Article 356 The Core and The Penumbra

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ABSTRACT

Article 356 is one of the most controversies creating article in Indian politics. There were instances of its use which was termed as misuse by many. The Article conform great power to the President of quashing a constitutionally elected government. Different articles facilitate the functioning of this power like 256, 257, 355, 365 these article talks about the situations in which the power can be used. The President comes under the executive but he was controlled by the Council of Ministers which comes under legislative. This creates an imbalance and to check it Judiciary is present which interprets the provisions and problems to the best solution of the situation. This paper analyzes the relationship and power dynamics between these three above institutions with respect to the President’s rule in any state. The case study of President’s rule in Uttarakhand in 2016 was taken to under the situation more clearly. Different case laws and judges opinions have been discussed which gives us the test to check whether the situation is under control of the constitution or not. The report of Sarkaria commission has also been discussed. The conclusion that we came on is that it majorly depends on case to case basis but state must show some accountability and the Union must give some time the states to make the situation normal to preserve the federal structure of the country.
INTRODUCTION

Article 356 is one of the most used (misused) and popular article in Indian politics. This article has proved one of the most powerful tools to strike down states governments. The power that Article 356 provides to executive is immense. This power needs a check and judiciary acts as supervisor regarding this. But there are many instances in which this power gets unchecked. In this paper we are looking all these aspects and critically analyze these one by one. The proclamation of President’s rule has always raised questions on Union government of the country. The history has many instances where this article has been use blatantly by many different governments constituting of different political parties for different reasons.

There are some landmark cases which have put a limit on these blatant abuses of power. Committees are formed to contemplate on specifics on the phrases of the provision. The area of penumbra is the phrase “the government of the state cannot be carried on in accordance with the provisions of the Constitution”. \(^1\) The judiciary has interpreted this phrase many a time in different cases. In this paper also we will look at some landmark judgments and analyze them.

I- DERIVATION

At the time of incorporating this article in the Indian constitution Dr. Ambedkar took a vote while assuming that this article will remain a dead letter in the future. He expressed his fear when he says that if any situation arises in which the power conferred under this article is used by the president then the union will become a judge of the quality of governance done by the state. India is a ‘union of states’ it means that states derives their power from the Union. So here Union is placed above states. States have their autonomy but they are contained in order to protect sovereignty of India. The type of citizenship in India is single citizenship that is governed by union

\(^1\) Ind. Const. § 356.
and not by states. The giving up of autonomy by states was returned with the security that the union provides to them.²

This condition for giving security is mentioned in Article 355 which states that centre must protect the states from any kind of external aggression or internal disturbance and ensure that the functioning of the state is going in accordance with the Constitution. The way in which all these must be done is mentioned in Article 356. The article contains the heading ‘provisions in case of failure of constitutional machinery’ and in other places in article it is mentioned ‘not in accordance with the constitution’. Article 355 also uses the same phrase while mentioning about duties of central to protect state.³

The power conferred to the President by this article is huge, that is to make a proclamation of President’s rule a president can go by oneself without any report from the governor. In most of the situations president is of the ruling party and this power can be used in those states where the ruling party is not ruling. However, this proclamation can always be challenged before judiciary of the country. But there are instances when there was an attempt to takeaway this power of judiciary. 38th constitutional amendment was one such attempt, the amendment has inserted clause (5) which states that President’s rule proclaimed under clause (1) can’t come under judicial review. But this clause was replaced by 44th amendment.⁴

There are some other articles which actually facilitate this power of proclaiming President’s rule. Article 365, 256 and 257 are those articles which describe situations and confer power to union to proclaim President’s rule. Article 365 states that when any state fails to comply with any of the executive direction given by the union in its capacity and within the limits of the constitution then the president can conclude that a situation has arisen when the state is not functioning according to the provision of the constitution. Article 256 states that the executive power of the union must be so exercised that they must ensure compliance with all the laws made by the parliament and


³ NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION A Consultation Paper on ARTICLE 356 OF THE CONSTITUTION. Member-In-Charge & Chairperson Justice Shri R.S. Sarkaria.

⁴ Ibid.
laws that applies to particular states and this power can extend to giving directions for the same.\(^5\) Article 257 carries the heading ‘Control of Union over States for certain things’ it states that the state executive power must not clash with the union executive power and the union can issue guidelines regarding the same.

