CASE NO.:
Writ Petition (civil) 257 of 2005

PETITIONER:
Rameshwar Prasad & Ors.

RESPONDENT:
Union of India & Anr.

DATE OF JUDGMENT: 24/01/2006

BENCH:
Y.K. Sabharwal CJI & K.G. Balakrishnan & B.N. Agrawal & Ashok Bhan & Arijit Pasayat

JUDGMENT:
JUDGMENT

Delivered by
Y.K. Sabharwal, CJI
K.G. BALAKRISHNAN, J
ARIJIT PASAYAT J.

[With W.P. (C) No.255 of 2005, W.P. (C) No.258 of 2005 and W.P.(C) No.353 of 2005

Y.K. Sabharwal, CJI.

The challenge in these petitions is to the constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar. It is a unique case. Earlier cases that came up before this Court were those where the dissolutions of Assemblies were ordered on the ground that the parties in power had lost the confidence of the House. The present case is of its own kind where before even the first meeting of the Legislative Assembly, its dissolution has been ordered on the ground that attempts are being made to cobble a majority by illegal means and lay claim to form the Government in the State and if these attempts continue, it would amount to tampering with constitutional provisions.

One of the questions of far reaching consequence that arises is whether the dissolution of Assembly under Article 356(1) of the Constitution of India can be ordered to prevent the staking of claim by a political party on the ground that the majority has been obtained by illegal means. We would first note the circumstances which led to the issue of impugned notification.

Factual Background

Election to the State of Bihar was notified by the Election Commission on 17th December, 2004. Polling for the said elections were held in three phases, i.e., 3rd February, 2005, 5th February, 2005 and 13th February, 2005. Counting of votes took place on 27th February, 2005. Results of the said elections were declared by the

Election Commission. On 4th March, 2005, Notification was issued by the Election Commission in pursuance of Section 73 of Representation of People Act, 1951 (for short 'the RP Act, 1951') duly notifying the names of the members elected for all the constituencies along with party affiliation.

Bihar Legislative Assembly comprises of 243 members and to secure an absolute majority support of 122 Members of Legislative Assembly (in short 'MLAs'), is required. National Democratic Alliance (for short 'NDA'), a political coalition of parties comprising of the Bharatiya Janata Party (for short 'BJP') and the Janata Dal (United) (for short 'JD(U)') was the largest pre-poll combination having the support of 92 MLAs. The party-wise strength in the Assembly was as under:

"(1)	NDA	92
(2)	RJD	75
(3)	LJP	29
(4)	Congress (I)	10
(5)	CPI (ML)	07
(6)	Samajwadi Party	04
(7)	NCP	03
(8)	Bahujan Samaj Party	02
(9)	Independents	17
(10)	Others	09"

Report dated 6th March, 2005 was sent by the Governor to the President, recommending newly constituted Assembly to be kept in suspended animation for the present. It reads as under:

"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	
			243

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 recd.)	
4.	C.P.I.(M) :	01	
5.	N.C.P. :	03	
			92

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

1.	B.J.P. :	37	
2.	J.D.(U) :	55	
			92

3. The present C.M., Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation along with 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 LJP 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 RJD nor the BJP in the formation of Government. The State President of Congress Party, Shri Ram Jatan Sinha, also met in the evening of 28.2.2005.

5. The State President of BJP, Shri Gopal Narayan Singh along with supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP & JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the RJD 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 RJD or NDA in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the CPI (ML-Lib.), Legislature Party along with 4 others met me and submitted a letter (AnnexureV) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of LJP, along with 15 others met me and submitted another letter (Annexure VI). They have reiterated their earlier stand.

9. The RJD 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.	NCP :	03	

3. CPI(M) : 01
4. BSP : 02

(Copy enclosed as Ann.VII)

The RJD with the above will have only 91.

They have further claimed that some of the Independent members may support the RJD. However, it has not been disclosed as to the number of Independent MLAs from whom they expect support nor their names.

Even if we assume the entire Independents totalling 17 to extend support to RJD 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 NDA delegation led by Shri Sushil Kumar Modi, MP, 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 Independent MLAs 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 authorization 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 summarised 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 Article 75 and Article 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's case referred to above in para 153, S.C. has stated with regard to the position where, I quote :

"After the General Elections held, no political party or coalition of parties or group 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 MLAs, 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 constituted Assembly be kept in suspended animation for the present, and the President of India is requested to take such appropriate action/decision, as required."

Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and the Assembly was kept in suspended animation. Another notification of the same date was also issued, inter alia, stating that

the powers exercisable by the President shall, subject to the superintendence, direction and control of the President be exercisable also by the Governor of Bihar. The object of the proclamation imposing President's rule was to give time and space to the political process to explore the possibility of forming a majority Government in the State through a process of political realignment as is reflected in the speech of Home Minister Shri Shivraj V. Patil in the Rajya Sabha on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was discussed. The Home Minister said :

"\005. But, I would like to make one point very clear. We are not very happy to impose President's Rule on the State of Bihar. Let there be no doubt in the minds of any Members of the House; we are not happy. After the elections we would have been happy if Government would have been formed by the elected representatives. That was not possible and that is why, President's Rule was imposed. But we cannot take pleasure in saying "Look we did this". We are not happy about it. I would ensure that the President's Rule is not continued for a long time. The sooner it disappear, the better it would be for Bihar, for democracy and for the system we are following in our country. But, who is to take steps in this regard? It is the elected representatives who have to take steps in this respect. The Governor can and, I would like to request in this House that elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. Even if it is minority Government with a slight margin, there is no problem\005.."

The Home Minister gave a solemn assurance to the nation that the imposition of President's rule was temporary and transient and was intended to explore the possibility of forming a popular Government. According to the petitioners, process of realignment of forces was set in motion and several political parties and independent MLAs re-considered their position in terms of their commitment to provide a majority Government in deference to the popular wishes of the people and announced support to the NDA led by Shri Nitish Kumar. First such announcement was made by the entire group of 17 independent MLAs on 8th April, 2005. The signed declaration was released by these MLAs to the media. With the support of 17 independent MLAs the support base of the NDA rose to 109 MLAs. Later on, it rose to 115 MLAs with the declaration of support by the Samajwadi Party (SP), the Bahujan Samaj Party (BSP) and the Nationalist Congress Party (NCP). Governor of Bihar sent a report on 27th April, 2005 to the President of India, inter alia, stating that the newspaper reports and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received, indicated 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 was a disturbing feature. According to the said report, the situation was fast approaching a scenario wherein if the trend is not arrested immediately the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. That it would not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll. The report is reproduced below in its entirety.

"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/BR-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 of India 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 targetting 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 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 practiced 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."

According to the petitioners, Lok Janashakti Party (LJP) had contested elections on the plank of opposing the then Government led by Rashtriya Janata Dal (RJD), which again is a constituent of United Progressive Alliance (UPA) in the Centre. It had a strength of 29 MLAs in the new assembly. The leader of LJP Shri Ram Vilas Paswan had taken the stand that he was opposed to RJD as well as NDA led by the BJP. MLAs belonging to LJP were in a rebellious mood. About 22 MLAs belonging to the LJP assembled on or around 21st May, 2005 and started working towards a major political realignment in the stand of the said party. According to them, 22 LJP members of the Legislative wing supported by members of the original political party reached a consensus subsequently to merge their party with the JD(U). That, with this the repolarisation of political forces was complete. According to them the proposed merger between two political formations was in consonance with the principles enumerated in para 4 of the Tenth Schedule to the Constitution. It provides that on a merger of the political party, all the members of the new political party with which the merger has taken place if and only if not less than two-third of the members of the said party have agreed to the said merger. It is their allegation that in order to thwart the formation of a Government led by JD(U) the Governor of Bihar sent another report from its Camp Office in Delhi on 21st May, 2005 to the President of India. It was reiterated in the report that from the information gathered through reports from media, meeting with various political functionaries, as also intelligence reports, a trend was indicated to win over elected representatives of the people. In his view a situation had arisen in the State wherein it would be desirable in the interest of State that assembly which has been kept in suspended animation be dissolved so that the people/electorate could be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course. The report dated 21st May, 2005 is reproduced in its entirety as follows :

"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. \026 GSR \026 162 (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 very disturbing and alarming feature. Any move by the break away faction 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."

The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs. (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly which has been impugned in these writ petitions.
Challenging proclamation dated 23rd May, 2005 issued under Article 356 of the Constitution ordering

dissolution of Bihar Legislative Assembly, petitioners have also prayed for restoration of Election Commission notification dated 4th May, 2005 issued under Section 73 of the RP Act of 1951.

According to the petitioners, the condition precedent for dissolving the assembly is that there must be satisfaction of the President that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. That this satisfaction has to be based on cogent material. Power of dissolution cannot be used to prevent the staking of claim for the formation of a Government by a political party with support of others. That the assembly was placed under suspended animation with the intention of providing time and space to political parties to explore the possibility of providing a majority Government in the State. No sooner the process of realignment was complete ensuring that the NDA led by Shri Nitish Kumar had the support of over 135 MLAs, report was sent by the Governor. The midnight meeting of the Cabinet was hurriedly called in order to prevent the formation of a Government. It was incumbent upon the Governor to make a meaningful and real effort for securing the possibility of a majority Government in the State. According to them the intention of the Governor was to prevent the formation of a Government led by Shri Nitish Kumar. That there was no material available or in existence to indicate that any political defection was being attempted through the use of money or muscle power. In the absence of any such material the exercise of power under Article 356 was a clear fraud on the exercise of power.

That allegations in the Governor's report of horse trading was factually incorrect and fictional. It was incumbent upon the Governor to verify the facts personally from the MLAs. That under the scheme of the Constitution the decision with regard to mergers and disqualifications on the ground of defection or horse trading is vested in the Speaker. The Governor could not have attempted to act on that basis and arrogated to himself such an authority. Relying heavily on the Nine Judge Bench judgment of this Court in S.R.Bommai & Ors. v. Union of India & Ors. [(1994) 3 SCC 1], it was contended that action of the Governor is mala fide in law; irrational, without any cogent material to support the conclusion arrived at and is based on mere ipse dixit and, thus, was not sustainable in law. It was contended that in exercise of judicial review this Court should quash the impugned notification and as a consequence restore the legislative assembly constituted by the Election Commission notification dated 4th March, 2005.

Mr.Soli Sorabjee led the arguments in support of the challenge to the validity of the impugned notification contending that the dissolution of the Assembly when examined in the light of law laid down in Bommai's case (supra) is clearly unconstitutional and deserves to be set aside and the status quo ante at least as on 7th March, 2005 may be directed.

Mr.Viplav Sharma, advocate, appearing in person in writ petition No.258 of 2005 adopting the arguments of Mr.Sorabjee further contended that before even elected candidates making and subscribing oath or affirmation, as contemplated by Article 188 of the Constitution, even the Assembly could not be placed under suspended animation and status quo as on the date of issue of

notification under Section 73 of the RP Act of 1951 deserves to be directed.

Mr. Narasimha, appearing in Writ Petition (C) No.353 for the petitioner, also adopted the arguments of Mr.Sorabjee but at the same time further contended that it is not legally permissible to order the dissolution of Assembly before its meeting even once and the MLAs being administered the oath as contemplated by the Constitution. This was also the submission of Mr. Viplav Sharma. Arguments on behalf of respondent \026 Union of India were led by learned Attorney General, Mr. Milon Banerjee, followed by learned Solicitor General and Additional Solicitor General, Mr. Gulam Vahanavati and Mr. Gopal Subramaniam respectively. Mr. P.P. Rao, learned senior advocate argued for State of Bihar. We place on record our appreciation for excellent and very able assistance rendered by all the advocates.

After hearing arguments on the question of the Governor not being answerable to any Court in view of immunity granted by Article 361(1) of the Constitution, we accepted the submission of the Government in terms of our order dated 8th September, 2005 that notice may not be issued to the Governor, giving brief reason in order to be followed by detailed reasons later. The said order reads as under :

"On the question whether the Governor could be impleaded in his capacity as the Governor and whether notice could be issued to him on the writ petitions in the context of averments made and the prayers contained in the petitions and other aspects highlighted in the order dated 31st August, 2005, we have heard Mr. Soli J. Sorabjee, learned senior counsel appearing in Writ Petition (C) No.257 of 2005, and Mr. Viplav Sharma, petitioner-in-person in Writ Petition (C) No.258 of 2005. We have also heard the submissions made by Mr. Milon K. Banerji, Attorney General for India, and Mr. Gopal Subramaniam, learned Additional Solicitor General.

The Constitution of India grants immunity to the Governor as provided in Article 361. Article 361(1), inter alia, provides that the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in exercise and performance of those powers and duties. It is submitted by learned Attorney General and Additional Solicitor General that in view of Article 361(1), this Court may not issue notice to the Governor. While we accept the submission but, at the same time, it is also necessary to note that the immunity granted to the Governor does not affect the power of the Court to judicially scrutinize the attack made to the proclamation issued under Article 356(1) of the Constitution of India on the ground of mala fides or it being ultra vires. It would be for the Government to

satisfy the court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of law. Even, the expression "purporting to be done" in Article 361 does not cover acts which are mala fide or ultra vires and, thus, the Government supporting the proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the ground of mala fides or proclamation being ultra vires would not be examined by the Court. At this stage, we have not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. That is a question still to be argued.

These are our brief reasons. We will give detailed reason later."

Under the aforesaid factual background, the points that fall for our determination are :

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

After hearing elaborate arguments, by a brief order dated 7th October, 2005, the notification dated 23rd May, 2005 was held to be unconstitutional but having regard to the facts and circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Order dated 7th October reads as under :

"The General Elections to the Legislative Assembly of Bihar were held in the month of February 2005. The Election Commission of India, in pursuance of Section 73 of the Representation of the People Act, 1951 in terms of Notification dated 4th March, 2005 notified the names of the elected members.

As no party or coalition of the parties was in a position to secure 122 seats so as to have majority in the Assembly, the Governor of Bihar made a report dated 6th March, 2005 to the President of India, whereupon in terms of Notification G.S.R.162(E) dated 7th March, 2005, issued in exercise of powers under Article 356 of the Constitution of India, the State was brought under President’s Rule and the Assembly was kept in suspended animation. By another Notification

G.S.R.163(E) of the same date, 7th March, 2005, it was notified that all powers which have been assumed by the President of India, shall, subject to the superintendence direction and control of the President, be exercisable also by the Governor of the State. The Home Minister in a speech made on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in the Rajya Sabha said that the Government was not happy to impose President's Rule in Bihar and would have been happy if Government would have been formed by the elected representatives after the election. That was, however, not possible and, therefore, President's Rule was imposed. It was also said that the Government would not like to see that President's Rule is continued for a long time but it is for elected representatives to take steps in this respect; the Governor can ask them and request them and he would also request that the elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. The Presidential Proclamation dated 7th March, 2005 was approved by the Lok Sabha at its sitting held on 19th March, 2005 and Rajya Sabha at its sitting held on 21st March, 2005.

The Governor of Bihar made two reports to the President of India, one dated 27th April, 2005 and the other dated 21st May, 2005. On consideration of these reports, Notification dated 23rd May, 2005 was issued 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 Notification G.S.R.162(E) dated 7th March, 2005 issued under Article 356 of the Constitution and the Legislative Assembly of the State of Bihar was dissolved with immediate effect.

These writ petitions have been filed challenging constitutional validity of the aforesaid Proclamation dated 23rd May, 2005. Mr. Soli J. Sorabjee, Senior Advocate and Mr. P.S. Narasimha, Advocate and Mr. Viplav Sharma, advocate appearing-in-person have made elaborate submissions in support of the challenge to the impugned action of dismissing the assembly.

On the other hand, Mr. Milon K. Banerjee, Attorney-General for India, Mr. Goolam E. Vahanavati, Solicitor General and Mr. Gopal Subramaniam, Additional Solicitor General appearing for Union of India and Mr. P.P. Rao, Senior Advocate appearing for the State of Bihar also

made elaborate submissions supporting the impugned Proclamation dated 23rd May, 2005.

Many intricate and important questions of law having far reaching impact have been addressed from both sides. After the conclusion of the hearing of oral arguments, written submissions have also been filed by learned counsel. Fresh elections in State of Bihar have been notified. As per press note dated 3rd September, 2005 issued by Election Commission of India, the schedule for general elections to the Legislative Assembly of Bihar has been announced. According to it, the polling is to take place in four phases commencing from 18th October, 2005 and ending with the fourth phase voting on 19th November, 2005. As per the said press note, the date of Notification for first and second phase of poll was 23rd September and 28th September, 2005, date of poll being 18th October, 2005 and 26th October, 2005 respectively. Notifications for third and fourth phases of poll are to be issued on 19th and 26th October, 2005 respectively.

