subjective evaluation that the party has lost majority without giving the ministry a chance to prove its confidence in floor test is the sole basis for imposition of presidential rule.

The third category is when there is a disavowal of opportunity to the inquirer. This is the kind of misuse where the government is not allowed to form the government after elections or is not given the opportunity to prove its majority or form an alternative government.

Another instance of misuse is when no caretaker government is formed.

The most dreadful misuse of Article 356 happened in 1977 and 1980 when 7 legislative assemblies were dissolved simultaneously twice. It was termed as wholesale dissolution of assemblies by the commission. Emergency was invoked because the ideology of state

¹⁶ *Ibid*

government and central government did not match. The abuse of this provision for political reasons can be clearly seen in this instance.

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.”¹⁸

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.¹⁹

S. R. BOMMAI CASE

*S.R. Bommai v. Union of India*²⁰ is a landmark judgement 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.

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *SR Bommai v Union of India* (1994) 3 SCC 1

Key Points of the Judgement -

Judges gave some guidelines to prevent the misuse of Article 356. They pointed out that the floor test is important. A warning should be given to the state as a precautionary measure and sufficient time should be given to reply. Limitations were placed on the President's power and judges pointed out he cannot take any irreversible actions or dissolve the assembly before the proclamation has been passed by the Parliament. They adhered to the views of the Sarkaria Commission on the use and misuse of Article 356. They came to the conclusion that it shall be used sparingly by the centre to protect the centre-state relations.

Justifiability of Article 356 -

All the judges decided unanimously that Presidential Proclamation is justiciable. The court is entitled to strike down the proclamation in the event that it is discovered to be *mala fide*. The court can also look into the relevant material through which President made his decision. The court held that material which is the base of the advice can be scrutinised in the court of law because it does not constitute advice and does is not barred by Article 74(2) of the Constitution. The court has the power to provide a remedy in case of improper use of Article 356. Section 123 of the Evidence Act can also come into play under different circumstances. This case opened a new door for judicial review and reduced the blatant misuse of this provision.

Bar on President's power -

The power conferred on President by Article 356 is not an absolute but a conditioned power. Though Presidential satisfaction is subjective, it should be based on some relevant material and it is a pre-requisite. The Proclamation is subject to approval by both the Houses. The court is entitled to restore the government in case the proclamation is against the constitution. The court has the power to provide remedy and prevent any kind of abuse of this provision. The proclamation can be challenged in a court of law even after being approved by the parliament.

This judgement strength the federal structure and put a check on arbitrary removal of the government for political gains.

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.”²¹ 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.

The use of this provision increased with time. As stated in RTI reply from the Ministry of Home Affairs (MHA)²², 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.”²³ 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.²⁴ 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

²¹ *Ibid*

²² 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

²³ Sarkaria Report (n 15)

²⁴ Dubey (n 5)

means necessary. The question of Judicial review first came in the case *State of Rajasthan v Union of India*.²⁵ 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 5.²⁶ And following the Bommai case, we can conclude that Article 356 does not enjoy blanket immunity.

Post Sarkaria Commission and Bommai case era, the abuse have reduced remarkably. In the case of *C. R. Das v UoI*²⁷, 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*²⁸, 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 organised 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 outcoming of the Bommai case was *Harish Singh Rawat v UoI*²⁹, 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

²⁵ *State of Rajasthan v Union of India* AIR 1977 SC 1361

²⁶ Dubey (n 5)

²⁷ *C R Das v Union of India* AIR 1999 Pat 221

²⁸ *Rameshar Prasad v Union of India* (2005) 7 SCC 149

²⁹ *Harish Singh Rawat v Union of India* (2016) 16 SCC 757

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 given to the Centre by Article 356 is crucial to maintain the spirit of the Constitution. And thus, deletion of this provision is not feasible. It is evident from the research and analysis that it has been abused for political reasons. The government at the Centre generally influences the parliament by majority vote and thus, can easily approve the proclamation and invoke State Emergency in whichever state they want. The lack of guidelines, safeguards and ambiguity in the Article leads to misuse.

States have tried to stand up for their rights whenever they could. The power conferred by this Article is very serious because it disrupts the normal functioning of the democracy and therefore, precautions should be taken before exercising this power. Various commissions have given safeguards to prevent misuse but it will only make a difference when they are implemented properly.

The State of West Bengal³⁰ 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.

³⁰ West Bengal Government Document of 1 December 1977 (West Bengal Memorandum), para 10

Various attempts were made to prevent the misuse and but only after Sarkaria Commission and Bommai case, the situation started to get better. Their contribution is extremely valuable.

The court also demonstrated that nothing is immune from judicial review and the Judiciary has the power to provide a remedy. In more than one case, the court prevented the misuse and showed that judicial review is a principle to be reckoned with.

Lastly, Article 356 is an essential part of the Constitution and it is the obligation of the executives to exercise their power in consonance with the Constitution.

“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.”³¹

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 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.

³¹ Dubey (n 5)

Safeguards and guidelines given by the Sarkaria Commission and Bommai case should be followed.