DUTY OF THE UNION UNDER ARTICLE 355 OF THE CONSTITUTION – REMEMBERING THE CONSTITUTIONAL IDEAL OF CO-OPERATIVE FEDERALISM

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The Constituent Assembly debates inform us that the duty of the Union towards the States under Art. 355 of the Constitution was incorporated in order to justify the drastic shift in the balance of Union-State relations caused by emergency action under Art. 356. An analysis of various legal authorities' interpretation and employment of Art. 355, however, reveals a gradual but stark evolution in its character, one which significantly widens the scope of Union action contemplated by it. This paper ventures an explanation for this departure but does not criticize it, as the current position may still be used beneficially. With a substantially wide range of Union interference in the States' domains amenable to be validated or invalidated on the touchstone of Article 355, however, the concern arises that such interference- and the calls for it– may often be tainted with mala fides or political unscrupulousness. To allay this fear, it is necessary that the constitutional ideal of co-operative federalism be taken note of with fresh vigour. The plea is not utopian as was recently illustrated by the Union's responses to the Karnataka Governor's recommendations for emergency action under Art. 356.

I. INTRODUCTION

Our Constitution has long been known as espousing its own unique brand of federalism, one which balances the distribution of powers between the Union and the States in a way as to allot them each separate spheres of governance, with the Union empowered to intervene in the State sphere where it is felt warranted. The starkest interventions are contemplated under Part XVIII of the Constitution dealing with 'Emergency Provisions'. A proclamation of emergency under Art. 352 gives to the President executive control over the States, and lawmaking power over both Union and States;[1] additionally, certain fundamental rights and freedoms under Part III are also suspended

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1 *Vide* Arts. 353 and 250.

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or curtailed.[2] A proclamation by the President under Art. 356 has the effect of vesting with the Parliament all the functions of the Legislative Assembly of the given State, and the effect of vesting the complete executive power of the State Government with the President. A proclamation under Art. 360 extends the executive authority of the Union to the giving of binding directions to any State as it deems necessary to maintain financial propriety. As will be elaborated, such drastic powers are exceptions to the ordinary federal framework of the Constitution- a framework which is, as a last resort, bent to meet certain dire and expedient situations as might arise.

Art. 355 of the Constitution falls in Part XVIII and imposes a duty on the Union to protect the States from external aggression and internal disturbance, as well as the duty to ensure that the Governments of the States are carried on in accordance with the provisions of the Constitution. In the Constituent Assembly, Dr. Ambedkar explained the purpose of incorporating Art. 355, keeping in mind the character of federalism as embodied in the Constitution, "if the Centre is to interfere in the administration of provincial affairs, as we propose to authorise the Centre by virtue of draft Arts. 278 and 278-A,[3] it must be by and under some obligation which the Constitution imposes upon the Centre. The invasion must not be an invasion which is wanton, arbitrary and unauthorised by law. Therefore, in order to make it quite clear that draft Arts. 278 and 278-A are not to be deemed as a wanton invasion by the Centre upon the authority of the province, we propose to introduce draft Art. 277-A[4]."[5] In the same vein, he opined as follows on the role of Arts. 355 and 356: "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 all these powers, will take proper precautions before actually suspending the administration of the provinces."[6]

As will be noticed subsequently,[7] however, there has been a gradual but stark change in the scope of actions contemplated for the discharge of the duty under Art. 355. The legal position has shifted from the view that the scope of these actions be restricted to actions of emergency nature viz. those contemplated in Part XVIII of the Constitution, to the currently prevalent view that all statutory and constitutionally available actions are permissible on the part of the Union in order to discharge its duty, if they can be shown as justiciable in light of the duty cast.[8]

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2 *Vide* Arts. 358 and 359.

3 Presently Art. 356.

4 Presently Art. 355.

5 9 CONSTITUENT ASSEMBLY DEBATES 133 (1949).

6 *Id.*, 177.

7 *See infra* Part II.

8 The justiciability of actions of the Union on the touchstone of Art. 355 was examined in Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665, as well as in H. S. Jain v. Union of

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The present work attempts firstly to outline the trajectory of legal thought and practice on the implications of the duty of the Union stipulated under Art. 355. Finding a significant departure in the current position from the original legislative intent (since actions contemplated by the Art. 355 duty today are far from restricted to those of emergency nature), it then offers an explanation for such a departure. Determining that the position as it stands can be used beneficially in Union-State relations, the paper briefly exposits the notion of co-operative federalism- an ideal which militates against Union-State relations being conducted in bad faith- and its importance for the proper use and interpretation of Art. 355 today. It then delineates certain measures which may be viewed as powers of the Union in lieu of its duty towards the States under Art. 355, such powers being granted to the Union not for wanton and whimsical exercise (*suo moto* or otherwise) but as necessary means to carry out the performance of a constitutional obligation. Finally, a recent political scenario in Karnataka is briefly illustrated in order to show that a firm understanding of, and adherence to, our federal arrangement is both attainable and rewarding.