Keeping in view the questions involved, the pronouncement of judgment with detailed reasons is likely to take some time and, therefore, at this stage, we are pronouncing this brief order as the order of the court to be followed by detailed reasons later. Accordingly, as per majority opinion, this court orders as under:

1. The Proclamation dated 23rd May, 2005 dissolving the Legislative Assembly of the State of Bihar is unconstitutional.

2. Despite unconstitutionality of the impugned Proclamation, but having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction the status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation dated 7th March, 2005 whereunder it was kept under suspended animation."

POINT NO.1 - Is it permissible to dissolve the Legislative Assembly under Article 174(2) (b) of the Constitution without its first meeting taking place?

Article 174 of the Constitution deals with the power of the Governor to summon the House, prorogue the House and dissolve the Legislative Assembly. This Court never had the occasion to consider the question of legality of dissolution of a Legislative Assembly even before its first meeting contemplated under Article 172 of the

Constitution. It has been contended on behalf of the petitioners by Mr. Narsimha and Mr. Viplav Sharma, appearing-in-person, that a Legislative Assembly can be dissolved under Article 174(2)(b) only after its first meeting is held as postulated by Article 172 of the Constitution. The argument is that there cannot be any dissolution without even members taking oath and the Legislative Assembly coming into existence. What does not exist, cannot be dissolved, is the submission. In this regard, the question to be considered also is whether the date for first meeting of the Legislative Assembly can be fixed without anyone being in a position to form the Government.

Let us first examine the relevant constitutional and statutory provisions.

Part VI of the Constitution dealing with the States has six chapters but relevant for our purpose are Chapter II and Chapter III. Chapter II comprising Article 153 to Article 167 relates to the executive, Chapter III comprising Article 168 to Article 212 relates to the State Legislature.

The federal structure under our Constitution contemplates that there shall be a Legislature for every State which shall consist of a Governor and one or two Houses, as provided in Article 168. Article 170 prescribes that the Legislative Assembly of each State shall consist of members chosen by direct election from territorial constituencies in the States. Article 170, therefore, brings in the democratic process of election.

Article 164 puts into place an executive Government. It enjoins upon the Governor to appoint the Chief Minister and other ministers on the advice of the Chief Minister. The Council of Ministers (Article 163) exercises the executive power of the State as provided under Article 154. Article 164(2) provides that the Council of ministers shall be collectively responsible to the Legislative Assembly of the State.

As provided in Article 172, every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. Article 174(1) provides that the Governor shall from time to time summon the House to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Article 174(2) (b) provides that the Governor may from time to time dissolve the Legislative Assembly. Every member of the Legislative Assembly of the State shall, before taking his seat, make and subscribe before the Governor, an oath or affirmation, as provided in Article 188 of the Constitution.

The contention urged is that the function of the Governor in summoning the House and administering the oath or affirmation to the members of the Legislative Assembly are not the matters of privilege, prerogative or discretion of the Governor but are his primary and fundamental constitutional obligations on which the principles of parliamentary democracy, federalism and even ’separation of power’ are dependent. Further contention is that another constitutional obligation of the Governor is to constitute the executive Government.

According to Mr. Narasimha, the Governor failed to fulfill these constitutional obligations. Neither the

executive Government nor the Legislative Assembly has been constituted by the Governor. On the other hand, the Governor has frustrated the very object of exercise of his constitutional obligation by dissolving the Legislative Assembly under Article 174(2)(b) without the Legislative Assembly being even constituted. When the Legislative Assembly is not even constituted, where is the question of its dissolution, is the contention urged. The submission is that under the scheme of Indian Constitution, it is impermissible to dissolve a Legislative Assembly before its first meeting and members making oath or affirmation as required by Article 188. According to the petitioners, under Indian Constitution, the Legislative Assembly is duly constituted only upon the House being summoned and from the date appointed for its first meeting. Article 172 which provides for duration of State Legislatures reads as under:

"172. Duration of State Legislatures -
(1) Every Legislative Assembly of every State, unless sooner dissolved shall continue for (five years) from the date appointed for its first meeting and no longer and the expiration of the said period of (five years) shall operate as a dissolution of the Assembly:
Provided that the said period, may while a proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.
(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

The aforesaid constitutional provision stipulates that five years term of a Legislative Assembly shall be reckoned from the date appointed for its first meeting and on the expiry of five years commencing from the date of the first meeting, the Assembly automatically stands dissolved by afflux of time. The duration of the Legislative Assembly beyond five years is impermissible in view of the mandate of the aforesaid provision that the Legislative Assembly shall continue for five years and 'no longer'. Relying upon these provisions, it is contended that the due constitution of the Legislative Assembly can only be after its first meeting when the members subscribe oath or affirmation under Article 188. The statutory deemed constitution of the Assembly under Section 73 of the R.P. Act, 1951, according to the petitioners, has no relevance for determining due constitution of Legislative Assembly for the purpose of Constitution of India.

Reference on behalf of the petitioners has also been made to law existing prior to the enforcement of the Constitution of India contemplating the commencement of the Council of State and Legislative Assembly from the date of its first meeting. It was pointed out that Section 63(d) in the Government of India Act, 1915 which dealt with Indian Legislature provided that every Council of

State shall continue for five years and every Legislative Assembly for three years from the date of its first meeting. Likewise, Section 72(b) provided that every Governor's Legislative Council shall continue for three years from its first meeting. The Government of India Act, 1919, repealing 1915 Act, provided in Section 8(1) that every Governor's Legislative Council shall continue for three years from its first meeting and in Section 21 provided that every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting. Likewise, the Government of India Act, 1935 repealing 1919 Act, had provision identical to Article 172 of the Constitution.

Section 73 of the R.P. Act 1951, in so far as relevant for our purposes, is as under:

"73. Publication of results of general elections to the House of the People and the State Legislative Assemblies. \027 Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by [the Election Commission] in the Official Gazette, as soon as may be after [the results of the elections in all the constituencies] [other than these in which the poll could not be taken for any reason on the date originally fixed under clause (d) of section 30 or for which the time for completion of the election has been extended under the provisions of section 153] have been declared by the returning officer under the provisions of section 53 or, as the case may be section 66, the names of the members elected for those constituencies] and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted."

In the present case, Notification under Section 73 of the RP Act, 1951 was issued on 4th March, 2005. The deemed constitution of the Legislative Assembly took place under Section 73 on the issue of the said notification. The question is whether this deemed constitution of Legislative Assembly is only for the purpose of the RP Act, 1951 and not for the constitutional provisions so as to invoke power of dissolution under Article 174(2)(b). The stand of the Government is that in view of aforesaid legal fiction, the constitution of the Legislative Assembly takes place for all purposes and, thus, the Legislative Assembly is deemed to have been 'duly constituted' on 4th March, 2005 and, therefore, the Governor could exercise the power of dissolution under Article 174(2)(b).

Section 73 of the RP Act, 1951 enjoins upon the Election Commission to issue notification after declaration of results of the elections in all the constituencies. The superintendence, direction and control of elections to Parliament and to the Legislature of every State vests in Election Commission under Article 324 of the Constitution. 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. Article 329 bars the interference by courts in electoral matters except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Article 327 read with Section 73 of the RP Act, 1951 provide for as to when the House or Assembly shall be 'duly constituted'. No provision, constitutional or statutory, stipulates that the 'due constitution' is only for the purposes of Articles 324, 327 and 329 and not for the purpose of enabling the Governor to exercise power under Article 174(2)(b) of the Constitution. In so far as the argument based on Article 172 is concerned, it seems clear that the due constitution of the Legislative Assembly is different than its duration which is five years \026 to be computed from the date appointed for its first meeting and no longer. There is no restriction under Article 174(2)(b) stipulating that the power to dissolve the Legislative Assembly can be exercised only after its first meeting. Clause (b) of proviso to Section 73 of the RP Act, 1951 also does not limit the deemed constitution of the Assembly for only specific purpose of the said Act or Articles 324, 327 and 329 of the Constitution. The said clause provides that the issue of notification under Section 73 shall not be deemed to affect the duration of the State Legislative Assembly, if any, functioning immediately before the issue of the said notification. In fact, clause (b) further fortifies the conclusion that the duration of the Legislative Assembly is different than the due constitution thereof. In the present case, we are not concerned with the question of duration of the Assembly but with the question whether the Assembly had been duly constituted or not so as to enable the Governor to exercise the power of dissolution under Article 174(2)(b). The Constitution of India does not postulate one 'due constitution' for the purposes of elections under Part XV and another for the purposes of the executive and the State Legislature under Chapter II and III of Part VI. The aforenoted provisions existing prior to the enforcement of Constitution of India are also of no relevance for determining the effect of deemed constitution of Assembly under Section 73 of the RP Act, 1951 to exercise power of dissolution under Article 274 (2)(b).

In K.K. Abu v. Union of India and Ors. [(AIR 1965 Kerala 229], a learned Single Judge of the High Court rightly came to the conclusion that neither Article 172 nor Article 174 prescribe that dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting. Once the Assembly is constituted, it becomes capable of dissolution. This decision has been referred to by one of us (Arijit Pasayat, J.) in Special Reference No.1 of 2002 (popularly known as Gujarat Assembly Election matter) [(2002) 8 SCC 237]. No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the State Legislature.

The acceptance of the contention of the petitioners can also lead to a breakdown of the Constitution. In a given case, none may come forth to stake claim to form the Government, for want of requisite strength to provide a stable Government. If petitioners' contention is accepted, in such an eventuality, the Governor will neither be able to appoint Executive Government nor would he be able to exercise power of dissolution under Article 174(2)(b). The Constitution does not postulate a

live Assembly without the Executive Government.
On behalf of the petitioners, reliance has, however, been placed upon a decision of a Division Bench of Allahabad High Court in the case of Udai Narain Sinha v. State of U.P. and Ors. [AIR 1987 All.203].
Disagreeing with the Kerala High Court, it was held that in the absence of the appointment of a date for the first meeting of the Assembly in accordance with Article 172(1), its life did not commence for the purposes of that article, even though it might have been constituted by virtue of notification under Section 73 of the RP Act, 1951 so as to entitle the Governor to dissolve it by exercising power under Article 174(2). It was held by the Division Bench that Section 73 of the RP Act, 1951 only created a fiction for limited purpose for paving the way for the Governor to appoint a date for first meeting of either House or the Assembly so as to enable them to function after being summoned to meet under Article 174 of the Constitution. We are unable to read any such limitation. In our view, the Assembly, for all intends and purposes, is deemed to be duly constituted on issue of notification under Section 73 and the duration thereof is distinct from its due constitution. The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided, unless the provisions are so clear as not to call for any other interpretation. This case does not fall in the later category.
In Gujarat Assembly Election Matter, the issue before the Constitution Bench was whether six months' period contemplated by Article 174(1) applies to a dissolved Legislative Assembly. While dealing with that question and holding that the said provision applies only to subsisting Legislative Assembly and not to a dissolved Legislative Assembly, it was held that the constitution of any Assembly can only be under Section 73 of the RP Act, 1951 and the requirement of Article 188 of Constitution suggests that the Assembly comes into existence even before its first sitting commences. (Emphasis supplied by us).
In view of the above, the first point is answered against the petitioners.
POINT NO.2: Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

This point is the heart of the matter. The answer to the constitutional validity of the impugned notification depends upon the scope and extent of judicial review in such matters as determined by a Nine Judge Bench decision in Bommai's case. Learned counsel appearing for both sides have made elaborate submissions on the question as to what is the ratio decidendi of Bommai's case.
According to the petitioners, the notification dissolving the Assembly is illegal as it is based on the reports of the Governor which suffered from serious legal and factual infirmities and are tainted with pervasive mala fides which is evident from the record. It is contended that the object of the reports of the Governor was to prevent political party led by Mr. Nitish Kumar to form the Government. The submission is that such being the object, the consequent notification of dissolution accepting the recommendation deserves to be annulled.
Under Article 356 of the Constitution, the dissolution of an Assembly can be ordered on the

satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. Such a satisfaction can be reached by the President on receipt of report from the Governor of a State or otherwise. It is permissible to arrive at the satisfaction on receipt of the report from Governor and on other material. Such a satisfaction can also be reached only on the report of the Governor. It is also permissible to reach such a conclusion even without the report of the Governor in case the President has other relevant material for reaching the satisfaction contemplated by Article 356. The expression 'or otherwise' is of wide amplitude.

In the present case, it is not in dispute that the satisfaction that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution has been arrived at only on the basis of the reports of the Governor. It is not the case of the Union of India that it has relied upon any material other than the reports of the Governor which have been earlier reproduced in extenso.

The Governor in the report dated 6th March, 2005 has referred to Bommai's case as also to the recommendations of Sarkaria Commission. Sarkaria Commission Report in Chapter IV deals extensively with the role of the Governors. Since in this case, the dissolution of the Assembly is based solely on the reports of the Governor and the issue also is as to the role played by the Governor and submissions also having been made on role which is expected from a high constitutional functionary like Governor, it would be useful to first examine that aspect.

Role of Governor

The role of the Governor has been a key issue in the matters of Central-State relations. The Constitution of India envisages three tiers of Government \026 the Union, State and the Local Self-Government. From the functional standpoint, it is stated that such a Constitution "is not a static format, but a dynamic process" [Report of the Sarkaria Commission on Centre-State Relations (1988)]. In the context of Union-State relations it has been noted that "the very dynamism of the system with all its checks and balances brings in its wake problems and conflicts in the working of Union-State relations."

In the light of a volatile system prevailing today, it is pertinent to recognize the crucial role played by the Governors in the working of the democratic framework. Addressing the Conference of Governors in June 2005, the President of India Dr. A.P.J. Abdul Kalam stressed the relevance of recommendations of the Sarkaria Commission and observed that "While there are many checks and balances provided by the Constitution, the office of the Governor has been bestowed with the independence to rise above the day-to-day politics and override compulsions either emanating from the central system or the state system." The Prime Minister Dr. Manmohan Singh on the same occasion noted that "you are the representatives of the center in states and hence, you bring a national perspective to state level actions and activities."

In Hargovind Pant v. Dr. Raghukul Tilak & Ors. [(1979) 3 SCC 458], observing on the issue as to whether a Governor could be considered as an "employee" of the Government of India, this Court said "it is no doubt true that the Governor is appointed by the President which

means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India."

Referring to Article 356 of the Constitution, the Court reasoned that "one highly significant role which he (Governor) has to play under the Constitution is of making a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution" and further added that the Governor "is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India."

Fortifying the same, Justice V.R. Krishna Iyer has observed that the mode of appointment can never legitimize any form of interference in the working of the Governor, else the concept of "judicial independence" would not be tenable, as even the judges of the High Courts and the Supreme Court are appointed by the President. (V.R. Krisnha Iyer, A Constitutional Miscellany (Second Edition, Lucknow:Eastern Book Co., 2003) at p.44).

The then Vice-President of India, Shri G.S. Pathak, had remarked in 1970 that "in the sphere which is bound by the advice of the Council of Ministers, for obvious reasons, the Governor must be independent of the Centre" as there may be cases "where the advice of the Centre may clash with advice of the State Council of Ministers" and that "in such cases the Governor must ignore the Centre's "advice" and act on the advice of his Council of Ministers."

Relevant for the present controversy, very significant observations were made in Bommai's case, when it was said "He (Governor) is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen" (para 272 \026 Jeevan Reddy, J. \026 Emphasis supplied by us)

The role of the Governor has come in for considerable criticism on the ground that some Governors have failed to display the qualities of impartiality expected of them. The Sarkaria Commission Report has noted that "many have traced this mainly to the fact that the Governor is appointed by, and holds office during the pleasure of the President, i.e., in effect, the Union Council of Ministers."

Rejecting the suggestion of an elected Governor, the Constituent Assembly repeatedly stressed on consultation with the Provincial/State Government prior to the appointment of the Governor. Sir Alladi Krishnaswamy Ayyar is quoted to have stated that "a convention of consulting the provincial cabinet might easily grow up" as was said to be the case in Canada (White Paper on the Office of the Governor, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow: Eastern Book Co., 2003) at p.45). Shri Jawaharlal Nehru had also observed in the debate on the appointment of Governor in the Constituent Assembly that a Governor "must be acceptable to the Province, he must be acceptable to the Government of the Province and yet he must not be known to be a part of the party machine of

that province." He was of the opinion that a nominated Governor shall have "far fewer common links with the Centre."

Querying as to what could be an objective and representative body which will fit into our Constitutional framework to facilitate the appointment of Governors on meritorious basis, the Sarkaria Commission has observed that "There is no gainsaying that a procedure must be devised which can ensure objectivity in selection and adherence to the criteria for selection and insulate the system from political pressures. Also, the new procedure must not only be fair but should be seen to be fair." (Chapter IV "Role of the Governor", Report of the Sarkaria Commission on Centre-State Relations (1988) at para 4.6.30). Recommending that the Vice-President of India and the Speaker of the Lok Sabha should be consulted by the Prime Minister in selecting a Governor, the Sarkaria Commission has noted that "such consultation will greatly enhance the credibility of the selection process."

