

Centre State Relations in India

Prof. Uday Shankar

Rajiv Gandhi School of Intellectual Property Law

Indian Institute of Technology, Kharagpur

**Week 03: All India Services; Public Service Commission; Administrative Relations during
Emergency**

Lecture 11: Administrative Relations during Emergency

Greetings to all of you. Today we will be discussing Article 356 which is lecture 11. In the last lecture we have discussed Article 352 National Emergency. So, in today's discussion we will be taking up these areas. We will try to understand that how administrative relation changes during emergency, what is the historical context of Article 356 and what are the debates which have been taken up in the Constituent Assembly while making the Constitution. What do we mean by failure of constitutional machinery and we will also try to understand that what is the difference between National Emergency and the Presidential Rule which is popularly known under Article 356.

So, any invocation of power under Article 356 is popularly known as Presidential Rule and what court has said on the issues of revocation of Article 356 that is also what we will discuss today. So, what is failure of constitutional machinery? How shall we understand it? We need to go back and look at what was the position under the Government of India Act 1935. Section 93 of the Government of India Act which was there in Chapter VI was dealing with the issue of failure of constitutional machinery and where it was suggested that Governor of a province can very well issue the proclamation if Governor is satisfied that the government of the province cannot be carried as per the provisions of 1935 Act. So, when you look at the very rational of including it, rational appears to be this - that there is a binding norm which the provincial government needs to adhere with and at any point if the provincial government deviates from that binding norm necessary intervention is to be made.

Now question is on whose initiative that intervention has to be met? So, as far as the need of intervention is concerned Constituent Assembly categorically provided that yes there is a need and that is why they have retained Section 93 of the Government of India Act in the form of Article 356. They categorically provided that this breakdown of constitutional machinery should be a ground for intervening should be a ground to revisit the functioning of the provincial government. So, the Drafting Committee they decided that let it be a responsibility of the Union government that if the provincial government fails to fulfill the constitutional norm, if the government is not being run as per the constitutional provision, then Union government can very well interfere. This provision was discussed in the Constituent Assembly as Draft Article 278 and it was discussed on 3rd and 4th August of 1949 wherein Dr. Ambedkar moved an amendment to state that Governor to be replaced with President as the first authority to declare an initiate steps to resolve an emergency situation in a State.

So that was the suggestion given by Dr. Ambedkar and HV Kamath has opposed the use of the phrase otherwise in the Draft Article wherein it was suggested that that intervention can be done either on the report of the Governor or otherwise wherein giving a kind of sweeping power to the Union government to interfere even if the Governor refuses to submit a report of the failure of the constitutional machinery in the State. So, that was the suggestion of Mr. Kamath. Mr. Kamath also suggested that President should be empowered to act only in case the Governor of a State informs him that a situation has arisen or that an emergency has arisen but not otherwise. So, Kamath was of the opinion that it is the responsibility of the Governor to apprise the President and let the let the Central government did not bypass the Governor for interfering on the matter of breakdown of constitutional machinery.

Mr. Shibban Lal Saxena and Mr. BH Zaidi they also argued that the President's power given under Draft Article 278 is far too sweeping because it converts the unitary the federal structure into unitary structure and therefore, they have flagged the issue. Mr. PS Deshmukh said that vesting of the power in the Union to intervene the affairs of the State was not in conformity with the value of federal setup and nor it would be administratively beneficial.

So, he was not in of the view that the Union government shall be allowed to interfere whereas Mr. Hriday Nath Kunzru urged that the Centre should intervene only to protect the State from external

aggression and internal commotion and for that article relating to proclamation of emergency was sufficient. So, in a way he was of the opinion that as far as need of intervention is concerned in a State, Article 352 will be good enough to address any kind of situation and no need to really get into Article 356.

Mr. Alladi Krishnaswami Ayyar supported this Draft Article 278 by stating that it is important to maintain the State autonomy, but it is also important that the autonomy must be based on the constitutional ideal. If at any point ideals are not being adhered with, they are not been complied with then there has to be corrective measures to be taken, there has to be a necessary measure to be required for restoring the constitutional provision, restoring the constitutional government in the State. So, the members have argued that because in Parliament there is a representative of all the States and it is it is getting through the voices of the elected representative. So, responsibility of the Parliament should be there that the government at the State level is running as per the constitution. So, some people argued that let the Parliament make the intervention and not the President should make the intervention.