II. EVOLUTION OF THE USE AND CHARACTER OF ARTICLE 355

The following is a brief teleology of the legislative, executive and judicial opinion and application of Art. 355; the train of thought may be understood under two broad heads:

A. ARTICLE 355 MERELY JUSTIFIES ACTION UNDER ARTICLES 352 AND 356

The rationale given by Dr. Ambedkar for including Art. 355 in the Constitution is along these lines: that the Constitution is a federal Constitution and thus the States have been assigned sovereignty within their own field, as well as plenary powers to secure peace, order and good government for themselves (barring the provisions which permit the Union to override any legislation that may be passed by the States); it is therefore necessary to provide that if any invasion is made into the States' domain, as is permitted by Art. 356, it is carried out in virtue of an obligation which the Constitution imposes upon the Union, in the absence of which such invasion would be a wanton, arbitrary, and unauthorised act.[9] Clearly, it is for this reason that Art. 355 has been placed specifically in Part XVIII which is sets out 'Emergency Provisions'.

In *State of Rajasthan* v. *Union of India*,[10] Beg, C.J.I observed that the provisions dealing with the proclamation of emergency under Art. 352,

India, (1997) 1 UPLBEC 594.

9 Constituent Assembly Debates, *supra* note 5.

10 (1977) 3 SCC 592: (1978) 1 SCR 1.

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which would have to be grave and immanent, would be covered by the first part of the duty of the Union towards a State mentioned in Art. 355 viz. to protect the States from external aggression and internal disturbances, and the second part of the duty, viz. to ensure that the Government of every State is carried on in accordance with the provisions of Constitution, is sought to be covered by a proclamation under Art. 356.

The legal fallout of this position was that though Art. 355 creates a duty of the Union towards the States, this duty was to be viewed as providing justification for the employment of emergency action under Arts. 352 and 356, and thus not contemplating any other action in lieu of this duty.

B. ARTICLE 355 CONTEMPLATES THE JUDICIOUS USE OF ARTICLES 352 AND 356, AND THUS GIVES RISE TO SEVERAL ALTERNATIVE POWERS AND DUTIES

The Constitution (Forty-Fourth Amendment) Act, 1978, importantly substituted the words 'armed rebellion' in Art. 352 for the term 'internal disturbance',[11] but left the term 'internal disturbance' unchanged in Art. 355. Therefore, the first part of the Art. 355 duty of the Union (to protect the States from external aggression and internal disturbances) was left broader in scope and thus seemed to contemplate measures other than Art. 352 to be made in discharge of it.

Accordingly, in *S.R. Bommai* v. *Union of India*,[12] Sawant, J.'s opinion (on behalf of Kuldip Singh, J. and himself) held that Art. 355 is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Arts. 356 and 357. It was also noted that the expression 'internal disturbance' is of larger connotation than 'armed rebellion', and thus while a proclamation of emergency under Art. 352 can be made only if a situation of armed rebellion arises, such Proclamation cannot be made for internal disturbance caused by any other situation. Additionally, it was observed that a proclamation cannot be issued under Art. 356 unless the internal disturbance gives rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Importantly, it was concluded that mere internal disturbance short of armed rebellion cannot justify a proclamation of emergency under Art. 352 nor can such disturbance justify issuance of proclamation under Art. 356, unless it disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution.[13]

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[11] *Vide* §37.

[12] (1994) 3 SCC 1: AIR 1994 SC 1918 ¶57.

[13] *Id*.

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In *Naga People's Movement of Human Rights* v. *Union of India,*[14] the Supreme Court was called upon to decide the question of the constitutionality of the Armed Forces (Special Powers) Act, 1958 ('AFSPA'), under which the Union is empowered to dispatch its armed forces in aid of States' civil power in any area it finds to be a 'disturbed area'.[15] After confirming the legislative competence of the Union *vide* Entry 2A of List I of the VII[th] Schedule, the enactment was upheld with the observation that its provisions were enacted in order to enable the Union to discharge the obligation imposed on it under Art. 355 of the Constitution so as to protect States from grave situations of internal disturbances and to prevent such situations from escalating to such seriousness as would require invoking the drastic measures under Art. 356.[16]

In *Sarbananda Sonowal* v. *Union of India*,[17] the Supreme Court was considering the matter of the constitutional *vires* of certain provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983, a Union enactment attempting to detect and deport illegal migrants residing in the State of Assam. The Court after examining the situation of large-scale illegal migration into the State of Assam, concluded that a situation amounting to external aggression and internal disturbance persisted therein. Therefore, it observed that it became the duty of Union to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Art. 355 of the Constitution. After examining the provisions of the Act in depth, it was held that the Act and the Rules made thereunder "negate the constitutional mandate contained in Art. 355 of the Constitution", whereby a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The Act was held to contravene Art. 355 of the Constitution and was therefore struck down as unconstitutional.

In the same vein, and in addition to the deployment of forces under the AFSPA,[18] the Union has on several occasions used its competence under Entry 2A of List I, wherein it is empowered to deploy its forces "in any State in aid of the civil power", to dispatch *inter alia* the Central Reserve Police Force (CRPF),[19] under the Central Reserve Police Force Act, 1949, and the Border

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14 (1998) 2 SCC 109: AIR 1998 SC 465: 1998 SCC (Cri) 514.

15 *Vide* §3.

16 *See supra* note 14, ¶36. Also, it was importantly stated that "[b]y virtue of Article 355 the Union owes a duty to protect the States against internal disturbance and since the deployment of armed forces in aid of civil power in a State is to be made by the Central Government in discharge of the said constitutional obligation, the conferment of the power to issue a declaration on the Central Government cannot be held to be violative of the federal scheme as envisaged by the Constitution,...", *id*., ¶46.

