SUPREME COURT OF INDIA

L.I.C. of India

Vs.

Sushil

C.A.No.719 of 2006

(Arijit Pasayat and S.H. Kapadia JJ.)

23.01.2006

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the order passed by a Division Bench of the Bombay High Court, Nagpur Bench, Nagpur. The respondent had secured employment in the Life Insurance Corporation of India (hereinafter referred to as the 'LIC') the appellant in this appeal on the basis that he belongs to Scheduled Tribe. Undisputedly, his caste was recorded as Halba. Committee for Scrutiny and Verification of Tribe Claims, Amaravati vide its order dated 30.4.2004 held that respondent's claim of belonging to Scheduled Tribe was wrong, unfounded and was a fraudulent claim. The order was questioned by respondent before the High Court by filing a writ petition. Before the High Court, learned counsel for the writ petitioner submitted that the writ petitioner was willing to file an undertaking to the effect that he will not claim any benefit on the basis of his case as Halba either in his service or anywhere else at any time for himself as well as for his legal heirs. With reference to a judgment of this Court in State of Maharashtra v. Milind and ors. (2001(1) SCC 4), the High Court held that in view of the undertaking the writ petitioner's services were not to be terminated notwithstanding invalidation order passed by the Scrutiny Committee.

Learned counsel for the LIC submitted that the approach of the High Court is clearly erroneous. In Milind's case (supra) this Court never laid down any principle of law having universal application. The observations in para 38 of the judgment were limited to the peculiar facts of the case. The High Court erroneously proceeded on the basis that the decision laid down a rule of universal application.

In response, learned counsel for the respondent submitted that the respondent had already rendered about 14 years of uninterrupted and blemishless service and merely because he could not establish his Scheduled Tribe claim, the benefit already granted should not have been withdrawn. It was pointed out that undertaking in the lines noted by the High Court had already been filed.

This Court in R. Vishwanatha Pillai v. State of Kerala and Others (2004(2) SCC 105) and Lillykutty v. Scrutiny Committee, SC & ST and Others. (2005(8) SCC 283) have considered the effect of non-genuine certificates in the case of Scheduled Castes and Scheduled Tribes' claims.

The protection under the Milind's case (supra) cannot be extended to the respondent no.1-employee as the protection was given under the peculiar factual background of that case. The employee concerned was a doctor and had rendered long years of service. This Court noted that on a doctor public money has been spent and, therefore, it will not be desirable to deprive the society of a doctor's service. Respondent no.1-employee in the present case is an LIC employee and the factor which weighed with this Court cannot be applied to him.

The above position was elaborated in Bank of India and Anr. v. Avinash D. Mandivikar and Ors. (2005 (7) SCC 690).

It is noted that in spite of six opportunities the respondent No.1 did not appear before the Scrutiny Committee. That being the position the Scrutiny Committee had no other option than to take a decision in the matter. We also find that the Scrutiny Committee referred to documents which were before it and came to the conclusion about the claim of respondent No. 1 being not genuine.

In Milind's case (supra), filing of the undertaking was not to be treated as the ratio of the judgment. Before us it was urged on behalf of respondent No.1 that in State of Maharashtra at the relevant time there were resolutions/Government Orders which made respondent believe that there was no fraudulent intention in claiming to be Halba. Mr. Lalit, learned counsel for respondent submitted that none of these aspects (including various G.Rs.) have been considered. The High Court in the present case proceeded on the basis as if mere filing of an undertaking in the line suggested by the writ petitioner was sufficient to bring the case under the umbrella of decision in Milind's case (supra). That is clearly not so.

As the High Court has not considered the matter in its proper perspective, except relying on Milind's case (supra) we think it appropriate to remit the matter to the High Court for a fresh consideration on merits of case on the grounds, if any, without influenced by any observation in this order.

The appeal is allowed to the aforesaid extent without any order as to costs.

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Rameshwar Prasad and Ors.
Vs.
Union of India and Anr.
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January 24, 2006
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ARIJIT PASAYAT
JUDGMENT:
J U D G M E N T
(With WP (C) Nos. 255, 258 and 353 of 2005)
ARIJIT PASAYAT J.

In the last few years the attack on actions of Governors in the matter of installation/dissolution of ministries has increased, which itself is a disturbing feature. A Governor has been assigned the role of a Constitutional sentinel and a vital link between the Union and the State. A Governor has also

been described as a useful player in the channel of communication between the Union and the State in matters of mutual interest and responsibility. His oath of office binds him to preserve, protect and defend the Constitution of India, 1950 (in short 'the Constitution') and the law, and also to devote himself to the service and the well being of the people of the State concerned. When allegations are made that he is partisan and/or is acting like an agent of a political party, un- mind of his Constitutional duties, it naturally is a serious matter.

The cases at hand relate to acts of the Governor of Bihar.

Challenge in these writ petitions is to the constitutionality, legality and validity of a Notification GSR 333(E) dated 23.5.2005 of the Union of India in ordering dissolution of the Bihar Legislative Assembly. Writ Petition (C) No.257 of 2005 has been filed by four persons who were elected to the dissolved Legislative Assembly. Petitioner No.1 Shri Rameshwar Prasad was elected as a candidate of the Bhartiya Janta Party (in short 'BJP'). Petitioner No.2 Shri Kishore Kumar was elected as an independent candidate. Petitioner No.3 Shri Rampravesh Rai was elected as a candidate of the Janta Dal United (in short 'JDU') while petitioner NO.4 Dr. Anil Kumar was elected as a candidate of the Lok Janshakti Party (in short 'LJP').

Writ Petition (C) No.353 of 2005 has been filed by Smt. Purnima Yadav who was elected as an independent candidate. Writ Petition (C) No.258 of 2005 has been filed by Shri Viplav Sharma, an Advocate, styled as a Public Interest litigation.

All these writ petitions have been filed under Article 32 of the Constitution. In Viplav Sharma's Writ Petition in addition to the challenges made by the writ petitioners in other two writ petitions, prayer has been made for a direction to the Governor of Bihar to administer oath to all the elected members of the 13th Legislative Assembly of the State of Bihar and make such assembly functional, purportedly in terms of Articles 172 and 176 of the Constitution and appoint the Chief Minister and Council of Ministers in terms of Article 164(1) of the Constitution. Further, consequential prayers have been made for a direction to the Election Commission of India (in short the 'Election Commission') not to hold fresh elections for the constitution of 14th State Legislative Assembly. It has also been prayed to direct stay the effect and operation of the purported report dated 22.5.2005 of the Governor of Bihar to the Union Cabinet inter-alia recommending the dissolution of the Assembly and the Presidential Proclamation dated 7.3.2005 placing the 13th State Legislative Assembly under suspended animation and the Presidential Proclamation dated 23.5.2005. In essence, his stand was that since the State Legislative Assembly was yet to be functional there was no question of dissolving the same. Certain other prayers have been made for laying down the guidelines and directions with which we shall deal with in detail later on. It is to be noted that by order dated 25.7.2005 it was noted that Mr. Viplav Sharma had stated before the Bench hearing the matter that he does not press the prayers (i), (ii), (vii) and (viii) in the writ petition.

The challenges in essence, as culled out from the submissions made by the petitioners are essentially as follows:

The dissolution of the Legislative Assembly by the impugned Notification dated 23.5.2005 in exercise of the powers conferred by sub-clause (b) of Clause (2) of Article 174 of the Constitution read with clause (a) of the Proclamation number GSR 162(E) dated 7th March, 2005 issued under Article 356 of the Constitution in relation to the State of Bihar has been made on the basis of a tainted and clearly unsustainable report of the Governor of Bihar. It is stated by Mr. Sorabjee that

the Governor's report which led to imposition of President's Rule over the State of Bihar was not based on an objective assessment of the ground realities. The Home Minister in his speech made on 21.3.2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in Rajya Sabha clearly indicated that it is not good for democracy to let the President's rule continue for a long time. It was unfortunate that no political party could get a majority and more parties could not come together to form the Government. The minority government also would not be proper to be installed where the difference between the requisite majority and the minority was not very small. The House was assured that the Government was not interested in continuation of President's Rule for a long time. It was categorically stated that sooner it disappears the better it would be for the State of Bihar, for democracy and for the system that has been followed in this country. The Governor was requested to explore the possibilities of formation of a Government. This could be achieved by talking to the elected representatives. Contrary to what was held out by the Home Minister, on totally untenable premises and with the sole objective of preventing Shri Nitish Kumar who was projected to be as the Chief Ministerial candidate by the National Democratic Alliance (in short the 'NDA') with support of a break away group of LJP and independents. In hot-haste, a report was given, which was attended to with unbelievable speed and the President's approval was obtained. The hot- haste and speed with which action was taken clearly indicates mala-fides. Though the Governor made reference to some horse trading or allurements the same was clearly on the basis of untested materials without details. Action of the Governor is of the nature which was condemned by this Court in S.R. Bommai and Ors. v. Union of India and Ors. (1994 (3) SCC 1). It was submitted that similar views expressed by respective Governors did not find acceptance in the cases of dissolution of Assemblies in Karnataka and Meghalaya in the said case. Though the Proclamations in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh were held to be not unconstitutional, yet the parameters of the scope of judicial review were highlighted. Even if it is accepted that the Governor's opinion is to be given respect and honour in view of the fact that he holds a high constitutional office, yet when the view is tainted with mala-fides the same has to be struck down. In the instant case according to learned counsel for petitioners, the background facts clearly established that the Governor was not acting bona fide and his objective was to prevent installation of a majority Government. Even if it is accepted for the sake of arguments that the majority was cobbled by unfair means that is a matter with which the Governor has no role to play. It is for the Speaker of the Assembly, when there is a floor test to consider whether there was any floor crossing. If any material existed to show that any Legislature was lured by unfair means that is for the electorate to take care of and the media to expose. That cannot be a ground for the Governor to prevent somebody from staking a claim when he has the support of majority number of legislatures. It is submitted that similar views regarding horse trading etc. were made in the report of the Governor so far as the dissolution of the Karnataka Assembly is concerned and this Court in S.R. Bommai's case (supra) found that the same cannot be the foundation for directing dissolution.

For the last few years formation of government by a party having majority has become rare. Therefore, the coalition governments are in place in several States and in fact at the Centre. There is nothing wrong in post poll adjustments and when ideological similarity weighs with any political party to support another political party though there was no pre-poll alliance, there is nothing wrong in it. Majority of the legislatures of the LJP party had decided to support JDU in its efforts to form a Government. Clear decisions were taken in that regard. Some Independent M.L.As had also extended their support to Mr. Nitish Kumar. The Governor cannot refuse to allow formation of a Government once the majority is established. The only exception can be where the Governor is of the view that a stable Government may not be formed by the claimants. It is not the position in the case at hand. Mr. Nitish Kumar had support of legislators, more than the requisite number and in

fact the number was far in excess of the requisite number. The Governor's actions show that he was acting in a partisan manner to help some particular political parties.

The scope of judicial review was delineated by this Court in State of Rajasthan and Ors. v. Union of India and Ors. (1977 (3) SCC 592) and was further expanded in Bommai's case (supra). Tested on the touchstone of the guidelines set out in Rajasthan's case (supra) and Bommai's case (supra) the Governor's report is clearly unsustainable and consequential Presidential Proclamation is unconstitutional. It is to be noted that the Presidential Proclamation was based solely on the Governor's report as has been accepted by the Union of India.

Mr. P.S. Narasimha and Mr. Viplav Sharma supported the stand. Additionally, with reference to their additional stands noted supra in the writ petitions, they submitted that the President's Notification is not sustainable and is unconstitutional.

In response, Mr. Milon K. Banerjee, learned Attorney General, Mr. Goolam E. Vahanvati, learned Solicitor General, Mr. Gopal Subramaniam, learned Additional Solicitor General, Mr. P.P. Rao, learned senior counsel and Mr. B.B. Singh, learned counsel submitted that there is no quarrel about the scope of judicial review of this Court in matters relating to Proclamation under Article 356(1) and consequentially Article 174(2) of the Constitution. But the factual scenario as projected by the petitioners is really not so.

In the instant case, the Governor had not in reality prevented anybody from staking a claim. It is nobody's case that somebody had staked a claim. What the Governor had indicated in his report dated 21.5.2005 (not dated 22.5.2005 as stated in the writ petitions by the writ petitioners) was that effort was to get the majority by tainted means by allurements like money, caste, posts and such unfair and other objectionable means. When the foundation for the claim was tainted the obvious inference is that it would not lead to a stable government and the same is clearly visible. It has been submitted that the parameters of judicial review are extremely limited so far as the Governor's report is concerned and consequential actions taken by the President. The Governor cannot be a mute spectator when democratic process is tampered with by unfair means. The effort is to grab power by presenting a majority, the foundation of which is based on factors which are clearly anti democratic in their conception. Parliamentary democracy is a part of the basic structure of the Constitution and when the majority itself is the outcome of foul means it is clearly against the mandate given by the electorate. It can never be said that the electorate wanted that their legislatures after getting their mandate would become the object of corrupt means. When the sole object is to grab power at any cost even by apparent unfair and tainted means, the Governor cannot allow such a government to be installed. By doing so, the Governor would be acting contrary to very essence of democracy. The purity of electorate process would get polluted. The framers of the Constitution never intended that democracy or governance would be manipulated. Defections strike at the root of representative government. They are unconstitutional, illegal, illegitimate, unethical and improper. The Tenth Schedule cannot take care of all situations and certainly not in the case of independents. It would be too hollow to contend that the floor test would cure all impurity in gathering support of the legislatures. Floor test cannot always be a measure to restrain the corrupt means adopted and in cobbling the majority. It is also too much to expect that by exposure of the corrupt means so far as a particular legislature is concerned, by the people or by the media the situation would improve. Since there is no material to show that any party staked a claim and on the contrary as is evident from the initial report of the Governor dated 6.3.2005 that nobody was in a position to stake a claim and the fact that passage of about three months did not improve the situation, the Governor was not

expected to wait indefinitely and in the process encourage defections or adoption of other objectionable activities. It is submitted that ratio in State of Rajasthan's case (supra) so far as the scope of judicial review is concerned has not been expanded in Bommai's case (supra), and the parameters remain the same.

With reference to Tenth Schedule more particularly sub- paragraphs 2 and 4 it is submitted that dis-qualification had been clearly incurred by the members of LJP break away group. There was in fact no merger of the so-called break away group with JDU. The documents filed by the petitioners amply show that there was only a proposal and in fact not any merger. Documents on the other hand show that the so called resolution was also manipulated. One person had signed for several persons and even the signatures differ. If really the persons were present in the so called meeting, adopted the resolution purported to have been taken, there was no reason as to why concerned participants did not sign the resolution and somebody else signed it in their favour. This clearly shows that on the basis of manipulated documents it was attempted to be projected as if Shri Nitish Kumar had a majority. Interestingly, Shri Nitish Kumar has not filed any petition and only four members have filed the petitions though claim was that more than 122 had extended support. Though that by itself may not be a ground to throw out the petitions, yet the petitions certainly suffer from legal infirmity. As amply proved, the petitioners have not approached this Court with clean hands and therefore are not entitled to any relief. It is submitted that the petitioners in WP (C) No.257 and 353 have not questioned the correctness of the President's Notification dated 7.3.2005, and interestingly in the so called Public Interest Litigation, it has been challenged. After having given up challenge to the major portion of the challenges it has not been explained by the petitioner in person as to how and in which way any of his rights has been affected. If the persons affected have not questioned the correctness of the Notification dated 7.3.2005 the petitioner in person should not be permitted to raise that question. It is the basic requirement of a Public Interest Litigation that persons who are affected are unable to approach the Court. It is strange that learned counsel for the legislators-writ petitioners have accepted the Notification dated 7.3.2005 to be valid and in order. The plea taken in the so called Public Interest Litigation is to the contrary. The factual position in Bommai's case (supra) was different. It related to cases where elected governments were in office and the Governors directed dissolution. The position is different here. Further it is submitted that the power exercised by the Governor is legislative in character and it can only be nullified on the ground of ultra-vires. The reports of the National Commission To Review the Working Of The Constitution and Sarkaria Commission have amply indicated the role to be played by the Governors' and sanctity to be attached to their report. Even when the parameters of judicial review spelt out in the State of Rajasthan and Bommai's cases (supra) are kept in view, the impugned report and consequential President's Notification do not suffer from any infirmity to warrant interference. It is further submitted that the Election Commission had notified fresh elections and even if for the sake of arguments if any defect is noticed in the Governor's report or the consequential President's Notification, that cannot be a ground to stall the election already notified. People can give their mandate afresh and the plea that large sums of money would be spent if the fresh elections are held is really no answer to preventing installation of a government whose foundation is shaky. It is submitted that the report does not even show a trend of any partisan approach vis-a-vis any political party by the Governor who was acting independently. In fact before the report dated 21.5.2005 on which the final decision for the Presidential Proclamation was taken a report dated 27.4.2005 was given which clearly indicated that no party was in a position to form the Government. The Governor has clearly indicated the source from which he came to know about the efforts to form the Government by illegal means. It is pointed out that the decision relied upon by Mr. P.S. Narasimha and Mr. Viplav Sharma i.e. Udai Narain Sinha v. State of U.P. and Ors. (AIR 1987 Allahabad 293)

does not really reflect the correct position in law and was rendered in the peculiar fact situation. On the contrary, the decision of the Kerala High Court in K.K. Aboo v. Union of India (AIR 1965 Kerala 229) lays the correct position. Stand that because of Articles 172 or 174 of the Constitution there is no scope of dissolving the Assembly before it was summoned to hold the meeting is not acceptable on the face of Section 73 of the Representation of People Act, 1951 (in short the 'RP Act'). It is pointed out that the decision in K.K. Aboo's case (supra) was approved to be laying down the correct law by a Constitution Bench of this Court in Special Reference No.1 of 2002 (2002 (8) SCC 237).

The reports of the Governor dated 6.3.2005, 27.4.2005 and 21.5.2005 need to be reproduced. They read as under:

"D.O.No.33/GB Patna, the 6th March, 2005 Respected Rashtrapati Jee, The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No.308/B.R.L.A./2005 dated 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position:

1. R.J.D. : 75
2. J.D.(U) : 55
3. B.J.P. : 37
4. Cong.(I) : 10
5. B.S.P. : 02
6. L.J.P. : 29
7. C.P.I. : 03
8. C.P.I.(M) : 01
9. C.P.I. (M.L.) : 07
10. N.C.P. : 03
11. S.P. : 04
12. Independent : 17

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243

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The R.J.D. and its alliance position is as follows:

1. R.J.D. : 75

2. Cong (I) : 10

3. C.P.I. : 03(support letter not received)
4. C.P.I.(M) : 01

5. N.C.P. : 03

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92

The N.D.A. alliance position is as follows:

1. B.J.P. : 37

2. J.D.(U) : 55

92

3. The present Chief Minister, Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation alongwith her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of L.J.P. met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the R.J.D. nor the B.J.P. in the formation of government. The State President of Congress Party, Shri Ram Jatan Sinha, also met me in the evening of 28.2.2005.

5. The State President of B.J.P., Shri Gopal Narayan Singh alongwith supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP and JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the R.J.D. to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the R.J.D. or N.D.A. in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the C.P.I. (M.L.-Lib), Legislature Party alongwith 4 others met me and submitted a letter (Annexure V) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of L.J.P. alongwith 15 others met me and submitted another letter (Annexure VI). They have re-iterated their earlier stand.

9. The R.J.D. met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties:

1. Cong.(I) : 10

2. N.C.P. : 03

3. C.P.I. (M) : 01

4. B.S.P. : 02(copy enclosed as Annex.VII)
The R.J.D. with the above will have only 91.

They have further claimed that some of the Independent members may support the R.J.D. However, it has not been disclosed as to the number of Independent M.L.As. from whom they expect support

nor their names.

Even if we assume the entire independents totalling 17 to extend support to R.J.D. alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House of 243.

10. The N.D.A. delegation led by Shri Sushil Kumar Modi, M.P., met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre-election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independents M.L.As. met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorisization letter supporting their claim.

12. I have also consulted the legal experts and the case laws particularly the case reported in AIR 1994 SC 1918 where the Supreme Court in para 365 of the report summarized the conclusion. The relevant part is para 2, i.e. the recommendation of the Sarkaria Commission do merit serious consideration at the hands of all concerned. Sarkaria Commission in its report has said that Governor while going through the process of selection should select a leader who in his judgment is most likely to command a majority in the Assembly. The Book "Constitution of India" written by Shri V.N. Shukla (10th Edition) while dealing with Articles 75 and 164 of the Constitution of India has dealt with this subject wherein it has quoted the manner of selection by the Governor, in the following words:

"In normal circumstances the Governor need have no doubt as to who is the proper person to be appointed; it is leader of majority party in the Legislative Assembly, but circumstances can arise when it may be doubtful who that leader is and the Governor may have to exercise his personal judgment in selecting the C.M. Under the Constitutional scheme which envisages that a person who enjoys the confidence of the Legislature should alone be appointed as C.M.".