II- SITUATIONS FOR USE

The above was derivation of power. In this chapter we will look at the situations in which President’s rule can be proclaimed in a state. The above articles broadly tell us what constitutes as state not functioning in accordance with the provision of the constitution. There is no specific mention of which events can lead us to the above conclusion. There is a mention that a non-compliance with the executive direction given by the union will constitute a situation where the President can say the functioning is not according to the constitution.\(^6\) But this type of literal interpretation can demolish the federal structure of the country. There will always be a minor conflict or dispute when the state and the central have different ruling parties and this conflict cannot give power to the union to impose President’s rule and control all executive and legislative powers of the state.

There are certain cases which contemplate on this question of what are the pre-requisites to proclaim President’s rule in a state. The most important case in this discussion is *S.R Bommai v UoI*\(^7\). The case first interprets 356 section by section. Since President is the one having discretionary power in proclaiming, they have first looked at what all is required for a President to derive at the conclusion. The method or approach the judges have interpreted from the language of the article is of “objective material”. They stated that the report of the governor or any other source which comes under the word ‘otherwise’ must contain some material facts based on which the president can take decision. Here the question is about the facts not about the decision that President whether is right or wrong but there has to be some relevant facts on which decision can

\(^6\) Ind. Const. § 365.
\(^7\) AIR 1994 SC 1918.
be taken. In essence, we can say that the decision to impose President’s rule must have a reason it cannot be arbitrary.

The facts must be such that they should indicate that there has arisen a situation which cannot be controlled by present state government. The State government is not in position to enforce the Indian constitution in its state. A situation is such where there is no remedy except proclaiming President’s rule. Then we can say that the objective material furnished before President either in Governor’s report or any other source is reasonable. This interpretation of the Apex Court acted as a limitation on Union’s unreined power.8

In second part Justice B.P Jeevan Reddy focused on role of President and how different word in the article can be interpreted to define the role of the President. To what extent President is obligated to use article 356? Firstly, they focused on the word ‘may’ and the interpretation that was made is that the conditions mentioned in subsequent clauses need not necessarily applied in full. It means it’s not always necessary to dissolve legislative assembly unless it becomes extremely necessarily or the purpose of proclamation is not fulfilled unless LA is not dissolved. The President cannot act at one’s own discretion or completely independent. By the virtue of article 74 (1) President is bound to act according to the aid and advice of Council of Ministers. So Union is the one having the real power to decide whether the material presented are enough or not. Clause (2) states that this advice cannot come under judicial scrutiny. So the question arises is President completely obliged to follow Union’s advice in matters related to State President’s rule? Here Justice B.P looked into the term ‘cannot’ and interpreted it while considering the heading of the article ‘failure of constitutional machinery’ and stated that the events must be of such nature in which there is no possibility for governor or any other state authority to control it. A situation has arisen which cannot be reversed unless a President’s rule is imposed. The failure of constitutional machinery is of larger extent as compared to simple non-compliance.9

Before a Governor sends a report or President makes a proclamation they first need to give a chance to the state government to make the situation normal. All the available alternatives must be employed by the Governor and the President. If the situation is not as per constitution but there

8 Ibid.
9 Supra note 6.
is a possibility of fresh election then the report of the Governor must include that the Governor is asking present government to work as caretaker to conduct day to day business and organize election. The President must give 2 month time to both the houses of parliament as per article 356 (3) to contemplate on the decision before dissolving legislative assembly. It is only after this passing of from both houses assembly can be dissolved.

III- ANALYSIS

So in the situation of the Uttarakhand state in 2016 there was a claim by the opposition that the present Congress government has lost its confidence. So here 9 out of 36 (35 is the majority) left Congress and they are declared as defected and issued a show cause notice. So the initial demand of the opposition was to dissolve present government and hold fresh election. Governor asked the CM to proof majority. Congress claimed they have the majority and will do a floor test. But there is a claim by BJP that the CM was trying to buy MLAs and there is a sting operation of the same. So the initial demand of dissolution turned into a demand of President’s rule on the ground that the Congress is not able to pass Appropriation Bill and there are malpractices going on for the floor test and hence the functioning is not according to the constitution. The ground they termed for proclamation of President’s rule is ‘breakdown of governance’.

The four broad categories which were given by Sarkaria Commission are- 1. Political crisis 2. Internal Subversion 3. Physical Breakdown 4. Non-compliance with union executive. The current situation will come under first category. So here there is no report by the Governor, The President took the decision on the advice of Union cabinet which was of the same party which is in opposition in Uttarakhand. President’s rule is proclaimed and the state assembly is put under suspended animation. Suspended animation means the members will remain members but the assembly will not meet.

So here the demand of Uttarakhand CM of floor test is denied. The CM approached the HC they allowed for floor test. The opposition then approached SC which upheld the order of floor test.