17 (2005) 5 SCC 665.

18 *See e.g.,* The Hindu, *A Modest Proposal on AFSPA*, available at http://www.thehindu.com/opinion/columns/siddharth-varadarajan/article615837.ece (Last visited on September 26, 2011).

19 *See e.g.,* The Hindu, *Allocation For NIA, BSF, CRPF, NATGRID Goes Up*, available at http://www.thehindu.com/news/national/article1497883.ece (Last visited on September 26, 2011).

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Security Force (BSF),[20] under the Border Security Force Act, 1968, in aid of various States' civil power. The exercise of power by the Union under the said competence has been recognised as made in discharge of its duty under Art. 355.[21]

But the broadened scope of Art. 355 is not restricted to the situations of external aggression and internal disturbance in States. In the case of *H. S. Jain* v. *Union of India*,[22] while assessing the question of a proclamation in respect of the State of Uttar Pradesh reimposing President's action under Art. 356, on the ground that there was no conceivable method of forming democratic government after the Legislative Assembly elections, it was held that by virtue of Art. 355, the constitutional duty cast on the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution obligated the Union to see that, after the constitution of the new Legislative Assembly, all possibilities of formation of popular Government in Uttar Pradesh were explored by the democratic process. Having regard to the facts of the case, it was concluded that before the proclamation under Art. 356 was issued, few or no alternative actions were explored, despite there being a legal and constitutional mandate to do so. The proclamation under Art. 356 was therefore set aside and importantly, it was held that the Art. 355 duty to ensure that the Government of the State be carried out in accordance with the provisions of the Constitution was not properly carried out.[23] Thus, it may be safely inferred that the second part of Art. 355, stipulating that the Union ensure that the Government of the States is carried on in accordance with the Constitution, is no longer merely a justification for action under Art. 356 but gives rise to independent powers and obligations as well.

Additionally, the Sarkaria Commission on Centre-State Relations (1988), the National Commission to Review the Working of the Constitution (2002) and the Punchhi Commission on Centre-State Relations (2010) have all expressed the similar view that Art. 355 not only imposes a duty on the Union but also grants it, by necessary implication, the power of doing all such acts and employing such means as are reasonably necessary for the effective performance of that duty, and thus the measures under Arts. 352 and 356 must be used as a last resort in situations of utmost gravity and urgency.[24]

The implication of the above legal opinion may be summarised as follows: the duty of the Union stipulated in Art. 355 creates a broad legal

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[20] *Id*.

[21] Report of the Commission on Centre-State Relations, Chapter VII, ¶7.3.04-07 (1988) ('Sarkaria Commission Report'). *See also* 5 Report of the Commission on Centre-State Relations, ¶4.5.02-03 (2010) ('Punchhi Commission Report').

[22] (1997) 1 UPLBEC 594.

[23] *Id*., ¶¶60, 67, and 152.

[24] *See* 2 Punchhi Commission Report, *supra* note 21, ¶5.3.02 (wherein the views of the Sarkaria Commission and the NCRWC are also recounted).

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standard that contemplates and justifies a range of action on the part of the Union towards the States in many situations that are not so grave as to warrant emergency measures but are yet of immediate and pressing concern enough as should justify the taking of alternative statutory and constitutional measures (not amounting to emergency action) towards the fulfilment of this duty. This means that Art. 355 is no longer exclusively an 'emergency provision'- though it still stands in Part XVIII and continues to play its role therein– but is additionally an important cog in the wheel of the Constitution's overall federal scheme.

III. A TAD OUT OF CONTEXT: WHY ARTICLE 355 SEEMS TO HAVE TAKEN ON THE TEXTURE IT HAS

What was concluded from the preceding section is by no means negative, yet it is instructive to delve into the reason(s) behind why such a change of shape might have arisen. Our first clue is the legislative history of the provision. In the Constituent Assembly debates, speaking about Art. 355, Dr. Ambedkar stated, "it will be found that it is not our Constitution alone which is going to create this duty and this obligation. Similar clauses appear in the American Constitution. They also occur in the Australian Constitution, which in express terms provides that it shall be the duty of the Central Government to protect the units or the States from external aggression or internal commotion. All that we propose to do is to add one more clause to the principle enunciated in the American and Australian Constitutions, namely, that it shall also be the duty of the Union to maintain the Constitution in the provinces as enacted by this law."[25]

Indeed, the United States' Constitution vide Art. 4, §4– known as the 'Guarantee Clause'- provides that, "The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence", and the Australian Constitution vide §119 provides that "the Commonwealth shall protect every State against invasion and on the application of the Executive Government of the State, against domestic violence." What is important to note however, is that these clauses, in their respective frameworks, seek to do nothing else other than add an important legal norm to their own respective federal schemes. Both the American and Australian Constitutions do not contain any provisions for specific emergency action, unlike our own Constitution. Thus under Art. 4(4) of the United States' Constitution, valid intervention can be made by the Federal Union in a State's domain through any statutory or constitutionally available measures that the Union deems appropriate, and which would uphold its guarantee of republican government to the

[25] Constituent Assembly Debates, *supra* note 5.