This is how Article 356 features now. Article 356 talks about situation where failure has been described and it says that President rule can be imposed on the fulfillment of two conditions. What are the two conditions? It says the conditions are that President must be satisfied, satisfied on this very count that a situation has arisen in which the government of a State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction that such a situation has arisen must be formed either on the basis of a report sent by the Governor or otherwise. So, what are the two conditions which Article 356 says? It says that President must be satisfied that situation has arisen where State cannot function as per the constitutional norm.

And how the President should get satisfied how the President should get that filler? It said either it should be based on the report submitted by the Governor or otherwise. "Or otherwise" becomes very significant that the President need not wait for the report of the Governor. President's satisfaction here we need to be very clear is the satisfaction of the Council of Ministers because of the norm of parliamentary democracy. So, Articles 356 and 357 provides for a meeting a situation arising from the failure of constitutional machinery in the State. What it says is that that President by proclamation assumed to himself all are any function of the government of the State or all are

any powers vested in or excisable by the Governor. So, you can very well see that the impact of imposing presidential rule, impact of taking over the government of the State is that State government becomes completely absent.

State government does not have any existence once the presidential rule is imposed. The State is entirely ruled by the Central government and all the powers which are there with the government that get transferred to the President. The President can also declare the powers of the Legislature of the State to be exercised by or under the authority of the Parliament. So, this becomes a very important point on the administrative relation between the Centre and the State that what otherwise is the exclusive authority of the State Legislature to make a law during presidential rule that gets transferred to the Parliament. So, here you can very well identify that what is being conveyed through this provision.

This provision converts federal system into a unitary system. This provision empowers constitutionally the Parliament to make a law on the State subject and President may make incidental or consequential provisions which are necessary or desirable for giving effect to the object of proclamation. These are the conditions relating to the duration of the proclamation. Article 356(3) says that there is a requirement of laying down of the proclamation on the floor of the House and it must be approved on the by the Parliament. If Parliament is not approving then the proclamation under Article 356 shall cease to be operational within 2 months of time.

So, that is what is the timeline given for the Parliament to consider the proclamation under Article 356. This provision again is very significant because this provision makes a kind of mandate to solicit, to seek the approval from the Parliament – elected representative. If Council of States is giving the approval of the resolution in 2 months' time by the same time Lok Sabha is not in session or Lok Sabha is dissolved, then such proclamation shall cease to operate after the expiry of 30 days from the date when the Lok Sabha first sits after reconstitution. So, that is the situation wherein when proclamation is issued and Lok Sabha is dissolved then obviously it would not be possible to get the approval from both the Houses. Article 356(4) says that an approved proclamation will have a lifetime of 6 months from the date when the proclamation has been issued and not from the date of approval.

So, the at a time once the approval comes from the House then the lifetime is 6 month and it can further be extended for another duration of 6 months. There is a possibility of continuing that proclamation for more than 1 year particularly when these two conditions are fulfilled. One when there is a national emergency then it is possible, national emergency under Article 352 which we have discussed in the last session and when the Election Commission certifies that it is necessary that proclamation continues to be enforced because of the difficulties in holding election. When these two conditions are there then it is possible to continue this within proclamation beyond the period of 1 year. So, that is what is important to look at it.

Now what are the consequences of Article 356? Article 356 consequences is let down in Article 357. Article 357 says that Parliament which has been conferred with the powers of the Legislature of the State that power may be conferred upon the President to make laws or President may authorize this power to any other authority. So, this is something wherein President can run the State or through the obviously through the Governor or President can make laws on the State subjects which are there in List II. President may also authorize expenditure from Consolidated Fund pending the sanction of the Parliament when the House of the People or Lok Sabha is not in session. So, these are the consequences of imposing presidential rule that is what is given in Article 357.

Parliament or the President or in authority to whom the power to make laws has been delegated, they may enact laws conferring powers and imposing duties upon the Union or its official and authorities that is what it says. So, you can very well look at it that all powers which was there with the State government or with the Governor all these are getting transferred to the Parliament or the President. And all these are being done to ensure that the governance in the State continues there should not be any kind of collapse of the governance. Article 357(2) says that the law enacted by Parliament or the President or any other authorized body, which it otherwise would not have been competent to enact, but for the proclamation in Article 356 shall continue to remain in force even after the proclamation ceases to operate. So, whatever laws are being made they continue, they continue unless and until once the State Legislature comes back, they look into it and they alter repeal or amend such laws which were passed during the presidential rule.