The other related issue of debate was regarding 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 functions by the Governor 'in his discretion' were deleted. (Chapter IV "Role of the Governor", Report of the Sarkaria Commission on Centre-State Relations (1988) at para 4.2.07). Article 163 of the Constitution (then Draft Article 143) generated considerable discussion, and Dr. Ambedkar is stated to have "maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government." (Constituent Assembly Debates (Volume VIII, Revised Edition) at pp.00-502).

The expression "required" found in Article 163(1) is stated to signify that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been reasoned that the expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. The Sarkaria Commission Report further adds that such necessity may arise even from rules and orders made "under" the Constitution.

Observing that the Governor needs to discharge "dual responsibility" \026 to the Union and the State \026 the Sarkaria Commission has sought to evaluate the role of the Governors in certain controversial circumstances, such as, in appointing the Chief Minister, in ascertaining the majority, in dismissal of the Chief Minister, in dissolving the Legislative Assembly, in recommending President's Rule and in reserving Bills for President's consideration.

Finding that the position of the Governor is indispensable for the successful working of the Constitutional scheme of governance, the Sarkaria Commission has noted that "most of the safeguards will be such as cannot be reduced to a set of precise rules of procedure or practice. This is so because of the very nature of the office and the role of the Governor. The safeguards have mostly to be in the nature of conventions and practices, to be understood in their proper pers-pective and faithfully adhered to, not only by the Union and the State Governments but also by the political parties." (Chapter IV "Role of the Governor", Report of the

Sarkaria Commission on Centre-State Relations (1988) at para 4.5.07). It was further added that "the fact that it will be impossible to lay down a concrete set of standards and norms for the functioning of a Governor will make it difficult for a Parliamentary Committee or the Supreme Court to inquire into a specific charge against a Governor."

Instrument of Instructions:

The Constituent Assembly, pursuant to the Report of the Provincial Constitution Committee, had decided to insert an Instrument of Instructions to the Governors in the form of a Schedule to the Constitution. Such an instrument was found to be necessary, "because of the mode of appointment and the injunction to act upon the advice of Ministers were not contained in the Constitution itself." (The framing of India India's Constitution \026 Select Documents (Volume IV, B. Shiva Rao (ed.), New Delhi: Universal Law Publishing Cp, 2004) at p. 86. The complete test of the suggested Instructions is reprroduced in pp.88-90). In the Government of India Act, 1935, the Instrument of Instructions appeared as instructions from the Sovereign.

The suggested list of instructions considered by the Constituent Assembly included value based standards that are expected of a Governor in discharging his duties vis-'-vis \026appointment of the Chief Minister after ascertaining a "stable majority"; appointments of Council of Ministers who "will best be in a position collectively to command the confidence of the Legislature"; to constitute an Advisory Board comprising of duly elected members of the Legislature, including the Leader of the Opposition, "to aid the Governor in the matter of making appointments under the Constitution" such as that of the Auditor-in-Chief for the State, Chairman of the State Public Services Commission; and mandating the Governor to 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 religious beliefs and sentiments."

The instructions were proposed as a Schedule to the Constitution as the Assembly felt that "it is preferable not to put them into the body of the Constitution, because they are conventions rather than legal rules." However, the same was not appended to the Constitution and lamenting about it, Shri A.G. Noorani has stated that the Instrument of Instructions could have codified conventions between the President and the Governors if allowed to exist. (A.G. Noorani, Constitutional Questions in India \026 The President, Parliament and the States (New Delhi: Oxford University Press, 2000) at p.11)

The P.V. Rajamannar Committee (1969), Inquiry Committee constituted by the Government of Tamil Nadu to report on the Centre-State relations, and the Study Team of the Administrative Reforms Commission (1967) headed by Shri M.C. Setalvad, have been quoted to have opined that "a specific provision should be inserted in the Constitution enabling the President to issue Instruments of Instructions to the Governors. The Instruments of Instructions should lay down guidelines indicating the matters in respect of which the Governor should consult the Central Government or in relation to which the Central Government could issue directions to him."

(White Paper on the Office of the Governor, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow: Eastern Book Co., 2003) at p.47). Justice Krishna Iyer has stated that a "Handbook" setting out the guidelines for Governors must be prepared officially by the Law Commission and approved by the Parliament to be kept as a reference in the same status as that of an Instrument of Instructions. However, the Sarkaria Commission has observed that "considering the multi-faceted role of the Governor and the nature of his functions and duties, we are of the view that it would be neither feasible nor desirable to formulate a comprehensive set of guidelines for the exercise by him of his discretionary powers. No two situations which may require a Governor to use his discretion, are likely to be identical."

Discretionary Powers of the Governor:

Expounding in detail on the exercise of discretionary powers by the Governor, the Sarkaria Commission has mainly recommended the following:

? Appointment of the Chief Minister \026 It is clear that the leader of the party which has an absolute majority in the Legislative Assembly should invariably be called upon by the Governor to form a Government. However, if there is a fractured mandate, then the Commission recommends an elaborate step-by-step approach and has further emphasized that "the Governor, while going through the process of selection as described, should select a leader who, in his (Governor's) judgement, is most likely to command a majority in the Assembly. The Governor's subjective judgement will play an important role." Upon being faced by several contesting claims, the Commission suggests that the most prudent measure on part of the Governor would be to test the claims on the floor of the House.

? Dismissal of the Chief Minister \026 Recommending a test of majority on the floor of the House to ascertain whether an incumbent Chief Minister continues to enjoy the majority, the Commission clearly dissuades the Governor from dismissing the Ministry based only on his "subjective satisfaction".

? Dissolution of the Assembly \026 Despite best efforts, if ultimately a viable Ministry fails to emerge, a Governor is faced with two alternatives \026 he may either dissolve the Assembly or recommend President's rule under Article 356, leaving it to the Union Government to decide the question of dissolution. The Commission expressed its firm view that the proper course would be "to allow the people of the State to settle matters themselves". The Commission recommended that "the Governor should first consider dissolving the Assembly and arranging for a fresh election and before taking a decision, he should consult the leaders of the political parties concerned and the Chief Election Commissioner."

Para 4.11.04 of Sarkaria Commission Report specifically deals with the situation where no single party obtains absolute majority and provides the order of preference the Governor should follow in selecting a Chief Minister. The order of preference suggested is :

1. An alliance of parties that was formed prior to the Elections.
2. The largest single party staking a claim to form the

Government with the support of others, including "independents".

3. A post-electoral coalition of parties, with all the partners in the coalition joining the Government.

4. A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside.

The Sarkaria Commission has noticed that in a number of situations of political instability in States, the Governors recommended President's Rule under Article 356 without exhausting all possible steps under the Constitution to induct or maintain a stable Government. The Governors concerned neither gave a fair chance to contending parties to form a Ministry, nor allowed a fresh appeal to the electorate after dissolving the Legislative Assembly. Almost all these cases have been criticized on the ground that the Governors, while making their recommendations to the President behaved in a partisan manner. The report further states that there has been no uniformity of approach in such situations and that these aspects have been dealt with in Chapter VI 'Emergency Provisions'.

In Chapter VI, Sarkaria Commission dealt with the emergency provisions noting the concern of framers of the Constitution of need for such provision in a country of our dimensions, diversities, disparities and "multitudinous people, with possibly divided loyalties". They took care to provide that, in a situation of such emergency, the Union shall have overriding powers to control and direct all aspects of administration and legislation throughout the country. They realised that a failure or breakdown of the constitutional machinery in a State could not be ruled out as an impossibility and a situation may arise in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

The common thread in all the emergency provisions is that the resort to such provision has to be in exceptional circumstances when there be the real and grave situation calling for the drastic action. Sarkaria Commission as also this Court has noted the persistent criticism in ever-mounting intensity, both in regard to the frequency and the manner of the use of the power under Article 356. The Sarkaria Commission has noticed that gravemen of the criticism is that, more often than not, these provisions have been misused, to promote the political interests of the party in power at the Centre. Some examples have been noted of situations in which the power of Article 356 was invoked improperly if not illegally. It is noted that the constitutional framers did not intend that this power should be exercised for the purpose of securing good Government. It also notices that this power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.

Whether it is a case of existing Government losing the majority support or of installation of new Government after fresh elections, the act of the Governor in recommending dissolution of Assembly should be only with sole object of preservation of the Constitution and not promotion of political interest of one or the other party.

In the present context of fractured verdicts in elections, the aforesaid discussion assumes great

importance and relevance. The criteria suggested in Sarkaria Commission Report for appointment of a person as a Governor is :

(i) He should be eminent in some walk of life;
(ii) He should be a person from 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.

It has not been seriously disputed by learned counsel appearing for the parties that, unfortunately, the criteria has been observed in almost total breach by all political parties. It is seen that one day a person is in active politics in as much as he holds the office of the Chief Minister or Minister or a party post and almost on the following day or, in any case, soon thereafter, the same person is appointed as the Governor in another State with hardly any cooling period. Ordinarily, it is difficult to expect detachment from party politics from such a person while performing the constitutional functions as Governor.

On this issue, we would like to say no more and leave this aspect to the wisdom of the political parties and their leaders to discuss and debate and arrive at, if possible, a national policy with some common minimum parameters applicable and acceptable to all major political parties.

Defections

At this stage, we may consider another side issue, namely, defections being a great evil.

Undoubtedly, defection is a great evil. It was contended for the Government that the unprincipled defections induced by allurements of office, monetary consideration, pressure, etc. were destroying the democratic fabric. With a view to control this evil, Tenth Schedule was added by the Constitution (Fifty-Second Amendment) Act, 1985. Since the desired goal to check defection by the legislative measure could not be achieved, law was further strengthened by the Constitution (Ninety-first Amendment) Act, 2003. The contention is that the Governor’s action was directed to check this evil, so that a Government based on such defections is not formed.

Reliance has been placed on the decision in the case of Kihoto Hollohan v. Zachillhu & Ors. [1992 Supp. (2) SCC 651] to bring home the point that defections undermine the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. It is also correct that to further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defection, by 91st Amendment, defection was made more difficult by deleting provision which did not treat mass shifting of loyalty by 1/3 as defection and by making the defection, altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule as amended by 91st Amendment.

In Kihoto’s case, the challenge was to validity of the Tenth Schedule, as it stood then. Argument was that this law was destructive of the basic structure of the Constitution as it is violative of the fundamental principle of Parliamentary democracy, a basic feature of the Indian Constitutionalism and is destructive of the freedom of

speech, right to dissent and freedom of conscience as the provisions seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of parliamentary democracy. It was also urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the decease itself, are adopted. It was said that the Tenth Schedule seeks to throw away the baby with the bath water.

Dealing with aforesaid submissions, the Court noted that, in fact, the real question was whether under the Indian Constitutional Scheme, is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements. It was noted that the points raised in the petition are, indeed, far reaching and of no small importance-invoking the 'sense of relevance and constitutionally stated principles of unfamiliar settings'. On the one hand there was the real and imminent threat to the very fabric of Indian democracy posed by certain level of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there may be certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. While dealing with the argument that the constitutional remedy was violative of basic features of the Constitution, it was observed that the argument ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The unethical political defections was described as a 'canker' eating into the vitals of those values that make democracy a living and worthwhile faith.

It was contended that the Governor was only trying to prevent members from crossing the floor as the concept of the 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 would also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. The contention is based on Para 144 of the judgment in Kihoto's case which reads thus :

"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 of 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 & Procedure" (1989 Edn. page 119) say:

"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."

Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions : one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This

provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately."

Our attention was also drawn to the objects and reasons for the 91st Constitutional Amendment. It states that demands were made from time to time in certain quarters for strengthening and amending the Anti-defection law as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions had not been able to achieve the desired goals of checking defections. The Tenth Schedule was also criticized on the ground that it allowed bulk defections while declaring individual defections as illegal. The provision for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule to the Constitution of India had, in particular, come under severe criticism on account of its destabilising effect on the Government.

Reliance has also been placed to the exposition of Lord Diplock in a decision of House of Lords in the case of Council of Civil Service Unions v. Minister for the Civil Service [1984 (3) All.ER 935] on the aspect of irrationality to the effect that "it applies to a decision may be so outrageous or in 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". It is contended that the Governor has many sources information wherefrom led him to conclude that the process that was going on in the State of Bihar was destroying the very fabric of democracy and, therefore, such approach cannot be described as outrageous or in defiance of logic, particularly, when proof in such cases is difficult if not impossible as bribery takes place in the cover of darkness and deals are made in secrecy. It is, thus, contended that Governor’s view is permissible and legitimate view.

Almost similar contention has been rejected in Bommai’s case.

The other decision of House of Lords in Puhlhofer v. Hillingdon, London Borough Council [(1986) 1 All.ER 467 at 474] relied upon by the respondents, has been considered by Justice Sawant in Bommai’s case.

The reliance was to the proposition that where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the 'obvious' to the 'debatable' to the 'just conceivable', it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. But in the present case, the inference sought to be drawn by the Governor without any relevant material, cannot fall in the category of 'debatable' or 'just conceivable', it would fall in the category of 'obviously perverse'. On facts, the inescapable inference is that the sole object of the Governor was to prevent the claim being made to form the Government and the case would fall under the category of 'bad faith'.

The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

Certainly, there can be no quarrel with the principles laid in Kihoto's case about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact, the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means. The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) Horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in Bommai's case. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate

could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, corruption and bribery was based on such general assumptions without any material which are quite easy to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be a different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party.

Interpretation of a Constitution and Importance of Political Parties

For principles relevant for interpretation of a Constitution, our attention was drawn to what Justice Aharon Barak, President of Supreme Court of Israel says in Harvard Law Review, Vol.116 (2002-2003) dealing particularly with the aspect of purposive interpretation of Constitution. Learned Judge has noticed as under :

"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 its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

It is further said that 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.

In fact, the scope of judicial review as enunciated in Bommai's case is in tune with the principles sought to be relied upon.

In support of the proposition that in Parliament Democracy there is importance of political parties and that interpretation of the constitutional provisions should advance the said basic structure based on political parties, our attention was drawn to write up Designing Federalism \026 A Theory of Self-Sustainable Federal Institution and what is said about political parties in a Federal State which is as under:

"Political parties created democracy and
\005 modern democracy is unthinkable
save in terms of parties.
Schattschneider 1942 : I
Here is a factor in the organisation of
federal Government which is of primary
importance but which cannot be ensured
or provided for in a constitution \026 a good
party system
Wheare 1953: 86
Whatever the general social conditions, if
any, that sustain the federal bargain,
there is one institutional condition that
controls the nature of the bargain in all
instances\005 with which I am familiar.
This is the structure of the party system,
which may be regarded as the main
variable intervening between the
background social conditions and the
specific nature of the federal bargain.
Riker 1964 : 136
In a country which was always to be in
need of the cohesive force of institutions,
the national parties, for all their faults,
were to become at an early hour primary
and necessary parts of the machinery of
Government, essential vehicles to convey
men's loyalties to the state.
Hofstadter 1969: 70-I

It is contended that the political parties are the main means not only whereby provincial grievances are aired but also whereby centralised and decentralised trends are legitimised. This contention is made in connection with the alleged stand of two-third MLAs of LJP against the professed stand of that political party. We are afraid that on facts of present case, the aforesaid concept and relevance of political parties is not quite relevant for our purpose to decide why and how the members of political parties had allegedly decided to adopt the course which they did, to allegedly support the claim for formation of the Government.

Morality

We may also deal with the aspect of morality sought to be urged. The question of morality is of course very serious and important matter. It has been engaging the attention of many constitutional experts, legal luminaries, jurists and political leaders. The concept of morality has also been changing from time to time also having regard to the ground realities and the compulsion of the situation including the aspect and relevance of

coalition governance as opposed to a single party Government. Even in the economic field, the concept of morality has been a matter of policy and priorities of the Government. The Government may give incentive, which ideally may be considered unethical and immoral, but in so far as Government is concerned, it may become necessary to give incentive to unearth black money. {R.K. Garg & Ors. v. Union of India & Ors. [1981(4) SCC 675, paras 18 and 31]}. It may be difficult to leave such aspects to be determined by high constitutional functionaries, on case to case basis, depending upon the facts of the case, and personal mould of the constitutional functionaries. With all these imponderables, the constitution does not contemplate the dissolution of Assemblies based on the assumption of such immoralities for formation of the satisfaction that situation has arisen in which the Government cannot be of the Constitution of India.

Article 356 and Bommai's case

Article 356(1) of the Constitution is as follows :

"356.\027(1) 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\027
(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."