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States.[26] In other words, there is no question of *restricting* action in lieu of the duty to emergency action (or any other defined class of action), as was originally intended in our own Constitution. For example, the United States legislature has passed enactments such as the Insurrection Act, which lays down a separate mechanism for federal intervention in the States' domain, and is justified by the Guarantee Clause.[27] Similarly, §119 of the Australian Constitution allows the Commonwealth Union to take any available legislative as well as executive measures encroaching the States' jurisdiction to discharge the protective duty mentioned therein.[28]

The provisions in these Constitutions are thus made as general stipulations of the federal relationship, whereas in respect of Art. 355, the duty laid down thereunder was intended to be exclusively concomitant to the specifically provided emergency action in Part XVIII.[29] Hypothetically, if our Constitution did not have any emergency provisions, but only the mandate of Art. 355, the interpretation of the Union's duty towards the States would have been straightforward and akin to Art. 4(4) and §119 of the United States and Australian Constitutions respectively. Given that it uses language sourced from these provisions but was incorporated specifically in Part XVIII dealing with 'emergency provisions' exclusively as a justification for action thereunder, however, it has taken on a unique colour of its own as elucidated in the preceding section.

It must, however, be noted that the current standing of Art. 355 need not be seen in a pessimistic light, as the broadened scope of Union action in lieu of its duty "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 [the] Constitution" affords every possibility that the additional powers available for the discharge of this duty be exercised in a co-operative spirit within the stipulated federal arrangement.

IV. CO-OPERATIVE FEDERALISM AND ITS ROLE IN THE PROPER USE OF ARTICLE 355

A. A UNIQUE BRAND OF FEDERALISM

Though the Constitution does not expressly declare the Indian Union to be a federation, Art. 1 tells us that India shall be a Union of States- the distinguishing feature of a federal arrangement- and Parts XI (Arts. 245 to 263)

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[26] *See* Jonathan Toren, *Protecting Republican Government From Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & Liberty 371, 400-409 (2006-07).

[27] Punchhi Commission Report, *supra* note 21, ¶5.2.02.

[28] *See* R. v. Sharkey, (1949) 79 CLR 121.

[29] *See supra* note 5.

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and XII (Arts. 264 to 298) of the Constitution inform us of the legal status of the Union and State Governments vis-a-vis each other in respect of legislative, administrative and financial relations. Herein, the Union and the States have each been assigned fields of law and governance over which they hold sovereign authority, subject to certain provisions which allow for Union interference in the States' domain.[30] The main reason often cited for the overweening role given to the Union is that in view of the pluralism and diversity subsisting in the nation, it is the Union's responsibility to uphold the unity and integrity of India, and ensure that the constitutional mandate of the nation as a secular, democratic republic is upheld in the States.[31] This capacity of the Union is, however, of a restricted nature, in view of the importance of decentralization of powers and representative governance, the virtues of a federal scheme.[32]

Speaking in this vein, Dr. B.R. Ambedkar addressed prescient words to the Constituent Assembly: "As to the relation between the Centre and the States, 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 the Constitution itself. This 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 may be that the Constitution assigns to the Centre too large a 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 [sic] by the Constitution. This is the principle embodied in our Constitution."[33] Granville Austin, in his landmark work, may be said to have introduced the term co-operative federalism, which he called the foundation of our constitutional system, noting that it is a federal arrangement which presumes interdependence of Union and State Governments rather than granting absolute independence in their allotted spheres.[34]

Also, there has been no shortage of judicial opinion on the character of the Union-State relations and the distribution of powers: In *Re: Under Article 143, Constitution of India*,[35] the Apex Court observed that "the essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent

[30] Kuldip Nayar v. Union of India, (2006) 7 SCC 1: AIR 2006 SC 3127 ¶23.

[31] Punchhi Commission Report, *supra* note 21, ¶2.2.

[32] H. M. Seervai, Constitutional Law of India- Volume III 166 (1983).

[33] 9 Constituent Assembly Debates (Proceedings) (November 25, 1949), available at http://parliamentofindia.nic.in/ls/debates/vol11p11.htm (Last visited on September 18, 2011).

[34] Granville Austin, The Indian Constitution: Cornerstone of a Nation 186 (1966).

[35] Special Reference No. of 1964, In re, AIR 1965 SC 745.

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of each other. The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."[36] In *ITC Ltd.* v. *Agricultural Produce Market Committee*,[37] a Constitution Bench of the Apex Court opined: "The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles."[38] Accordingly, federalism has been judicially acknowledged as an essential feature of the Constitution and part of its basic structure.[39]

B. THE UNION AS GENTLE PROTECTOR

It may be recounted that the mandate of Art. 355 is that the Union must *protect* the States from external aggression and internal disturbance, and *ensure* that the Government of every State is carried out in accordance with the Constitution. The Oxford Dictionary of English[40] defines 'protect' as "to keep safe from harm or injury" and 'ensure' as "make sure something will occur or be the case". If the Union is to carry out this role towards the States, it is clear that it must be endowed with some legal powers to do so. It may be argued that the emergency measures under Arts. 352 and 356 are sufficient in this regard. Before responding, we may notice the nature of 'Emergency Provisions' as laid down in Part XVIII of the Constitution.