In Bommai case referred to above in para 153 S.C. has stated with regard to the position where, I quote:

"Suppose after the General Elections held, no political party or coalition of parties or groups is able to secure absolute majority in the Legislative Assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the Legislature. It would be a case of failure of constitutional machinery".

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents M.L.As., a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete

inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly Constituent Assembly be kept in suspended animation for the present and the President of India is requested to take such appropriate action/decision, as required.

With regards,
Yours sincerely,
(Buta Singh)
Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi.
D.O. No. 52/GB Patna, the 27th
April,2005
Respected Rashtrapati Jee, I invite a reference to my D.O. No.33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (Constituted vide Election Commission's notification No.308/B.R.- L.A./2005 dated the 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No.G.S.R. 162(E), dated 7th March, 2005 and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation.

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempt is being made to win over others. The JD-U is also targeting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two third of Congress MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the Centre, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission To Review The Working Of The Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and

opportunistic political realignment from time to time. A reasonable degree of stability of Government and a strong Government is important. It has also been noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts, etc. which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practised by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate.

With regards,
Yours sincerely,
(Buta Singh)
Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi."

D.O. No. 140/PS-GB/BN Patna, the 21st May, 2005 Respected Rashtrapati Jee,

I invite a reference to my D.O. letter No. 52/GB dated 27th April 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U.

As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post election alliance

combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. GSR- 162 (E) dated 7th March 2005 and the Assembly was kept in suspended animation.

The reports received by me in the recent past through the media and also through meeting with various political functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is a very disturbing and alarming feature. Any move by the break away action to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions.

Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course.

With regards,
Yours sincerely
Sd/-
(Buta Singh)
Dr. A.P.J. Abdul Kalam,
President of India,
Rashtrapati Bhavan,
New Delhi.
We shall first deal with the question as to the essence of the judgment in Bommai's case (supra).

Lot of arguments have been advanced as to the true essence of the conclusions arrived at in Bommai's case (supra) and the view expressed as regards the scope of judicial review. In A.K. Kaul and Anr. v. Union of India and Anr. (1995 (4) SCC 73), the position was summed up as follows: "21. It would thus appear that in S. R. Bommai though all the learned Judges have held that the exercise of powers under Article 356(1) is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the view of the majority (Pandian, Ahmadi, Verma Agrawal, Yogeshwar Dayal and Jeevan Reedy, JJ.) is that the principles evolved in Barium Chemicals for adjudging the validity of an action based on the subjective satisfaction of the authority created by statute do not, in their entirety, apply to the exercise of a constitutional power under Article 356. On the basis of the judgment of Jeevan Reddy, J., which takes a narrower view than that taken by Sawant, J., it can be said that the view of the majority (Pandian, Kuldip Singh, Sawant, Agrawal and Jeevan Reddy, JJ.) is that: (i) the satisfaction of the President while making a Proclamation under Article 356 (1) is justiciable;

(ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous

and or irrelevant grounds;

(iii) even if some of the materials on which the action is taken is found to be irrelevant, the court would still not interferes so long as there is some relevant material sustaining the action;

(iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute it opinion for that of the President;

(v) the ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case a abuse of power or what is sometimes called fraud on power;

(vi) the court will not lightly presume abuse or misuse of power and will make allowance of the fact that the president and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and

(vii) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive."

If the State of Rajasthan's case (supra) and Bommai's case (supra) are read together it is crystal clear that in Bommai's case, the scope of judicial review as set out in the State of Rajasthan's case (supra) was elaborated as is clear from the summation in A.K. Kaul's case (supra). Lord Greene said in 1948 in the famous Wednesbury case (1948 (1) KB 223s) that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. Lord Diplock in Council for Civil Services Union v. Minister of Civil Service [(1983) 1 AC 768] (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility".

In Om Kumar and Ors. v. Union of India (2001 (2) SCC 386), this Court observed, inter alia, as follows: "The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least- restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is

meant by proportionality.

xxx xxx xxx xxx xxx

The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent.

Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case Attorney General v. Guardian Newspapers Ltd. (No.2) (1990) 1 AC 109 (at pp. 283-284), Lord Goff stated that there was no inconsistency between the convention and the common law. In Derbyshire County Council v. Times Newspapers Ltd. (1993) AC 534, Lord Keith treated freedom of expression as part of common law. Recently, in R. v. Secy. Of State for Home Deptt., ex p. Simms (1999) 3 All ER 400 (HL), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re- emphasised in in R. v. Lord Saville ex p (1999) 4 All ER 860 (CA), at pp.870,872) . In all these cases, the English Courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

However, the principle of "strict scrutiny" or "proportionality" and primary review came to be explained in R. v. Secy. of State for the Home Deptt. ex p Brind (1991) 1 AC 696. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organizations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-49).

".....whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations"and that the courts were "not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it".

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid pp. 750-51).

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the Brind case (1991) 1 AC 696. Where Convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

In Union of India and Anr. vs. G. Ganayutham (1997 [7] SCC 463), in paragraph 31 this Court observed as follows: "31. The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind (1991 (1) AC 696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by

Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority".

The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

According to Wade, Administrative Law (9th Edition) is the law relating to the control of powers of the executive authorities. To consider why such a law became necessary, we have to consider its historical background.

Up to the 19th century the functions of the State in England were confined to (i) defence of the country from foreign invasion, and (ii) maintenance of law and order within the country.

This vast expansion in the State functions resulted in large number of legislations and also for wide delegation of State functions by Parliament to executive authorities, so also was there a need to create a body of legal principles to control and to check misuse of these new powers conferred on the State authorities in this new situation in the public interest. Thus, emerged Administrative Law. Maitland pointed out in his Constitutional History:

"Year by year the subordinate Government of England is becoming more and more important. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."

But in the early 20th century following the tradition of Dicey's classic exposition in his: The Law of the Constitution, there was a spate of attacks on parliamentary delegation culminating in the book New Despotism by the then Chief Justice of England, Lord Hewart published in 1929. In response, the British Government in 1932 set up a committee called the Committee on Ministerial Powers headed by Lord Donoughmore, to examine these complaints and criticisms. However, the Donoughmore Committee rejected the argument of Lord Hewart and accepted the reality that a modern State cannot function without delegation of vast powers to the executive authorities, though there must be some control on them.

In R. v. Lancashire CC, ex p Huddleston [1986 (2) All ER 941 (CA)], it was said about Administrative Law that it "has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely, the maintenance of the highest standards of public administration".

In Liversidge v. Anderson (1941 (3) All E.R. 338 (HL) the case related to the Defence (General) Regulations, 1939 which provided: "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association he may make an order against that person directing that he be detained."

The detenu Liversidge challenged the detention order passed against him by the Secretary of State. The majority of the House of Lords, except Lord Atkin, held that the Court could not interfere because the Secretary of State had mentioned in his order that he had reasonable cause to believe that Liversidge was a person of hostile origin or association. Liversidge was delivered during the Second World War when the executive authority had unbridled powers to detain a person without even disclosing to the Court on what basis the Secretary had reached to his belief. However, subsequently, the British courts accepted Lord Atkin's dissenting view that there must be some relevant material on the basis of which the satisfaction of the Secretary of State could be formed. Also, the discretion must be exercised keeping in view the purpose for which it was conferred and the object sought to be achieved, and must be exercised within the four corners of the statute (See: Clariant International Ltd. and Another v. Securities and Exchange Board of India (2004(8) SCC 524) Sometimes a power is coupled with a duty. Thus, a limited judicial review against administrative action is always available to the Courts. Even after elaboration in Bommai's case (supra) the scope for judicial review in respect of Governors' action cannot be put on the same pedestal as that of other administrative orders. As observed in Para 376 of judgment in Bommai's case (supra) the scope of judicial review would depend upon facts of the given case. There may be cases which do not admit of judicial prognosis. The principles which are applicable when an administrative action is challenged cannot be applied stricto sensu to challenges made in respect of proclamation under Article 356. However, in view of what is observed explicitly in Bommai's case (supra), the proclamation under Article 356(1) is not legislative in character. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. (See: Smt. Shalini Soni and Ors. v. Union of India and others 1980 (4) SCC 544). The Wednesbury principle is often misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached to it. As observed by Lord Diplock in CCSU's case (supra) a decision will be said to suffer from Wednesbury unreasonableness if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

A Constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the appearance of the State and its aspirations throughout history. It determines the State's fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one. Performance of all these tasks by a Constitution requires a balance of its subjective and objective elements, because "it is a constitution we are expounding." As Chief Justice Dickson of the Supreme

Court of Canada noted:

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by it framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

The political question doctrine, in particular, remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches. By foreclosing judicial review, even regarding the minimal rationality of the political branches' discretionary choices, the doctrine denies federal judges a role in "giving proper meaning to our public value" in important substantive fields. (Quoted from an Article in Harvard Law Review).

Democratic Theory is based on a notion of human dignity: as beings worthy of respect because of their very nature, adults must enjoy a large degree of autonomy, a status principally attainable in the modern world by being able to share in the Governance of their community. Because direct rule is not feasible for the mass of citizens, most people can share in self government only by delegating authority to freely chosen representatives. Thus Justice Hugo L. Black expressed a critical tenet of democratic theory when he wrote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we...must live."

For democratic theory, what makes governmental decisions morally binding is process: the people's freely choosing representatives, those representatives' debating and enacting policy and later standing for re-election, and administrators' enforcing that policy. Democratic theory, therefore, tends to embrace both positivism and moral relativism.

Whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism. It presumes that "out there" lurk discoverable standards to judge whether public policies infringe on human dignity. The legitimacy of a policy depends not simply on the authenticity of decision makers' credentials but also on substantive criteria. Even with the enthusiastic urging of a massive majority whose representatives have meticulously observed proper processes, government may not trample on fundamental rights. For constitutionalists, political morality cannot be weighed on a scale in which "opinion is an omnipotence," only against the moral criterion of sacred, individual rights. They agree with Jafferson: "An elective despotism was not the government we fought for....." (From Constitutions, Constitutionalism, and Democracy by Walter F. Murphy).

Allegation of mala-fides without any supportable basis is the last feeble attempt of a losing litigant, otherwise it will create a smokescreen on the scope of judicial review. This is a pivotal issue around which the fate of this case revolves. As was noted in A.K. Kaul's case (supra) the satisfaction of the President is justiciable. It would be open to challenge on the ground of mala fides or being based wholly on extraneous or irrelevant grounds. The sufficiency or the correctness of the factual

position indicated in the report is not open to judicial review. The truth or correctness of the materials cannot be questioned by the Court nor would it go into the adequacy of the material and it would also not substitute its opinion for that of the President. Interference is called for only when there is clear case of abuse of power or what is some times called fraud on power. The Court will not lightly presume abuse or misuse of power and will make allowance for the fact that the decision making authority is the best judge of the situation. If the Governor would have formed his opinion for dissolution with the sole objective of preventing somebody from staking a claim it would clearly be extraneous and irrational. The question whether such person would be in a position to form a stable government is essentially the subjective opinion of the Governor; of course to be based on objective materials. The basic issue therefore is did the Governor act on extraneous and irrelevant materials for coming to the conclusion that there was no possibility of stable government.

According to the petitioners, the question whether there was any allurement or horse trading (an expression frequently used in such cases) or allurement of any kind is not a matter which can be considered by the Governor. The scope of judicial review of Governor's decision does not and cannot stand on the same footing as that of any other administrative decision. In almost all legal inquiries intention as distinguished from motive is the all important factor and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. Whereas fairness is synonymous with reasonableness bias stand included within the attributes and broader purview of the word "malice" which in common acceptation implies "spite" or "ill will". Mere general statements will not be sufficient for the purpose of indication of ill will. There must be cogent evidence available on record to come to a conclusion as to whether in fact there was bias or mala fide involved which resulted in the miscarriage of justice. The tests of real likelihood and reasonable suspicion are really inconsistent with each other. (See S. Parthasarthi v. State of A.P. (1974 (3) SCC 459). The word 'bias' is to denote a departure from the standing of even handed justice. (See: Franklin vs. Minister of Town and Country Planning (1947 2 All ER 289 (HL). In State of Punjab v. V.K. Khanna and Ors. (2001 (2) SCC 330), it was observed as follows:

"Incidentally, Lord Thankerton in Franklin v. Minister of Town and Country Planning (1948 AC 87 : (1947) 2 All ER 289 (HL) opined that the word "bias" is to denote a departure from the standing of even-handed justice. Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar case ((2001) 1 SCC 182) further noted the different note sounded by the English Courts in the manner following : (SCC pp.199-201, paras 30-34)

"30. Recently however, the English courts have sounded a different note, though may not be substantial but the automatic disqualification theory rule stands to some extent diluted. The affirmation of this dilution however is dependent upon the facts and circumstances of the matter in issue. The House of Lords in the case of R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2) ((2000) 1 AC 119) observed: '... In civil litigation the matters in issue will normally have an economic impact; therefore a Judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a Judge applies just as much if the Judge's decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties.'

31. Lord Brown-Wilkinson at p. 136 of the report stated:

'It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25-11-1998 would lead to a position where Judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a Judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the Judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a Judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a Judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the Judge would be well advised to disclose a possible interest.'

32. Lord Hutton also in Pinochet case ((2000) 1 AC 119) observed :

'There could be cases where the interest of the Judge in the subject- matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.'

33. Incidentally in Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (2000 QB 451)] the Court of Appeal upon a detail analysis of the oft-cited decision in R. v. Gough (1993 AC 646) together with the Dimes case (Dimes v. Grand Junction Canal, (1853) 3 HL Cas 759 : 10 ER 301), Pinochet case ((2000) 1 AC 119), Australian High Court's decision in the case of J.R.L., ex p C.J.L., Re ((1986) 161 CLR 342) as also the Federal Court in Ebner, Re ((1999) 161 ALR 557) and on the decision of the Constitutional Court of South Africa in President of the Republic of South Africa v. South African Rugby Football Union ((1999) 4 SA 147) stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

'By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (Vakuta v. Kelly ((1989) 167 CLR 568)); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of

bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.'

34. The Court of Appeal judgment in Locabail (200 QB 451) though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case - a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient."

In Bommai's case (supra) though all the learned Judges held that exercise of power under Article 356(1) of the Constitution is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the majority view was to the effect that the principles evolved in Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors. (AIR 1967 SC 295) for adjudging the validity of an action based on the subjective satisfaction of the authority created by the Statute do not in their entirety apply to the exercise of constitutional power under Article 356 of the Constitution. Mala fide intent or biased attitude cannot to be put on a strait- jacket formula but depend upon facts and circumstances of each case and in that perspective judicial precedent would not be of much assistance. It is important to note that in Bommai's case (supra) this Court was concerned with cases of dissolution of Assemblies when cabinets were in office. Though at first flush, it appears that the factual background in Karnataka's case (supra) dealt with in Bommai's case (supra) has lot of similarity with the factual position in hand, yet on a deeper analysis the position does not appear to be so. The factual position was peculiar. In the instant case, the Governor's report reveals that the source of his opinion was intelligence reports, media reports and discussions with functionaries of various parties. A plea was raised by the petitioners that it has not been indicated as to functionaries of which party the Governor had discussed with. That cannot be a ground to hold the report to be vulnerable. As was noted in Bommai's case (supra) the sufficiency or correctness of factual aspects cannot be dealt with. Therefore, as noted above, the only question which needs to be decided is whether the conclusions of the Governor that if foul means are adopted to cobble the majority it would be against the spirit of democracy. Again the question would be if means are foul can the Governor ignore it and can it be said that his view is extraneous or irrational.

In the report dated 27.4.2005 to which reference has been made in the report dated 21.5.2005 reference is made to allurements like money, caste, posts etc. and this has been termed as a disturbing feature. In both the reports, the opinion of the Governor is that if these attempts are allowed to continue, it would amount to tampering with constitutional provisions. Stand of the petitioners is that even if it is accepted to be correct, there is no constitutional provision empowering the Governor to make the same basis for not allowing a claim to be staked. This argument does not appear to be totally sound.

In Kihoto Hollohan v. Zachillhu and Ors. (1992 Supp (2) SCC 651) the menace of defection was noted with concern and the validity of the Tenth Schedule was upheld. While upholding the validity of the provision this Court in no uncertain terms deprecated the change of loyalties to parties and the craze for power. The Statement of Objects and Reasons appended to the Constitution (52nd Amendment) Act, 1985 refer to the evil of political defection which has been the matter of national concern. It was noted that if it is not combated it is likely to undermine the very foundation of our democracy and the principles which sustain it. It was noted as follows:

"26. In expounding the processes of the fundamental law, the Constitution must be treated as a

logical whole. Westel Woodbury Willoughby in The Constitutional Law of the United States (2nd Edn. Vol.1 p.65) states:

"The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts."

27. A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances a distinction which differentiates a statute from a Charter under which all statutes are made. Cooley on Constitutional Limitations (8th edn. Vol.1, p.129) says:

"Upon the adoption of an amendment to a Constitution, the amendment becomes a part thereof; as much so as it had been originally incorporated in the Constitution; and it is to be construed accordingly."

Again, in paragraph 41, the position was illuminatingly stated by Mr. Justice M.N. Venkatachaliah (as His Lordship then was). A right to elect, fundamental though it is to democracy is anomalously enough neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So it is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are and therefore subject to statutory limitation. (See Jyoti Basu and Ors. v. Debi Ghosal and Ors. (1982 (1) SCC 691).

Democracy as noted above is the basic feature of the Constitution. In paragraphs 44 and 49 of Kihoto's case (supra) it was noted as follows:

"44. But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source f sustenance nay, indeed, its very survival. Intra party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on Parliament Functions, Practice and Procedure (1989 Edn., p.119) says;

"Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy.

49. Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a

provision for dis-qualification for defection. Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossing belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti- defection law seeks to recognize the practical need to place the proprieties of political and personal conduct whose awkward erosion and grotesque manifestations have been the bane of the times above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. We should, we think, defer to this legislative wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted to that end..." are constitutional."

Therefore, the well recognised position in law is that purity in the electorate process and the conduct of the elected representative cannot be isolated from the constitutional requirements. "Democracy" and "Free and Fair Election" are inseparable twins. There is almost an inseverable umbilical cord joining them. In a democracy the little man- voter has overwhelming importance and cannot be hijacked from the course of free and fair elections. His freedom to elect a candidate of his choice is the foundation of a free and fair election. But after getting elected, if the elected candidate deviates from the course of fairness and purity and becomes a "Purchasable commodity" he not only betrays the electorate, but also pollutes the pure stream of democracy.

Can the governor whose constitutional duty is to safeguard the purity throw up his hands in abject helplessness in such situations?

As noted by this Court in People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr. (2003 (4) SCC 399) a well informed voter is the foundation of democratic structure. If that be so, can it be said that the Governor will remain mute and silent spectator when the elected representatives act in a manner contrary to the expectations of the voters who had voted for them. In paragraph 94 of it was noted as follows:

"94. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered for ever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in Lily Thomas Vs. Speaker, Lok Sabha [(1993) 4 SCC 234] quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting

the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus two fold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information-relevant and essential would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the Press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly it will facilitate the Press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter-whether he acquires information directly by keeping track of disclosures or through the Press and other channels of communication, will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Though I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated."

There is no place for hypocrisy in democracy. The Governor's perception about his power may be erroneous, but it is certainly not extraneous or irrational. It has been rightly contended by learned counsel for the Union of India that apart of Governor's role to ensure that the Government is stable, the case may not be covered by the Tenth Schedule and it cannot be said that by avoiding the Tenth Schedule by illegitimate or tainted means a majority if gathered leaves the Governor helpless, and a silent onlooker to the tampering of mandate by dishonest means. It is not and cannot be said that by preventing a claim to be staked the Governor does not act irrationally or on extraneous premises. Had the Governor acted with the object of preventing anyone from staking a claim his action would have been vulnerable. The conduct of the Governor may be suspicious and may be so in the present case, but if his opinion about the adoption of tainted means is supportable by tested materials, certainly it cannot be extraneous or irrational. It would all depend upon the facts of each case. If the Governor in a particular case without tested or unimpeachable material merely makes an observation that tainted means are being adopted, the same would attract judicial review. But in the instant case there is some material on which the Governor has acted. This ultimately is a case of subjective satisfaction based on objective materials. On the factual background one thing is very clear i.e. no claim was staked and on the contrary the materials on record show what was being projected. It is also clear from a bare perusal of the documents which the petitioners have themselves enclosed to the writ petitions that authenticity of the documents is suspect.