Power under Article 356(1) is an emergency power but it is not an absolute power. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be

exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution. The Governor takes the oath, prescribed by Article 159 to preserve, protect and defend the Constitution and the laws to the best of his ability. Power under Article 356 is conditional, condition being formation of satisfaction of the President as contemplated by Article 356(1). The satisfaction of the President is the satisfaction of Council of Ministers. As provided in Article 74(1), the President acts on the aid and advice of Council of Ministers. The plain reading of Article 74(2) stating that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court, may seem to convey that the Court is debarred from inquiring into such advice but Bommai has held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President has issued the proclamation under Article 356. Justice Sawant, in Para 86 states that :

"What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material."

It was further said that the Parliament would be entitled to go into the material on basis of what the Council of Ministers tendered the advice and, therefore, secrecy in respect of material cannot remain inviolable. It was said that :

"When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government."

On the similar lines, is the opinion of Jeevan Reddy, J. :

"Clause (2) of Art. 74, understood in its

proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. In fact, CI. (2) is a reproduction of sub-sec. (4) of S. 10 of the Government of India Act, 1935. (The Government of India Act did not contain a provision corresponding to An. 74(1) as it stood before or after the Amendments aforementioned). The scope of CI. (2) should not be extended beyond its legitimate fields. In any event, it cannot be read or understood as conferring an immunity upon the council of ministers or the Minister/ Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his functions. The limited provision contained in Art. 74(2) cannot override the basic provisions in the Constitution relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed Jo have been taken in accordance with Art. 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/ action is for them to decide and for the Court to be satisfied about it. Where, of course, the act/order questioned is one pertaining to the executive power of the Government of India, the position is much simpler. It does not represent the act/order of the President done/taken in exercise of his functions and hence there is no occasion for any aid or advice by the Ministers to him. It is the act/order of Government of India, though expressed in the name of the President. It is for the concerned Minister or Ministry, to whom the function is allocated under the Rules of Business to defend and justify such action/ order.

In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Art. 74(2). The argument that the advice tendered to the President comprises material as well and, therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him -- and if need

be to satisfy him -- that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Art. 74(2). But it is difficult to appreciate how does the supporting material, becomes part of advice. The respondents cannot .say that whatever the President sees -- or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the Court. Art. 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find if difficult to agree with the reasoning in State of Rajasthan on this score, insofar as it runs contrary to our holding."

The scope of judicial review has been expanded by Bommai and dissent has been expressed from the view taken in State of Rajasthan’s case.
The above approach shows objectivity even in subjectivity. The constitutionalism or constitutional system of Government abhors absolutism \026 it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself. This line is clear also from Maru Ram v. Union of India & Ors. [(1981) 1 SCC 107]. It would also be clear on in depth examination of Bommai that declared the dissolution of three Assemblies illegal but before we further revert to that decision, a brief historical background including the apprehension of its abuse expressed by our founding fathers may be noted.
Articles 355 and 356 of the Constitution set the tenor for the precedence of the Union over the States. It has been explained that the rationale for introducing Article 355 was to distinctly demarcate the functioning of the State and Union governments and to prevent any form of unprincipled invasions by the Union into the affairs of the State. It was felt that through the unambiguous language of Articles 355 and 356, the Union shall be constitutionally obliged to interfere only under certain limited circumstances as laid down in the provisions.
Referring to what is now Article 355, Dr. Ambedkar had reasoned that "in view of the fact that we are endowing the Provinces with plenary powers and making them sovereign within their own fields it is necessary to provide that if any invasion of the provincial field is done, it is in virtue of this obligation." (T.K. Thope, Dr. Ambedkar and Article 356 of the Constitution \026 [(1993) 4 SCC (Jour) 1]. Pursuant to this reasoning, Dr. Ambedkar further explained that before resorting to Article 356 "the first thing the President will do would be to issue 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 the 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 those two remedies fail that he would resort to this Article." Dr. Ambedkar admitted that these articles were "liable to be abused" and that he cannot "altogether deny that there is a possibility of these articles being employed for political purposes." But he reasoned that such an "objection applies to every part of the Constitution which gives power to the Centre to override the Provinces" and added that the "proper thing we ought to expect is that such articles will never be called into operation and they would remain a dead letter." (Constituent Assembly Debates (Volume IX, Revised Edition) at pp.175-177).

Scope of Judicial Review under Article 356 \026 State of Rajasthan v. Union of India :

In State of Rajasthan's case, there was a broad consensus among five of the seven Judges that the Court can interfere if it is satisfied that the power has been exercised mala fide or on "wholly extraneous or irrelevant grounds". Some learned Judges have stated the rule in narrow terms and some others in a little less narrow terms but not a single learned Judge held that the proclamation is immune from judicial scrutiny. It must be remembered that at that time clause (5) was there barring judicial review of the proclamation and yet they said that Court can interfere on the ground of mala fides. Surely, the deletion of clause (5) has not restricted the scope of judicial review but has widened it.

Justice Reddy in Bommai's case has noticed, in so far as it was relevant, the ratio underlying each of the six opinions delivered by Seven Judge Bench in the case of State of Rajasthan (supra) as under :

"Beg, C. J. The opinion of Beg, C. J. contains several strands of thought. They may be stated briefly thus:

(i) The language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State Governments with respect to the question how the State Governments should function and who should hold reins of power.

(ii) By virtue of Article 365(5) and Article 74(2), it is impossible for the Court to question the satisfaction of the President. It has to decide the case on the basis of only those facts as may have been admitted by or placed by the President before the Court.

(iii) The language of Article 356(1) is very wide. It is desirable that conventions are developed channelising the exercise of this power. The Court can interfere only when the power is used in a grossly perverse and unreasonable manner so as to constitute patent misuse of the provisions or to an abuse of power. The same idea is expressed at another place saying that if "a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved" by the proclamation, it would be liable to be

struck down. The question whether the majority party in the Legislative Assembly of a State has become totally estranged from the electorate is not a matter for the Court to determine.
(iv) The assessment of the Central Government that a fresh chance should be given to the electorate in certain States as well as the question when to dissolve the Legislative Assemblies are not matters alien to Article 356. It cannot be said that the reasons assigned by the Central Government for the steps taken by them are not relevant to the purposes underlying Article 356.
We may say at once that we are in respectful disagreement with propositions (i), (ii) and (iv) altogether. So far as proposition (iii) is concerned, it is not far off the mark and in substance accords with our view, as we shall presently show.

Y. V. Chandrachud, J. On the scope of judicial review, the learned Judge held that where the reasons disclosed by the Union of India are wholly extraneous, the Court can interfere on the ground of mala fides. Judicial scrutiny, said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed". The Court cannot sit in judgment over the satisfaction of the President for determining whether any other view of the situation is reasonably possible, opined the learned Judge.
Turning to the facts of the case before him, the learned Judge observed that the grounds assigned by the Central Government in its counter-affidavit cannot be said to be irrelevant to Article 356. The Court cannot go deeper into the matter nor shall the Court enquire whether there were any other reasons besides those disclosed in the counter-affidavit.

P. N. Bhagwati and A. C. Gupta, JJ. The learned Judges enunciated the following propositions in their opinion:
The action under Article 356 has to be taken on the subjective satisfaction of the President. The satisfaction is not objective. There are no judicially discoverable and manageable standards by which the Court can examine the correctness of the satisfaction of the President. The satisfaction to be arrived at is largely political in nature, based on an assessment of various and varied facts and factors besides several imponderables and fast changing situations. The Court is not a fit body to enquire into or determine the correctness of the said satisfaction or assessment, as it may be called. However, if the power is exercised mala fide or is

based upon wholly extraneous or irrelevant grounds, the Court would have jurisdiction to examine it. Even clause (5) is not a bar when the contention is that there was no satisfaction at all.
The scope of judicial review of the action under Article 356, -- the learned Judges held -- is confined to a "narrow minimal area: May be that in most cases, it would be difficult, if not impossible, to challenge the exercise of power under Article 356(1) on the aforesaid limited ground, because the facts and circumstances on which the satisfaction is based, would not be known. However, where it is possible, the existence of satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds."
We may say with great respect that we find it difficult to agree with the above formulations in toto. We agree only with the statements regarding the permissible grounds of interference by Court and the effect of clause (5), as it then obtained. We also agree broadly with the first proposition, though not in the absolute terms indicated therein.

Goswami and Untwalia, JJ. The separate opinions of Goswami and Untwalia, JJ. emphasise one single fact, namely, that inasmuch as the facts stated in the counter-affidavit filed by the Home Minister cannot be said to be "mala fide, extraneous or irrelevant", the action impugned cannot be assailed in the Court.

Fazal Ali, J. The learned Judge held that:
(i) the action under Article 356 is immune from judicial scrutiny unless the action is "guided by extraneous consideration" or "personal considerations".
(ii) the inference drawn by the Central Government following the 1977 elections to the Lok Sabha cannot be said to be unreasonable. It cannot be said that the inference drawn had no nexus with Article 356."

Bommai’s case
The Nine Judge Bench considered the validity of dissolution of Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. Out of six States, the majority held as unconstitutional the dissolution of Assemblies of Karnataka, Nagaland and Meghalaya as well. Six opinions have been expressed. There is unanimity on some issues, likewise there is diversity amongst several opinions on various issues.
Karnataka Facts
In the case of Karnataka, the facts were that the Janta Party being the majority party in the State Legislature had formed the Government under the

leadership of Shri S.R. Bommai on August 30, 1988 following the resignation on August 1, 1988 of the earlier Chief Minister Shri Hegde who headed the ministry from March 1985 till his resignation. On 17th April, 1989 one legislator presented a letter to the Governor withdrawing his support to the Ministry. On the next day he presented to the Governor 19 letters allegedly written by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to the BJP which was supporting the ministry, withdrawing their support to the ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on the said letters verified. On April 19, 1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party viz. Janta Dal, there were dissensions and defections. In support, the Governor referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Chief Minister Shri Bommai did not command a majority in the Assembly and hence it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356(1). The Governor did not ascertain the view of Shri Bommai either after the receipt of the 19 letters or before making his report to the President. On the next day i.e. April 20, 1989, 7 out of the 19 legislators who had allegedly sent the letters to the Governor complained that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e. on April 27, 1989. The Chief Minister and his Law Minister met the Governor on the same day and informed him about the decision to summon the Assembly Session. The Chief Minister offered to prove his majority on the floor of the House, even by pre-poning the Assembly Session, if needed. To the same effect, the Governor however sent yet another report to the President on the same day i.e. April 20, 1989, in particular, referring to the letters of seven Members pledging their support to the Ministry and withdrawing their earlier letters. He however opined in the report that the letters from the 7 legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356(1) of the Constitution. On that very day, the President issued the Proclamation in dissolving the House. The Proclamation was thereafter approved by the Parliament as required by Article 356(3).

A writ petition filed in the High Court challenging the validity of dissolution was dismissed by a three Judge Bench inter alia holding that the facts stated in the Governors report cannot be held to be irrelevant and that the Governor’s satisfaction that no other party was in a position to form the Government had to be accepted since

his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The High Court relied upon the test laid down in the State of Rajasthan case and held that on the basis of materials disclosed, the satisfaction arrived at by the President could not be faulted.

Nagaland Facts

In the case of Nagaland, the Presidential Proclamation dated August 7, 1988 was issued under Article 356(1) imposing President's rule. At the relevant time in the Nagaland Assembly there were 60 legislators, 34 belonging to Congress (I), 18 to Naga National Democratic Party and 1 to Naga Peoples' Party and seven were independent legislators. On July 28, 1988, 13 out of the 34 MLAs of the ruling Congress (I) party informed the Speaker of the Assembly that they have formed a separate party and requested him for allotment of separate seats for them in the House. The Session was to commence on August 28, 1988. By decision dated July 30, 1988 the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the Constitution. On July 31, 1988, Shri Vamuzo, one of the 13 defecting MLAs who had formed a separate party, informed the Governor that he commanded the support of 35 out of the then 59 Members in the Assembly and was in a position to form the Government. On August 3, 1988, the Chief Secretary of the State wrote to Shri Vamuzo that according to his information, Shri Vamuzo had wrongfully confined the MLAs who had formed the new party. The allegations were denied by Shri Vamuzo and he asked the Chief Secretary to verify the truth from the Members themselves. On verification, the Members told the Chief Secretary that none of them was confined as alleged. On August 6, 1988 the Governor sent a report to the President of India about the formation of a new party by the 13 MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement by Mr. Vamuzo and one other person, and that the story of split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going on in the State. He made a special reference to the insurgency in Nagaland and also stated that some of the Members of the Assembly were having contacts with the insurgents. He expressed the apprehension that if the affairs were allowed to continue as they were, it would affect the stability of the State. In the meantime the Chief Minister submitted his resignation to the Governor and recommended the imposition of the President's rule. The President thereafter issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Shri Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Gauhati High Court. The Petition was heard by a Division Bench. The Bench differed on the effective operation of Article 74(2) and hence the matter was referred to the third Judge. But before the third learned Judge could hear the matter, the Union of India moved this Court for grant of Special Leave which was granted and the proceedings in the High Court were stayed. Dealing with the implications of Article 74(2) of the Constitution Justice Sawant speaking for himself and Justice Kuldip Singh came to the conclusion that although the advice given by the Council of Ministers is

free from the gaze of the Court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny. On the facts, Justice Sawant expressed the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House notwithstanding the fact that the Governor in his report has stated that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress (I) MLAs were allured by the monetary benefits and that amounted to incredible lack of political morality and complete disregard of the wishes of the electorate.

Meghalaya

Insofar as the Proclamation in respect of the Meghalaya is concerned, that was also held to be invalid. The ground on which dissolution was invalidated was the constitutional functionary had failed to realize the binding legal consequences of the orders of this Court and the constitutional obligation to give effect to the said order.

Facts of Madhya Pradesh, Rajasthan and Himachal Pradesh

Insofar as the cases of States of Madhya Pradesh, Rajasthan and Himachal Pradesh are concerned the dismissal of the Governments was a consequence of violent reactions in India and abroad as well as in the neighbouring countries where some temples were destroyed, as a result of demolition of Babri Masjid structure on 6th December, 1992. The Union of India is said to have tried to cope up the situation by taking several steps including banning of some organizations which had along with BJP given a call for Kar sevaks to march towards Ayodhya on December 6, 1992. The Proclamation in respect of these States was issued on January 15, 1993. The Proclamations dissolving the assemblies were issued on arriving at satisfaction as contemplated by Article 356(1) on the basis of Governor's report. It was held that the Governor's reports are based on relevant materials and are made bona fide and after due verification.

The Conclusion Nos. I, II, IV, VI, VII, IX and X in the opinion of Justice Sawant are as under:

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

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

IV. Since the provisions contained in cl. (3) of Article 356 are intended to be a, check on the powers of the President under clause (1) thereof, it will not be

permissible for the President to exercise powers under sub-clauses (a), (b) and (c) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 174(2)(b) read with Article 356(1)(a) till at least both the Houses of Parliament approve of the Proclamation.

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

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

IX. The Proclamations dated April 21, 1989 and October 11, 1991 and the action taken by the President in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 and 7 of 1992 respectively are unconstitutional. The Proclamation dated August 7, 1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the Proclamation operated, are valid. The Civil Appeal No. 3645 of 1989 and Transfer case Nos. 5 and 7 of 1992 are allowed accordingly with no order as to costs. Civil Appeal Nos. 193-194 of 1989 are disposed of by allowing the writ petitions filed in the Gauhati High Court accordingly but without costs.

X. The Proclamations dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the

said proclamations are not unconstitutional. Civil Appeals Nos. 1692, 1692A-1692C, 4627-30 of 1993 are accordingly allowed and Transfer case Nos. 8 and 9 of 1993 are dismissed with no order as to costs."

Justice Jeevan Reddy has expressed opinion for himself and Justice Agrawal. The conclusions Nos. 2, 3, 7, 8 and 12 in paragraph 434 are relevant for our purpose and the same read as under:

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

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

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

(8) If the court strikes down the proclamation, it has the power to restore the dismissed Government to office and

revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/ Legislative Assembly or other competent authority to review, repeal or modify such act orders and laws.
(12) The proclamations dated January 15, 1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in Civil Appeals Nos. 1692, I692A-I692C of 1993, 4627-4630 of 1990, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The Civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P.(C) No. 237 of 1993 is set aside. The Transferred Cases are dismissed."

Justice Jeevan Reddy has also expressed agreement with the conclusions I, II and IV to VII in the Judgment of Justice Sawant delivered on behalf of himself and Justice Kuldip Singh.
Justice Pandian has expressed agreement with the opinion of Justice P.B. Sawant on his conclusions I, II and IV to VIII but so far as the reasoning and other conclusions are concerned, the learned Judge has agreed with the Judgment of Justice Reddy.
For determining the scope of judicial review in terms of law enunciated by Bommai, it is vital to keep in view that majority opinion in that case declared as illegal the dissolution of assemblies of Karnataka and Nagaland. At an appropriate place later, we will note the reason that led to this declaration.