On the occurrence of certain specified situations, these provisions empower the President to assume various facets of the legislative and executive power of the Union or States (as the case may be), such as would not ordinarily vest with him, in order to combat the given expediency. The specific situations are as follows:[41] (a) A situation of grave emergency whereby the security of India or any part of its territory is threatened by war or external aggression or armed rebellion. (Art. 352 and related Articles viz. Art. 353, Proviso to Art. 83(2), and Arts. 250, 354, 358 and 359); (b) A situation involving breakdown of constitutional machinery in a State, i.e., where the Government of the State cannot be carried on in accordance with the provisions of the Constitution (Arts. 356 and 357); (c) A situation of 'external aggression' and/or 'internal

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36 *Id.*, 762.
37 (2002) 9 SCC 232.
38 *See id.,* ¶125.
39 S. R. Bommai v. Union of India, *supra* note 12.
40 OXFORD DICTIONARY OF ENGLISH (3rd ed., 2010).
41 *See* SARKARIA COMMISSION REPORT, *supra* note 21, ¶6.1.04.

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disturbance' which is not grave enough to satisfy the requirements of either Art. 352 or Art. 356, but nevertheless, calls for other action by the Union pursuant to the first part of Art. 355; and (d) A situation where the financial stability or credit of India or any part thereof is threatened (Art. 360).

In the context of democratic republic arrangements it has been noted with near unanimity that the executive wing must be institutionally restrained from holding arbitrary power,[42] and therefore that constitutionally provided emergency provisions are in the nature of exceptions created to legitimize State action which may be genuinely necessary to prevent or cure a situation of dire expediency.[43] It is evident from the brief description of the four scenarios above that their subsistence would potentially endanger the security and stability of the nation. Therefore, the ordinary constitutional delineation of rights and powers is sought to be suspended *vide* the Emergency Provisions in order to allow for a more powerful and centralized mechanism that would be better enabled to tackle such serious situations.[44]

As noted earlier, a proclamation of emergency under Art. 352 gives to the President executive control over the States, and lawmaking power over both the Union and States;[45] additionally, certain fundamental rights and freedoms under Part III are also suspended or curtailed.[46] A proclamation by the President under Art. 356 has the effect of vesting with the Parliament all the functions of the Legislative Assembly of the given State, and the effect of vesting with the President the complete executive power of the State government. A Proclamation under Art. 360 extends the executive authority of the Union to the giving of directions to any State which it deems necessary to maintain financial propriety.

Though this change in the ordinary constitutional distribution of powers is done in the interests of efficacy and expediency, the emergency powers should be exercised with caution, and only if, on a careful consideration of the subsisting situation, no other measure appears suitable. That emergency action must be used sparingly and as a last resort has been widely acknowledged and constantly reiterated.[47]

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[42] *See* Montesquieu, Spirit of Laws Book XI Ch. 6 (1748); *see also* James Madison, The Federalist Nos. 47, 48 & 51 (1788); I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1: AIR 2007 SC 861 ¶35 (*per* Sabharwal, C.J.).

[43] *See e.g.* John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 Int'l J. Const. L. 210 (2004); also, the rationale is often encapsulated by the maxim '*salus populi est suprema lex*' (the safety of the people is the supreme law) and '*salus republican est suprema lex*' (safety of the State is the supreme law), *see e.g.* D.K. Basu v. State of West Bengal, (1997) 1 SCC 416:1997 SCC (Cri) 92: AIR 1997 SC 610 ¶34.

[44] *Supra* note 10, 69 (*per* Bhagwati, J.).

[45] *Vide* Arts. 353 and 250.

[46] *Vide* Arts. 358 and 359.

[47] 1 Report of the National Commission to Review the Working of the Constitution ('NCRWC Report'), Chapter 8, ¶8.19.2 (2002); *see also* Rameshwar Prasad (6) v. Union of India, (2006)

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It is well conceivable that a situation may arise which calls for the Union to carry out its duty under Art. 355, but does not necessitate the invocation of Arts. 352 and/or 356. In other words- in terms of the dictionary meanings above- it is clearly conceivable that in certain situations (for instance unlawful carrying on of Panchayats or Municipalities, or unreasonableness in the State's taxation mechanism), in acting to keep the States safe from external aggression and internal disturbances, and making sure that the State Governments are carried out in accordance with the Constitution, the Union need not take the extreme step of completely usurping States' sovereignty, granted to them under our Constitution's federal scheme. Justice Ahmadi's observations in *S. R. Bommai*, though made in a dissenting capacity, are instructive: "Thus the federal principle, social pluralism and pluralist democracy which form the basic structure of our Constitution demand that the exercise of power under the said provision [Art. 356] is confined strictly for the purpose and to the circumstances mentioned therein and for none else."[48] Backed by the justification of its duty under Art. 355 therefore, the Union may invoke one of several alternative measures available to it which would only intervene to a limited extent in the States' spheres and thus preserve the otherwise regular constitutional working of the respective State Government.[49] These measures are justiciable and therefore amenable to be tested on the touchstone of Art. 355.[50]

Therefore, those measures taken by the Union which do not amount to emergency action but are made in order "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 [the] Constitution", while interfering to a limited extent in the States' sphere of governance to assist the State Government, can often be necessary to ameliorate a given problematic situation and smoothen out the creases, in order to prevent the greater evil of unwarranted and hasty invocations of emergency actions which lead to the near total assumption of the given State's governmental machinery. Emergency measures need only be used when there is no other means practicable to carry out the mandate of Art. 355.