Judicial response to human rights cannot be blunted by legal jugglery. (See: Bhupinder Sharma v. State of Himachal Pradesh 2003(8) SCC 551). Justice has no favourite other than the truth. Reasonableness, rationality, legality as well as philosophically provide colour to the meaning of fundamental rights. What is morally wrong cannot be politically right. The petitioners themselves have founded their claims on documents which do not have even shadow of genuineness so far as claim of majority is concerned. If the Governor felt that what was being done was morally wrong, it cannot be treated as politically right. This is his perception. It may be erroneous. It may not be specifically spelt out by the Constitution so far as his powers are concerned. But it ultimately is a perception. Though erroneous it cannot be termed as extraneous or irrational. Therefore however suspicious conduct of the Governor may be, and even if it is accepted that he had acted in hot haste it cannot be a ground to term his action as extraneous. A shadow of doubt about bona fides does not lead to an inevitable conclusion about mala fides.

We may hasten to add that similar perceptions by Governors may lead to chaotic conditions. There may be human errors. Therefore, the concerned Governor has to act carefully with care and caution and can draw his inference from tested and unimpeachable material; otherwise not.

In B.R. Kapur v. State of Tamil Nadu and Anr. (AIR 2001 SC 3435) this Court considered the role of the Governor in appointing the Chief Minister. It was held that the Governor can exercise his discretion and can decline to make the appointment when the person chosen by the majority party is not qualified to be member of Legislature. It was observed that in such a case the Constitution prevails over the will of the people. It was further observed that accepting submissions as were made in that case that the Governor exercising powers under Article 164(1) read with (4) was obliged to appoint as Chief Minister whosoever the majority party in the Legislature nominated, regardless of whether or not the person nominated was qualified to be a member of the legislature under Article 173 or was disqualified in that behalf under Article 191,and the only manner in which a Chief Minister who was not qualified or who was disqualified could be removed was by a vote of no-confidence in the legislature or by the electorate at the next elections and that the Governor was so obliged even when the person recommended was, to the Governor's knowledge, a non-citizen, under age, a lunatic or an undischarged insolvent, and the only way in which a non- citizen, or under age or lunatic or insolvent Chief Minister could be removed was by a vote of no-confidence in the legislature or at the next election, is to invite disaster.

The situation cannot be different when the Chief Minister nominated was to head a Ministry which had its foundation on taint and the majority is cobbled by unethical means or corrupt means. As was observed in B.R. Kapur's case (supra) in such an event the constitutional purity has to be maintained and the Constitution has to prevail over the will of the people.

With these conclusions the writ applications could have been disposed of. But, taking note of some of the disturbing features highlighted by learned counsel about the suspicious and apparently indefensible roles of some Governors, it is necessary to deal with some of the relevant aspects.

It is relevant to take note of what the Sarkaria Committee had said about the role of Governors:

1. INTRODUCTION

4.1.01 The role of the Governor has emerged as one of the key issues in Union State relations. The

Indian political scene was dominated by a single party for a number of years after Independence. Problems which arose in the working of Union-State relations were mostly matters for adjustment in the intra-party forum and the Governor had very little occasion for using his discretionary powers. The institution of Governor remained largely latent. Events in Kerala in 1959 when President's rule was imposed, brought into some prominence the role of the Governor, but thereafter it did not attract much attention for some years. A major change occurred after the Fourth General Elections in 1967. In a number of States, the party in power was different from that in the Union. The subsequent decades saw the fragmentation of political parties and emergence of new regional parties frequent, sometimes unpredictable realignments of political parties and groups took place for the purpose of forming governments. These developments gave rise to chronic instability in several State Governments. As a consequence, the Governors were called upon to exercise their discretionary powers more frequently. The manner in which they exercised these functions has had a direct impact on Union- State relations. Points of friction between the Union and the States began to multiply.

4.1.02 The role of the Governor has come in for attack on the ground that some Governors have failed to display the qualities of impartiality and sagacity expected of them. It has been alleged that the Governors have not acted with necessary objectivity either in the manner of exercise of their discretion or in their role as a vital link between the Union and the States. Many have traced this mainly to the fact that the Governor is appointed by, and holds office during the pleasure of, the President, (in effect, the Union Council of Ministers). The part played by some Governors, particularly in recommending President's rule and in reserving States Bills for the consideration of the President, has evoked strong resentment. Frequent removals and transfers of Governors before the end of their tenure has lowered the prestige of this office. Criticism has also been levelled that the Union Government utilizes the Governor's for its own political ends. Many Governors, looking forward to further office under the Union or active role in politics after their tenure, came to regard themselves as agents of the Union. (Underlined for emphasis)

2. Historical background:

4.2.01 The Government of India Act, 1858 transferred the responsibility for administration of India from the East India Company to the British Crown. The Governor then became an agent of the Crown, functioning under the general supervision of the Governor-General. The Montagu-Chelmsford Reforms (1919) ushered in responsible Government, albeit in a rudimentary form. However, the Governor continued to be the pivot of the Provincial administration.

4.2.02 The Government of India Act, 1935 introduced provincial autonomy. The Governor was now required to act on the advice of Ministers responsible to the Legislature. Even so, it placed certain special responsibilities on the Governor, such as prevention of grave menace to the peace or tranquility of the Province, safeguarding the legitimate interests of minorities and so on. The Governor could also act in his discretion in specified matters. He functioned under the general superintendence and control of the Governor General, whenever he acted in his individual judgment or discretion.

4.2.03 In 1937 when the Government of India Act, 1935 came into force, the Congress party commanded a majority in six provincial legislatures. They foresaw certain difficulties in functioning under the new system which expected Ministers to accept, without demur, the censure implied, if the Governor exercised his individual judgment for the discharge of his special responsibilities. The

Congress Party agreed to assume office in these Provinces only after it received an assurance from the Viceroy that the Governors would not provoke a conflict with the elected Government.

4.2.04 Independence inevitably brought about a change in the role of the Governor. Until the Constitution came into force, the provisions of the Government of India Act, 1935 as adapted by the India (Provisional Constitution) Order, 1947 were applicable. This Order omitted the expressions 'in his discretion', 'acting in his discretion' and 'exercising his individual judgment', wherever they occurred in the Act. Whereas, earlier, certain functions were to be exercised by the Governor either in his discretion or in his individual judgment, the Adaptation Order made it incumbent on the Governor to exercise these as well as all other functions only on the advice of his Council of Ministers.

4.2.05 The framers of the Constitution accepted, in principle, the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. While the pattern of the two levels of government with demarcated powers remained broadly similar to the pre-independence arrangements, their roles and inter-relationships were given a major reorientation.

4.2.06 The Constituent Assembly discussed at length the various provisions relating to the Governor. Two important issues were considered. The first issue was whether there should be an elected Governor. It was recognized that the co-existence of an elected Governor and a Chief Minister responsible to the Legislature might lead to friction and consequent weakness in administration. The concept of an elected Governor was therefore given up in favour of a nominated Governor. Explaining in the Constituent Assembly why a Governor should be nominated by the President and not elected Jawaharlal Nehru observed that "an elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer common links with the Centre."

4.2.07 The second issue related to the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various Articles of the Draft Constitution relating to the exercise of specified functioned by the Governor 'in his discretion' were deleted. The only explicit provisions retained were those relating to Tribal Areas in Assam where the administration was made a Central responsibility. The Governor as agent of the Central Government during the transitional period could act independently of his Council of Ministers. Nonetheless, no change was made in Draft Article 143, which referred to the discretionary powers of the Governor. This provision in Draft Article 143 (now Article 163) generated considerable discussion. Replying to it, Dr. Ambedkar maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government.

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4.3.09 The Constitution contains certain provisions expressly providing for the Governor to Act:-

(A) in his discretion; or

(B) in his individual judgment; or

(C) independently of the State Council of Ministers; vis. (a)(i) Governors of all the States-Reservation for the consideration of the President of any Bill which, in the opinion of the Governor

would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Constitution designed to fill (Second Proviso to Article 200).

(ii) The Governors of Arunachal Pradesh, Assam, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura have been entrusted with some specific functions to be exercised by them in their discretion (vide Articles 371A, 371F and 371H and paragraph 9 of the Sixth Schedule). These have been dealt with in detail in Section 14 of this Chapter

(b) The Governors of Arunachal Pradesh and Nagaland have been entrusted with a special responsibility with respect to law and order in their respective States. In the discharge of this responsibility, they are required to exercise their "individual judgment" after consulting their Council of Ministers. This aspect also has been discussed in Section 14 of this Chapter.

(c) Governors as Administrator of Union TerritoryAny Governor, on being appointed by the President as the administrator of an adjoining Union Territory, has to exercise his functions as administrator, independently of the State Council of Ministers (Article 239(2). In fact, as administrator of the Union Territory, the Governor is in the position of an agent of the President.

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4.4.01 The three important facets of the Governor's role arising out of the Constitutional provisions, are:-

(a) as the constitutional head of the State operating normally under a system of Parliamentary democracy;

(b) as a vital link between the Union Government and the State Government;

And (C) As an agent of the Union Government in a few specific areas during normal times (e.g. Article 239(2) and in a number of areas during abnormal situations (e.g. article 356(1))

4.4.02 There is little controversy about) above. But the manner in which he has performed the dull role, as envisaged in (a) and (b) above, has attracted much criticism. The burden of the complaints against the behaviour of Governors, in general, is that they are unable to shed their political inclinations, predilections and prejudices while dealing with different political parties within the State. As a result, sometimes the decisions they take in their discretion appear as partisan and intended to promote the interests of the ruling party in the Union Government, particularly if the Governor was earlier in active politics or intends to enter politics at the end of his term. Such a behaviour, it is said, tends to impair the system of Parliamentary democracy, detracts from the autonomy of the States, and generates strain in Union State relations.

In the Report of the "National Commission To Review The Working Of The Constitution" the role of the Governor has been dealt with in the following words:

"The powers of the President in the matter of selection and appointment of Governors should not be diluted. However, the Governor of a State should be appointed by the President only after consultation with the Chief Minister of that State. Normally the five year term should be adhered to and removal or transfer should be by following a similar procedure as for appointment i.e. after

consultation with the Chief Minister of the concerned State.

(Para 8.14.2)

In the matter of selection of a Governor, the following matters mentioned in para 4.16.01 of Volume I of the Sarkaria Commission Report should be kept in mind:-

(i) He should be eminent in some walk of life.

(ii) He should be a person outside the State. (iii)He should be a detached figure and not too intimately connected with the local politics of the State; and

(iv) He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.

In selecting a Governor in accordance with the above criteria, persons, belonging to the minority groups continue to be given a chance as hitherto. (para 8.14.3)

There should be a time-limit-say a period of six months within which the Governor should take a decision whether to grant assent or to reserve a Bill for consideration of the President. If the Bill is reserved for consideration of the President, there should be a time-limit, say of three months, within which the President should take a decision whether to accord his assent or to direct the Governor to return it to the State Legislature or to seek the opinion of the Supreme Court regarding the constitutionality of the Act under Article 143. (Para 8.14.4.)

8.14.6 Suitable amendment should be made in the Constitution so that the assent given by the President should avail for all purposes of relevant articles of the Constitution. However, it is desirable that when a Bill is sent for the President's assent, it would be appropriate to draw the attention of the President to all the articles of the Constitution, which refer to the need for the assent of the President to avoid any doubts in court proceedings.

8.14.7 A suitable article should be inserted in the Constitution to the effect that an assent given by the President to an Act shall not be permitted to be argued as to whether it was given for one purpose or another. When the President gives his assent to the Bill, it shall be deemed to have been given for all purposes of the Constitution. 8.14.8 The following proviso may be added to Article 111 of the Constitution:

"Provided that when the President declares that he assents to the Bill, the assent shall be deemed to be a general assent for all purposes of the Constitution."

Suitable amendment may also be made in Article 200.

Article 356 should not be deleted. But it must be used sparingly and only as a remedy of the last resort and after exhausting action under other articles like 256, 257 and 355.

(Paras 8.18 and 8.19.2)

8.16-Use-Misuse of Article 356

"Since the coming into force of the Constitution on 26th January, 1950, Article 356 and analogous provisions have been invoked 111 times. According to a Lok Sabha Secretariat study, on 13 occasions the analogous provision namely Section 51 of the Government of Union Territories Act, 1963 was applied to Union Territories of which only Pondicherry had a legislative assembly until the occasion when it was last applied. In the remaining 98 instances the Article was applied 10 times technically due to the mechanics of the Constitution in circumstances like re-organisation of the States, delay in completion of the process of elections, for revision of proclamation and there being no party with clear majority at the end of an election. In the remaining 88 instances a close scrutiny of records would show that in as many as 54 cases there were apparent circumstances to warrant invocation of Article 356. These were instances of large scale defections leading to reduction of the ruling party into minority, withdrawal of support of coalition partners, voluntary resignation by the government in view of widespread agitations, large scale militancy, judicial disqualification of some members of the ruling party causing loss of majority in the House and there being no alternate party capable of forming a Government. About 13 cases of possible misuse are such in which defections and dissensions could have been alleged to be result of political manoeuvre or cases in which floor tests could have finally proved loss of support but were not resorted to. In 18 cases common perception is that of clear misuse. These involved the dismissal of 9 State Governments in April 1977 and an equal number in February 1980. This analysis shows that number of cases of imposition of President's Rule out of 111, which could be considered as a mis-use for dealing with political problems or considerations irrelevant for the purposes in that Article such as mal-administration in the State are a little over 20. Clearly in many cases including those arising out of States Re-organisation it would appear that the President's Rule was inevitable. However, in view of the fact that Article 356 represents a giant instrument of constitutional control of one tier of the constitutional structure over the other raises strong misapprehensions.

8.17- Sarkaria Commission- Chapter 6 of the Sarkaria Commission Report deals with emergency provisions, namely, Articles 352 to 360. The Sarkaria Commission has made 12 recommendations; 11 of which are related to Article 356 while 1 is related to Article 355 of the Constitution. Sarkaria Commission also made specific recommendations for amendment of the Constitution with a view to protecting the States from what could be perceived as a politically driven interference in self-governance of States. The underlined theme of the recommendations is to promote a constitutional structure and culture that promotes co-operative and sustained growth of federal institutions set down by the Constitution.

8.19. Need for conventions-

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8.19.5- In case of political breakdown, the Commission recommends that before issuing a proclamation under Article 356 the concerned State should be given an opportunity to explain its position and redress 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, or for other reasons necessitating urgent action.

8.20. Situation of Political breakdown

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8.20.3 The Commission recommends that the question 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 Union Government should take the required steps, to enable the Legislative Assembly to meet and freely transact its business. The Governor should not be allowed to dismiss the Ministry, so long as it enjoys the confidence of the House. It is only where a Chief Minister refuses to resign, after his Ministry is defeated on a motion of no-confidence, that the Governor can dismiss the State Government. 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 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.

8.20.4 The problem of political breakdown would stand largely resolved if the recommendations made in para 4.20.7 in Chapter 4 in regard to the election of the leader of the House (Chief Minister) and the removal of the Government only by a constructive vote of no-confidence are accepted and implemented.

8.20.5. Normally President's Rule in a State should be proclaimed on the basis of Governor's Report under article 356(1). The Governor's 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.

8.21. Constitutional Amendments

8.21.1- Article 356 has been amended 10 times principally by way of amendment of clause 356(4) and by substitution/omission of proviso to Article 356(5). These were basically procedural changes. Article 356, as amended by Constitution (44th Amendment) provides that a resolution with respect to the continuance in force of a proclamation for any period beyond one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless two conditions are satisfied, viz:-

(i) that a proclamation of Emergency is in operation in the whole of India or as the case may be, in the whole or any part of the State; and

(ii) that the Election Commission certifies that the continuance in force of the proclamation during the extended period is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

8.21.2 The fulfillment of these two conditions together are a requirement precedent to the continuation of the proclamation. It could give rise to occasions for amendment of the Constitution from time to time merely for the purpose of this clause as happened in case of Punjab.

Circumstances may arise where even without the proclamation of Emergency under Article 352, it may be difficult to hold general elections to the State Assembly. In such a situation continuation of President's Rule may become necessary. It may, therefore, be more practicable to delink the two

conditions allowing for operation of each condition in its own specific circumstances for continuation of the President's Rule. This would allow for flexibility and save the Constitution from the need to amend it from time to time.

8.21.3. The Commission recommends that in clause (5) of Article 356 of the Constitution, in sub-clause (a) the word "and" occurring at the end should be substituted by "or" so that even without the State being under a proclamation of Emergency, President's rule may be continued if elections cannot be held.

8.21.4 Whenever a proclamation under Article 356 has been issued and approved by the Parliament it may become necessary to review the continuance in force of the proclamation and to restore the democratic processes earlier than the expiry of the stipulated period. The Commission are of the view that this could be secured by incorporating safeguards corresponding, in principal, to clauses (7) and (8) of Article 352. The Commission, therefore, recommends that clauses (6) and (7) under Article 356 may be added on the following lines: "(6) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a proclamation issued under clause (1) or a proclamation varying such proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such proclamation. (7) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a proclamation issued under clause (1) or a proclamation varying such proclamation:

(a) to the Speaker, if the House is in session; or

(b) to the President, if the House is not in session, a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution."

8.22- Dissolution of Assembly

8.22.1- When it is decided to issue a proclamation under Article 356(1), a matter for consideration that arises is whether the Legislative Assembly should also be dissolved or not. Article 356 does not explicitly provide for dissolution of the Assembly. One opinion is that if till expiry of two months from the Presidential Proclamation and on the approval received from both Houses of Parliament the Legislative Assembly is not dissolved, it would give rise to operational disharmony. Since the executive power of the Union or State is co-extensive with their legislative powers respectively, bicameral operations of the legislative and executive powers, both of the State Legislature and Parliament in List II of VII Schedule, is an anathema to the democratic principle and the constitutional scheme. However, the majority opinion in the Bommai judgment holds that the rationale of clause (3) that every proclamation issued under Article 356 shall be laid before both Houses of Parliament and shall cease to operate at the expiry of two months unless before the expiration of that period it has been approved by resolutions passed by both Houses of Parliament, is to provide a salutary check on the executive power entrenching parliamentary supremacy over the executive.

8.22.2 The Commission having considered these two opinions in the background of repeated criticism of arbitrary use of Article 356 by the executive, is of the view that the check provided

under clause 3 of Article 356 would be ineffective by an irreversible decision before Parliament has had an opportunity to consider it. The power of dissolution has been inferred by reading sub-clause (a) of clause I of Article 356 along with Article 174 which empowers the Governor to dissolve Legislative Assembly. Having regard to the overall constitutional scheme it would be necessary to secure the exercise of consideration of the proclamation by the Parliament before the Assembly is dissolved.

8.22.3 The Commission, therefore, recommends that Article 356 should be amended to ensure that 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 as had an opportunity to consider it.

It would also be appropriate to take note of very enlightening discussions in the Constituent Assembly which throw beacon light on the role of Governors, parameters of powers exercisable under Articles 174 and 356 of the Constitution.

Constituent Assembly met on Ist June, 1949 Article 143 (Amendment Nos. 2155 and 2156 were not moved) H. V. Kamath (C.P. & Berar: General): Mr. President, Sir, I move:

"That in clause (1) of Article 143, the words 'except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion' be deleted." If this amendment were accepted by the House, this clause of Article 143 would read thus :- "There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the President in the exercise of his functions." Sir, it appears from a reading of this clause that the Government of India Act of 1935 has been copied more or less blindly without mature consideration. There is no strong or valid reason for giving the Governor more authority either in his discretion or otherwise vis-a-vis his ministers, than has been given to the President in relation to his ministers. If we turn to Article 61 (1), we find it reads as follows :-

"There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions." When you, Sir, raised a very important issue, the other day, Dr. Ambedkar clarified this clause by saying that the President is bound to accept the advice of his ministers in the exercise of all of his functions. But here Article 143 vests certain discretionary powers in the Governor, and to me it seems that even as it was, it was bad enough, but now after having amended Article 131 regarding election of the Governor and accepted nominated Governors, it would be wrong in principle and contrary to the tenets and principles of constitutional Government, which you are going to build up in this country. It would be wrong I say, to invest a Governor with these additional powers, namely, discretionary powers. I feel that no departure from the principles of constitutional Government should be favoured except for reasons of emergency and these discretionary powers must be done away with. I hope this amendment of mine will commend itself to the House. I move, Sir. Prof. K. T. Shah (Bihar: General) : Mr. President, I beg to move:

"That in clause (1) of Article 143, after the word 'head a comma be placed and the words 'who shall be responsible to the Governor and shall' be inserted and the word to' be deleted." So, that the amended Article would read. "(1) There shall be a Council of Ministers with the Chief Minister at the head who shall be responsible to the Governor and shall aid and advise the Governor in the exercise of his functions .....etc."