Some observations made in the minority opinion of Justice K. Ramaswamy are also very significant. Learned Judge has said that the motivating factor for action under Article 356(1) should never be for political gain to the party in power at the Centre, rather it must be only when it is satisfied that the constitutional machinery has failed. It has been further observed that the frequent elections would belie the people's belief and faith in parliamentary form of Government, apart from enormous election expenditure to the State and the candidates. The Court, if upon the material placed before it, finds that satisfaction reached by the President is unconstitutional, highly irrational or without any nexus, then the Court would consider the contents of the Proclamation or reasons disclosed therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the Proclamation. In that event, the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently, Proclamation issued under Article 356 would be declared

unconstitutional.
It is apparent that Justice Ahmadi and Justice Ramaswamy though in minority, yet learned Judges have frowned upon the highly irrational action.

Now, let us see the opinion of Justice Sawant, who spoke for himself and Justice Kuldip Singh and with whom Justice Pandian, Justice Jeevan Reddy and Justice Agrawal agreed, to reach the conclusion as to the invalidity of Proclamation dissolving assemblies of Karnataka and Nagaland.
Learned Judge has opined that the President's satisfaction has to be based on objective material. That material may be available in the report sent to the President by the Governor or otherwise or both from the report and other sources. Further opines Justice Sawant that the objective material, so available must indicate that the Government of State cannot be carried on in accordance with the provisions of the Constitution. The existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the issue of the Proclamation.
Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of Pakistan Constitution is not couched in the same terms. In Muhammad Sharif v. Federation of Pakistan, PLD 1988 (LAH) 725, the question was whether the order of the President dissolving the National Assembly on 29th May, 1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistan Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National Assembly but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects (Emphasis supplied by us). It would be instructive to note as to what was stated by the learned Chief Justice and Justice R.S. Sidhwa, as reproduced in the opinion of Justice Sawant:
"Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order

under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for."

Dealing with the second argument, the learned Chief Justice held:

"If the argument be correct then the provision 'Notwithstanding anything contained in clause (2) of Article 48' would be rendered redundant as if it was no part of the Constitution. It is obvious and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that 'Notwithstanding clause (2) of Article 48 \005 the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid expressly stated; otherwise it is presumed to be there in Courts of record\005.Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice..... It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects......".

Dealing with the same arguments, R.S. Sidhwa, J. stated as follows :

".....I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Arts. 58(2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny

of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer."

It is well settled that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. On consideration of these observations made in the case of State of Rajasthan as also the other decisions {Kehar Singh & Anr. v. Union of India & Anr. [(1989) 1 SCC 204] and Maru Ram v. Union of India [(1981) 1 SCC 107]}, Justice Sawant concluded that the exercise of power to issue proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. While considering the question of material, it was held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. (Emphasis supplied by us). Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from material is certainly open to judicial review.
It has been further held that when the Proclamation is challenged by making a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government in view of the provisions of Section 106 of the Evidence Act, the burden of proof would be on the Union Government.
Thus having reached the aforesaid conclusions as to the parameters of the judicial review that the satisfaction cannot be based on the personal whim, wish, view, opinion or ipse dixit de hors the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review, the report on basis whereof Proclamation dissolving the Assembly of Karnataka had been issued was subjected to a close scrutiny, as is evident from paragraphs 118, 119 and 120 of the opinion of Justice Sawant which read as under:
"118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have

arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed

was, therefore, liable to be struck down.
(Emphasis supplied by us)
119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.
(Emphasis supplied by us)
120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had

broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid."
(Emphasis supplied by us)

The view of the High Court that the facts stated in the Governor's report had to be accepted was not upheld despite the fact that the Governor had got the authenticity of the signatures of 19 MLAs on letters verified from the Legislature Secretariat, on the ground that he had not cared to interview the legislators and that there were conflicting letters from the seven legislators. The conclusion drawn by the Governor that those seven legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their own free will was frowned upon, particularly when they had not been interviewed by the Governor. It was further observed that it is not known from where the Governor got the information about the horse-trading going on between the legislators. Further conclusion reached was that the Governor had thrown all cannons of propriety to the winds and showed undue haste in inviting the President to issue Proclamation under Article 356(1) which clearly smacked of mala fides. It was noticed that the facts stated by the Governor in his report were his own opinion based on unascertained material and in the circumstances they could hardly be said to form the objective material on which the President could have acted.

When the facts of the present case are examined in light of the scope of the judicial review as is clear from the aforesaid which represents ratio decidendi of majority opinion of Bommai's case, it becomes evident that the challenge to the impugned Proclamation must succeed.

The case in hand is squarely covered against the Government by the dicta laid down in Bommai's case. There cannot be any presumption of allurement or horse-trading only for the reason that some MLAs, expressed the view which was opposed to the public posture of their leader and decided to support the formation of the Government by the leader of another political party. The minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if

satisfied that the party or the group staking claim would not be able to provide to the State a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still not opt to take a step which may lead to the fall of the Government for various reasons including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.

As opposed to the cases of dissolution of Karnataka and Nagaland, while considering the cases of dissolution of assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh, it was held in Bommai that the reports of the Governors disclosed that the State Governments had miserably failed to protect the citizens and property of the State against internal disturbances, it was found that the Governor's reports are based on relevant material and are made bona fide and after due verification. It is in the light of these findings that the validity of the Proclamation was unanimously upheld in respect of these three States.

Now, let us revert to the reasoning given in the opinion of Justice B.P. Jeevan Reddy, speaking for himself and Justice Agrawal.

As already noticed, Justice Reddy to the extent stated in para 324 expressed his dissent with the reasoning of State of Rajasthan case.

Before we examine paragraph 389, wherein Justice Reddy has noticed, in brief, eight reasons given by the Special Bench of the High Court in dismissing the writ petition and the opinion of learned Judge as contained in para 391, we feel that to fully appreciate Bommai's case which reversed Full Bench decision of Karnataka High Court, it would be quite useful to note what exactly was stated by the High Court in Paragraphs 28 to 34 of its judgment reported in S.R. Bommai & Ors. v. Union of India & Ors. [AIR 1990 Karnataka 5]. The said paragraphs read as under :

"28. Coming to the second facet of the contention of Mr. Soli Sorabjee, we find that the criticism levelled is that the inference drawn by the Governor that there is no other party which is in a position to form the Government, is not only vague but factually incorrect and hence the President had no relevant material to arrive at his satisfaction for proclamation issued by him.

The aforesaid contention again is without any merit for the reasons: (i) that the Governor formed the said satisfaction which can necessarily be the result of his own impressions. Narration of events in no way advances the case of satisfaction because the very satisfaction of the Governor is an integral part of the material relevant fact. It may also be that the Governor would have met several MLAs and enquired of them. But what transpired between them cannot be a matter of record. In the context where the Governor's personal bona fides are not in question, his satisfaction

expressed is to be assumed as part of the relevant material facts in the sense that the very satisfaction stated therein comprehends within itself the idea of all the other necessary factors, (ii) the report of 19th April, 1989 has to be read with the second report of 20th April, 1989 wherein "atmosphere getting vitiated" and "horse-trading" were referred. "Pressurisation of MLAs", "Horse-trading" and "vitiating atmosphere" referred to in the report necessarily indicate the existence of facts for the satisfaction that no other party was in a position to form the Government in accordance with the Constitution: The report could have been more explicit and, not adopting such a course by itself cannot nullify the essence of the report. If the President had any reason to doubt the veracity of those statements it was for him to seek a clarification or further report. However, if the President chose to accept the statement of the Governor as to the satisfaction that none else was in a position to form the Government it is because the President found it to be a sufficient arid acceptable statement as to the existence of factual situation. This statement in para 3 of the first report may also be weighed and understood in the background of the principle that in case the existing Ministry was found to have lost the majority in the House, it is left to the discretion of the Governor to call upon someone else to form the Ministry, whom he thinks is in a position to command majority in the House. Further, absolutely no material has been placed before us to show that any other party or individual staked his or her claim to form a stable Ministry; rather, throughout, the petitioners' case has been that the existing Ministry headed by Sri S. R. Bommai continued to enjoy the support of the majority in the House. This premise was held to be not correct for which material facts were given in both the reports made by the Governor.

29. It may be emphasised that a person holding majority does not require time to prove that majority. Instead of telling the Governor that he would prove majority on the floor of the House, the Chief Minister could have as well obtained the signatures of 113 MLAs and placed before the Governor to demonstrate his strength. Moreover, the second report of the Governor also conveys certain material facts; some of the ML As who withdrew their support to Sri S. R. Bommai wrote again withdrawing the earlier letters with oscillation and ficklemindedness. Fluctuating loyalties

leading to unhealthy practice are pointed out in the report. The democratic culture was being vulgarised. Vitiation of the atmosphere was felt by the Governor. In the context of the prevailing situation the Governor was certainly entitled to report to the President the aforesaid facts. We, are therefore, of the firm view that the two reports of the Governor conveyed to the President the essential and relevant facts from which the President could assess the situation for an action under Art. 356 of the Constitution.

30. Another major attack levelled against the reports of the Governor by Mr. Soli Sorabjee was that nowhere in the report's it is stated that the State Government cannot be carried on in accordance with the Constitution. In other words, there is no material on the record to show that there has been Constitutional breakdown of the machinery in the State. In support of his argument the learned counsel drew our attention to the statement in the report which reads:

"It is not appropriate under the circumstances to have the State administered by an Executive consisting of Council of Ministers who do not command the majority in the House."

What was sought to be argued by the learned counsel was to say that it is not appropriate is quite different from saying that there is a constitutional breakdown, and as the Governor only feels that it is not appropriate, there was no legal justification for taking the impugned action.

Again we find ourselves unable to agree with Mr. Soli Sorabjee. The words "it is not appropriate under the circumstances" have to be understood in the context of the report, especially the next sentence, so as to convey the meaning that the Executive which does not command the support of the majority in the House cannot administer the. State in accordance with the Constitution. 'Inapp-ropriateness' stated here is referable to the meaning 'is not in accordance with law'. Reference to any dictionary would show that 'appropriateness' and 'compatibility' are interchangeable and, therefore, when something is said to be not appropriate it conveys the meaning that it is not compatible or not in accordance with law. Hence the statement of the Governor in this sentence clearly asserts his

understanding of the true principle that ah Executive having no majority support in the Legislature, if carries on the Government, will be administering the State not in accordance with the Constitution.

31. In view of the aforesaid discussion, we find no escape from the conclusion that the grounds stated and material supplied in the reports of the Governor are neither irrelevant nor vague, that the reasons disclosed bear a reasonable nexus with the exercise of the particular power and hence the satisfaction of the President must be treated as conclusive, and that there is no scope at all for a finding that the action of the President is in flagrant violation of the very words of Art. 356(1).

32. Mr. Soli Sorabjee also contended that the factors like the alleged 'unethical methods adopted during the formation of Janata Dal' 'expansion of cabinet', 'horse-trading' and 'atmosphere getting vitiated' are not only vague but have no nexus at all with the question of failure of Constitutional machinery. The learned counsel also laid great stress by contending that the Governor by acting upon the letters given by 19 legislators had circumvented the Anti Defection legislation, the primary aim of which is to discourage the toppling game by legislators by changing their loyalties, and by acting upon those letters the legislators were permitted, in substance, to play the game of toppling the ruling Ministry without incurring the consequences of Anti-Defection law because, if these legislators had withdrawn their support in the House and voted against the Ministry, they would have incurred disqualification under Anti-Defection Law. Reliance upon these letters is contrary to the underlying purpose and the essence of Anti-Defection legislation and therefore illegitimate and prohibited. The learned counsel buttressed his arguments by contending that if the floor test had been held the legislators who had written letters might have changed their mind for several valid reasons e.g. (i) change in the style of functioning of leadership, (ii) change in the leadership, (iii) realisation for maintaining party unity, (iv) unwillingness to incur disqualification under Anti-Defection legislation and (v) not giving a pretext for imposition of President's Rule. In support of the contention that the floor test has always been recognised as the legitimate and relevant method, Sri Soli Sorabjee relied

on the judgment of the Orissa High Court in Bijayananda v. President of India, Sarkaria Commission Report page 173 para6.5.01, the judgment of Gauhati High Court in Vamuzov. Union of India, (1988) 2 Gauh LJ 468 at p. 483, Report of the Committee of Governors dated 1-10-1971, pages 208, 209, 210, 217-219, 221-219, 221- 223 and 234, and Address by Speaker of Lok Sabha on the occasion of Speakers' Conference on 16-7-1970 paras 13 and 14.

33. In our view, the aforesaid contentions/ points urged by the learned counsel do not in any way destroy the effect of the two material grounds on the basis of which the subjective satisfaction was arrived at by the President. The Governor honestly and truly has stated all the facts. They are not vague at all and are narrative in nature. What was happening in the State, the Governor has disclosed in the report. The Governor was assessing whether the first petitioner was commanding majority and he (Governor) was entitled to take into consideration the behaviour of the MLAs one way or the other.

It is expected that a Government to be effective should not only command a majority in the House but should also be backed by the majority members outside the house so that the Government would not be under a perennial pressure of being dislodged whenever the House meets again.

We have gone through the judgments of the Orissa and Gauhati High Courts mentioned above and find that the same are distinguishable. In Bijayanand's case the main fact was that the Leader of the Opposition who had shown his majority in the House was not tailed upon to form the Ministry not because he had no majority but because the Governor expected that the majority might fall at any moment and there may be no stable Ministry, and on this aspect G. K. Misra, C.J. observed that the Governor is not concerned whether the Ministry could be stable in future. If the Ministry which would have been formed by the Leader of the Opposition would have fallen afterwards, the Governor would have been justified to recommend for the President's Rule if at that time no other person was in a position to from an alternative Ministry by having majority support. But, in the instant case, the position is entirely different as at the initial stage itself the Governor has in unequivocal terms stated in his report

that he is also satisfied that there is no other party which is in a position to form the Government.

Coming to the case of Vamuzo, (1988(2) Gauh LJ 468) the facts are :

"Hokishe Sema formed the Government in 1987. Chishi attempted to bring down and destabilise the Government. To achieve that end he offered money and lured the separated group of 13 to step out from the ruling party. The Governor called the episode 'incredible lack of political morality and complete disregard of the wishes of the electorates on the part of the breakway congressmen'. That none of them therefore had ever expressed any grievances to the Chief Minister at any time in the past. The 13 persons are kept under forcible confinement by K. L. Chishi and Vamuzo. The split of the party is not true. It is obvious that what may be called a political group of the darkest hue has been stated in his absence contrary to the, noble Naga character and democratic traditions'. The recognition by the Speaker was done in haste. The entire incident manifests political horse trading and machinations. He added there is proof that they are the group of 13 persons have not separated from the ruling party voluntarily ....."

If we look at those facts, again we find that there is absolutely no similarity of the aforesaid facts to the two material facts in the case on hand. In the said case, as found on those facts, the Governor was held to have exceeded his jurisdiction and the facts stated therein were found to be irrelevant to the provisions of An. 356(1), by the Gauhati High Court.

So far as Sarkada Commission Report, the report of the Committee of Governors and the Address of the Speaker of Lok Sabha are concerned, the views expressed therein are really commendable and it is expected that wherever any such drastic action, like the exercise of power under Art. 356(1), is taken, it should be ensured that the subjective satisfaction of the President is

not based on any irrelevant, irrational or perverse ground. But, in the view we have taken on the facts of this case, the views expressed in those reports are of no assistance to the petitioners. Moreover these recommendations are to alter the exist-ing laws, which implies that till these recommendations are moulded into constitutionally enforceable norms the existing law would prevail.

34. Mr. Soli Sorabjee had made pointed reference to the Tenth Schedule i.e. Anti Defection Law, for bringing home his point that the factum of the withdrawal of the support by 19 legislators was wholly irrelevant. This argument was advanced to prove his point that in the context of Anti Defection Legislation, floor test was the most relevant, legitimate and surest method to determine whether the Council of Ministers headed by Sri S.R. Bommai commanded the majority in the House or not. We are afraid, we are unable to agree with this submission of the learned counsel. The introduction of Tenth Schedule in the Constitution has not in any way affected the exercise of power under Art. 356 nor has it amended Art. 356 in any manner. The amending body which inserted the Tenth Schedule to the Constitution had before it several decisions (specially the Rajasthan Case as to the scope of Art. 356. There is a presumption that the law-making body was aware of the existing interpretation given by the Supreme Court on a provision of law or of a Constitutional provision. If the said Constitutional provision (Art. 356) was untouched while adding a new schedule to the Constitution elsewhere without reference to the existing provision (Art. 356), we have to presume that the existing interpretation of the said provision continues to govern the situation. It is not possible to hold that the interpretation given to Art. 356 in Rajasthan Case, if continued to govern it, would destroy the efficacy of the Tenth Schedule. Tenth Schedule to the Constitution is applicable to the transaction of business inside the House of Legislature. The ami defection activity outside the House is not penalised in any manner by Tenth Schedule. Concept of the failure of the Constitutional machinery of the Government is not confined to the loss of majority by a ministry in the House; it may be due to several reasons. Therefore, if meeting of the Legislature, was contemplated as a mandatory requirement preceding a report of the Governor for an action

under Art. 356 and floor test was impliedly made the sole and exclusive test to judge the stability of the Ministry (after the Tenth Schedule was added to the Constitution), the Tenth Schedule would have been suitably worded, or Art. 356 would have been altered."