Now let us look at the distinction between Article 356 and Article 352. Article 352 restricts Central intervention to a situation of war external aggression and armed rebellion whereas the grounds on which Article 356 can be invoked is a case of failure of constitutional machinery in a State. So, under Article 352, Centre gets the concurrent power to legislate on the State matters whereas, on the matter of presidential rule on the matter of Article 356 State Legislature ceases to function because the State Legislature is dissolved and the government is dismissed and the laws for the State are to be made by the Parliament and Governor administers the State. So, the relationship of the Union with all the state changes under Article 352 whereas, under Article 356 it changes only vis-a-vis those States where presidential rule is invoked. Now justiciability has always been a question because Article 356 talks about satisfaction.

So how do we read satisfaction should it be read as a subjective satisfaction or objective satisfaction. Now an attempt has been made through 38th constitutional amendment in the year 1975 to exclude the scope of judicial review on the subject matter. Clause (5) was added wherein there was complete immunity given to the satisfaction which Article 356 refers to. This clause was removed through 44th constitutional amendment in the year 1978. Now since then occasions are arising for analyzing the scope and ambit of Article 356 vis-à-vis judicial review.

But what shall be the reach of the court in addressing the issue of use misuse and abuse of Article 356. Now initially it appears that the court was very reluctant to get into the issue of Article 356. That is how you look at it that in the cases of *Rao Birender Singh v. Union of India*, *Jyotirmoy Bose v. Union of India*, *Bijayanand v. President of India*, *KK Aboo v. Union of India*, *In re A Sreeramulu* where Punjab & Haryana High Court, Calcutta High Court, Orissa High Court, Kerala High Court and Andhra Pradesh High Court respectively refrained from interfering on the matter of Article 356. Now *State of Rajasthan v. Union of India* became a sort of a beginning point for justiciability on the matter of Article 356. Wherein a letter was written by a newly elected Central government to all those State governments where State government was of opposing party, wherein advisory was given to the State governments to write to the Governor to dissolve the Assembly and to seek a fresh mandate in the light of the mandate received at the Centre by Janata Party. When this letter has been written to the Chief Minister by the Central government, matter was taken up in the court in *State of Rajasthan v. Union of India*.

Wherein the court said that as far as the satisfaction of the President is concerned, it is a subjective satisfaction and it cannot be tested on any objective test or judicially discoverable and manageable standards. So, you can very well look at it in 1977 the court was bit reluctant on interfering on the issue of applicability of Article 356. Court has said that maintenance of democratic norm can very well be regarded as one of the grounds for invoking Article 356, it cannot be seen to be as an irrelevant ground. Importantly, the court has made an observation that though it is a subjective satisfaction, but then the proclamation can be challenged if the exercise of power is malafide. Malafide or it is on constitutionally prohibited ground or it is on extraneous ground, then intervention can be made by the judiciary.

So, the court says that is a subjective satisfaction, but then the court clarifies that if it is an exercise of power on a malafide ground, court can interfere because every office needs to act constitutionally. SR Bommai is a landmark judgment on the issue of justiciability of presidential rule. In this case, no opportunity was given to the sitting Chief Minister to prove the majority on the floor of the House, Assembly was dissolved and the question was raised that whether proclamation of Article 356, emergency under Article 356 is a valid. The court here said that the satisfaction of the President under Article 356 must be based on objective material and that objectivity must be reflected either through the Governor's report or otherwise and the proclamation issued is subject to judicial review. So, the court looked into the language of Article 74 which bars the court from inquiring into the advice given by the Cabinet to the President.

So, court said that that what Article 74(2) does is that it puts an embargo upon the judiciary to not to inquire into the advice, but court can very well look into the materials on which advice is been given and court can very well look at it that whether the advice given has got a rational connect with the material or not. So, if material is indicating something else and advice is given contrary to the same then it would be appropriate on the part of the judiciary to interfere. So, court has said that we will not look into the adequacy of the material, sufficiency of the material, but court will certainly look at into this fact that whether the material which has been brought before the Cabinet which has been presented before the President, whether that material is helping the President in arriving at the decision in an objective manner or not. Another important thing which has been done, you may say an important constitutional safeguard introduced through a judicial process is the court has said that Legislative Assembly cannot be dissolved unless and until both the Houses

of the Parliament approve the proclamation. Prior to this what was happening is that the moment Article 356 was invoked Assembly was dissolved and the effect was such that if the Assembly is dissolved then Assembly can be restored, can be revived only with a fresh election.

There is no there is no situation, there is no occasion to revive it back and that is an important intervention done by the judiciary in this case where the judiciary has laid down this very point that Legislative Assembly cannot be dissolved it can be only suspended unless the approval comes from both the Houses. So, look at the shift in the approach between the State of Rajasthan and Bommai. The interpretation given under given in relation to Article 356 in the State of Rajasthan has a centripetal impact making Centre more powerful and relying more on the Centre for its decision whereas, when in Bommai it is more of a centrifugal impact where giving a true meaningful understanding to the federal structuring of the Constitution, the autonomy to the provincial unit. So, standard of judicial review which was there and in State of Rajasthan Case it was only on the purpose of or the reasons of issuing a proclamation.