Sir, this is a logical consequence of the general principle of this Draft Constitution, namely, that the Government is to be upon the collective responsibility of the entire Cabinet to the legislature. At the same time, in the Cabinet the Prime Minister or the Chief Minister or by whatever title he is described would be the Principal Adviser and I would like to fix the responsibility definitely by the Constitution on the Chief Minister, the individual Ministers not being in the same position. Whatever may be the procedure or convention within the Cabinet itself, however the decisions of the Cabinet may be taken, so far as the Governor is concerned, I take it that the responsibility would be of the Chief Minister who will advise also about the appointment of his colleagues or their removal if it should be necessary. It is but in the fitness of things that he should be made directly responsible for any advice tendered to the Constitutional head of the State, namely, the Governor. As it is, in my opinion, a clear corollary from the principles we have so far accepted, I hope there would be no objection to this amendment.

(Amendments Nos. 2159 to 2163 were not moved.) Mr. President: There is no other amendment. The Article and the amendments are open to discussion. Shri T. T. Krishnamachari : Mr. President, I am afraid I will have to oppose the amendment moved by my honourable Friend Mr. Kamath, only for the reason that he has not understood the scope of the clearly and his amendment arises out of a misapprehension. Sir, it is no doubt true, that certain words from this Article may be removed, namely, those which refer to the exercise by the Governor of his functions where he has to use his discretion irrespective of the advice tendered by his Ministers. Actually, I think this is more by way of a safeguard, because there are specific provisions in this Draft Constitution which occur subsequently where the Governor is empowered to act in his discretion irrespective of the advice tendered by his Council of Ministers. There are two ways of formulating the idea underlying it. One is to make a mention of this exception in this Article 143 and enumerating the specific power of the Governor where he can exercise his discretion in the s that occur subsequently, or to leave out any mention of this power here and only state is in the appropriate . The former method has been followed. Here the general proposition is stated that the Governor has normally to act on the advice of his Ministers except in so far as the exercise of his discretions covered by those in the Constitution in which he is specifically empowered to act in his discretion. So long as there are Articles occurring subsequently in the Constitution where he is asked to act in his discretion, which completely cover all cases of departure from the normal practice to which I see my honourable Friend Mr. Kamath has no objection, I may refer to Article 188, I see no harm in the provision in this Article being as it is. It happens that this House decides that in all the subsequent Articles, the discretionary power should not be there, as it may conceivably do, this particular provision will be of no use and will fall into desuetude. The point that my honourable Friend is trying to make, while he concedes that the discretionary power of the Governor can be given under Article 188, seems to be pointless. If it is to be given in Article 188, there is no harm in the mention of it remaining here. No harm can arise by specific mention of this exception of Article 143. Therefore, the serious objection that Mr. Kamath finds for mention of this exception is pointless. I therefore think that the Article had better be passed without any amendment. If it is necessary for the House either to limit the discretionary power of the Governor or completely do away with it, it could be done in the Articles that occur subsequently where specific mention is made without which this power that is mentioned here cannot at all be exercised. That is the point I would like to draw the attention of the House to and I think the Article had better be passed as it is.

Dr. P. S. Deshmukh (C. P. & Berar: General): Mr. President, Mr. T. T. Krishnamachari has clarified the position with regard to this exception which has been added to clause (1) of Article 143. If the Governor is, in fact, going to have a discretionary power, then it is necessary that this clause which

Mr. Kamath seeks to omit must remain.

Sir, Besides this, I do not know if the Drafting Committee has deliberately omitted or they are going to provide it at a later stage, and I would like to ask Dr. Ambedkar whether it is not necessary to provide for the Governor to preside at the meetings of the Council of Ministers. I do not find any provision here to this effect. Since this Article 143 is a mere reproduction of section 50 of the Government of India Act, 1935, where this provision does exist that the Governor in his discretion may preside at the meetings of the Council of Minister, I think this power is very necessary. Otherwise, the Ministers may exclude the Governor from any meetings whatever and this power unless specifically provided for, would not be available to the Governor. I would like to draw the attention of the members of the Drafting Committee to this and to see if it is possible either to accept an amendment to Article 143 by leaving it over or by making this provision in some other part. I think this power of the Governor to preside over the meetings of the Cabinet is an essential one and ought to be provided for. Shri Brajeshwar Prasad: Mr. President, Sir, the Article provides

"That there shall be a Council of Minister with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions".

Sir, I am not a constitutional lawyer but I feel that by the Provisions of this Article the Governor is not bound to act according to the advice tendered to him by his Council of Ministers. It only means that the Ministers have the right to tender advice to Governor. The Governor is quite free to accept or to reject the advice so tendered. In another sphere of administration the Governor can act in the exercise of his functions in his discretion. In this sphere the Ministry has not got the power to tender any advice. Of course it is left open to the Governor to seed the advice of the Ministers even in this sphere. I feel that we have not taken into account the present facts of the situation. We have tried to copy and imitate the constitutions of the different countries of the world. The necessity of the hour requires that the Governor should be vested not only with the power to act in his discretion but also with the power to act in his individual judgment. I feel that the Governor should be vested with the power of special responsibilities which the Governor under the British regime were vested in this country. I feel that there is a dearth of leadership in the provinces. Competent men are not available and there are all kinds of things going on in the various provinces. Unless the Governor is vested with large powers it will be difficult to effect any improvement in the Provincial administration. Such a procedure may be undemocratic but such a procedure will be perfectly right in the interest of the country. I feel there is no creative energy left in the middle class intelligentsia of this country. They seem to have become bereft of initiative and enterprise. The masses who ought to be the rulers of this land are down- trodden and exploited in all ways. Under these circumstances there is no way left open but for the Government of India to take the Provincial administrations in its own hands. I feel that we are on the threshold of a revolution in this country. There will be revolution, bloodshed and anarchy in this country. I feel that at this juncture it is necessary that all powers should remain centralised in the hands of the Government of India. In certain provinces the machinery of law and order seems to have completely broken down. Dacoities, arson, loot, murder and inflationary conditions are rampant. I am opposed to this Article, because I am convinced that federalism cannot succeed in a country which is passing through a transitory period. The national economy of America is fully developed. It can afford to have a federal form of Government. In a country where there is no room for expansion and for economic development, there is no necessity for a centralised economy. In India when our agriculture, industry, minerals etc. are in an incipient stage of development, it is necessary that power must be vested in the hands of the Government of India. Federalism was in vogue in the 19th century when the means of communications were undeveloped.

The technical knowledge and resources at the disposal of Governments in ancient times were of a very meager character. Today the situation has completely changed. Means of communications have developed rapidly. Technical knowledge and the necessary personnel at the disposal of the Government of India are of such a wide character that it can undertake to perform all the functions which a modern Government is expected to perform. There is another reason why I am opposed to this Article. In this country there is no scope for federalism. All governments have become more or less unitary in character. If we are to escape political debacles, economic strangulation and military defeats on all fronts, then our leaders and statesmen must learn to think in unorthodox terms: otherwise there is no future for this country.

Pandit Hirday Kunzru: (United Provinces: General): Mr. President, I should like to ask Dr. Ambedkar whether it is necessary to retain after the words "that the Governor will be aided and advised by his Ministers", the words "except in regard to certain matter in respect of which he is to exercise his discretion". Supposing these words, which are reminiscent of the old Government of India Act and the old order, are omitted, what harm will be done? The functions of the Ministers legally will be only to aid and advice the Governor. The Article in which these words occur does not lay down that the Governor shall be guided by the advice of his Ministers but it is expected that in accordance with the Constitutional practice prevailing in all countries where responsible Government exists the Governor will in all matters accept the advice of his Ministers. This does not however mean that where the Statute clearly lays down that action in regard to specified matters may be taken by him on his own authority this Article 143 will stand in his way. My Friend Mr. T. T. Krishnamachari said that as Article 188 of the Constitution empowered the Governor to disregard the advice of his Ministers and to take the administration of the province into his own hands, it was necessary that these words should be retained, i.e. the, discretionary power of the Governor should be retained. If however, he assured us, Article 188 was deleted later, the wording of Article 143 could be reconsidered. I fully understand this position and appreciate it, but I should like the words that have been objected to by my Friend Mr. Kamath to be deleted. I do not personally think that any harm will be done if they are not retained and we can then consider not merely Article 188 but also Article 175 on their merits; but in spite of the assurance of Mr. Krishnamachari the retention of the words objected to does psychologically create the impression that the House is being asked by the Drafting Committee to commit itself in a way to a principle that it might be found undesirable to accept later on. I shall say nothing with regard to the merits of Article 188. I have already briefly expressed my own views regarding it and shall have an opportunity of discussing it fully later when that Article is considered by the House. But why should we, to being with, use a phraseology that it an unpleasant reminder of the old order and that makes us feel that though it may be possible later to reverse any decision that the House may come to now, it may for all practical purposes be regarded as an accomplished fact? I think Sir, for these reasons that it will be better to accept the amendment of my honourable Friend Mr. Kamath, and then to discuss Articles 157 and 188 on their merits. I should like to say one word more before I close. If Article 143 is passed in its present form, it may give rise to misapprehensions of the kind that my honourable Friend Dr, Deshmukh seemed to be labouring under when he asked that a provision should be inserted entitling the Governor to preside over the meetings of the Council of Ministers. The Draft Constitution does not provide for this and I think wisely does not provide for this. It would be contrary to the traditions of responsible government as they have been established in Great British and the British Dominions, that the Governor or the Governor-General should, as a matter of right, preside over the meetings of his cabinet. All that the Draft Constitution does is to lay on the Chief Ministers the duty of informing the Governor of the decisions come to by the Council of Ministers in regard to administrative matter and the legislative programme of the government. In spite of this, we see that

the Article 143, as it is worded, has created a misunderstanding in the mind of a member like Dr. Deshmukh who takes pains to follow every of the Constitution with care. This is an additional reason why the discretionary power of the Governor should not be referred to in Article 143. The speech of my friend Mr. Krishnamachari does not hold out the hope that the suggestion that I have made has any chance of being accepted. Nevertheless, I feel it my duty to say that the course proposed by Mr. Kamath is better than what the Drafting Sub-Committee seem to approve. Prof. Shibban Lal Saksena (United Provinces: General): Mr. President, Sir, I heard very carefully the speech of my honourable Friend, Mr. krishnamachari, and his arguments for the retention of the words which Mr. Kamath wants to omit. If the Governor were an elected Governor, I could have understood that he should have these discretionary powers. But now we are having nominated Governors who will function during the pleasure of the President, and I do not think such persons should be given powers which are contemplated in Article 188.

Then, if Article 188 is yet to be discussed--and it may well be rejected--then it is not proper to give these powers in this Article beforehand. If Article 188 is passed, then we may reconsider this Article and add this clause if it is necessary. We must not anticipate that we shall pass Article 188, after all that has been said in the House about the powers of the Governor.

These words are a reminder of the humiliating past. I am afraid that if these words are retained, some Governor may try to imitate the Governors of the past and quote them as precedents, that this is how the Governor on such an occasion acted in his discretion. I think in our Constitution as we are now framing it, these powers of the Governors are out of place; and no less a person than the honourable Pandit Govind Ballabh Pant had given notice of the amendment which Mr. Kamath has moved. I think the wisdom of Pandit Pant should be sufficient, guarantee that this amendment be accepted. It is just possible that Article 188 may not be passed by this House. If there is an emergency, the Premier of the province himself will come forward to request the Governor that an emergency should be declared, and the aid of the Centre should be obtained to meet the emergency. Why should the Governor declare an emergency over the head of the Premier of the Province? We should see that the Premier and the Governor of a Province are not at logger heads on such an occasion. A situation should not be allowed to arise when the Premier says that he must carry on the Government, and yet the Governor declares an emergency over his head and in spite of his protestations. This will make the Premier absolutely impotent. I think a mischievous Governor may even try to create such a situation if he so decides, or if the President wants him to do so in a province when a party opposite to that in power at the Centre is in power. I think Article 188, even if it is to be retained should be so modified that the emergency should be declared by the Governor on the advice of the Premier of the province. I suggest to Dr. Ambedkar that these words should not find a place in this Article, and as a consequential amendment, sub-section (ii) of this Article should also be deleted.

Shri Mahavir Tyagi (United Provinces: General): Sir, I beg to differ from my honourable radical Friends Mr. Kamath and Prof. Shibban Lal Saksena, and I think the more powers are given to the provinces, the stiffer must be the guardianship and control of the Centre in the exercise of those powers. That is my view. We have now given up the Centre, and we are going to have nominated Governors. Those Governors are not to be there for nothing. After all, we have to see that the policy of the Centre is carried out. We have to keep the States linked together and the Governor is the Agent or rather he is the agency which will press for and guard the Central policy. In fact, our previous conception has now been changed altogether. The whole body politic of a country is affected and influenced by the policy of the Centre. Take for instance subjects like Defence

involving questions of peace or war, of relationship with foreign countries; of our commercial relations, exports and imports. All these are subjects which affect the whole body politic, and the provinces cannot remain unaffected, they cannot be left free of the policy of the Centre. The policy which is evoked in the Centre should be followed by all the States, and if the Governors were to be in the hands of the provincial Ministers then there will be various policies in various provinces and the policy of each province shall be as unstable as the ministry. For there would be ministers of various types having different party labels and different programmes to follow. Their policies must differ from one another; it will therefore be all the more necessary that there must be coordination of programmes and policies between the States and the Central Government. The Governor being the agency of the Centre is the only guarantee to integrate the various Provinces or States. The Central Government also expresses itself through the provincial States; along with their own administration, they have also to function on behalf of the Central Government. A Governor shall act as the agency of the Centre and will see that the Central policy is sincerely carried out. Therefore the Governor's discretionary powers should not be interfered with. Democratic trends are like a wild beast. Say what you will, democracy goes by the whims and fancies of parties and the masses. There must be some such machinery which will keep this wild beast under control. I do not deprecate democracy. Democracy must have its way. But do not let it degenerate into chaos. Moreover the State governments may not be quite consistent in their own policies. Governments may change after months or years; with them will change their policies. The Governors may change too, but the policy and instructions given by the Centre to the Governors will remain practically unchanged. The more the powers given to the States the more vigilant must be the control. The Governor must remain as the guardian of the Central policy on the one side, and the Constitution on the other. His powers therefore should not be interfered with. Shri B. M. Gupta (Bombay: General): Sir, I think the explanation given by my honourable Friend Mr. T. T. Krishnamachari Should be accepted by the House and the words concerning discretion of the Governor should be allowed to stand till we dispose of Article 175 and Article 188.

With regard to the suggestion made by the honourable Dr. Deshmukh about the power being given to the Governor to preside over the meetings of the cabinet I have to oppose it. He enquired whether the Drafting Committee intended to make that provision later on. I do not know the intentions of the Drafting Committee for the future but as far as the Draft before us is concerned I think the Drafting Committee has definitely rejected it. I would invite the attention of the honourable House to Article 147 under which the Governor shall be entitled only to information. If we allow him to preside over the meetings of the Cabinet we would be departing from the position we want to give him, namely that of a constitutional head. If he presides over the meeting of the Cabinet be shall have an effective voice in shaping the decisions of the Cabinet in the entire field of administration, even in fields which are not reserved for his discretionary power. If certain powers have to be given to him, our endeavour should be to restrict them as far as possible, so that the Governor's position as a constitutional head may be maintained. Therefore, Sir, I oppose the proposal of Dr. Deshmukh.

Shri Alladi Krishnaswami Ayyar (Madras: General): Sir, there is really no difference between those who oppose and those who approve the amendment. In the first place, the general principle is laid down in Article 143 namely, the principle of ministerial responsibility, that the Governor in the various spheres of executive activity should act on the advice of his ministers. Then the Article goes on to provide "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." So long as there are Articles in the Constitution which enable the Governor to act in his discretion and in certain circumstances, it may be, to over-ride the cabinet or to refer to the President, this Article as it is framed is perfectly in order. If later on the

House comes to the conclusion that those Articles which enable the Governor to act in his discretion in specific cases should be deleted, it will be open to revise this Article. But so long as there are later Articles which permit the Governor to act in his discretion and not on ministerial responsibility, the Article as drafted is perfectly in order.

The only other question is whether first to make a provision in Article 143 that the Governor shall act on ministerial responsibility and then to go on providing "Notwithstanding anything contained in Article 143.....he can do this" or "Notwithstanding anything contained in Article 143 he can act in his discretion." I should think it is a much better method of drafting to provide in Article 143 itself that the Governor shall always act on ministerial responsibility excepting in particular or specific cases where he is empowered to act in his discretion. If of course the House comes to the conclusion that in no case shall the Governor act in his discretion, that he shall in every case act only on ministerial responsibility, then there will be a consequential change in this Article. That is, after those Articles are considered and passed it will be quite open to the House to delete the latter part of Article 143 as being consequential on the decision come to by the House on the later Articles. But, as it is, this is perfectly, in order and I do not think any change is warranted in the language of Article 143. It will be cumbrous to say at the opening of each "Notwithstanding anything contained in Article 143 the Governor can act on his own responsibility".

Shri H. V. Kamath: Sir, on a point of clarification, Sir, I know why it is that though emergency powers have been conferred on the President by the Constitution no less than on Governors, perhaps more so, discretionary power as such have not been vested in the President but only in Governors?

Pandit Thakur Das Bhargava (East Punjab: General): Sir, I beg to oppose the amendment of Mr. Kamath. Under Article 143 the Governor shall be aided in the exercise of his functions by a Council of Ministers. It is clear so far. I gave notice of an amendment which appears on the order paper as Article 142-A which I have not moved. In the amendment I have suggested that the Governor will be bound to accept the advice of his ministers on all matters except those which are under this Constitution required to be exercised by him in his discretion. My submission in that it is wrong to say that the Governor shall be a dummy or an automaton. As a matter of fact according to me the Governor shall exercise very wide powers and very significant powers too. If we look at Article 144 it says: "The Governor's ministers shall be appointed by him and shall hold office during his pleasure."

So he has the power to appoint his ministers. But when the ministers are not in existence who shall advise him in the discharge of his functions? When he dismisses his ministry then also he will exercise his functions under his own discretion.

Then again, when the Governor calls upon the leader of a party for the choice of ministers, after a previous ministry has been dissolved, in that case there will be no ministry in existence; and who will be there to advise him? Therefore he will be exercising his functions in his discretion. It is wrong to assume that the Governor will not be charged with any functions which he will exercise in his discretion. Articles 175 and 188 are the other Articles which give him certain functions which he has to exercise in his discretion.

Under Article 144 (4) there is a mention of the Instrument of Instructions which is given in the Fourth Schedule. The last paragraph of it runs thus: "The Governor shall do all that in him lies to maintain standards of good administration, to promote all measures making for moral, social and

economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the state, and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religions beliefs and sentiments." My submission is that according to me the Governor shall be a guide, philosopher and friend of the Ministry as well as the people in general, so that he will exercise certain functions some of which will be in the nature of unwritten conventions and some will be such as will be expressly conferred by this Constitutions. He will be a man above party and he will look at the Minister and government from a detached standpoint. He will be able to influence the ministers and members of the legislature in such a manner that the administration will run smoothly. In fact to say that a person like him is merely a dummy, an automaton or a dignitary without powers is perfectly wrong. It is quite right that so far as our conception of a constitutional governor goes he will have to accept the advice of his ministers in many matters but there are many other matters in which the advice will neither be available nor will he be bound to accept that advice.

(underlined for emphasis)

Under Article 147 the Governor has power for calling for information and part (c) says: This will be the duty of the Chief Minister.