In para 389, Justice Reddy states that the High Court has dismissed the writ petition giving following reasoning :

"(1) The proclamation under Article 356(1) is not immune from judicial scrutiny. The court can examine Whether the satisfaction has been formed on wholly extraneous material or whether there is a rational nexus between the material and the satisfaction.

(2) In Article 356, the President means the Union council of ministers. The satisfaction referred to therein is subjective satisfaction. This satisfaction has no doubt to be formed on a consideration of all the facts and circumstances.

(3) The two reports of the Governor conveyed to the President essential and relevant facts which were relevant for the purpose of Article 356. The facts stated in the Governor's report cannot be stated to be irrelevant. They are perfectly relevant.

(4) Where the Governor's "personal bona fides" are not questioned, his satisfaction that no other party is in a position to form the government has to be accepted as true and is based upon a reasonable assessment of all the relevant facts.

(5) Recourse to floor test was neither compulsory nor obligatory. It was not a prerequisite to sending up a report recommending action under Article 356(1),

(6) The introduction of Xth Schedule to the Constitution has not affected in any manner the content of the power under Article 356.

(7) Since the proclamation has to be issued on the satisfaction of the Union council of ministers the Governor's report cannot be faulted on the ground of legal mala fides.

(8) Applying the test indicated in the State of Rajasthan v. Union of India, the court must hold, on the basis of material disclosed, that the subjective satisfaction arrived at by the President is conclusive and cannot be faulted. The proclamation, therefore, is unobjectionable."

Except for aforesaid reasons 1 and 2, other reasons were not accepted by Justice Reddy. Learned Judge did not accept the reasoning of the High Court that where Governor's personal bona fides are not questioned, his satisfaction that no party is in a position to form the Government has to be accepted as true as it is based on

reasonable assessment of all the relevant facts. The Court also did not accept the reasoning that the Governor's report cannot be faulted on the ground of mala fides. Learned Judge has stated that the question whether government has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The House is the place where the democracy is in action. It is not a question of subjective satisfaction of the Governor. It would be useful to note what has been observed in paragraph 391 which reads thus:

"391. We must also say that the observation under point (7) is equally misplaced. It is true that action under Article 356 is taken on the basis of satisfaction of the Union Council of Ministers but on that score it cannot be said that 'legal mala fides' of the Governor is irrelevant. When the Article speaks of the satisfaction being formed on the basis of the Governor's report, the legal mala fides, if any, of the Governor cannot be said to be irrelevant. The Governor's report may not be conclusive but its relevance is undeniable. Action under Article 356 can be based only and exclusively upon such report. Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath. He is actually reporting against his own Government. It is for this reason that Article 356 places such implicit faith on his report. If, however, in a given case his report is vitiated by legal mala fides, it is bound to vitiate the President's action as well. Regarding the other points made in the judgment of the High Court, we must say that the High Court went wrong in law in approving and upholding the Governor's report and the action of the President under Article 356. The Governor's report is vitiated by more than one assumption totally unsustainable in law. The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority Governments are not unknown. What is necessary is that that Government should enjoy the confidence of the House. This aspect does not appear to have been kept in mind by the Governor. Secondly and more importantly whether the council of ministers have lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the

said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House. It is gratifying to note that Sri R. Venkataraman, the former President of India has affirmed this view in his Rajaji Memorial Lecture (Hindustan Times dated February 24, 1994).

The substantial reasons given by the High Court in paragraphs 28 to 34 for dismissing the writ petition did not find favour with this Court. Dealing with the report of the Governor in respect of Karnataka, it was held that in the circumstances it cannot be said that the Governor's report contained or was based upon relevant material. There could be no question of the Governor making an assumption of his own.

Clearly, Bommai's case expanded the scope of judicial review. True, observations by Justice Reddy were made in the context of a situation where the incumbent Chief Minister is alleged to have lost the majority support or the confidence of the House and not in the context of a situation arisen after a general election in respect whereof no opinion was expressed, but, in our view the principles of scope of judicial review in such matters cannot be any different. By and large, same principles will apply when making recommendation for dissolution of a newly elected Assembly and again plunging the State to elections.

Justice Reddy, for upholding the dissolution of the State Legislatures of Madhya Pradesh, Rajasthan and Himachal Pradesh also came to the conclusion that the reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and the property of the State against the internal disturbances and on the basis of the said report, the President formed the requisite satisfaction. Dealing with the circumstances in the State of Madhya Pradesh, it was held that 'Governor's reports are based upon relevant material and are made bona fide and after due verification'. (Emphasis supplied by us)

Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid.

In view of the above, we are unable to accept the contention urged by the ld. Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal ipse dixit of the Governor. The drastic and extreme action under Article 356 cannot be justified

on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be main player, but Council of Ministers should have verified facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what Governor stated. Clearly, the Governor has mislead the Council of Ministers which lead to aid and advice being given by the Council of Ministers to the President leading to the issue of the impugned Proclamation.

Regarding the argument urged on behalf of the Government of lack of judicially manageable standards and, therefore, the court should leave such complex questions to be determined by the President, Union Council of Ministers and the Governor, as the situation like the one in Bihar, is full of many imponderables, nuances, implications and intricacies and there are too many ifs and buts not susceptible of judicial scrutiny, the untenability of the argument becomes evident when it is examined in the light of decision in Bommai' case upholding the challenge made to dissolution of the Assemblies of Karnataka and Nagaland. Similar argument defending the dissolution of these two assemblies having not found favour before a Nine Judge Bench, cannot be accepted by us. There too, argument was that there were no judicially manageable standards for judging Horse-trading, Pressure, Atmosphere being vitiated, wrongful confinement, Allurement by money, contacts with insurgents in Nagaland. The argument was rejected.

The position was different when Court considered validity of dissolution of Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh.

In paragraphs 432 and 433 of the opinion of Justice Jeevan Reddy in Bommai's case, after noticing the events that led to demolition of Babri Masjid on 6th December, 1992, the assurances that had been given prior to the said date, the extraordinary situation that had arisen after demolition, the prevailing tense communal situation, the learned Judge came to the conclusion that on material placed before the Court including the reports of the Governors, it was not possible to say that the President had no relevant material before him on the basis of which he could form satisfaction that BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot disassociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of structure, cannot be disassociated from the acts and deeds of the leaders of BJP. It was further held that if the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspected in view of the acts and conduct of the party controlling these Governments and that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, the Court is not able to say that there was no relevant material upon which he could be so satisfied. Under these circumstances, it was observed that the Court cannot question the correctness of the material produced

and that even if part of it is not relevant to the action. The Court cannot interfere so long as there is some relevant material to sustain the action. For appreciating this line of reasoning, it has to be borne in mind that the same learned Judge, while examining the validity of dissolution of Karnataka and Nagaland Assemblies, agreeing with the reasoning and conclusions given in the opinion of Justice Sawant which held that the material relied upon by the Governor was nothing but his ipse dixit came to the conclusion that the said dissolution were illegal. The majority opinion and the correct ratio thereof can only be appreciated if it is kept in view that the majority has declared invalid the dissolution of Assemblies of Karnataka and Nagaland and held as valid the dissolution of the Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh. Once this factor is kept in full focus, it becomes absolutely clear that the plea of perception of the same facts or the argument of lack of any judicially manageable standards would have no legs to stand.

In the present case, like in Bommai's case, there is no material whatsoever except the ipse dixit of the Governor. The action which results in preventing a political party from staking claim to form a Government after election, on such fanciful assumptions, if allowed to stand, would be destructive of the democratic fabric. It is one thing to come to the conclusion that the majority staking claim to form the Government, would not be able to provide stable Government to the State but it is altogether different thing to say that they have garnered majority by illegal means and, therefore, their claim to form the Government cannot be accepted. In the latter case, the matter may have to be left to the wisdom and will of the people, either in the same House it being taken up by the opposition or left to be determined by the people in the elections to follow. Without highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.

It was also contended that the present is not a case of undue haste. The Governor was concerned to see the trend and could legitimately come to the conclusion that ultimately, people would decide whether there was an 'ideological realignment", then there verdict will prevail and the such realigned group would win elections, to be held as a consequence of dissolution. It is urged that given a choice between going back to the electorate and accepting a majority obtained improperly, only the former is the real alternative. The proposition is too broad and wide to merit acceptance. Acceptance of such a proposition as a relevant consideration to invoke exceptional power under Article 356 may open a floodgate of dissolutions and has far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or

the State to another election. This aspect assumes great significance in situation of fractured verdicts and in the formation of coalition Governments. If, after polls two or more parties come together, it may be difficult to deny their claim of majority on the stated ground of such illegality. These are the aspects better left to be determined by the political parties which, of course, must set healthy and ethical standards for themselves, but, in any case, the ultimate judgment has to be left to the electorate and the legislature comprising also of members of opposition.

To illustrate the aforesaid point, we may give two examples in a situation where none of the political party was able to secure majority on its own :

1. After polls, two or more political parties come together to form the majority and stake claim on that basis for formation of the Government. There may be reports in the media about bribe having been offered to the elected members of one of the political parties for its consenting to become part of majority. If the contention of the respondents is to be accepted, then the constitutional functionary can decline the formation of the Government by such majority or dissolve the House or recommend its dissolution on the ground that such a group has to be prevented to stake claim to form the Government and, therefore, a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

2. A political party stakes claim to form the Government with the support of independent elected candidates so as to make the deficient number for getting majority. According to the media reports, under cover of darkness, large sums of bribe were paid by the particular party to independent elected candidates to get their support for formation of Government. The acceptance of the contention of the respondents would mean that without any cogent material the constitutional functionary can decline the formation of the Government or recommend its dissolution even before such a claim is made so as to prevent staking of claim to form the Government.

We are afraid that resort to action under Article 356(1) under the aforesaid or similar eventualities would be clearly impermissible. These are not the matters of perception or of the inference being drawn and assumptions being made on the basis whereof it could be argued that there are no judicial manageable standards and, therefore, the Court must keep its hands off from examining these matters in its power of judicial review. In fact, these matters, particularly without very cogent material, are outside the purview of the constitutional functionary for coming to the conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

The contention that the installation of the Government is different than removal of an existing Government as a consequence of dissolution as was the factual situation before the Nine Judge Bench in Bommai’s case and, therefore, same parameters cannot be applied in these different situations, has already been dealt with hereinbefore. Further, it is to be remembered that a political party prima facie having majority has to

be permitted to continue with the Government or permitted to form the Government, as the case may be. In both categories, ultimately the majority shall have to be proved on the floor of the House. The contention also overlooks the basic issue. It being that a party even, prima facie, having majority can be prevented to continue to run the Government or claim to form the Government declined on the purported assumption of the said majority having been obtained by illegal means. There is no question of such basic issues allegedly falling in the category of "political thicket" being closed on the ground that there are many imponderables for which there is no judicially manageable standards and, thus, outside the scope of judicial review.

The further contention that the expression 'situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' in Article 356 shows that the power is both preventive and/or curative and, therefore, a constitutional functionary would be well within his rights to deny formation of the Government to a group of parties or elected candidates on the ground of purity of political process is of no avail on the facts and circumstances of this case, in view of what we have already stated. Even if preventive, power cannot be abused.

Another contention urged is that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered and in that light of the expressions such as 'mala fide' or 'irrational' or 'extraneous' have to be seen with a view to ultimately find out whether the action is ultra vires or not. The contention is that the concept of malafides as generally understood in the context of executive action is unavailable while deciding the validity of legislative action. The submission is that that the malafides or extraneous consideration cannot be attributed to a legislative act which when challenged the scope of inquiry is very limited.

For more than one reason, we are unable to accept the contention of the proclamation of the nature in question being a legislative act. Firstly, if the contention was to be accepted, Bommai's case would not have held the proclamation in case of Karnataka and Nagaland as illegal and invalid. Secondly, the contention was specifically rejected in the majority opinion of Justice Jeevan Reddy in paragraph 377. The contention was that the proclamation of the present nature assumes the character of legislation and that it can be struck down only on the ground on which a legislation can be struck down. Rejecting the contention, it was held that every act of Parliament does not amount to and does not result in legislation and that the Parliament performs many other functions. One of such functions is the approval of the proclamation under clause (3) of Article 356. Such approval can, by no stretch of imagination, be called 'legislation'. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under clause (1) of Article 356. It is a safeguard conceived in the interest of ensuring proper exercise of power under clause (1). It is certainly not legislation nor legislative in character.

Mr. Subramaniam, learned Additional Solicitor General, however, contended that Bommai's case proceeded on the assumption that the proclamation

under Article 356(1) is not legislative but when that issue is examined in depth with reference to earlier decisions in the cases of In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950 [1951 SCR 747 at page 970-971]; Jayantilal Amrit Lal Shodhan v. F.N. Rana and Ors. [(1964) 5 SCR 294 at 205-206]; Rameshchandra Kachardas Porwal & Ors. State of Maharashtra & Ors. [(1981) 2 SCC 722], A.K. Roy v. Union of India & Ors. [(1982) 1 SCC 271], it would be clear that the conclusion of Justice Reddy in para 377 requires re-look in the light of these decisions. We are unable to accept the contention. The decision of Nine Judge Bench is binding on us.

Though Bommai has widened the scope of judicial review, but going even by principles laid in State of Rajasthan's case, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. Apart from the fact that the narrow minimal area of judicial review as advocated in State of Rajasthan's case is no longer the law of the land in view of its extension in Bommai's case but the present case even when considered by applying limited judicial review, cannot stand judicial scrutiny as the satisfaction herein is based on wholly extraneous and irrelevant ground. The main ground being to prevent a party to stake claim to form the Government.

In State of Rajasthan's case, in para 185, Justice Untwalia observed that this Court is not powerless to interfere with such an order which is ultra vires, wholly illegal or mala fide as in such a situation it will tantamount in law to be no order at all. Further observing that it is incompetent and hazardous for the Court to draw conclusions by investigation of facts by entering into the prohibited area but at the same time it would be equally untenable to say that the Court would be powerless to strike down the order, if on its face, or, by going round the circumference of the prohibited area, the Court finds the order as a mere pretence or colourable exercise of the extraordinary powers given under certain Articles of the Constitution and thus in a given case it may be possible to conclude that it is a fraud on the exercise of the power. In the present case, we have reached the conclusion that the action of the Governor was a mere pretence, the real object being to keep away a political party from staking a claim to form the Government.

Referring to the opinion of Justice Reddy, in Bommai's case, it was contended for the respondents that the approach adopted in Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors. [(1966) Supl. SCR 311] and other cases where action under challenge is taken by statutory or administrative authorities, is not applicable when testing the validity of the constitutional action like the present one. For proper appreciation of the contention, it may be useful to reproduce in full paragraphs 372 and 373 from which certain observations were relied upon. The same read as under:

"372. Having noticed various decisions projecting different points of view, we may now proceed to examine what should be the scope and reach of judicial review when a proclamation under Article 356(1)

is questioned. While answering this question, we should be, and we are, aware that the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the Government of the States is carried on in accordance with the Constitution. We are equally aware that any misuse or abuse of this power is bound to play havoc with our constitutional system. Having regard to the form of Government we have adopted, the power is really that of the Union Council of Ministers with the Prime Minister at its head. In a sense, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional Government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the centre for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power --undoing the will of the people of a State by dismissing the duly constituted Government and dissolving the duly elected Legislative Assembly -- must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later. Sow a wind and you will reap the whirlwind. Wisdom lies in moderation and not in excess."
(Emphasis supplied by us)
Further, learned Judge states that :
"373. Whenever a proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court -- Supreme Court and High Courts -- by the Constitution. Now, what are the grounds upon which the court can interfere and strike down the proclamation? While discussing the decisions herein-above, we have indicated the unacceptability of the approach adopted by the Privy Council in Bhagat Singh v. Emperor (AIR 1931 PC 111) and King Emperor v. Bengari Lal Sarma (AIR 1945 PC 48). That was in the years 1931 and 1944, long before the concept of judicial review had acquired its present efficacy. As stated by the Pakistan Supreme Court, that view is totally unsuited to a democratic polity. Even the Privy Council has not stuck to that view, as is evident from its decision in the case from Malaysia Stephen

Kalong Ningkan v. Government of Malaysia (1970 AC 379). In this case, the Privy Council proceeded on the assumption that such a proclamation is amenable to judicial review. On facts and circumstances of this case, it found the action justified. Now, coming to the approach adopted by the Pakistan Supreme Court, it must be said -- as indicated hereinbefore --that it is coloured by the nature of the power conferred upon the President by Section 58(2)(b) of the Pakistani Constitution. The power to dismiss the federal Government and the National Assembly is vested in the President and President alone. He has to exercise that power in his personal discretion and judgment. One man against the entire system, so to speak --even though that man too is elected by the representatives of the people. That is not true of our Constitution. Here the President acts on the aid and advice of the Union Council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the Government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in Barium Chemicals is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot ipso facto be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities -- nor at any rate, in their entirety. We would rather adopt the formulation evolved by this court in State of Rajasthan as we shall presently elaborate. We also recognise, as did the House of Lords in C.C.S.U. v. Minister for the Civil Service (1985 AC 374) that there are certain areas including those elaborated therein where the court would leave the matter almost entirely to the President/Union Government. The court would desist from entering those arenas, because of the very nature of those functions. They are not the matters which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues

relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. But the same cannot be said of the power under Article 356. It is another matter that in a given case the court may not interfere. It is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may vary from an ordinary case of subjective satisfaction."