V. ADDITIONAL POWERS OF THE UNION IN LIEU OF ITS ARTICLE 355 DUTY

This section attempts to delineate some powers available to the Union for the effective discharge of its duty under Art. 355. These actions are legally and constitutionally available to the Union, and ought to be considered by it before invoking emergency measures. Needless to say, however, that their

2 SCC 1: AIR 2006 SC 980 ¶250.

48 *Supra* note 12, ¶106.

49 *See infra* Part V.

50 *See e.g.* Sarbananda Sonowal v. Union of India*, supra* note 17, and H. S. Jain v. Union of India*, supra* note 22.

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exercise would be misplaced if tainted with ulterior ends. It may be clarified that this delineation of powers does not claim to be exhaustive.

A. POWER OF PARLIAMENT TO LEGISLATE WITH RESPECT TO A MATTER IN THE STATE LIST IN THE NATIONAL INTEREST

Per Art. 249, the Parliament is empowered to make laws for the whole or any part of the territory of India in respect of any matter in the State List, if the Council of States declares by a resolution supported by at least two-thirds of its members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to that particular matter. Concomitantly, Art. 251 when read with Art. 249 provides that in case of inconsistency between a law made by Parliament under Art. 249 and a law made by a State legislature, the Union law will prevail to the extent of such inconsistency or repugnancy.[51] Also, Arts. 256 and 257(1), which provide for compliance by the States with the Union's laws and executive directions, ensure that once the power under Art. 249 is exercised by the Union to legislate on matters in the State List, it can expect that all such legislations and directions *in lieu* thereof will be complied with by a given State.[52]

The Union is thereby empowered to legislate on any matter in List II of the VIIth Schedule that it may deem expedient and in public interest, but at the same time a safeguard is provided vide the requirement of a resolution passed by the Council of States. Art. 249 may thus be utilized by the Union to legislate on such matters as may help it, in financially troublesome scenarios, to ensure the constitutional governance of the States,[53] for example, local government under Entry 5.

B. GRANTS FROM THE UNION TO STATES IN NEED OF FINANCIAL ASSISTANCE

Art. 275 envisages that the Parliament may provide financial assistance each year as grants in aid of the revenues of such States as it deems to be in need of such assistance. This power is in keeping with the duty of the Union towards the States under Art. 355. If the Parliament opines that it must provide monetary help to a particular State in order to protect it from external aggression and internal disturbances and/or ensure the constitutional

[51] Kuldip Nayar v. Union of India, *supra* note 30, ¶21.

[52] If the directions made under Arts. 256 or 257 are not complied with by a State, then Art. 365, which validates (but does not obligate) the President's Proclamation under Art. 356, is attracted.

[53] With regard to the first part of the Art. 355 duty, to protect the States against external aggression and internal disturbances, the Union already possesses the required competence under Entries 1 and 2A of List I read with Entry 1 of List II.

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functioning of that its government, it is free to discharge this obligation by granting a suitable sum as financial assistance to that State.

C. LEGISLATIVE COMPETENCE IN RESPECT OF DEFENCE AND ARMED FORCES

Vide Entry 2A in List I of the VII[th] Schedule, the Union can enact legislations governing the deployment and maintenance of armed forces in a State in aid of the civil power. Also, although Entries 1 and 2 in List II give the States legislative control over public order and police, they are made subject to Entry 2A in List I. The Sarkaria Commission, the National Commission to Review the Working of the Constitution and the Punchhi Commission all take the view that by virtue of legislation under these Entries, the duty of the Union under Art. 355 to protect the States from external aggression and internal disturbance can be carried out.[54] The Central Reserve Police Force Act, 1949 and the Border Security Force Act, 1968 are examples of the ongoing utilisation of the above legal position, as they provide frameworks for intervention by Union forces in the States' domain in lieu of its Art. 355 duty.[55]

If the Union apprehends, therefore, that there is a danger of external aggression or internal disturbance taking place within a State, it is a constitutional action for it to deploy and maintain armed forces and/or paramilitary forces in that State– under the mechanism of an enabling legislation– to mitigate and quell the danger, so that it does not escalate to a degree that provokes either Art. 352 or Art. 356.

D. PRECAUTIONARY MEASURES AVAILABLE TO THE PRESIDENT WHEN CONSIDERING THE GOVERNOR'S REPORT UNDER ARTICLE 356

Dr. Ambedkar when speaking in the context of the proclamation under Art. 356, expressed his views on its use as under: "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."[56]

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54 *See* PUNCHHI COMMISSION REPORT, *supra* note 21.

55 *Supra* note 20.

56 CONSTITUENT ASSEMBLY DEBATES, *supra* note 5, 177.

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1. Political Correctives, Warnings and Advisories

Along the same lines as the aforequoted view, the Sarkaria Commission felt that the use of the power under Art. 356 would be improper if the President gives no prior warning or opportunity to the State Government to correct itself, and such warning could be dispensed with only in cases of extreme urgency where immediate action is the only feasible option available to the Union.[57]

This emphasis on the Union issuing warnings, correctives and advisories before resorting to action under Art. 356 is in keeping with the federal scheme of the Constitution, as this approach shows willingness on part of the Union not to abdicate its duty under Art. 355, while at the same time expressing a necessary degree of restraint in completely taking over the States' governmental machinery. Thus, if the Union is of the considered view that a particular situation may be remedied or improved by some action(s) of the State government itself, it may prepare an advisory note mentioning and explaining such courses of action as it deems appropriate. The same has been carried out by the Union in response to the Karnataka Governor's May, 2011 recommendation to the President for the imposition Art. 356 action on that State.[58] The Union may also warn a given State Government that if it does not take some steps to set right a situation moving towards constitutional breakdown, the President would be compelled to intervene under Art. 356.