"If the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

This is specifically a matter which is of great importance. The Governor is competent to ask the Chief Minister to place any matter before the Council of Ministers which one minister might have decided. When he calls for information he will be acting in the exercise of his discretion. He may call for any kind of information. With this power he will be able to control and restrain the ministry from doing irresponsible acts. In my opinion taking the Governor as he is conceived to be under the Constitution he will exercise very important functions and therefore it is very necessary to retain the words relating to his discretion in Article 143. Shri H. V. Pataskar (Bombay: General): Sir, Article 143 is perfectly clear. With regard to the amendment of my honourable Friend Mr. Kamath various points were raised, whether the Governor is to be merely a figure- head, whether he is to be a constitutional head only or whether he is to have discretionary powers. To my mind the question should be looked at from and entirely different point of view. Article 143 merely relates to the functions of the ministers. It does not primarily relate to the power and functions of a Governor. It only says: "There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions." Granting that we stop there, is it likely that any complications will arise or that it will interfere with the discretionary powers which are proposed to be given to the Governor? In my view Article 188 is probably necessary and I do not mean to suggest for a moment that the Governor's powers to act in an emergency which powers are given under Article 188, should not be there. My point is this, whether if this Provision, viz., "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion", is not there, is it going to affect the powers that are going to be given to him to act in his discretion under Article 188? I have carefully listened to my honourable Friend and respected constitutional lawyer. Mr. Alladi Krishnaswami Ayyer, but I was not able to follow why a provision like this is necessary. He said that instead later on, while considering Article 188, we might have to say "Notwithstanding anything contained in Article 143." In the first place to my mind it is not necessary. In the next place, even granting that it becomes necessary at a later stage to

make provision on Article 188 by saying "notwithstanding anything contained in Article 143", it looks so obnoxious to keep these words here and they are likely to enable certain people to create a sort of unnecessary and unwarranted prejudice against certain people. Article 143 primarily relates to the functions of the ministers. Why is it necessary at this stage to remind the ministers of the powers of the Governor and his functions, by telling them that they shall not give any aid or advice in so far as he, the Governor is required to act in his discretion? This is an Article which is intended to define the powers and functions of the Chief Minister. At that point to suggest this, looks like lacking in courtesy and politeness. Therefore I think the question should be considered in that way. The question is not whether we are going to give discretionary power to the Governors or not. The question is not whether he is to be merely a figure-head or otherwise. These are question to be debated at their proper time and place. When we are considering Article 143 which defines the function of the Chief minister it looks so awkward and unnecessary to say in the same "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." Though I entirely agree that Article 188 is absolutely necessary I suggest that in this Article 143 these words are entirely unnecessary and should not be there. Looked at from a practical point of view this provision is misplaced and it is not courteous, nor polite, nor justified nor relevant. I therefore suggest that nothing would be lost by deleting these words. I do not know whether my suggestion would be acceptable but I think it is worth being considered from a higher point of view.

Shri Krishna Chandra Sharma (United Provinces: General): Sir, the position is that under Article 41 the executive powers of the Union are vested in the President and these may be exercised by him in accordance with the Constitution and the law. Now, the President of the Union is responsible for the maintenance of law and order and for good Government. The Cabinet of the State is responsible to the people through the majority in the Legislature. Now, what is the link between the President and the State? The link is the Governor. Therefore through the Governor alone the President can discharge his functions for the good Government of the country. In abnormal circumstances it is the Governor who can have recourse to the emergency powers under Article 188. Therefore the power to act in his discretion under Article 143 ipso facto follows and Article 188 is necessary and cannot be done away with. Therefore certain emergency powers such as under Article 188 are necessary for the Governor to discharge his function of maintaining law and order and to carry on the orderly government of the State.

I wish to say word more with regard to Professor Shah's amendment that the Minister shall be responsible to the Governor. The Minister has a majority in the legislature and as such, through the majority, he is responsible to the people. If he is responsible to the Governor, as distinguished from his responsibility to the Legislature and through the legislature to the people of the State, then he can be overthrown by the majority in the legislature and he cannot maintain his position. He cannot hold the office. Therefore it is an impossible proposition that a Minister could ever be responsible to the Governor as distinguished from his responsibility to the people through the majority in the legislature. He should therefore be responsible to the Legislature and the people and not to the President. That is the only way in which under the scheme in the Draft Constitution the government of the country can he carried on. (underlined for emphasis)

Shri Rohini Kumar Chaudhari: (Assam: General): I rise to speak more in quest of clarification and enlightenment than out of any ambition to make a valuable contribution to this debate.

Sir, one point which largely influenced this House in accepting the Article which provided for

having nominated Governors was that the Honourable Dr. Ambedkar was pleased to assure us that the Governor would be merely a symbol. I ask the honourable Dr. Ambedkar now, whether any person who has the right to act in his discretion can be said to be a mere symbol. I am told that this provision for nominated governorship was made on the model of the British Constitution. I would like to ask Dr. Ambedkar if His Majesty the king of English acts in his discretions in any matter. I am told--I may perhaps be wrong--that His Majesty has no discretion even in the matter of the selection of his bride. That is always done for him by the Prime Minister of England.

Sir, I know to my cost and to the cost of my Province what 'acting by the Governor in the exercise of his discretion' means. It was in the year 1942 that a Governor acting in his discretion selected his Ministry from a minority party and that minority was ultimately converted into a majority. I know also, and the House will remember too, that the exercise of his discretion by the Governor of the Province of Sindh led to the dismissal of one of the popular Ministers-- Mr. Allah Bux. Sir, if in spite of this experience of ours we are asked to clothe the Governors with the powers to act in the exercise of their discretion, I am afraid we are still living in the past which we all wanted to forget.

We have always thought that it is better to be governed by the will of the people than to be governed by the will of a single person who nominates the Governor who could act in his discretion. If this Governor is given the power to act in his discretion there is no power on earth to prevent him from doing so. He can be a veritable king Stork. Furthermore, as the Article says, whenever the Governor thinks that he is acting in his discretion nowhere can he be questioned. There may be a dispute between the Ministers and the Governor about the competence of the former to advise the Governor; the Governor's voice would prevail and the voice of the Ministers would count for nothing. Should we in this age countenance such a state of affairs? Should we take more then a minute to dismiss the idea of having a Governor acting in the exercise of his discretion? It may be said that this matter may be considered hereafter. But I feel that when once we agree to this provision, it would not take long for us to realise that we have made a mistake. Why should that be so? Is there any room for doubt in this matter? Is there any room for thinking that anyone in this country, not to speak of the members of the legislature, will ever countenance the idea of giving the power to the Governor nominated by a single person to act in the exercise of his discretion? I would submit, Sir, if my premise is correct, we should not waste a single moment in discarding the provisions which empower the Governor to act in his discretion.

(underlined for emphasis)

I also find in the last clause of this Article that the question as to what advice was given by a Minister should not be enquired into in any court. I only want to make myself clear on this point. There are two functions to be discharged by a Governor. In one case he has to act on the advice of the Minister and in the other case he has to act in the exercise of his discretion. Will the Ministry be competent to advise the Governor in matters where he can exercise his discretion? If I remember a right, in 1937 when there was a controversy over this matter whether Ministers would be competent to advise the Governor in matters where the Governor could use his discretion, it was understood that Ministers would be competent to advise the Governor in the exercise of his discretion also and if the Governor did not accept their advice, the Ministers were at liberty to say what advice they gave. I do not know that is the intention at present. There may be cases where the Ministers are competent to give advice to the Governor but the Governor does not accept their advice and does something which is unpopular. A Governor who is nominated by the Centre can afford to be unpopular in the province where he is acting as Governor. He may be nervous about public opinion

if he serves in his own province but he may not care about the public opinion in a province where he is only acting. Suppose a Governor, instead of acting on the advice of his Minister, acts in a different way. If the Minister are criticised for anything the Governor does on his own, and the Ministers want to prosecute a party for such criticism, would not the Ministers have the right to say that they advised the Governor to act in a certain way but that the Governor acted in a different way? Why should we not allow the Ministers the liberty to prosecute a paper, a scurrilous paper, a misinformed paper, which indulged in such criticism of the Ministers? Why should not the Ministers be allowed to say before a court what advice they gave to the Governor? I would say, Sir--and I may be excused for saying so-- that the best that can be said in favour of this Article is that it is a close imitation of a similar provision in the Government of India Act, 1935, which many Members of this House said, when is was published, that they would not touch even with a pair of tongs.

(underlined for emphasis)

The Honourable Dr. B. R. Ambedkar : Mr. President, Sir, I did not think that it would have been necessary for me to speak and take part in this debate after what my Friend, Mr. T. T. Krishnamachari, had said on this amendment of Mr. Kamath, but as my Friend, Pandit Kunzru, pointedly asked me the question and demanded a reply, I thought that out of courtesy I should say a few words. Sir, the main and the crucial question is, should the Governor have discretionary powers? It is that question which is the main and the principal question. After we come to some decision on this question, the other question whether the words used in the last part of clause (1) of Article 143 should be retained in that Article or should be transferred somewhere else could be usefully considered. The first thing, therefore, that I propose to do so is to devote myself of this question which, as I said, is the crucial question. It has been said in the course of the debate that the retention of discretionary power in the Governor is contrary to responsible government in the provinces. It has also been said that the retention of discretionary power in the Governor smells of the Government of India Act, 1935, which in the main was undemocratic. Now, speaking for myself, I have no doubt in my mind that the retention on the vesting the Governor with certain discretionary powers is in no sense contrary to or in no sense a negation of responsible government. I do not wish to rake up the point because on this point I can very well satisfy the House by reference to the provisions in the Constitution of Canada and the Constitution of Australia. I do not think anybody in this House would dispute that the Canadian system of government is not a fully responsible system of government, nor will anybody in this House challenge that the Australian Government is not a responsible form of government. Having said that, I would like to read section 55 of the Canadian Constitution.

"Section 55.--Where a Bill passed by the House of Parliament is presented to the Governor- General for the Queen's assent, he shall, according to his discretion, and subject to the provisions of this Act, either assent thereto in the Queen's name, or withhold the Queen's assent or reserve the Bill for the signification of the Queen's pleasure."

(underlined for emphasis)

Pandit Hirday Nath Kunzru: May I ask Dr. Ambedkar when the British North America Act was passed?

The Honourable Dr. B. R. Ambedkar : That does not matter at all. The date of the Act does not matter. Shri H. V. Kamath: Nearly a century ago. The Honourable Dr. B.R. Ambedkar : This is my

reply. The Canadians and the Australians have not found it necessary to delete this provision even at this stage. They are quite satisfied that the retention of this provision in section 55 of the Canadian Act is fully compatible with responsible government. If they had left that this provision was not compatible with responsible government, they have even today, as Dominions, the fullest right to abrogate this provision. They have not done so. Therefore in reply to Pandit Kunzru I can very well say that the Canadians and the Australians do not think such a provision is an infringement of responsible government.

Shri Lokanath Misra (Orissa : General): On a point of order, Sir, are we going to have the status of Canada or Australia? Or are, we going to have a Republic Constitution?

The Honourable Dr. B. R. Ambedkar : I could not follow what he said. If, as I hope, the House is satisfied that the existence of a provision vesting a certain amount of discretion in the Governor is not incompatible or inconsistent with responsible government, there can be no dispute that the retention of this clause is desirable and, in my judgment, necessary. The only question that arises is....

Pandit Hirday Nath Kunzru : Well, Dr. Ambedkar has missed the point of the criticism altogether. The criticism is not that in Article 175 some powers might not be given to the Governor, the criticism is against vesting the Governor with certain discretionary powers of a general nature in the Article under discussion. The Honourable Dr. B. R. Ambedkar: I think he has misread the Article. I am sorry I do not have the Draft Constitution with me. "Except in so far as he is by or under this Constitution," those are the words. If the words were "except whenever he thinks that he should exercise this power of discretion against the wishes or against the advice of the ministers", then I think the criticism made by my honourable Friend Pandit Kunzru would have been valid. The clause is a very limited clause; it says: "except in so far as he is by or under this Constitution". Therefore, Article 143 will have to be read in conjunction with such other Articles which specifically reserve the power to the Governor. It is not a general clause giving the Governor power to disregard the advice of his ministers in any matter in which he finds he ought to disregard. There, I think, lies the fallacy of the argument of my honourable Friend, Pandit Kunzru. Therefore, as I said, having stated that there is nothing incompatible with the retention of the discretionary power in the Governor in specified cases with the system of responsible Government, the only question that arises is, how should we provide for the mention of this discretionary power? It seems to me that there are three ways by which this could be done. One way is to omit the words from Article 143 as my honourable Friend, Pandit Kunzru, and others desire and to add to such Articles as 175, or 188 or such other provisions which the House may hereafter introduce, vesting the Governor with the discretionary power, saying notwithstanding Article 143, the Governor shall have this or that power. The other way would be to say in Article 143, "that except as provided in Articles so and so specifically mentioned-Article 175, 188, 200 or whatever they are". But the point I am trying to submit to the House is that the House cannot escape from mentioning in some manner that the Governor shall have discretion.

Now the matter which seems to find some kind of favour with my honourable Friend, Pandit Kunzru and those who have spoken in the same way is that the words should be omitted from here and should be transferred somewhere else or that the specific Articles should be mentioned in Article 143. It seems to me that this is a mere method of drafting. There is no question of substance and no question of principle. I personally myself would be quite willing to amend the last portion of clause (1) of Article 143 if I knew at this stage what are the provisions that this Constituent

Assembly proposes to make with regard to the vesting of the Governor with discretionary power. My difficulty is that we have not as yet come either to Articles 175 or 188 nor have we exhausted all the possibilities of other provisions being made, vesting the Governor with discretionary power. If I knew that, I would very readily agree to amend Article 143 and to mention the specific, but that cannot be done now. Therefore, my submission is that no wrong could be done if the words as they stand in Article 143 remains as they are. They are certainly not inconsistent. Shri H. V. Kamath: Is there no material difference between Article 61(1) relating to the President vis-a-vis his ministers and this ?

The Honourable Dr. B. R. Ambedkar : Of course there is because we do not want to vest the President with any discretionary power. Because the provincial Governments are required to work in subordination to the Central Government, and therefore, in order to see that they do act in subordination to the Central Government the Governor will reserve certain things in order to give the President the opportunity to see that the rules under which the provincial Governments are supposed to act according to the Constitution or in subordination to the Central Government are observed.

Shri H. V. Kamath: Will it not be better to specify certain Articles in the Constitution with regard to discretionary power, instead of conferring general discretionary powers like this?

The Honourable Dr. B. R. Ambedkar : I said so, that I would very readily do it. I am prepared to introduce specific Articles, if I knew what are the Articles which the House is going to incorporate in the Constitution regarding vesting of the discretionary powers in the Governor.

Shri H. V. Kamath: Why not hold it over? The Honourable Dr. B. R. Ambedkar : We can revise. This House is perfectly competent to revise Article 143. If after going through the whole of it, the House feels that the better way would be to mention the Articles specifically, it can do so. It is purely a logomachy.

Shri H. V. Kamath: Why go backwards and forwards? Mr. President: The question is:

"That in clause (1) of Article 143, the words 'except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion be deleted."

The amendment was negatived.

Mr. President: The question is:

"That in clause (1) of Article 143, after the word 'head' a comma be placed and the words 'who shall be responsible to the Governor and shall' be inserted and the word 'to' be deleted." The amendment was negatived.

Mr. President: The question is:

"That Article 143 stand part of the Constitution."

The motion was adopted.

Article 143 was added to the Constitution. Constituent Assembly met on 2nd June, 1949 ARTICLE 153

Mr. President: Article 153 is for the consideration of the House.

With regard to the very first amendment, No. 2321, as we had a similar amendment with regard to Article 69 which was discussed at great length the other day, does Professor Shah wish to move it?

Prof. K. T. Shah: If I am in order I would like to move it. But if you rule it out, it cannot be moved.

Mr. President: It is not a question of ruling it out. If it is moved, there will be a repetition of the argument once put forward.

Prof. K. T. Shah: I agree that this is a similar amendment, but not identical.

Mr. President: I have not said it is identical. Prof. K. T. Shah: All right. I do not move it, Sir. Mr. President: Amendment Nos. 2322, 2323, 2324, 2325 and 2326 are not moved, as they are verbal amendments. Prof. K. T. Shah: As my amendment No. 2327 is part of the amendment not moved, I do not move it. Mr. President: Then amendments Nos. 2328, 2329 and 2330 also go. Amendment No. 2331 is not moved. Mr. Mohd. Tahir (Bihar: Muslim): Mr. President, I move: "That at the end of sub-clause (c) of clause (2) of Article 153, the words 'if the Governor is satisfied that the administration is failing and the ministry has become unstable' be inserted." In this clause certain powers have been given to the Governor to summon, prorogue or dissolve the Legislative Assembly. Now I want that some reasons may be enumerated which necessitate the dissolution of a House. I find that to clause (3) of Article 153 there is an amendment of Dr. Ambedkar in which he wants to omit the clause which runs thus: "(3) the functions of the Governor under sub-clause (a) and (c) of clause (2) of this Article shall be exercised by him in his discretion." I, on the other hand, want that some reasons should be given for the dissolution. Nowhere in the Constitution are we enumerating the conditions and circumstances under which the House can be dissolved. If we do not put any condition, there might be difficulties. Supposing in some province there is a party in power with whose views the some reasons to dissolve the Assembly and make arrangements for fresh elections. If such things happen there will be no justification for a dissolution of the House. Simply because a Governor does not subscribe to the views of the majority party the Assembly should not be dissolved. To avoid such difficulties I think it is necessary that some conditions and circumstances should be enumerated in the Constitution under which alone the Governor can dissolve the House. There should be no other reason for dissolution of the House except mal-administration or instability of the Ministry and its unfitness to work. Therefore this matter should be considered and we should provide for certain conditions and circumstances under which the Governor can dissolve the House.

(underlined for emphasis)

Mr. President: The next amendment, No. 2333, is not moved. Dr. Ambedkar may move amendment No. 2334. The Honourable Dr.B.R. Ambedkar: Sir, I move: "That clause (3) of Article 153 be omitted." This clause is apparently inconsistent with the scheme for a Constitutional Governor.

Mr. President: Amendment No. 2335 is the same as the amendment just moved. Amendment No. 2336 is not moved. Shri H.V. Kamath: Mr. President, Sir, may I have your leave to touch upon the

meaning or interpretation of the amendment that has just been moved by my learned Friend, Dr. Ambedkar? If this amendment is accepted by the House it would do away with the discretionary powers given to the Governor. There is, however, sub-clause (b). Am I to understand that so far as proroguing of the House is concerned, the Governor acts in consultation with the Chief Minister or the Cabinet and therefore no reference to it is necessary in clause (3)?

Mr. President: He wants clause (3) to be deleted. Shri H.V. Kamath: In clause (3) there is references to sub- clauses (a) and (c). I put (a) and (b) on a par with each other. The Governor can summon the Houses or either House to meet at such time and place as he thinks fit. Then I do not know why the act of prorogation should be on a different level. Mr. President: That is exactly what is not being done now. All the three are being put on a par.

Shri H. V. Kamath: Then I would like to refer to another aspect of this deletion. That is the point which you were good enough to raise in this House the other day, that is to say, that the President of the Union shall have a Council of Ministers to aid and advise him in the exercise of his functions.

The corresponding Article here is 143: "There shall be a Council of Minister with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions....."

Sir, as you pointed out in connection with an Article relating to the President vis-a-vis his Council of Ministers, is there any provision in the Constitution which binds the Governor to accept or to follow always the advice tendered to him by his Council of Ministers? Power is being conferred upon him under this Article to dissolve the Legislative Assembly. This is a fairly serious matter in all democracies. There have been instances in various democracies, even in our own provinces sometimes, when a Cabinet seeking to gain time against a motion of censure being brought against them, have sought the Governor's aid, in getting the Assembly prorogued. This of course is not so serious as dissolution of the Legislative Assembly. Here the Article blindly says, "subject to the provisions of this Article." As regards clause (1) of the Article, I am glad that our Parliament and our other Legislatures would meet more often and for longer periods. I hope that will be considered and will be given effect to at the appropriate time. Clause (2) of this Article is important because it deals with the dissolution of the Assembly by the Governor of a State and in view of the fact that there is no specific provision-of course it may be understood and reading between the lines Dr. Ambedkar might say that the substance of it is there, but we have not yet decided even to do away with the discretionary powers of the Governor to accept the advice tendered to him by his Council of Ministers, there is a lacuna in the Constitution. Notwithstanding this, we are conferring upon him the power to dissolve the Legislative Assembly, without even mentioning that he should consult or be guided by the advice of his Ministers in this regard. I am constrained to say that this power which we are conferring upon the Governor will be out of tune with the new set-up that we are going to create in the country unless we bind the Governor to accept the advice tendered to him by his Minister. I hope that this Article will be held over and the Drafting Committee will bring forward another motion later on revising or altering this Article in a suitable manner.