The aforesaid paragraphs cannot be read in isolation and have to be seen while bearing in mind that learned Judge invalidated dissolution of Assembly of Karnataka and Nagaland. Be that as it may, in the present case, the validity of the impugned notification is not being judged on application of principles available for judging the validity of administrative actions.

Further, para 376 of the opinion of Justice Jeevan Reddy is very instructive and it may be reproduced as under :

"We recognise that judicial process has certain inherent limitations. It is suited more for adjudication of disputes rather than for administering the country. The task of governance is the job of the Executive. The Executive is supposed to know how to administer the country, while the function of the judiciary is limited to ensure that the Government is carried on in accordance with the Constitution and the Laws. Judiciary accords, as it should, due weight to the opinion of the Executive in such matters but that is not to say, it defers to the opinion of Executive altogether. What ultimately determines the scope of judicial review is the facts and circumstances of the given case. A case may be a clear one -- like Meghalaya and Karnataka cases -- where the court can find unhesitatingly that the proclamation is bad. There may also be cases -- like those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh -- where the situation is so complex, full of imponderables and a fast-evolving one that the court finds it not a matter which admits of judicial prognosis, that it is a matter which should be left to the judgment of and to be handled by the Executive and may be in the ultimate analysis by the people themselves. The best way of demonstrating what we say is by dealing with the concrete cases before us.
(Emphasis supplied by us)

It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the Governor report dated 21st May, 2005, inter alia, stating that 17 \026 18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government

would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case of 'assumption', or 'perception' as to the provisions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act. It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature. Dealing with the question whether power of disqualification of members of the House vests exclusively with the House to the exclusion of judiciary which in Britain was based on certain British legislature practices, as far as India is concerned, it was said in Kihoto's case that :

"It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area."

The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

The Governor, a high Constitutional functionary is required to be kept out from the controversies like disqualification of members of a Legislative Assembly and, therefore, there are provisions like Article 192(2) in the Constitution providing for Governor obtaining the opinion of the Election Commission and acting according to such opinion, in the constitutional scheme of things.

Similar provision, in so far as, member of Parliament is concerned being in Article 103(2) of the Constitution {Brundaban Nayak v. Election Commission of India & Anr. [(1965) 3 SCR 53]; and Election Commission of India & Anr. v. Dr. Subramaniam Swamy & Anr. [(1996) 4 SCC 104].

For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT NO.3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

As a consequence of the aforesaid view on point no. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for 18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party \026 the Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

POINT NO.4 : What is the scope of Article 361 granting immunity to the Governor?

By order dated 8th September, 2005, we held that the Constitution of India grants immunity to the Governor as provided in Article 361. Article 361(1), inter alia, provides that the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purported to be done by him in the exercise and performance of those powers and duties. We accepted the submissions made on behalf of the respondents that in view of this Article notice could not be issued to the Governor, at the same time, further noticing that the immunity granted does not affect the power of this Court to judicial scrutinise attack made on

the Proclamation issued under Article 356(1) of the Constitution of India on the ground of malafides or it being ultra vires and that it would be for the Government to satisfy the Court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of the law. We, further held that the expression 'purported to be done' in Article 361 does not cover acts which are mala fide or ultra vires and thus, the Government supporting the Proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the grounds of mala fide or being ultra vires would not be examined by the Court. This order was made at the stage when we had not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. This question was argued later.

In our order dated 8th September, 2005 while giving the brief reasons we stated that detailed reasons will be given later.

Article 361(1) which grants protection to the President and the Governor reads as under :

"361.Protection of President and Governors and Rajpramukhs.--(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a Slate, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such Stale, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor,

the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims."

A plain reading of the aforesaid Article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as they are not answerable to any Court for the exercise and performance of their powers and duties. Most of the actions are taken on aid and advice of Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of malafides are required to be defended by Union of India or the State, as the case may be. Even in cases where the personal malafides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal malafides are made. Article 361 does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to President or Governor for even filing of affidavit to assist the Court. Filing of an affidavit on one's own volition is one thing than issue of direction by the Court to file an affidavit. The personal immunity under Article 361(1) is complete and, therefore, there is no question of the President or the Governor being made answerable to the Court in respect of even charges of malafides.

In Union Carbide Corporation, etc., etc. v. Union of India, etc. etc. [(1991) 4 SCC 584], dealing with Article 361(2) of the Constitution, Justice Venkatahalliah referred to the famous case of Richard Nixon [(1982) 457 US 731] about theoretical basis for the need for such immunity. It was said

"Article 361(2) of the Constitution confers on the President and the Governors immunity even in respect of their personal acts and enjoins that no criminal proceedings shall be instituted against them during their term of office. As to the theoretical basis for the need for such immunity, the Supreme Court of the United States in a case concerning immunity from civil liability (Richard Nixon v. Ernest Fitzgerald, 457 US 731 : 73 Law Ed 2d 349) said:

".....This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our Government....."

".....In the case of the President the inquiries into history and policy though mandated independently by

our case, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective Government under, a constitutionally mandated separation" of powers."

(L Ed p.367)

".....In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognise absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.
Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action....."

A division Bench of the Bombay High Court in the case of Shri Pratapsing Raojirao Rane & others v. The Governor of Goa & others [AIR 1999 Bombay 53] has correctly held that in respect of his official acts, the Governor is not answerable to the Court even in respect of charge of mala fide and that in such an eventuality the Governor cannot be said to be under the duty to deal with the allegations of mala fide. The Constitutional Law of India, 4th Edn. by H.M.Seervai has been rightly relied upon in the said judgment. The observations made by full Bench of the Madras High Court in K.A. Mathialagan & Ors. v. The Governor of Tamil Nadu & Ors. [AIR 1973 Madras 198] that the Governor would be under duty to deal with allegations of mala fide in order to assist the Court has been rightly described in Seervai's commentary being in direct conflict with the complete personal immunity of the Governor.

The words 'purported to be done' are of wide amplitude. In Biman Chandra v. Governor, West Bengal [AIR 1952 Calcutta 799] it was held that Article 361 affords immunity in respect of its exercise and performance of the power and duties of the office and any act done or purported to be done by him in exercise and performance of those powers and duties.

In G.D.Karkare v. T.L.Shevde [AIR 1952 Nagpur

330] construing the expression 'purporting to be done' it was held that any act, though not done in pursuance of the Constitution, may nevertheless be accorded this protection if the act professes or purports to be done in pursuance of the Constitution. It was further explained that though the Governor is not amenable to the process of the Court but it cannot be said that the High Court cannot examine his action and grant relief in the absence of authority making the decision.

In State v. Kawas Manekshaw Nanavati [AIR 1960 Bombay 502] full Bench of the High Court held that Article 361 only gives personal protection to the Governor. It is not necessary that the Governor should be a party to the proceeding. Validity of actions can be considered and decided in the absence of the Governor. In The State of West Bengal and Ors. v. Sallendra Nath Bose [AIR 1964 Calcutta 184] it was held that a citizen is not without redress even though he cannot implead the Governor as a party but can be given relief.

The position in law, therefore, is that the Governor enjoys complete immunity. Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of malafides.

In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant status quo ante and consequentially permitted the completion of ongoing election process.

All petitions are disposed of accordingly.

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K.G. BALAKRISHNAN, J.

I have had the advantage of reading in draft the judgment prepared by Hon'ble the Chief Justice of India, Shri Y. K. Sabharwal and I find myself unable to agree with the decision on point No. 2 formulated in the judgment. On all other points, I gratefully adopt the exposition of law and agree with the decision proposed by the learned Chief Justice. Point No. 2 is as follows :-

"(1)\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?"

Few factual details are necessary to decide the question. The election to the Bihar State Legislature was held in the month of February, 2005 and the results of the election were declared on 23rd March, 2005. The names of the members elected to the Bihar State Legislature were notified by the Election Commission. Certain political groups and political parties participated and the National Democratic Alliance (for short 'NDA'), a coalition

comprising Bhartatiya Janata Party (for short 'BJP') and Janata Dal (United) (for short "JD(U)") secured the largest support of MLAs. The party-wise strength in the Assembly was as follows :-

"(1) NDA 92
(2) RJD 75
(3) LJP 29
(4) Congress (I) 10
(5) CPI (ML) 07
(6) Samajwadi Party 04
(7) NCP 03
(8) Bahujan Samaj Party 02
(9) Independents 17
(10) Others 09"

In order to secure an absolute majority to form a Government in the State of Bihar, support of 122 Members of Legislative Assembly was required. NDA could secure only 92 seats and no other political parties or group came forward to support NDA to form a Government. RJD was also in the same dilemma. LJP, another political party which was under the leadership of Shri Ram Vilas Paswan had secured 29 seats in the State Legislature. This political party did not extend support either to NDA or RJD. As none could form a Government, Governor of the State of Bihar sent a Report on 6th March, 2005 to the President of India recommending President's Rule in the State and for keeping the Assembly in suspended animation for the time being. On 7th March, 2005 the President's Rule was imposed in the State of Bihar and the Assembly was kept in suspended animation. This order passed by the President of India under Article 356 of the Constitution on 7th March, 2005 is not challenged in most of the petitions before us. In one of the petitions, the Notification issued on 7th March, 2005 under Article 356 of the Constitution is also challenged but the petitioner could not substantiate his contentions and the very challenge itself is highly belated.

While the Assembly was in suspended animation, the two political groups, the NDA which had secured 92 seats and the RJD which had secured 75 seats in the State Legislature made attempts to form a Government in the State of Bihar. It appears that the LJP, which had secured 29 seats in the State Legislature was not prepared to extend support either to NDA or RJD. When the (Vote on Account) Bill of 2005 for the State of Bihar was presented before the Parliament, the Home Minister made a statement to the effect that the President's Rule would not be continued for a long time and they would have been happy if a Government had been formed by the elected representatives and that the elected representative should talk to each other and create a situation in which it becomes possible for them to form a Government. The discussion must have been continued between the political parties.

On 27th April, 2005 the Governor of Bihar sent a Report to the President of India wherein he stated that he had received Intelligence Reports to the effect that some elected representatives were said to have been approached by factions within the party and outside the party with various allurements like money, castes and posts etc. and the same was a disturbing trend. He also cautioned that if the trend is not arrested immediately, the political instability would further deepen and the horse-trading would be indulged in by various political parties and it would not be possible to contain the situation and the people should be given a fresh opportunity to elect their representatives.

It seems that pursuant to letter dated 27th April, 2005 sent by the Governor of Bihar to the President, no decision was taken by the President for dissolution of the State Assembly. Again on 21st May, 2005 the Governor of Bihar sent a letter to the President and this is the crucial document on the basis of which the Bihar State Legislative Assembly was dissolved under Article 174 (2) (b) of the Constitution. The letter is as follows :-

" 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 JDU.

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. \026 GSR \026 162 (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 registered today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature. Any move by the break away faction 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."

The gist of the letter written by the Governor is that political parties either individually or with the then pre-election combination or with post-election alliance combination could not stake a claim to form a popular Government since none could claim support of a simple majority of 122 in a House of 243 members and, therefore, the President issued a Proclamation under Article 356. The Governor further stated that he had received information through media and reports gathered through meeting with various political functionaries that there had been a trend to win over elected representatives of the people and 17-18 MLAs were moving towards JD(U) and various allurements had been offered to them. Governor also indicated that any move by the break-away faction to align with any other party, to cobble a majority and stake a claim to form a Government would positively affect the Constitutional provisions and safeguards provided therein. The Governor was of the view that if the Assembly is dissolved, the political parties would get another opportunity to seek a fresh mandate of the people. From the letter, it is clear that no political party or group or alliance had approached the Governor claiming absolute majority in the State Legislature nor did they try to form a Government with the help of other political parties or independent MLAs.

The Report of the Governor was received by the Union of India on 22nd May, 2005. The Union Cabinet which met at about 11.00 P.M., took a decision and sent a fax message to the President of India recommending dissolution of the Legislative Assembly of Bihar. On 23rd May, 2005 the Bihar Assembly was dissolved and that order of dissolution is under challenge before us.

We heard learned Attorney General, Mr. Milon K. Banerji; learned Solicitor General, Mr. Ghoolam E. Vahanvati; learned Additional Solicitor General, Mr. Gopal Subramaniam; Mr. Soli Sorabjee, learned Senior Advocate; Mr. P.S. Narasimha, learned counsel for the petitioner and Mr. Viplav Sharma, Advocate, who appeared in person. Many other counsel who were supporting the petitioner submitted their written arguments. Most of the arguments centered around the decision rendered by this Hon'ble Court in S.R. Bommai & Ors. Vs. Union of India & Ors. [(1994) 3 SCC 1]. The decision in S.R. Bommai's case was rendered by a Nine Judge Bench and several opinions were expressed. Justice B.P. Jeevan Reddy gave a separate judgment with which Justice S.C. Agrawal agreed. Justice A.M. Ahmadi, Justice J.S. Verma, Justice K. Ramaswamy and Justice Yogeshwar Dayal agreed with certain propositions given by Justice B.P. Jeevan Reddy. Although there was a broad concurrence with the views expressed by Justice Jeevan Reddy, Justice Sawant & Kuldip Singh, JJ. struck a different note and their approach, reasoning and conclusion are not similar.

In order to understand the scope and ambit of the decision in S.R. Bommai's case it is necessary to see the earlier decision in State of Rajasthan & Ors. Vs. Union of India & Ors. reported in (1977) 3 SCC 592. The facts which had led to the filing of that case was that in March, 1977 elections were held to the Lok Sabha and the result of the elections was interpreted to mean that the Congress party had lost people's mandate. The Union Home Minister sent a letter to the Chief Ministers of certain States asking them to advise their respective Governors to dissolve the Assemblies and seek a fresh mandate from the people. The letter together with the statement made by the Union Law Minister was treated as a threat to dismiss those State

Governments. They approached this Hon'ble Court by filing suits and writ petitions. In that case, six opinions were delivered by the Seven Judge Bench. Though all of them agreed that the writ petitions and suits be dismissed, the reasoning were not uniform. Some of the opinions in that judgment can be briefly stated as follows :-

Bhagwati, J. on behalf of Gupta, J and himself, while dealing with the "satisfaction of the President" prior to the issuance of the Proclamation under Article 356 (1), stated as follows :-

"So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so..... This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law....."

He went on to say :-
"..\005\005\005.. Here the only limit on the power of the President under Art. 356, clause (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as 'judicially discoverable and manageable standards'. It would largely be a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour and a host of other considerations\005"

He further stated :-

"\005.. It must of course be conceded that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Art. 356, clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. \005..This is the

narrow minimal area in which the exercise of power under Article 356, Clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists".

(Emphasis supplied)

Beg, CJ was of the opinion that by virtue of Article 356 and Article 74(2) of the Constitution, it is impossible for the court to question the 'satisfaction' of the President. It is to be decided on the basis of only those facts as may have been admitted or placed before the court. Beg CJ was also of the opinion that the language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State Government with respect to the question as to how the State Government should function and should hold reigns of power. But these views were not accepted by the majority. YV Chandrachud, J, speaking on the scope of judicial review held that if the reasons disclosed by the Union of India are wholly extraneous, the court can interfere on the ground of mala fides. "Judicial scrutiny", said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed. The court cannot sit in judgment over the 'satisfaction' of the President for determining, if any other view is reasonably possible." As regards the facts disclosed in the case, the learned Judge was of the view that the facts disclosed by the Central Government in its counter affidavit cannot be said to be irrelevant to Article 356. Goswami and Untwalia, JJ. gave separate opinions and expressed the view that the facts stated cannot be said to be extraneous or irrelevant.