2. Actions available to the Governor before Recommending Article 356 Action

More than one course of action is open to the Governor before submitting a report recommending President's Proclamation under Art. 356. If there is a failure for any reason by one party to obtain the required majority in the Assembly, the Governor should explore all possibilities of having a government enjoying majority support in the Assembly. Thus, if there is a doubt as to a ruling party's majority in the Assembly, the Governor may ask the said party to prove its majority by a 'floor test', as recommended by the Supreme Court in the *S.R. Bommai*. In the Karnataka Assembly situation, the Union while declining to issue a Presidential proclamation under Art. 356 requested the Governor to direct a floor test in October, 2011.[59] If such measures prove to be unfruitful, the Governor may consider dissolving the Assembly so that fresh elections may be held, thereby leaving any political deadlock to be resolved by the elector-

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[57] Sarkaria Commission Report, *supra* note 21, ¶6.5.01 (vi).

[58] Times News Network, *Centre Rejects Bhardwaj's Recommendation for President's Rule in Karnataka*, The Times of India (Bangalore), May 22, 2011.

[59] CNN-IBN Live, *Karnataka CM Agrees to 2nd Floor Test*, available at http://ibnlive.in.com/news/ktaka-cm-agrees-to-2nd-floor-test-on-oct-14/132891-37.html (Last visited on September 19, 2011).

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ate. Though the power of dissolution of the Assembly is to be exercised by the Governor on the advice of his Ministry, such advice ceases to be binding on him as soon as the Ministry loses majority support and the requirement of Art. 164(2) that the Ministry shall be collectively responsible to the Legislative Assembly is no longer fulfilled.[60]

Thus, as per the views of the Sarkaria Commission, if the Governor finds that it is not possible for such a government enjoying majority support to be installed, and if on consultation with the Chief Election Commissioner it is found that it is feasible to hold fresh elections without avoidable delay, he may ask the outgoing Ministry to continue as a caretaker Government. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker Government should be allowed to function, as a matter of convention, in a manner as to merely carry on the day-to-day government and desist from taking any major policy decision.[61]

In the case of *H. S. Jain* v. *Union of India*,[62] the Governor's responsibility to take all available measures for the resolution of a deadlock in the Assembly was emphasised, and on finding on the facts that the Uttar Pradesh Governor ignored several legal and constitutional measures to institute a Government with majority support and instead hastily recommended the President's action under Art. 356, the Court set aside the President's proclamation made on the basis of his report. Thus, the President must apply his mind to the Governor's report and examine whether alternative courses of action are available, per the mandate of Art. 355, as was done in October, 2011 when the President directed the Governor to have the majority in Karnataka proved by way of a floor test.[63]

VI. THE UNION RESPONSE TO GOVERNOR'S RECOMMENDATIONS FOR ARTICLE 356 ACTION IN KARNATAKA (2010-11)

From October 6, 2010 to May 21, 2011, a tense political situation persisted in Karnataka. It was sparked off when 16 Members of the State Legislative Assembly– 11 from the ruling party (BJP) and 5 independents– submitted a letter to the Governor withdrawing their support to the ruling party.[64] A complaint was filed by the Chief Minister, on the basis of which the Speaker disqualified these Members on the basis of the Xth Schedule of

60 SARKARIA COMMISSION REPORT, *supra* note 21, ¶6.4.04.
61 *Id.*, ¶6.4.07-08.
62 (1997) 1 UPLBEC 594.
63 *Supra* note 59.
64 *Karnataka BJP Rebel MLAs Not to be Taken Back: Venkaiah*, DECCAN HERALD (New Delhi) October 22, 2011.

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the Constitution.[65] The Governor thereafter directed that the ruling party's majority be proved on the floor of the House; this was done so but in an unruly manner and not to the satisfaction of the Governor who recommended the imposition of President's Rule under Art. 356 to the President, reporting the 'unconstitutional' nature of the floor test.[66] The same was not acted upon, and the Governor directed the Chief Minister to prove the ruling majority in the House for a second time.[67] The BJP was able to demonstrate this and thus won the floor test twice in a gap of four days under the direction of the Governor.[68] On May 13, the disqualification order of the Speaker was set aside by the Supreme Court as violative of the mandate of the Xth Schedule.[69] In the wake of this judgment, the Governor again submitted a report recommending President's action under Art. 356 on grounds that the Speaker tampered with the composition of the Assembly in an unconstitutional manner as held in the aforementioned decision; however, the Union rejected this recommendation as well, choosing instead to issue an advisory note to the State Government.[70]

The refusal to act upon the first instance was an apt response from the Union. Though we have no material to inform us of the exact reasons behind the response, it may be surmised that the Union was clearly of the opinion that the lack of decorum in the House while conducting the floor test could not amount to the breakdown of constitutional machinery as contemplated in Art. 356. The fact that the Governor directed the Chief Minister to prove his party's majority a second time just one day after he had recommended President's Rule, leaves us to conjecture with good chances of success that the Union while refusing to invoke Art. 356, advised the direction of a second floor test. This is in keeping with the position of law as per the *S. R. Bommai* case.