10 Supra note 3.
The president here has not employed all the possible measure. He has an option to call for floor test which the governor did but the President acted solely on the advice of the Union. His proclamation is based on ‘sting operation’ which can be called an electoral malpractice because it happened before floor test.

So here first we will look what all options does President had – 1. He might try to look into the authenticity of the sting. 2. He might have given the state government an option to make the situation normal after satisfying himself about the authenticity of the sting. Congress has submitted a report to the governor regarding the falsehood which should be looked by the President. The main allegation of BJP was that Rawat Government was indulging in corrupt practices is some land allotment case. This type of allegation will come under maladministration. SR Bommai stated some conditions under which a President rule cannot be proclaimed and maladministration and corruption is among them. Another thing which it mentions is that a warning has to be given to the concerned state before proclamation which is clearly not given in this case. The problem with these two grounds are- 1. It’s subjective and complicated to actually define maladministration in a definite way. 2. The problem with corruption is that there are anti-corruption laws to deal with it and secondly there are always serious allegations of corruption to every government in every state. This type of ground will give unequalled power to the union to dismiss the democratically elected government.

The court of first instance here is Uttarakhand HC. CM approached Uttarakhand HC and asked for removal of President’s rule. The HC allowed the plea of Rawat to repeal the President’s rule. The HC was annoyed given by the reasoning because is the presence of contradictions in Rawat’s statement and actual happening in the Legislative Assembly. He told the court that BJP members

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12 Ibid.
13 AIR 1994 SC 1918.
asked for a division vote after the appropriation Bill was passed. But HC looked at the proceedings and discovered that the BJP has asked for written vote of division.  

The opposition then approached the SC as they alleged horse-trading of MLAs by the CM. The SC accepted the plea to but gone for a middle ground. SC ordered removal of President’s rule for the purpose of floor test. SC was being critical of HC order it said HC cannot pass an order to repeal President’s rule just like that. SC stated there is lack of consideration on the part of HC. They should have called for more documents specially related to recent events that occurred in Arunachal Pradesh. So here the SC is finding a temporary cure for the situation which has arised but at the same considering their power of judicial review and willing to look into the situation after both houses passes a proclamation. So here Judiciary got two opportunities to interfere- 1st at the time of proclamation and 2nd after it is passed by both the houses.

The power of judicial interpretation was 1st time used in the case of State of Rajasthan v UoI. SC has never into the politics part of President’s rule. It means the decision of president was never questioned. However, in Minerva Mills and others v Union of India and others SC stated that it must not act reluctant in doing its constitutional duty even if it involves going into the politics. Simultaneosly it said that checking whether a prescribed procedure is followed or not is important in the case of national emergency. Neither sufficiency of the facts nor President’s satisfaction is a concern of the court.

The power of Judicial review is important because ones the assembly is dissolved it becomes irreversible. That is way judiciary can interfere just after the proclamation. In this case if the

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judiciary has not interfered and called for a floor test then a duly elected democratic government can be dissolved. The phrase of the article 356 that says ‘the government of the state cannot be carried on in accordance with the provision of the constitution’ is completely subjective and depends on case to case basis. It was an inexhaustive list of events that may lead to this.

It is not always President’s rule which breaks down the constitutional machinery. Sometimes not going for President’s rule can also lead to constitutional breakdown in a state. E.g- The situation that aroused in Gujarat, Justice Fali Nariman says regarding this that there were refugees all around the state, many thousand people were charge sheeted. The numbers are enough to tell that situation is out of hand. He pointed out a flaw in the constitution that there has to a provision which should deal with President’s rule in those states where they have same ruling party as in the Centre.18

CONCLUSION

In this paper we have looked at how the Union executive derives its power to act upon any state. We have looked at what kind of situation is necessary in a state to take it under president’s rule. This particular case is a common happening with regard to application of 356. The claim of opposition that the present government has lost the confidence of the house must be dealt wisely by both the Governor and the President. The present government is the duly elected government and dissolution will not under constitutional values if done on lack of evidences.

In this case the responsibility of both Governor and the President increases, here President is of same party who is ruling in the state but the evidence was so serious that he goes for a proclamation ignoring all possibilities which is not reasonable. But Judiciary did its duty diligently and stored the deserving government. Supreme Court here analyzed the situation perfectly and gone for a middle ground so that democratic values remain protected. The allegation was not particularly of a constitutional breakdown but it was more of unethical and illegal electoral practices which can

18 Supra note 2.
create imbalance in the state administration. So it can come under the category of improper functioning or as it is termed ‘breakdown of governance.’