From the dicta laid down in State of Rajasthan's case, it is clear that the power of judicial review could be exercised when an order passed under Article 356 is challenged before the court on the ground of mala fides or upon wholly extraneous or irrelevant grounds and then only the court would have the jurisdiction to examine it. The plea raised by the learned Attorney General that a proclamation passed under Article 356 is legislative in character and outside the ken of judicial scrutiny was rejected by the majority of the Judges in State of Rajasthan's case.

On a careful examination of the various opinions expressed in S.R Bommai's case, it is clear that the majority broadly accepted the dicta laid down in Rajasthan's case. It was also held that the principles of judicial review that are to be applied when an administrative action is challenged cannot be applied when a challenge is made against a Presidential order passed under Article 356.

P.B. Sawant, J. speaking for himself and Kuldip Singh, J. took a different view and held that the same principles would apply when a proclamation under Article 356 also is challenged. Some of the observations made by the learned Judges would make the position clear.

In S.R Bommai's case, a plea was raised that the principles of judicial review as laid down in Barium Chemicals Ltd. & Anr. v. The Company Law Board & Ors. (1966) Suppl. 3 SCR 311 are applicable and the subjective satisfaction of the President as contemplated under Article 356 could be examined. In the Barium Chemical's case, the Company Law Board under Section 237(b) of the Companies Act appointed four inspectors to investigate the affairs of the appellant-company on the ground

that the Board was of the opinion that there were circumstances suggesting that the business of the appellant-company was being conducted with intent to defraud its creditors, members or any other persons and that the persons concerned in the management of the affairs of the company had in connection therewith, been guilty of fraud, misfeasance and other misconduct towards the company and its members. The company filed a writ petition challenging the said order. In reply to the writ petition, the Chairman of the Company Law Board filed an affidavit and contended that there was material on the basis of which the order was issued and that he had himself examined this material and formed the necessary opinion within the meaning of the said Section 237(b) of the Companies Act. The majority of the Judges held that the circumstances disclosed in the affidavit must be regarded as the only material on the basis of which the Board formed the opinion before ordering an investigation under Section 237(b) and that the circumstances could not reasonably suggest that the company was being conducted to defraud the creditors, members or other persons and, therefore, the impugned order was held ultra vires the section. Hidayatullah, J. as he then was, stated that the power under Section 237(b) is discretionary power and the first requirement for its exercise is the honest formation of an opinion that an investigation is necessary and the next requirement is that there are circumstances suggesting the inferences set out in the section. An action not based on circumstances suggesting an inference of the enumerated kind will not be valid. Although the formation of opinion is subjective, the existence of circumstances relevant to the inference as the sine quo non for action must be demonstrable. If their existence is questioned, it has to be proved at least prima facie. It is not sufficient to assert that the circumstances must be such as to lead to conclusions of action definiteness.

These principles were also applied in some of the later decisions where the administrative action was challenged before the court. (See M.A. Rashid & Ors. Vs. State of Kerala (1975) 2 SCR 93].

There was also a plea that the principles of judicial review enunciated by Lord Diplock in "Council of Civil Services Union & Ors. Vs. Minister for Civil Services 1985 AC 374 GCHQ would apply when Presidential Proclamation under Article 356 is challenged. This plea also was not accepted by the majority of the Judges in S.R. Bommai's case.

The broad view expressed by Sawant, J., to which Kuldip Singh, J. also agreed, could be gathered from the observations on page 102 in the S.R. Bommai's case which is to the following effect:

"From these authorities, one of the conclusions which may safely be drawn is that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. \005\005\005\005\005\005\005

In other words, the President has to be convinced of,

or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review."

The above opinion expressed by Sawant J., to which Kuldip Singh, J. also agreed was not fully accepted by other Judges. B.P. Jeevan Reddy, J. speaking for himself and Agrawal, J., held that the proclamation under Article 356 is liable to judicial review and held that the principles of judicial review, which are applicable when an administrative action is challenged, cannot be applied stricto sensu.

At the end of the judgment, Jeevan Redddy, J. summarized the conclusions and conclusions (6) and (7) speak of the scope and ambit of judicial review. Clause (1), (2), (6) and (7) are relevant for the purpose of the present case. These are as follows:
1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the government of a State cannot be carried on in accordance with the provisions of the Constitution, Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. The satisfaction contemplated by the Article is subjective in nature.
(2) The power conferred by Art. 356 upon the President is a conditioned power. It is not an absolute power. The existence of material -- which may comprise of or include the report(s) of the Governor -- is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Art. 356 do merit serious consideration at the hands of all concerned.

[3] \005.
[4] \005.
[5] \005.
(6) Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and S. 123 of the Evidence Act cover different fields. It may happen that while defending the proclamation, the minister or the concerned official may claim the privilege under S. 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of S. 123.
(7) The proclamation under Article 356(I) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) (which was introduced by 38th (Amendment) Act) by the 44th

(Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so. if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to 'the action taken.

[Emphasis supplied]

Justice Ratnavel Pandian agreed with Jeevan Reddy J. on his conclusions on all the above points. He disagreed with only Clause (3) of the summary of conclusions. Clause (3) deals only with the power of dissolving the legislative assembly which shall be exercised by the President only after proclamation under clause (1) of Article 356 is approved by both the Houses of Parliament and until such approval the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly.

J.S. Verma, Ahmadi and Ramaswami, JJ. took a different note. Ahmadi, J. was of the opinion that the court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be mala fide. Before exercise of the Court's jurisdiction, sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President, i.e. the executive must not be called upon to answer the charge. Ramaswamy, J. was also of the same opinion.

Verma, J. was of the view that the test for adjudging the validity indicated in the The Barium Chemicals Ltd.'s case and other cases of that category have no application for testing and invalidating a proclamation issued under Article 356. He was of the opinion that only cases which permit application of totally objective standards for deciding whether the constitutional machinery has failed are amenable to judicial review and the remaining cases wherein there is any significant area of subjective satisfaction dependent on some imponderables or inferences are not justiciable because there are no judicially manageable standards for resolving that controversy and those cases are subject only to political scrutiny and correction for whatever its value in the existing political scenario.

It is important to note that in S.R. Bommai's case, majority of Judges held, that as regards the imposition of President's Rule in Karnataka, Meghalaya and Nagaland, the Presidential proclamations were unconstitutional. The facts which ultimately led to the Presidential proclamation under Article 356(1) in two States are significant to understand the law laid down in S.R. Bommai's case.

In the case of Karnataka, the President dismissed the government and dissolved the State Assembly. The Janta Party was ruling the State and it had formed the Government under the leadership of Shri S.R. Bommai. One member of the legislature defected from the party and presented a letter to the Governor withdrawing his support to the Ministry. On the next day, he presented to the Governor 19 letters allegedly signed by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to Bhartiya Janata Party which was supporting the Minstry, withdrawing their support to the Minstry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislative Department and got the authenticity of the signatures on the said letters verified.

Governor then sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and he referred to the 19 letters received by him and in view of withdrawal of support by the said legislators , the Chief Minister Shri Bommai did not command a majority in the Assembly and no other political party was in a position to form the government and, therefore, recommended to the President to exercise power under Article 356(1). The Governor did not ascertain the view of the Chief Minister, Shri Bommai, and on the next day, seven out of the nineteen legislators who had allegedly written the said letters to the Governor made a complaint that their signatures were obtained by misrepresentation. The Governor also did not take any steps directing the Chief Minister to seek a vote of confidence in the legislature nor met any of the legislators who had allegedly defected from the Janta Party. It was in this background that the proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, equally suffered from mala fides. The duly constituted Ministry was dismissed on the basis of the material which was no more than the ipse dixit of the Governor.

In the case of Meghalaya, Meghalaya United Parliamentrary Party (MUPP) which had a majority in the Legislative Assembly formed the government in March, 1990 under the leadership of Shri B.B. Lyngdoh. One Kyndiah Arthree was at the relevant time the Speaker of the House. He was elected as the leader of the opposition known as United Meghalaya Parliamentary Forum (UMPF). On his election, Shri Arthree claimed support of majority of the members in the Assembly and requested the Governor to invite him to form the government. The Governor asked the Chief Minister Shri Lyngdoh to prove his majority on the floor of the House. A special sessions was convened on 7.8.91 and a Motion of Confidence in the Ministry was moved. Thirty Legislators supported the Motion and 27 voted against it. Instead of announcing the result of the voting on the Motion, the Speaker declared that he had received a complaint against five independent MLAs of the ruling coalition front alleging that they were disqualified as legislators under the anti-defection law and since they had become disentitled to vote, he was suspending their right to vote. On this announcement, there was uproar in the House and it had to be adjourned. On 11.8.1991, the Speaker issued show cause notices to the alleged defectors. The five MLAs replied stating that they had not joined any of the parties and they had continued to be independent. The Speaker passed an order disqualifying the five MLAs. Thereafter, on Governor's advice, the Chief Minister Shri Lyngdoh summoned the Session of the Assembly on 9.9.1991 for passing a vote of confidence in the Ministry. The Speaker, however, refused to send the notices of the Session to the five disqualified independent MLAs whereupon they approached this court. This court issued interim orders staying the operation of the Speaker's order. Only four of them had applied to the court for an order of stay. The Speaker issued a Press Statement in which he declared that he did not accept any interference by any court. The Governor, therefore, prorogued the Assembly indefinitely. The Assembly was again convened and the four independent MLAs who had obtained interim orders from the court moved a contempt petition before this court against the Speaker. The Speaker made a declaration in a press statement defying the interim order of this Court. On 8.10.1991, this Court passed an order directing that all authorities of the State should ensure the compliance of the Court's interim order of 6.9.1991 and four of the five independent MLAs received invitation to attend the Session of the Assembly. After the Motion of Confidence in the

Ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of the four independent MLAs. The 26 MLAs who had supported the Ministry and four MLAs who had voted in favour of the Motion elected a new Speaker and the new Speaker declared that the Motion of Confidence in the Ministry had been carried since 30 MLAs had voted in favour of the Government. They thereafter sent letters to the Governor that they had voted in favour of the Ministry. However, the Governor wrote a letter to the Chief Minister asking him to resign in view of what had transpired in the Session on 8.10.1991. The Chief Minister moved this Court against the letter of the Governor. Despite all these facts, the President on 11.10.1991 issued a proclamation under Article 356(1) and in the proclamation it was stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution.

In the case of Nagaland also, similar situation had arisen. The facts are not necessary to be stated in detail.

In all these three cases where the Presidential Proclamations issued under Article 356 were quashed by this Court, were States wherein the Government was functioning on the strength of the majority, whereas in the instant case the decision of dissolution of the Assembly was evidently passed on the report of the Governor when the Assembly was in suspended animation and there was no democratically elected Government in the State and, therefore, there was no question of testing the majority of the Government on the floor of the Assembly.

From the S.R. Bommai's decision, it can be discerned that the majority was of the view that so far as the scope and ambit of judicial review is very limited when a proclamation under Article 356 is questioned and similar parameters would apply in a case where a Notification is passed under Article 174(2) {b) dissolving the State Legislative Assembly. The plea raised by the Additional Solicitor General, Shri Gopal Subramaniam that the Notification dissolving Assembly is of a legislative character and could be challenged only on the ground of absence of legislative competence or ultra vires of the Constitution, cannot be accepted. This plea was raised in Rajasthan's case as well as in S.R. Bommai's case, but it was rightly rejected in both the cases. However, the power exercised by the President is exceptional in character and it cannot be treated on par with an administrative action and grounds available for challenging the administrative action cannot be applied. In view of Article 74(2) of the Constitution, the court cannot go into the question as to what manner of advice was tendered by the Council of Ministers to the President. The power conferred on the President is not absolute; it has got checks and balances. It is true that the power exercised by the President is of serious significance and it sometime amounts to undoing the will of the people of the State by dismissing the duly constituted Government and dissolving the duly constituted Legislative Assembly. Any misuse of such power is to be curbed if it is exercised for mala fide purposes or for wholly extraneous reasons based on irrelevant grounds. The Court can certainly go into the materials placed by the Governor which led to the decision of dissolving the State Assembly.

The Presidential proclamation dissolving the Bihar State Legislative Assembly was issued pursuant to two reports sent in by the Governor. It may be remembered that Article 356(1) Proclamation imposing President's Rule was issued on 7th March,

2005. Thereafter, on 22nd April, 2005, the Governor sent a report wherein he stated that none of the political parties. either individually or with the then pre-election combination or with post-election alliance, could stake a claim to form a popular Government wherein they could claim support of a simple majority of 122 in a House of 243. The Governor had also indicated that there are certain newspaper reports and other reports gathered through meeting with different parties' functionaries that some steps are being taken to win over the elected representatives of the people through various allurements like money, caste, post, etc. Thereafter, on 21.5.2005, the Governor of Bihar sent another report and based on that, the Bihar State Assembly was dissolved on 23rd May, 2005. In the report dated 21st May, 2005, the Governor reiterated his earlier report that no party had approached him to form a popular Government since none could claim the support of a simple majority of 122 in a House of 243. In that report, the Governor had also stated that 17/18, or more perhaps, LJP MLAs are moving towards the JD(U) and that various allurements have been offered to them and it was an alarming feature and the Governor was also of the opinion that it was positively affecting the Constitutional provisions and safeguards built therein and distorted the verdict of the people.

The contention urged by learned ASG, Shri Gopal Subramaniam was that this is the material which was placed before the President before a Proclamation was issued under Article 174(2)(b) of the Constitution. It is important to note that the writ petitioners have no case that JD(U) or any other alliance had acquired majority and that they had approached the Governor staking their claim for forming a Government. No material is placed before us to show that the JD(U) or its alliance with BJP had ever met the Governor praying that they had got the right to form a Government. The plea of the petitioners' counsel is that they were about to form a Government and in order to scuttle that plan the Governor sent a report whereby the Assembly was dissolved to defeat that plan is without any basis. The Governor in his report stated that 17 or 18 members of the LJP had joined the JD(U)-BJP alliance, but no materials have been placed before us to show that they had, in fact, joined the alliance to form a Government. One letter has been produced by one of the petitioners and the same is not signed by all the MLAs and as regards some of them, some others had put their signatures. Therefore, it is incorrect to say that the Governor had taken steps to see that the Assembly was dissolved hastily to prevent the formation of a Government under the leadership of the political party JD(U). If any responsible political party had any case that they had obtained majority support or were about to get a majority support or were in a position to form minority Government with the support of some political parties and if their plea was rejected by the Governor, the position would have been totally different. No such situation had been reached in the instant case. It is also very pertinent to note that the order for dissolution of the State Assembly was passed after about three months of the proclamation imposing the President's Rule was issued under Article 356(1). When there was such a situation, the only possible way was to seek a fresh election and if it was done by the President, it cannot be said that it was a mala fide exercise of power and the dissolution of the Assembly was wholly on extraneous or irrelevant grounds. It is also equally important that in Karnataka, Meghalaya and Nagaland cases, there was a democratically-elected Government functioning and when there is an allegation that it had lost its majority in the Assembly, the primary duty was to seek a vote of confidence in the Assembly and test the strength on the floor of the Assembly. Such a

situation was not available in the present case. It was clear that not a single political party or alliance was in a position to form the Government and when the Assembly was dissolved after waiting for a reasonable period, the same cannot be challenged on the ground that the Governor in his report had stated that some horse-trading is going on and some MLAs are being won over by allurements. These are certainly facts to be taken into consideration by the Governor. If by any foul means the Government is formed, it cannot be said to be a democratically-elected Government. If Governor has got a reasonable apprehension and reliable information such unethical means are being adopted by the political parties to get majority, they are certainly matters to be brought to the notice of the President and at least they are not irrelevant matters. Governor is not the decision-making authority. His report would be scrutinized by the Council of Ministers and a final decision is taken by the President under Article 174 of the Constitution. Therefore, it cannot be said that the decision to dissolve the Bihar State Legislative Assembly, is mala fide exercise of power based on totally irrelevant grounds.

Applying the parameters of judicial review of Presidential action in this regard, I do not think that the petitioners in these writ petitions have made out a case for setting aside the Notification issued by the President on 23rd May, 2005. The Writ Petitions are without any merit they are liable to be dismissed.

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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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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	
			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. \026 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 \026 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 \026 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 \026 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 \026 whose awkward erosion and grotesque manifestations have been the bane of the times \026above 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.

Xx xx xx xx

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 Territory\027Any 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.

Xx xx xx
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-

Xx xx xx xx

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

Xx xx xx xx

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.

xxx xxx xxx xxx

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.

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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.

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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.

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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\027

(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.