Union did not have to show that purpose indeed existed whereas, in Bommai Case the scope of judicial review has expanded and the onus was imposed upon the Union government to justify the exercise of power that is how the situation has got changed. Other important judicial pronouncements Rameshwar Prasad (IV) v. Union of India, where the court has said that presidential proclamation cannot be justified if it is based on mere ipse dixit this is a Latin maxim which means that where the one which is sitting on the position of authority believes on it and that personal belief may not be a good ground to justify the action. It is based on suspicion or whims and fancies of the Governor. In Rameshwar Prasad what happened was that election happened in the State of Bihar and then it was a fractured mandate there was some kind of negotiation going on between the parties and then some report came in the newspaper that some trading is going on the matter of garnering the support what we call popularly known as horse trading. And on this kind of report Governor has submitted the recommendation for dissolving the Assembly of a State which has not even been brought into existence even for a single day and on the advice of the Governor, the President dissolved the Assembly.

Obviously, the court has said in this case that it was wrong decision, it was unconstitutional. But then by the time the court has given this decision Assembly election was already announced. It

was already under it was already undergoing and therefore the court refrained from passing an order of status quo ante. Court said that because process is already done it is not advisable to pass an order of a status quo ante. So, this is again the impact of SR Bommai because in SR Bommai, the court has said that the court can very well pass an order of a status quo ante. So, if something wrong has been done then the position can be restored which we find in case of Harish Chandra Rawat v. Union of India which came to the Supreme Court through the High Court where again the opportunity was not given to the Chief Minister to prove his majority on the floor of the House and the government was dismissed. The court said that this was not as per the ruling of SR Bommai and therefore this in this case the court has said that the imposition of President rule was bad in law and the government has to be restored. Article 356 has always been into controversy somehow right after the commencement of the Constitution Article 356 has been imposed from the time when multi-party system started playing a prominent role in political sphere in this country.

On this we find important recommendations given by Commissions. Sarkaria Commission is one such Commission which has given clarified that on what ground Article 356 needs to be invoked. So, it said that political crisis arising from the inability of any party or coalition of parties to form a workable majority; internal subversion resulting from an effort of a State government to undermine responsible government; physical breakdown following an inability to respond to internal disturbance; and non-compliance with the Union, for example by refusing to follow the directions during war. Sarkaria Commission said that let the grounds be very specific on which Article 356 can be used so that abuse of Article 356 can be avoided. So, Sarkaria Commission has said that Article 356 should be used in a very rare occasion, it should be used sparingly in extreme cases as a measure of last resort when all other alternative measures have failed and alternative measures it has been suggested that a warning can be issued to the State instead of directly dismissing the government or dissolving the Assembly. Though instances are not there where a warning has been issued but then this is a very good suggestion where a kind of flag can be raised that things are not happening as per the constitutional expectation and therefore a course correction is needed.

All attempts should be made to resolve the crisis at the State level before taking the recourse of Article 356 and the availability and choice of alternatives will depend upon the nature of constitutional crisis that what kind of constitutional crisis it is, what are the causes of such

constitutional crisis, what are the exigencies of the situation. So before taking action under Article 356, Sarkaria Commission suggests that let there be explanation received from the State that why there should not be action taken under Article 356, what is the justification of the State, what are the explanation the State is giving because we need to understand that this is one provision which disturbs the constitutional set up as envisaged and as valued in the scheme of 1950 Constitution. Punchhi Commission has also dealt on the issue of use misuse and abuse of Article 356 and in fact it has gone to the extent of suggesting that whatever has been stated by the Supreme Court in SR Bommai, let it become part of the Constitution so that it becomes a matter of concrete provision and every government is constitutionally bound to follow the same. Commission has also observed that when an external aggression or internal disturbance paralyzes the State administration creating a situation of potential breakdown of constitutional machinery then this provision is to be followed and then all alternative courses available to the Union for discharging the responsibility must be excised. So, the Punchhi Commission here has also highlighted the relevance of Article 355 because Article 355 imposes the responsibility on the union to see that a state is run as per the Constitution.

So, in that way Union can very well caution the State, Union can give advisory to the State that is what can be done under Article 355 without getting into the measures given under Article 356 that is what Punchhi Commission suggests. These are the references for this lecture. Thank you very much.