In the second instance, the question arose whether a Xth Schedule order of the Speaker disqualifying certain members of the Assembly, would amount to a situation in which the Government of the State could not be carried out in accordance with the provisions of the Constitution. It is, however, submitted that a mere overruling of a Speaker's order does not imply that the entire Government of a State cannot be carried out in accordance with the provisions

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65 NDTV, *Karnataka Speaker Disqualifies 16 Rebel MLAs,* October 11, 2010*,* available at http://www.ndtv.com/article/india/karnataka-speaker-disqualifies-mlas-58765 (Last visited on September 18, 2011).

66 Times News Network, *Governor Submits Report, Seeks President's Rule in Karnataka,* available at http://timesofindia.indiatimes.com/india/Governor-for-Presidents-rule-in-Karnataka/articleshow/6729468.cms (Last visited on September 19, 2011).

67 Times News Network, *Karnataka Governor Terms Trust Vote Farce, Offers CM Another Chance,* available at http://timesofindia.indiatimes.com/india/Karnataka-Governor-sets-Oct-14-as-deadline-for-second-floor-test/articleshow/6734816.cms (Last visited on September 19, 2011).

68 The Hindu, *Yeddyurappa Wins Trust Vote Again*, available at http://www.thehindu.com/todays-paper/article831462.ece (Last visited on September 18, 2011).

69 Balchandra L. Jarkiholi v. B. S. Yeddyurappa, (2011) 7 SCC 1: 2011 (6) SCALE 172.

70 Times News Network, *supra* note 58.

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of the Constitution. The Speaker merely discharged his constitutional duty as he interpreted it under the X[th] Schedule. It is in this light that the President rejected the Governor's recommendation for issue of Proclamation under Art. 356,[71] and instead chose to issue an advisory to the State Government. In both these instances, the Union has acted admirably in accordance with the mandate of Art. 355, discharging its duty towards the State Government of Karnataka by directing a floor test and by issuing an advisory, while at the same time showing the restraint that is required to avoid a hasty invocation of Art. 356. This is entirely in keeping with co-operative federalism and the relationship between the Union and States as envisaged by the Constitution.

VII. CONCLUDING REMARKS

This paper has focused on the nature of the duty of the Union towards the States under Art. 355 of the Constitution and the change in the provision's legal implications since its inception. While it was initially stipulated exclusively as a duty to validate the Union's drastic encroachment into the States' domain in the taking of emergency action, it has grown to contemplate certain other actions of the Union which are not made in lieu of emergency provisions but which are taken in order to prevent certain immediate and pressing situations from escalating to such degree as would necessitate emergency actions. Though the present work investigates the trajectory of the change in character of Art. 355, and ventures an underlying explanation for the same, it does not argue for a revival of the original position.

The reason for the same is that the brand of federalism propounded by our Constitution never envisaged watertight relations between the Union and State Governments i.e., either complete autonomy for the States or excessive interference in the States' domain by the Union. Instead, co-operation and interdependence have always been viewed as integral to the proper carrying out of the federal arrangement. Accordingly, this notion has been coined 'co-operative federalism', meaning that the power of governance is distributed in several organs and institutions, with the Union being given a degree of dominance over the States so as to preserve the unity and integrity of the nation as well as to protect them from external aggression and internal disturbance, and ensure that their governments are carried on in a constitutional manner. It is submitted that such a role cannot be carried out by the Union if the only actions available to it are either the full-fledged employment or eschewal of emergency measures in respect of a given situation. Other available measures are of utmost importance and must be considered and utilised before it is concluded that nothing less than emergency action is necessary to prevent or remedy the given situation. Some of these measures have been detailed, such as financial assistance under Art. 275, power to legislate in the State List under Art. 249, deployment and

[71] Times News Network, *supra* note 59.

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maintenance of armed and paramilitary forces in aid of the civil power under the VII[th] Schedule, and the issue of warnings, correctives and advisories.

Under the mandate of Art. 355 therefore, the Union may be seen as having the role of a gentle protector of the States. This means that in a situation of concern in a given State, the Union ought to initially show reluctance to interfere, but if such an attitude leads to worsening consequences, the Union cannot ignore its obligation towards the States under Art. 355. This, however, does not mean that it hastily invokes emergency measures. Having regard to the federal scheme of the Constitution and the need to minimize the exercise of sweeping emergency powers, the Union may consider the other available powers at its disposal that would help in the effective carrying out of its obligation towards the States. It must be remembered, however, that any action made by the Union, or any requests by the Governor or State Government for the same, must be made in the absence of *mala fides* and unscrupulous ends. The only reason for the Union to discharge its duty under Art. 355 is to maintain harmony in the functioning of the day-to-day and governmental affairs of the State. This end must be unforgotten in governmental functionaries' deliberations over Union interference in the States' domain.

The recent decisions taken by the Union in response to the Karnataka Governor's recommendations for a Proclamation under Art. 356 (May, 2011) are commended on analysis, as the direction to conduct a floor test and the issue of an advisory, while declining to intervene under Art. 356, showed an awareness to the Art. 355 duty, while yet refusing to unduly assume to itself the entire functioning of the State Government. The incontinent application of Art. 356 of the Constitution has been repeatedly regretted by several commentators, but if the above attitude of the Union continues to be followed, we may well breathe easy.

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