Shri Gopal Narain (United Provinces: General): Mr. President, Sir, before speaking on this, I wish to lodge a complaint and seek redress from you. I am one of those who have attended all the meetings of this Assembly and sit from beginning to the end, but my patience has been exhausted now. I find that there are a few honourable Members of this House who have monopolised all the debates, who must speak on every Article, on every amendment and every amendment to amendment. I know, Sir, that you have your own limitations and you cannot stop them under the

rules, though I see from your face that also feel sometimes bored, but you cannot stop them. I suggest to you, Sir, that some time-limit may be imposed upon some Members. They should not be allowed to speak for more than two or three minutes. So far as this Article is concerned, it has already taken fifteen minutes, though there is nothing new in it, and it only provides discretionary powers to the Governor. Still a Member comes and oppose it. I seek redress from you, but if you cannot do this, then you must allow us at least to sleep in our seats or do something else than sit in this House. Sir, I support this Article.

Mr. President: I am afraid I am helpless in this matter. I leave it to the good sense of the Members.

Shri Brajeshwar Prasad: (Rose to speak). Mr. President: Do you wish to speak after this? (Laughter). The Honourable Dr. B.R. Ambedkar: I do not think I need reply. This matter has been debated quite often. Mr. President: Then I will put the amendments to vote. The question is:

"That at the end of sub-clause (c) of clause (2) of Article 153, the words `if the Governor is satisfied that the administration is failing and the ministry has become unstable' be inserted." The amendment was negatived.

Mr. President: The question is:

"That clause (3) of Article 153 be omitted." The amendment was adopted.

Mr. President: The question is:

"That Article 153, as amended, stand part of the Constitution." The motion was adopted. Article 153, as amended, was added to the Constitution Constituent Assembly met on 3rd August, 1949 Article 278. Provisions in case of Failure of Constitutional machinery in States.

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Pandit Hirday Nath Kunzru (United Provinces: General): Mr. President, I am really very glad that the framers of the Constitution have at last accepted the view that Article 188 should not find a place in our Constitution. That Article was inconsistent with the establishment of responsible Government in the provinces and the new position of the Governor. It is satisfactory that this has at last been recognised and that the Governor is not going to be invested with the power that Article 188 proposed to confer on him. It is, however, now proposed to achieve the purpose of Article 188 and the old Article 278 by a revision of Article 278. We have today to direct our attention not merely to Articles 278 and 278-A, but also to Article 277-A. This Article lays down that it will be the duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of this Constitution. It does not merely authorise the Central Government to protect the State against external aggression or internal Commotion; it goes much further and casts on it the duty of seeing that the Government of a province is carried on in accordance with the provision of this Constitution. What exactly do these words mean? This should be clearly explained since the power to ensure that the provincial constitutions are being worked in a proper way makes a considerable addition to the powers that the Central Government will enjoy to protect a State against external aggression or internal disturbance. I think, Sir, that it will be desirable in this connection to consider Articles 275 and 276, for their provisions have vital bearing on the s that have been placed before us. Article 275 says that, when the President is satisfied that a grave emergency exists

threatening the security of India or of any part of India, then he may make a declaration to that effect. Such a declaration will cease to operate at the end of two months, unless before the expiry of this period, it has been approved by resolutions passed by both Houses of Parliament. If it is so approved, then, the declaration of emergency may remain in force indefinitely, that is, so long as the Executive desires it to remain in force, or so long as Parliament allows it to remain in force. So long as the Proclamation operates, under Article 276, the Central Government will be empowered to issue directions to the government of any province as regards the manner in which its executive authority should be exercised and the Central Parliament will be empowered to make laws with regard to any matter even though it may not be included in the Union List. It will thus have the power of passing laws on subjects included in the State List. Further, the Central Legislature will be able to confer powers and impose duties on the officers and authorities of the Government of India in regard to any matter in respect of which it is competent to pass legislation. Now the effect of these two Articles is to enable the Central Government to intervene when owing to external or internal causes the peace and tranquility of India or any part of it is threatened. Further, if misgovernment in a province creates so much dissatisfaction as to endanger the public peace, the Government of India will have sufficient power, under these Articles to deal with the situation. What more is needed then in order to enable the Central Government to see that the government of a province is carried on in a proper manner. It is obvious that the framers of the Constitution arc thinking not of the peace and tranquility of the country, of the maintenance of law and order but of good government in provinces. They will intervene not merely to protect provinces against external aggression and internal disturbances but also to ensure good government within their limits. In other words, the Central Government will have the power to intervene to protect the electors against themselves. If there is mismanagement or inefficiency or corruption in a province, I take it that under Articles 277, 278 and 278-A taken together the Central Government will have the power. I do not use the word 'President' because he will be guided by the advice of his Ministers to take the government of that province into its own hands. My honourable Friend, Mr. Santhanam gave some instances in order to show how a breakdown might occur in a province even when there was no external aggression, no war and no internal disturbance. He gave one very unfortunate illustration to explain his point. He asked us to suppose that a number of factions existed in a province which prevented the government of that province from being carried on in accordance with the provisions of this Act i.e., I suppose efficiently. He placed before us his view that in such a case a dissolution of the provincial legislature should take place so that it might be found out whether the electors were capable of applying a proper remedy to the situation. If, however, in the new legislature the old factions-I suppose by factions he meant parties-re-appeared, then the Central Government in his opinion would be justified in taking over the administration of the province. Sir, if there is a multiplicity of parties in any province we may not welcome it, but is that fact by itself sufficient to warrant the Central Government's Interference in provincial administration? There are many parties in some countries making ministries unstable. Yet the Governments of those countries are carried on without any danger to their security or existence. It may be a matter of regret if too many parties exist in a province and they are not able to work together or arrive at an agreement on important matters in the interests of their province; but however regrettable this may be, it will not justify in my opinion, the Central Government in intervening and making itself jointly with Parliament responsible for the government of the province concerned. As I have already said, if mismanagement in a province takes place to such an extent as to create a grave situation in India or in any part of it, then the Central Government will have the right to intervene under Articles 275 and 276. Is it right to go further than this? We hear serious complaints against the governments of many provinces at present, but it has not been suggested so far that it will be in the ultimate interests of the country and the provinces concerned that the Central Government should set aside the

provincial governments and practically administer the provinces concerned, as if they were Centrally administered areas. It may be said, Sir, that the provincial governments at present have the right to intervene when a municipality or District Board is guilty of gross and persistent mal-administration, but a municipality or a District Board is too small to be compared for a moment in any respect with a province. The very size of a province and the number of electors in it place it on a footing of its own. If responsible government is to be maintained, then the electors must be made to feel that the power to apply the proper remedy when misgovernment occurs rests with them. They should know that it depends upon them to choose new representatives who will be more capable of acting in accordance with their best interests. If the Central Government and Parliament are given the power that Articles 277, 278 and 278-A read together propose to confer on them, there is a serious danger that whenever there is dissatisfaction in a province with its government, appeals will be made to the Central Government to come to its rescue. The provincial electors will be able to throw their responsibility on the shoulders of the Central Government. Is it right that such a tendency should be encouraged? Responsible Government is the most difficult form of government. It requires patience, and it requires the courage to take risks. If we have neither the patience nor the courage that is needed, our Constitution will virtually be still- born. I think, therefore, Sir, that the Articles that we are discussing are not needed. Articles 275 and 276 give the Central Executive and Parliament all the power that can reasonably be conferred on them in order to enable them to see that law and order do not break down in the country, or that misgovernment in any part of India is not carried to such lengths as to jeopardise the maintenance of law and order. It is not necessary to go any further. The excessive caution that the framers of the Constitution seem to be desirous of exercising will, in my opinion, be inconsistent with the spirit of the Constitution, and be detrimental, gravel detrimental, to the growth of a sense of responsibility among the provincial electors.

Before concluding, Sir, I should like to draw the attention of the House to the Government of India Act, 1935 as adopted by the India (Provisional Constitution) Order, 1947. Section 93 which formed an important part of this Act as originally passed, has been omitted from the Act as adopted in 1947, and I suppose it was omitted because it was thought to be inconsistent with the new order of things. My honourable Friend Mr. Santhanam said that in the Government of India Act, 1935, the Governor who was allowed to act in his discretion would not have been responsible to any authority. That, I think, is a mistake I may point out that the Governor, in respect of all powers that he could exercise in his discretion, was subject to the authority of the Governor-General and through him and the Secretary of State for India, to the British Parliament. The only difference now is that our executive, instead of being responsible to an electorate 5,000 miles away, will be responsible to the Indian electors. This is an important fact that must be clearly recognised, but I do not think that the lapse of two years since the adapted Government of India Act, 1935, came into force, warrants the acceptance of the Articles now before us. The purpose of section 93 was political. Its object was to see that the Constitution was not used in such away as to compel the British Government to part with more power than it was prepared to give to the people of India. No such antagonism between the people and the Government of India can exist in future. Whatever differences there may be, will arise in regard to administrative or financial or economic questions. Suppose a province in respect of economic problems, takes a more radical line than the Government of India would approve. I think this will be no reason for the interference of the Government of India. Shri T. T. Krishnamachari (Madras: General): What happens if the provincial government deliberately refuses to obey the provisions of the Constitution and impedes the Central Government taking action under Article 275 and 276? Pandit Hirday Nath Kunzru: No province can do it. It cannot because it would be totally illegal. But if such a situation arises the Central Government will have sufficient power

under Articles 275 and 276 to intervene at once. It will have adequate power to take any action that it likes. It can ask its own officers to take certain duties on themselves and if those officers are impeded in the discharge, of their duties, or, if force is used against them-to take an extreme case-the Central Government will be able to meet such a challenge effectively, without our accepting the Articles now before us. I should like the House to consider the point raised by my honourable Friend Mr. Krishnamachari very carefully. I have thought over such a situation in my own mind, over and over again, and every time I have come to the conclusion that Articles 275 and 276 will enable the Government of India to meet effectively such a manifestation oil recalcitrance, such a rebellious attitude as that supposed by Mr. Krishnamachari. In such a grave situation, the Government of India will have the power to take effective action under Articles 275 and 276. What need is there then for the Articles that have been placed before us? Sir, one of the speakers said that we should not be legalistic. Nobody has discussed the Articles moved by Dr. Ambedkar in a legalistic spirit. I certainly have not discussed it in a narrow, legal way. I am considering the question from a broad political point of view from the point of view of the best interests of the country and the realization by provincial electors of the important fact that they and they alone are responsible for the government of their province. They must understand that it rests with them to decide how it should be carried on. Sir, even if the framers of the Constitution are not satisfied with the arguments that I have put forward and want that the Central Government should have more power than that given to it by Articles 275 and 276, I should ask them to pause and consider whether there was not a better way of approaching this question for the time being. In view of the discussions that have taken place in this House and outside, it seems to me that there is a respectable body of opinion in favour of not making the Constitution rigid, that is, there are many people who desire that for some time to come amendments to the Constitution should be allowed to be made in the same way as those of ordinary laws are. I think that the Prime Minister in a speech that he made here some months ago expressed the same view. If this idea is accepted by the House, if say for five years the Constitution can be amended in the same way as an ordinary law, then we shall have sufficient time to see how the Provinces develop and how their government is carried on. If experience shows that the position is so unfortunate as to require that the Central Government should make itself responsible not merely for the safety of every Province but also for its good government, then you can come forward with every justification for an amendment of the Constitution. But I do not see that there is any reason why the House should agree to the Articles placed before us today by Dr. Ambedkar. Sir, I oppose these Articles.

Shri L. Krishnaswami Bharathi (Madras: General): Sir, I felt impelled by a sense of duty to place a certain point of view before the House, or else I would not have come before the mike. I feel the need for a brief speech. I accord my wholehearted support to the new Articles moved by Dr. Ambedkar, but I am not at all convinced of the wisdom of the Drafting Committee in deleting Article 188. It is this point of view which I want to emphasise.

Sir, that Article has a history behind it. There was a full-dress debate on it for two days when eminent Premiers participated in it. We must understand what Article 188 is for. It is not for normal conditions. It is in a state of grave emergency that a Governor was, under this Article, invested with some powers. I may remind the House of the debate where it was Mr. Munshi's amendment which ultimately formed part of Article 188. In moving the amendment Dr. Ambedkar said that no useful purpose would be served by allowing the Governor to suspend the Constitution and that the President must come into the picture even earlier. Article 188 provides for such a possibility. It merely says that when the Governor is satisfied that there is such a grave menace to peace and tranquility he can suspend the Constitution. It is totally wrong to imagine that he was given the

power to suspend the Constitution for a duration of two weeks. Clause (3) provides that it is his duty to forthwith communicate his Proclamation to the President and the President will become seized of the matter under Article 188. That is an important point which seems lost sight of. The Governor has to immediately communicate his Proclamation. The Article was necessitated because it was convincingly put forward by certain Premiers. There may be a possibility that it is not at all possible to contact the President. Do you rule out the possibility of a state of inability to contact the Central Government? Time is of the essence of the matter. By the time you contact and get the permission, many things would have happened and the delay would have defeated the very purpose before us. The, honourable Mr. Kher said that it is not necessary to keep this Article because we have all sorts of communications available. In Bombay I know of instances where we have not been able to contact the Governor for not less than twenty-four hours What is the provision under Article 278? The Governor of Madras says there is a danger to peace and tranquility. Assuming for a moment that the communications are all right, the President cannot act. He has to convene the Cabinet; the members of the Cabinet may not be readily available; and by the time he convenes the Cabinet and gets their consent the purpose of the Article would be defeated. Therefore, it was only with a view to see in such a contingency where the Governor finds, that delay will defeat the very objective, that Article 188 was provided for. I see no reason why the Drafting Committee in their wisdom ruled out such a possibility. It is no doubt true that the Article was framed two years ago, but since those two years many things have happened that show that there is urgent need for the man on the spot to decide and act quickly so that a catastrophe may be prevented. Today there is an open defiance of authority everywhere and that defiance is well- organised. Before the act, they cut off the telephone wires, as they did in the Calcutta Exchange. That is what is happening in many parts of the country. Therefore, when there is a coup d'etat it is just possible they will cut off communications and difficulties may arise. It is only to provide for this possibility that the Governor is given these powers. I do not think there will be any fool of a Governor who will, if there is time, fail to inform the President. I would like to have an explanation as to why this fool-proof arrangement has been changed and why we have become suspicious that the Governor will act in a wrong manner. According to the provision, he has to forthwith communicate to the President and the President may say, "Well, I am not convinced; cancel it." You must take into consideration that the Governor will be responsible, acting wisely and in order to save the country from disaster. The President comes into the picture directly, because the Governor has to communicate the matter forthwith according to clause (3) of Article 188. As Mr. President said, it is sheer commonsense that the man on the spot should be given the powers to deal with the situation, so that it may not deteriorate. I am not at all convinced of the wisdom of the change. The provision as now proposed is not as fool-proof as it ought to be.

(underlined for emphasis)

Besides, I would like to have an explanation as to why the Drafting Committee goes out of the way to delete the provision which was considered and accepted by the House previously. In my view it is improper, because the House had decided it. If we appoint a Drafting Committee, we direct them to draft on the basis of the decisions taken by us. Is this the way in which they should draft? Their duty was to scrutinise the decisions already arrived at and then draft on that basis. Therefore, I would like to have an explanation ----a convincing explanation---as to what happened within these two years which has made the members of the Drafting Committee delete this wholesome, healthy and useful provision. Mr. Naziruddin Ahmad: Mr. President, Sir, I think that the amendments moved by Dr. Ambedkar constitute startling and revolutionary changes in the Constitution. I submit a radical departure has been made from our own decisions. We took important decisions in this House as to

the principles of the Constitution and we adopted certain definite principles and Resolutions and the Draft Constitution was prepared in accordance with them. Now, everything has to be given up. Not only the Draft Constitution has been given up, but the official amendments which were submitted by Members of the House within the prescribed period which are printed in the official blue book have also been given up. During the last recess some additional amendments to those amendments were printed and circulated. Those have also been given up. I beg to point out that all the amendments and amendments to amendments which have been moved today are to be found for the first time only on the amendment lists for this week which have been circulated only within a day or two from today. So serious and radical changes should not have been introduced at the last minute when there is not sufficient time for slow people like us to see what is happening and whether these changes really fit in with our original decisions and with other parts of the Constitution as a whole. I submit that the Drafting Committee has been drifting from our original decisions, from the Draft Constitution and from our original amendments. It would perhaps be more fitting to call the Drafting Committee "the Drifting Committee". I submit that the deletion of Article 188 is a very important and serious departure from principles which the House solemnly accepted before. Some honourable Members who usually take the business of the House seriously have attempted to support these changes on the ground that some emergency powers are highly necessary. I agree with them that emergency powers are necessary and I also agree that serious forces of disorder are working in a systematic manner in the country and drastic powers are necessary. But what I fail to appreciate is the attempt to take away the normal power of the Governor or the Ruler of a State to intervene and pass emergency orders. It is that which is the most serious change. In fact, originally the Governor was to be elected on adult suffrage of the province, but now we have made a serious departure that the Governor is now to be appointed by the President. This is the first blow to Provincial Autonomy. Again, we have deprived the Upper Houses in the States of real powers; not merely have we taken away all effective powers from Upper Houses in the Provinces, but also made it impossible for them to function properly and effectively. We are now going to take away the right of the Ministers of a State and the Members of the Legislatures and especially the people at large from solving their own problems. As soon as we deprive the Governor or a Ruler of his right to interfere in grave emergencies, at once we deprive the elected representatives and the Ministers from having any say in the matter. As soon as the right to initiate emergency measures is vested exclusively in the President, from that moment you absolve the Ministers and Members of the local legislatures entirely from any responsibility. The effect of this would mean that their moral strength and moral responsibility will be seriously undermined. It is the aspect of the problem to which I wish to draw the attention of the House. (underlined for emphasis)

This aspect of the matter, I submit, has not received sufficient or adequate consideration in this House. If there is trouble in a State, the initial responsibility for quelling it must rest with the Ministers. If they fail, then the right to initiate emergency measures must lie initially with the Governor or the Ruler. If you do not allow this, the result would be that the local legislature and the Ministers would have responsibility of maintaining law and order without any powers. That would easily and inevitably develop a kind of irresponsibility. Any outside interference with the right of a State to give and ensure their own good Government will not only receive no sympathy from the Ministers and the members, but the action of the President will be jeered at, tabooed and boycotted by the people of the State, the Members of the Legislature and the Ministers themselves.

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Pandit Thakur Das Bhargava : I think the constitutional machinery cannot be regarded ordinarily to

have failed unless the dissolution powers are exercised by the Governor under section 153.

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I think we are drifting, perhaps unconsciously, towards a dictatorship. Democracy will flourish only in a democratic atmosphere and under democratic conditions. Let people commit mistakes and learn by experience. Experience is a great tutor. The arguments to the contrary which we have heard today were the old discarded arguments of the British bureaucracy. The British said that they must have overriding powers, that we cannot manage our affairs and that they only knew how to manage our affairs. They said also that if we mismanaged things they will supersede the constitution and do what they thought fit. What has been our reply to this? It was that "Unless you make us responsible for our acts, we can never learn the business of government. If we mismanage the great constitutional machinery, we must be made responsible for our acts. We must be given the opportunity to remedy the defects". This argument of ours is being forgotten. The old British argument that they must intervene in petty Provincial matters is again being revived and adopted by the very opponents of that argument. In fact, very respected Members of this House are adopting almost unconsciously the old argument of the British Government. I submit that even the hated British did not go so far as we do. I submit our reply to that will be the same as our respected leaders gave to the British Government. I submit, therefore, that too much interference by the Centre will create unpleasant reactions in the States. If you abolish provincial autonomy altogether that would be logical. But to make them responsible while making them powerless would be not a proper thing to do. (underlined for emphasis)

Then I come to the proviso to clause (1) of Article 278. It safeguards against the rights of the High Court in dealing with matters within their special jurisdiction. A Proclamation of emergency will not deprive the High Court of its jurisdiction. That is the effect of this proviso. But it conveniently forgets the existence of the Supreme Court. While it takes care to guarantee the rights of the High Courts against the Proclamation, the rights of the Supreme Court are not guaranteed. I only express the hope that the absence of any mention of the Supreme Court in the proviso will not affect the powers of that Court.

Shri T. T. Krisnamachari: It is not necessary because the Central Government is subject to the jurisdiction of the Supreme Court under all conditions.

(Underlined for emphasis)

Mr. Naziruddin Ahmad: As the honourable Member himself has on a previous occasion said, this Constitution would be the lawyers' heaven. Speaking from experience, I think that this proviso will lead to much legal battle, and lawyers alone will be benefited by this. I wish that the interpretation put forward by Mr. T. T. Krishnamachari is right, but it is not apparent to me. When we come to clause (2) of Article 278, in this clause it is stated that any such proclamation may be revoked or varied by a subsequent proclamation. (underlined for emphasis)

Constituent Assembly met on 4th August 1949 The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Nine of the Clock, Mr. President (The Honourable Dr. Rajendra Prasad) in the Chair. Articles 188, 277-A and 278-continued. xxx xxx xxx xxx

Then coming to proposed Article 278-A sub-clause (a) and (b) of clause (1) are new. Clause (a) is

new and (b) is consequential. The new point which has been introduced is also revolutionary. Instead of allowing the Provincial Legislatures to have their say on the emergency legislation and thereby giving the Provincial Assemblies an opportunity to assess the guilt or innocence of the Ministers or other person or to give a verdict, the responsibility is thrown on the Parliament. 'That would again, as I submitted yesterday, go to make the Central Government and the Parliament unpopular in the State concerned. It may happen that Provincial Ministers and others are guilty of mismanagement and misgovernment; but if we do not allow the Provincial Assemblies to sit in judgment over them, the result would be that guilty or innocent persons, lawbreakers and law-abiding persons, good or bad people in the State should all be combined. The result would be that those for whose misdeeds the Emergency Powers would be necessary, would be made so many heroes; they would be lionised, and the object of teaching them a lesson would be frustrated. The Centre would be unpopular on the ground that it is poking its nose unnecessarily and mischievously into their domestic affairs. Then, Sir, in sub-clause (c) of clause (1) of this Article 278-A, the President is expected to authorize and sanction the Budget as the head of the Parliament. This would be an encroachment on the domestic budget of the Provinces and the States. That would be regarded with a great deal of dis-favour. It would have been better to allow the Governor or the Ruler to function and allow their own budget to be managed in their own way. Subventions may be granted but that expenditure should not be directly managed by the President.

Coming to clause (d) there is an exception in favour of Ordinances under Article 102 to the effect that "the President may issue Ordinances except when the Houses of Parliament are in session". The sub-clause is misplaced in the present Article. There is an appropriate place where Ordinances are dealt with. Sub-clause (d) should find a place among the group of Articles dealing with Ordinances and not here. This is again the result of hasty drafting.

These are some of the difficulties that have been created. It is not here necessary to deal with them in detail. The most important consequence of this encroachment on the States sphere would be that we would be helping the communist techniques. Their technique is that by creating trouble in a Province or a State, they would partially paralyse the administration and thereby force the Emergency Powers. Then, they will try to make those drastic powers unpopular. What is more, they will make the guilty Ministers and guilty officers heroes. The legislature of the State would, as I have submitted, be deprived of the right of discussion. If the President takes upon himself the responsibility of emergency powers, then his action, I suppose, cannot be discussed in the States legislatures. The only way of ventilating Provincial and States grievances is to allow the Provinces and the States to find out the guilty persons and hold them up to ridicule and contempt and that would be entirely lost. This would have the effect of bringing all sorts of people good and bad, law-breaking and law-abiding persons into one congregation. The Centre will be unpopular and the guilty States would be regarded as so many martyrs and the Centre would be flouted and would be forced to use more and more Emergency Powers and would be caught in a vicious circle. Then, the States will gradually get dissatisfied and they will show centrifugal tendencies and this will be reflected in the general elections to the House of the People at the Centre. The result would be that very soon these very drastic powers calculated to strengthen the hands of the Centre will be rather a source of weakness in no distant time.

(underlined for emphasis)

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There is an implication in Article 278 which is something like saying, that you must overcome evil by good and meet lawlessness with law. The President has no powers to meet undemocratic forces in the country except in a cratic manner. It is like saying that the forces of evil must be overcome by the forces of non-violence and good. Practical statesmen and law- makers will not accept this proposition easily. Xxx xxx xxx

Mr. President: Dr. Ambedkar.

The Honourable Dr. B. R. Ambedkar (Bombay : General) : Sir, although these Articles have given rise to a debate which has lasted for nearly five hours, I do not think that there is anything which has emerged from this debate which requires me to modify my attitude towards the principles that are embodied in these Articles. I will therefore not detain the House much longer with a detailed reply of any kind. I would first of all like to touch for a minute on the amendment suggested by my Friend Mr. Kamath in Article 277-A. His amendment was that the word "and" should be substituted by the word "or". I do not think that that is necessary, because the word "and" in the context in which it is placed is both conjunctive as well as disjunctive, which can be read in both ways, "and" or "or", as the occasion may require. I, therefore, do not think that it is necessary for me to accept that amendment, although I appreciate his intention in making the amendment.

The second amendment to which I should like to refer is that moved by my Friend Prof. Saksena, in which he has proposed that one of the things which the President may do under the Proclamation is to dissolve the legislature. I think that is his amendment in substance. I entirely agree that that is one of the things which should be provided for because the people of the province ought to be given an opportunity to set matters right-by reference to the legislature. But I find that that is already covered by sub-clause (a) of clause (1) of Article 278, because sub-clause (a) proposes that the President may assume to himself the powers exercisable by the Governor or the ruler. One of the powers which is vested and which is exercisable by the Governor is to dissolve the House. Consequently, when the President issues a Proclamation and assumes these powers under sub-clause (a), that power of dissolving the legislature and holding a now election will be automatically transferred to the President which powers no doubt the President will exercise on the advice of his Ministers. Consequently my submission is that the proposition enunciated by my Friend Prof. Saksena is already covered by sub-clause (a), it is implicit in it and there is therefore no necessity for making any express provision of that character. Now I come to the remarks made by my Friend Pandit Kunzru. The first point, if I remember correctly, which was raised by him was that the power to take over the administration when the constitutional machinery fails is a new thing, which is not to be found in any constitution. I beg to differ from him and I would like to draw his attention to the Article contained in the American Constitution, where the duty of the United States is definitely expressed to be to maintain the Republican form of the Constitution. When we say that the Constitution must be maintained in accordance with the provisions contained in this Constitution we practically mean what the American Constitution means, namely that the form of the constitution prescribed in this Constitution must be maintained. Therefore, so far as that point is concerned we do not think that the Drafting Committee has made any departure from an established principle. The other point of criticism was that Articles 278 and 278-A were unnecessary in view of the fact that there are already in the Constitution Articles 275 and 276. With all respect I must submit that he (Pandit Kunzru) has altogether misunderstood the purposes and intentions which underlie Article 275 and the present Article 278. His argument was that after all what you want is the right to legislate on provincial subjects. That right you get by the terms of Article 276, because under that the Centre gets the power, once the Proclamation is issued, to legislate on all subjects mentioned in

List II. I think that is a very limited understanding of the provisions contained either in Articles 275 and 276 or in Articles 278 and 278-A. I should like first of all to draw the attention of the House to the fact that the occasions on which the two sets of Articles will come into operation are quite different. Article 275 limits the intervention of the Centre to a state of affairs when there is war or aggression, internal or external. Article 278 refers to the failure of the machinery by reasons other than war or aggression. Consequently the operative clauses, as I said, are quite different. For instance, when a proclamation of war has been issued under Article 275, you get no authority to suspend the provincial constitution. The provincial constitution would continue in operation. The legislature will continue to function and possess the powers which the constitution gives it; the executive will retain its executive power and continue to administer the province in accordance with the law of the province. All that happens under Article 276 is that the Centre also gets concurrent power of legislation and concurrent power of administration. That is what happens under Article 276. But when Article 278 comes into operation, the situation would be totally different. There will be no legislature in the province, because the legislature would have been suspended. There will be practically no executive authority in the province unless any is left by the proclamation by the President or by Parliament or by the Governor. The two situations are quite different. I think it is essential that we ought to keep the demarcation which we have made by component words of Articles 275 and 278. I think mixing the two things up would cause a great deal of confusion.

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The Honourable Dr. B.R. Ambedkar: Only when the government is not carried on in consonance with the provisions laid down for the constitutional government of the provinces, whether there is good government or not in the province is for the Centre to determine. I am quite clear on the point.

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The Honorable Dr. B.R. Ambedkar: It would take me very long now to go into a detailed examination of the whole thing and, referring to each say, this is the print which is established in it and say, if any government or any legislature of a province does not act in accordance with it, that would act as a failure of machinery. The expression "failure of machinery" I find has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore with its de facto and de jure meaning. I do not think any further explanation is necessary. Xxx xxx xxx xxx

The Honourable Dr. B. R. Ambedkar: In regard to the general debate which has taken place in which it has been suggested that these Articles are liable to be abused, I may say that I do not altogether deny that there is a possibility of these Articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the Provinces. In fact I share the sentiments expressed by my honourable 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. I hope the first thing he will do would be to issue a mere 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. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this Article. It is only in those circumstances he would resort to this Article. I do not think we could then say that these

Articles were imported in vain or that the President had acted wantonly. Shri H. V. Kamath : Is Dr. Ambedkar in a position to assure the House that Article 143 will now be suitably amended? The Honourable Dr. B. R. Ambedkar : I have said so and I say now that when the Drafting Committee meets after the Second Reading, it will look into the provisions as a whole and Article 143 will be suitably amended if necessary. Mr. President: I will now put the amendment to vote one after another.

The question is:

"That Article 188 be deleted."

The motion was adopted.

Article 188 was deleted from the Constitution. Mr. President: Then I will take up Article 277-A. The question is:

"That in amendment No. 121 of List I (Second Week) of Amendments to Amendments, in the proposed new Article 277-A, for the word 'Union' the words 'Union Government' be substituted."

The amendment was negatived.

Mr. President: Now I will put amendment No. 221. The question is:

"That in amendment No. 121 of List I (Second Week) of Amendments to Amendments in the proposed new Article 277-A for the word 'and' where it occurs for the first time, the word 'or' be substituted."

The amendment was negatived.

Mr. President: The question is:

"That in Amendment No. 121 of List I (Second Week) of Amendments to Amendments, for the words 'internal disturbance' the words 'internal insurrection or chaos' be substituted."

The amendment was negatived.

Mr. President : The question is :

"That after Article 277 the following new Article be inserted:-

'277-A. It shall be the duty of 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 motion was adopted,

Mr. President: The question is.:

"That Article 277-A stand part of the Constitution."

The motion was adopted.

Article 277-A was added to the Constitution. Mr. President: The question is:

"That in amendment No. 160 of List II. (Second Week), of Amendments to Amendments in clause (1) of the proposed Article 278, for the word 'Ruler' the words the Rajpramukh' be substituted."

The amendment was negatived.

Mr. President: The question is:

"That in amendment No. 160 of List II (Second Week) of Amendments to Amendments, in clause (1) of the proposed Article 278, the words 'or otherwise' be deleted."

The amendment was negatived.

Mr. President : The question is:

"That in amendment No. 160 of List II (Second Week): of Amendments to Amendments, in clause (1) of the proposed Article 278, after the words 'is satisfied that' the words 'a grave emergency has arisen which threatens the peace and tranquillity of the State and that' be added."

The amendment was negatived.

Mr. President: The question is:

"That in amendment No. 160 of List II (Second Week) of Amendments to Amendments for the first proviso to clause (4) of the proposed Article 278, the following be substituted- 'Provided that the President may if he so thinks fit order at any time, during this period a dissolution of the State legislature followed by a fresh general election, and the Proclamation shall cease to have effect from the day on which the newly elected legislature meets in session'."

The amendment was negatived.

Mr. President: The question is:

"That for Article 278, the following articles be substituted 278(1). Provisions in case of failure of constitutional machinery in States. - If the President, on receipt of a report from the Governor or Ruler of a State or otherwise, is satisfied that the government of the State cannot be carried on in accordance with the provisions of the 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 I the Governor or Ruler, as the case may be, 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 authorise 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 provisions of this Constitution relating to High Courts.

(2)Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3)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:

Provided that if any such Proclamation is issued at a time when the House of the People is dissolved or if the dissolution of the House of the People takes place during the period of two months referred to in this clause and the Proclamation has not been approved by a resolution passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

(4)A Proclamation so approved shall, unless revoked, cease to operate on the expiration of six months form the date of the passing of the second of the resolutions approving the Proclamation under clause (3) of this Article : Provided that if and so often as a resolution approving the continuance in force of such a proclamation is passed: by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any, such period of six months and a resolution approving the continuance in force of such Proclamation has not been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

278-A. Exercise of legislative powers under proclamation issued under Article 278. (1). Where by a Proclamation issued under clause (1) of Article 278 of this Constitution it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent-

(a) for Parliament to delegate the power to make laws for, the State to the President or any other authority specified by him in, that behalf-

(b) for Parliament or for the President or other authority to whom the power to make laws is delegated under sub-clause (a) of this clause to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Government of India or officers and authorities of the Government of India.

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament;

(d for the President to promulgate Ordinances under Article 102 of this Constitution except when both Houses of Parliament are in session.

(2)Any law made by or under the authority of Parliament which Parliament or the President or other authority referred to in sub-clause (a) of clause (1) of this Article would not, but for the issue of a Proclamation under Article 278 of this Constitution, have been competent to make shall to the extent of the incompetency cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by an Act of the Legislature of the State."

The amendment was adopted. Mr. President: The question is:

"That the proposed Article 278 stand part of the Constitution."

The motion was adopted.

Article 278 was added to the Constitution. Mr. President: The question is:

"That proposed Article 278-A stand part of the Constitution."

The motion was adopted.

Article 278-A was added to the Constitution. In the Adoption of the Constitution the speech of Dr. B.R. Ambedkar on 25.11.1949 contained the following significant observations:

"As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr. T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the legislature, the executive and the judiciary. The factors on which the working of those organs of State depends are the people and the political parties they will set up as their instrument to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the

part which the people and their parties are likely to play..... Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed some very weighty views which makers of Constitutions can never afford to ignore. In one place, he has said:

"We may consider each generation as a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."

In another place, he has said:

"The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is mot absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead and not the living."

I admit that what Jefferson has said is not merely true, but is absolutely true. There can be no question about it. Had the Constituent Assembly departed from this principle laid down by Jefferson it would certainly be liable to blame even to condemnation. But I ask, has it? Quite the contrary. One has only to examine the provisions relating to the amendment of the Constitution. The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfillment of extraordinary terms and conditions as in America or Australia, but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a two- thirds majority and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public. There is only one point of constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration, but is also founded on a mis-understanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the State, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but by the Constitution itself. That is what the Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre a larger field for the operation of its legislative and executive authority than is to be found in any other federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said, lies in the partition of the legislative and executive authority between the Centre and the units

by the Constitution. This is the principle embodied in our Constitution. There can be no mistake about it. It is, therefore, wrong to say that the States have been placed under the Centre. The Centre cannot by its own will alter the boundary of that partition. Nor can the judiciary. For as has been well said:

"Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another."

The first charge of centralization defeating federalism must therefore fall.

As noted above, the Governor occupies a very important and significant post in the democratic set up. When his credibility is at stake on the basis of allegations that he was not performing his constitutional obligations or functions in the correct way, it is a sad reflection on the person chosen to be the executive Head of a particular State. A person appointed as a Governor should add glory to the post and not be a symbolic figure oblivious of the duties and functions which he has is expected to carry out. It is interesting to note that allegations of favouratism and mala fides are hurled by other parties at Governors who belonged or belong to the ruling party at the Centre, and if the Governor at any point of time was a functionary of the ruling party. The position does not change when another party comes to rule at the Centre. It appears to be a matter of convenience for different political parties to allege mala fides. This unfortunate situation could have been and can be avoided by acting on the recommendations of the Sarkaria Commission and the Committee of the National Commission To Review The Working Of The Constitution in the matter of appointment of Governors. This does not appear to be convenient for the parties because they want to take advantage of the situation at a particular time and cry foul when the situation does not seem favourable to them. This is a sad reflection on the morals of the political parties who do not loose the opportunity of politicizing the post of the Governor. Sooner remedial measures are taken would be better for the democracy.

It is not deficiency in the Constitution which is responsible for the situation. It is clearly attributable to the people who elect the Governors on considerations other than merit. It is a disturbing feature, and if media reports are to be believed, Raj Bhawans are increasingly turning into extensions of party offices and the Governors are behaving like party functionaries of a particular party. This is not healthy for the democracy.

The key actor in the Centre-State relations is the Governor who is a bridge between the Union and the State. The founding fathers deliberately avoided election to the office of the Governor, as is in vogue in the U.S.A. to insulate the office from the linguistic chauvinism. The President has been empowered to appoint him as executive head of the State under Article 155 in Part VI, Chapter II. The executive power of the State is vested in him by Article 154 and exercised by him with the aid and advice of the Council of Ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the oath to protect and defend the Constitution and the law. The office of the Governor, therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the Constitution by the elected executive and given him an umpire's role. When a Gandhian economist Member of the Constituent Assembly wrote a letter to Gandhiji of his plea for abolition of the office of the Governor, Gandhiji wrote to

him for its retention, thus; the Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional dead lock in the State and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crisis would be resolved in the State. The Governor thus should play an important role. In his dual undivided capacity as a head of the State he should impartially assist the President. As a constitutional head of the State Government in times of constitutional crisis he should bring about sobriety. The link is apparent when we find that Article 356 would be put into operation normally based on Governor's report. He should truthfully and with high degree of constitutional responsibility, in terms of oath, inform the President that a situation has arisen in which the constitutional machinery in the State has failed and the Government of State cannot be carried on in accordance with the provisions of the Constitution, with necessary detailed factual foundation.

It is incumbent on each occupant of every high office to be constantly aware of the power in the High Office he holds that is meant to be exercised in public interest and only for public good, and that it is not meant to be used for any personal benefit or merely to elevate the personal status of the current holder of that office.

In Sarkaria Commission's report it was lamented that some Governors were not displaying the qualities of impartiality and sagacity expected of them. The situation does not seem to have improved since then.

Reference to Report of the Committee of Governors (1971) would also be relevant. Some relevant extracts read as follows:

"According to British constitutional conventions, though the power to grant to a Prime Minister a dissolution of Parliament is one of the personal prerogatives of the Sovereign, it is now recognized that the Sovereign will normally accept the advice of the Prime Minister since to refuse would be tantamount to dismissal and involve the Sovereign in the political controversy which inevitably follows the resignation of a Ministry. A Prime Minister is entitled to choose his own time within the statutory five year limit for testing whether his majority in the House of Commons still reflects the will of the electorate. Only if a break up of the main political parties takes place can the personal discretion of the Sovereign become the paramount consideration. There are, however, circumstances when a Sovereign may be free to seek informal advice against that of the Prime Minister. Professor Wade, in Constitutional Law (Wade and Phillips, Eighth Edn. 1970), states these circumstances thus:

"If the Sovereign can be satisfied that (1) an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it followed closely on the last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government for a reasonable period with a working majority, the Sovereign could constitutionally refuse to grant a dissolution to the Prime Minister in office".

Prof. Wade further observes:

"It will be seldom that all these conditions can be satisfied. Particularly dangerous to a constitutional Sovereign is the situation which would arise if having refused a dissolution to the outgoing Prime Minister he was faced by an early request from his successor for a general election. Refusal might

be justified if there was general agreement inside and outside the House of Commons that a general election should be delayed and clearly it would be improper for a Prime Minister to rely on defeat on a snap vote to justify an election".

The observations of Hood Phillips in his latest book, Reform of the Constitution (1970), are relevant:

"There is no precedent in this country of a Prime Minister, whose party has a majority in the Commons, asking for a dissolution in order to strengthen his weakening hold over his own party. If he did ask for a dissolution the better opinion is that the Queen would be entitled, perhaps would have a duty, to refuse. In the normal case when the Sovereign grants a dissolution this is on assumption that the Prime Minister is acting as leader on behalf of his party. Otherwise the electorate could not be expected to decide the question of leadership. So if the Sovereign could find another Prime Minister who was able to carry on the government for a reasonable period, she would be justified in refusing a dissolution. Something like this happened in South Africa in 1939 when the question was whether South Africa should enter the war: the Governor- General refused a dissolution to Hertzog, who resigned and was replaced by Smuts who succeeded in forming a Government.

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We may first examine the precise import of Article 356 which sanctions President's rule in a State in the event of a break-down of the constitutional machinery. Four our present purpose, it is enough to read the language of clause (1) of the Article: Article 356(1):

356. Provisions in case of failure of constitutional machinery in State.--(1) If the President, on receipt of report from the Governor of the 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 authorise 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.

'The salient features of this provision', in the words of Shri Alladi Krishnaswami Ayyar (speaking in the Constituent Assembly), "are that immediately the proclamation is made, the executive functions

(of the State) are assumed by the President. What exactly does this mean? As members need not be repeatedly reminded on this point, 'the President' means the Central Cabinet responsible to the whole Parliament in which are represented representatives from the various units which form the component parts of the Federal Government. Therefore, the State machinery having failed, the Central Government assumes the responsibility instead of the State Cabinet. Then, so far as the executive government is concerned, it will be responsible to the Union Parliament for the proper working of the Government in the State. If responsible government in a State functioned properly, the Centre would not and could not interfere.

While the Proclamation is in operation, Parliament becomes the Legislature for the State, and the Council of Ministers at the Centre is answerable to Parliament in all matters concerning the administration of the State. Any law made pursuant to the powers delegated by Parliament by virtue of the Proclamation is required to be laid before Parliament and is liable to modification by Parliament. Thus, a state under President's rule under Article 356 virtually comes under the executive responsibility and control of the Union Government. Responsible government in the State, during the period of the Proclamation, is replaced by responsible government at the Centre in respect of matters normally in the State's sphere.

In discussing Article 356, attention is inevitably drawn to Section 93 of the Government of India Act, 1935. This section had attained a certain notoriety in view of the enormous power that it vested in the Governor and the possibility of its misuse, the Governor being the agent of the British Government. Many of the leading members of the Constituent Assembly had occupied important positions as Ministers in the Provinces following the inauguration of Provincial autonomy and had thus first-hand experience of the working of this particular section and the possible effect of having in the Constitution a provision like Section 93. There was, therefore, considerable discussion, both in the Constituent Assembly and in the Committees, on the advisability, or necessity, of incorporating the provision in the Constitution. Pandit H.N. Kunzru, who had serious apprehensions regarding this provision, suggested the limiting of the Governor's functions to merely making a report to the President, it being left to the President to take such action as he considered appropriate on the report. Pandit Govind Ballabh Pant agreed with Pandit Kunzru in principle. The former referred in particular to the administrative difficulties that would be created by giving powers to the Governor to act on his own initiative over the head of his Ministers.

The whole question was examined at a meeting of the Drafting Committee with Premiers of Provinces on July 23, 1949. Pandit Pant again expressed the view that the Governor should not come into the picture as an authority exercising powers in his discretion. Armed with such powers, he would be an autocrat and that might lead to friction between him and his Ministers.

Shri Alladi Krishnaswami Ayyar tried to allay apprehensions in the minds of the members of the Constituent Assembly about the similarity between Section 93 of the Government of India Act and the provision made in Article 356 of the Constitution. He said in the Constituent Assembly:

"There is no correspondence whatever between the old section 93 (of the Government of India Act, 1935) and this except in regard to the language in some parts. Under Section 93, the ultimate responsibility for the working of Section 93 was the Parliament of great Britain which was certainly representative of the people of India, whereas under the present article the responsibility is that of the Parliament of India which is elected on the basis of universal franchise, and I have no doubt that not merely the conscience of the representatives of the State concerned but also the conscience of

the representatives of the other units will be quickened and they will see to it that the provision is properly worked. Under those circumstances, except on the sentimental objection that it is just a repetition of the old Section 93, there is no necessity for taking exception to the main principle underlying this article".

In winding up the debate on the emergency provisions, Dr. Abmedkar observed:

"In regard to the general debate which has taken place in which it has been suggested that these articles are liable to be abused, I may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the Provinces. In fact I share the sentiments expressed by my honourable 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".

Dr. Ambedkar's hope that this provision would be used sparingly, it must be admitted, has not been fulfilled. During the twenty-one years of the functioning of the Constitution, President's rule has been imposed twenty-four times- the imposition of President's rule in Kerala on November 1, 1956, was a continuation of President's rule in Travancore- Cochin imposed earlier on March 23, 1956- the State of Kerala having been under President's rule five times and for the longest period. Out of seventeen States (not taking into account PEPSU which later merged into Punjab, and excluding Himachal Pradesh which became a State only recently), eleven have had spells of President's rule. The kind of political instability in some of the states that we have witnessed and the politics of defection which has so much tarnished the political life of this country were not perhaps envisaged in any measure at the time the Constituent Assembly considered the draft Constitution. No Governor would, it can be safely asserted, want the State to be brought under President's rule except in circumstances which leave him with no alternative.

The article, as finally adopted, limits the functions of the Governor to making a report to the President that a situation has arisen in which there has been failure of the constitutional machinery. The decision whether a Proclamation may be issued under Article 356 rests with the President, that is to say, the Union Government. Significantly, the President can exercise the power "on receipt of a report from the Governor or otherwise" if he is satisfied that the situation requires the issue of such a Proclamation.

Some of the circumstances in which President's rule may have to be imposed have already been discussed. What is important to remember is that recourse to Article 356 should be the last resort for a Governor to seek. A frequent criticism of the Governor in this connection is that he sometimes acts at the behest of the Union Government. This criticism emanates largely from a lack of appreciation of the situations which confront the Governors. Imposition of President's rule normally results in the President vesting the Governor with executive functions which belong to his Council of Ministers This is a responsibility which no Governor would lightly accept. Under President's rule he functions in relation to the administration of the State under the superintendence, direction and control of the President and concurrently with him by virtue of an order of the President.

As Head of the State, the Governor has a duty to see that the administration of the State does not

break down due to political instability. He has equally to take care that responsible Government in the State is not lightly disturbed or superseded. In ensuring these, it is not the Governor alone but also the political parties which must play a proper role. Political parties come to power with a mandate from the electorate and they owe primary responsibility to the Legislature. The norms of parliamentary government are best maintained by them.

Before leaving this issue, we would like to state that it is not in the event of political instability alone that a Governor may report to the President under Article 356. Reference has been made elsewhere in this report to occasions where a Governor may have to report to the President about any serious internal disturbances in the State, or more especially of the existence or possibility of a danger of external aggression. In such situations also it may become necessary for the Governor to report to the President for action pursuant to Article 356.

It is difficult to lay down any precise guidelines in regard to the imposition of President's rule. The Governor has to act on each occasion according to his best judgment, the guiding principle being, as already stated, that the constitutional machinery in the State should, as far as possible, be maintained.

CONVENTIONS:

Conventions of the Constitution, according to Dicey's classic definition, consist of "customs, practices, maxims, or precepts which are not enforced or recognized by the Courts", but "make up a body not of laws, but of constitutional or political ethics". The broad basis of the operation of conventions has been set out in Prof. Wade's Introduction of Dicey's Law of the Constitution (1962 edn.). The dominant motives which secure obedience to conventions are stated to be:

"(1) the desire to carry on the traditions of constitutional government;

(2) the wish to keep the intricate machinery of the ship of State in working order;

(3) the anxiety to retain the confidence of the public, and with it office and power".

These influences secure that the conventions of Cabinet Government, which are based on binding precedent and convenient usage, are observed by successive generations of Ministers. The exact content of a convention may change or even be reversed, but each departure from the previous practice is defended by those responsible as not violating the older precedents. Objections are only silenced when time has proved that the departure from precedent has created a new convention, or has shown itself to be a bad precedent and, therefore, constituted in itself a breach of convention.

This exposition of the nature of conventions will show that, if they have to be observed and followed, the primary responsibility therefor will rest on those charged with the responsibility of government. In a parliamentary system, this responsibility unquestionably belongs to the elected representatives of the people who function in the Legislatures. They are mostly members of political parties who seek the suffrage of the electorate on the basis of promises made and programmes announced. The political parties, therefore, are concerned in the evolution of healthy conventions so that they "retain the confidence of the public, and, with it, office and power".

"I feel that it (the Constitution) is workable, it is flexible and it is strong enough to hold the country

together both in peace time and in war time. Indeed if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile."

These words were uttered by Dr. Ambedkar in the Constituent Assembly in moving consideration of the draft Constitution. It has become the fashion, when situations arise which may not be the liking of a particular political party, to blame the Constitution. The Governors also inevitably get their share of the blame either because, it is alleged they take a distorted view of the Constitution, or, as is also alleged, because the Constitution permits them to resort to "unconstitutional" acts. The essential structure of our Constitution relating to the functioning of the different branches of government is sound and capable of meeting all requirements. The conventions, or the guide-lines, that we are called upon to consider should be viewed in this background.

Conventions evolve from experience and from trial and error. The working of our Constitution during the past twenty-one years has exposed not so much any weaknesses in our political life. Some of the weaknesses will be evident from the discussions in the earlier part of this Report. The Governors, under our Constitution, do not govern; government is the primary concern of the Council of Ministers which is responsible to the Legislature and the people. Therefore, for a purposeful evolution of conventions, the willing co-operation of the political parties and their readiness to adhere to such conventions are of paramount importance. In recent years, it has been a regrettable feature of political life in some of the States, with the growing number of splinter parties, some of them formed on the basis of individual or group alignments and not of well-defined programmes or policies, that governments are formed with a leader- a Chief Minister - who comes to that office not as of a right, with the previous acquiescence of followers and the deference of his colleagues, but as being the most "acceptable" candidate for the time. Much of his time and efforts are, therefore, inevitably spent in finding expedients to keep himself in power and the Cabinet alive".

In Special Reference NO.1 of 2002 case (supra) in paragraphs 55 and 56 it was observed as follows: "55. It was then urged on behalf of the Union that under Article 174 what is dissolved is an Assembly while what is prorogued is a House. Even when an Assembly is dissolved, the House continues to be in existence. The Speaker continues under Article 94 in the case of the House of the People or under Article 179 in the case of the State Legislative Assembly till the new House of the People or the Assembly is constituted. On that premise, it was further urged that the fresh elections for constituting a new Legislative Assembly have to be held within six months from the last session of the dissolved Assembly.

56. At first glance, the argument appeared to be very attractive, but after going deeper into the matter we do not find any substance for the reasons stated hereinafter"

Article 172 provides for duration of the State Legislatures. The Superintendence, direction and control of the elections to Parliament and to the Legislatures of every State vest in the Election Commission under Article 324. Article 327 provides that Parliament may make provision with respect to all matters relating to, or in connection with, elections to the Legislative Assembly of a State and all other matters necessary for securing the due constitution of the House of the Legislature. Conjoint reading of Article 327 of the Constitution and Section 73 of the R.P. Act makes the position clear that the Legislative Assembly had been constituted. No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the Legislature.

Once by operation of Section 73 of the R.P. Act the House or Assembly is deemed to be constituted, there is no bar on its dissolution. Coming to the plea that there was no Legislative Assembly in existence as contended by Mr. Viplav Sharma, appearing in person the same clearly overlooks Section 73 of the R.P. Act. There is no provision providing differently in the Constitution. There is no challenge to the validity of the Section 73 of the R.P. Act, which is in no way repugnant by any provision to the Constitution. That being so, by operation of Section 73 of the R.P. Act the Assembly was duly constituted. The stand that the Governor was obliged to convene the Session for administering oath to the members and for formation of a Cabinet thereafter has no relevance and is also not backed by any constitutional mandate. There was no compulsion on the Governor to convene a session or to install a Cabinet unless the pre-requisites in that regard were fulfilled. The reports of the Governor clearly indicated that it was not possible to convene a session for choosing a Chief Minister or for formation of a Cabinet. Even if hypothetically it is held that the dissolution notifications are unsustainable, yet restoration of status quo ante is not in the present case the proper relief. As noted supra, no stake was claimed by any person before the Governor. The documents relied upon to show that a majority existed lack authenticity and some of them even have the stamp of manipulation. The elections as scheduled had reached on an advanced stage. Undisputedly, the Election Commission had made elaborate arrangements. It would be inequitable to put the clock back and direct restoration of stats quo ante.

In Public Law 2005, some interesting write-ups are there which have relevance. They read as follows: "Judicial review-Power of the court to limit the temporal effect of the annulment of an administrative decision, postpone the date at which it will produce effects and qualify the extent of the nullity. Under French welfare law, agreements relating to unemployment allowances are private agreements signed by unions and employers' associations- but they enter into force only if approved by the Minister for Social Affairs. They then become compulsory for all. Several associations defending the rights of the unemployed brought an action against ministerial decisions approving such agreements. Standing was granted. The decisions were quashed on procedural grounds, i.e. the composition of the committee which had to be consulted and the way the consultation took place. The issues at stake related to the date at which this annulment would enter into force and to its effects. The matter was an extremely sensitive one, socially and politically; the scope and amount of unemployment allowances. To say nothing would have led to the application of the principle according to which nullity is retroactive. An annulled decision is supposed never to have existed. It is therefore impossible to maintain its effects for a certain time. Such are the strict requirements of the principle of legality. On the other hand, the court cannot disregard the practical consequences of its decision, not only for the parties, but for a larger public, especially in such an area. These consequences may affect not only the functioning of a public service but also the rights of individuals. They may create a legal void, and social havoc.

Hence the idea of allowing the court, when it annuls an administrative decision, to include in its judgment specific orders as to whether and when the annulment will produce effects and, if so, which persons might be in a special position. Such a discretion has been used for a long time by both European courts. The European Court of Human Right' judgment in Marckx v. Belgium (1979-80) 2 E.H.R.R. 330, is an apt illustration. As for the ECJ, it construed broadly the second paragraph of Art. 231 EC (formerly Art.174) according to which: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive". This derogation to the ex tunc effect has been applied in cases relating not only to regulations, but also to preliminary rulings concerning interpretation (Case C-43/75 Defrenne v. Sabena (1976 E.C.R. 455; Case C-61/79 Denkjavit Italiana

(1980 E.C.R. 1205; Case C-4/79 Societe Cooperative Providence agricole de la Champagne (1980 ECR 2823; Case C-109/79 Maiseies de Beauce (1980 E.C.R. 2882; Case-145/79 Societe Roquette Freres (1980 E.C.R. 2917), directives (Case C-295/90 European Parliament v. Council (1992 E.C.R. I-4193) and decisions (Case C-22/96) European Parliament v Council (1998 E.C.R. I-3231). The ECJ held that the use of such a power was justified in order to take into account "imperious considerations of legal certainty relating to all interests at stake, public and private". In doing so, however, the Court's decisions could harm the rights of the very petitioners who wanted the Court to arrive at the decision it took. Hence the dissenting decisions of several national higher courts, such as the Italian Constitutional Court (April 21, 1989, Fragd) and the Conseil d'Etat (June 28, 1985, Office national interprofessionnel des cereales o Societe Maiseries de Beauce, concl. Genevois, RTDE, 1986, 145; July 26, 1985; Office national interprofessionnel des cereales, p.233, concl. Genevois AJDA, 1985; June 13, 1986, Office national interprofessionnel des cereales, concl. Bonichot, RTDE 1986, 533). This is why the ECJ took some precautions to protect the rights of persons who had previously brought an action or an equivalent claim. Some ECJ judgments led to the inclusion of special clauses into the EC Treaty, as shown by the Maastricht Treaty Protocol 2 (the "Barber Declaration") following the ECJ's judgment in Case C-262/88 Barber v. Guardian Royal Exchange Assurance Group (1991 (1) Q.B. 344). This Protocol limits the effects ratione temporis (before May 17, 1990) of Article 141 EC. The ECJ has been explicit on the considerations it takes into account to use such powers. They relate, on the whole, to legal certainty lato sensu, i.e. to the concrete effects of its decision on existing legal situations, and the desirability of avoiding the creation of a legal void. Many European constitutional courts have a similar power.

The Conseil d'Etat had never affirmed that it had such a faculty. It was not, however, entirely unaware of the issue; in Vassilikiotis, June 26, 2001, p. 303 it annulled a ministerial decision in so far as it did not state how the permit necessary for guides in museums and historical monuments would be granted to persons with diplomas of other EU Member States. The judgment added precise and compulsory prescriptions telling the Administration exactly what it should do, even before revising the regulation. Otherwise an unlawful domestic regulation would have remained in force, perpetuating discrimination contrary to EC law. It thus held that the Administration was under an obligation to enact, after a reasonable delay, the rules applying to the persons mentioned above. Meanwhile the decision forbade the Administration to prevent EU nationals from guiding visits on the ground that they did not possess French diplomas. It belonged to the competent authorities to take, on a case-by-case basis, the appropriate decisions and to appreciate the value of the foreign diplomas (see also July 27, 2001, Titran, P.411) In Association AC, a case that lent itself to such a move, the Conseil d'Etat decided to innovate and to give administrative courts new powers. The new principles affirmed may be summed up as follows:

1. The principle is that an annulled administrative decision is supposed never to have existed.

2. However, such a retroactive effect may have manifestly excessive consequences in view of (a) the previous effects of the annulled decision and of the situations thus created and (b) the general interest which could make it desirable to maintain its effects temporarily.

3. If so, administrative courts are empowered to take specific decisions as to the limitation of the effects, in time, of the annulment.

4. They may do so after having examined all grounds relating to the legality of the decision and after asking the parties their opinion on such a limitation.

5. They must take into account (a) the consequences of the retroactivity of the annulment for the public and private interests at stake and (b) the effects of such a limitation on the principle of legality and on the right to an effective remedy.

6. Such a limitation should be exceptional.

7. The rights of the persons who brought an action, before the court's judgment, against the annulled decision must be preserved.

8. The court may decide that all or part of the effects of the decision prior to its annulment will be regarded as definitive, or that the annulment will come into force at a later time as determined by the judgment.

In the present case the Conseil d'Etat annulled a number of ministerial decisions. It also annulled other ones, but only from July 1 onwards, thus giving seven weeks to the Minister. The rights of persons who had earlier brought an action were explicitly preserved. The effects of a third group of annulled decisions were declared to be definitive, with the same reservation. Several comments are in order on this important judgment. The influence of the ECJ's case law and of its use of the ex nunc/ex tunc effect is evident. The judgment is also an apt illustration of a renewal of the conception of the role of administrative courts. It no longer stops when judgment is given. More and more attention is given to its effects, its practical consequences for all, the way it must be implemented by the Administration and its repercussions on the rights of individuals. Hence the attention given to the ways and means to conciliate the two basic principles of legality and of legal certainty (securite juridique). The latter is more and more seen as a pressing social need, to borrow the vocabulary of the European Court of Human Rights. A strong illustration is the recent case law of the Cour de cassation restricting the scope not only of lois de validation but also of retroactive "interpretative statutes", on the basis of Articles 6(1) and 13 ECHIR: see Cass.plen. Janaury 24, 2003, Mme X o Association Promotion des handicape's dans le Loiret, and Cass. Civ. April 7, 2004, in Bulletin d'information de la Cour de cassation, March 15, 2004, with the report of Mme Favre. The discretion of the courts is a two-fold one; on whether to use such a faculty and on how to use it. One last-prospective-remark: might the next step be the limitation, by the courts, of the effects in time of a change in the case law?"

To Sum up:

So far as scope of Article 361 granting immunity to the Governor is concerned, I am in respectful agreement with the view expressed by Hon'ble the Chief Justice of India.

(1) Proclamation under Article 356 is open to judicial review, but to a very limited extent. Only when the power is exercised mala fide or is based on wholly extraneous or irrelevant grounds, the power of judicial review can be exercised. Principles of judicial review which are applicable when an administrative action is challenged, cannot be applied stricto sensu.

(2) The impugned Notifications do not suffer from any constitutional invalidity. Had the Governor tried to stall staking of claim regarding majority that would have fallen foul of the Constitution and the notifications of dissolution would have been invalid. But, the Governor recommended dissolution on the ground that the majority projected had its foundation on unethical and corrupt

means which had been and were being adopted to cobble a majority, and such action is not constitutional. It may be a wrong perception of the Governor. But it is his duty to prevent installation of a Cabinet where the majority has been cobbled in the aforesaid manner. It may in a given case be an erroneous approach, it may be a wrong perception, but it is certainly not irrational or irrelevant or extraneous.

(3) A Public Interest Litigation cannot be entertained where the stand taken was contrary to the stand taken by those who are affected by any action. In such a case the Public Interest Litigation is not to be entertained. That is the case here.

(4) Hypothetically even if it is said that the dissolution notifications were unconstitutional, the natural consequence is not restoration of status quo ante. The Court declaring the dissolution notifications to be invalid can assess the ground realities and the relevant factors and can mould the reliefs as the circumstances warrant. In the present case restoration of the status quo ante would not have been the proper relief even if the notifications were declared invalid. (5) The Assembly is constituted in terms of Section 73 of the R.P. Act on the conditions indicated therein being fulfilled and there is no provision in the Constitution which is in any manner contrary or repugnant to the said provision. On the contrary, Article 327 of the Constitution is the source of power for enactment of Section 73.

(6) In terms of Article 361 Governor enjoys complete immunity. Governor is not answerable to any Court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine validity of the action including on the ground of mala fides.

(7) It has become imperative and necessary that right persons are chosen as Governors if the sanctity of the post as the Head of the Executive of a State is to be maintained.

The writ applications are accordingly dismissed but without any order as to costs.