

CHAPTER 28

EMERGENCY PROVISIONS

FEDERAL government, according to *Bryce*, means weak government because it involves a division of power. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of emergent circumstances, internal or external. But while in countries like the *United States* this expansion of federal power takes place through the wisdom of judicial interpretation, in *India*, the Constitution itself provides for conferring extraordinary powers upon the Union in case of different kinds of emergencies. As has been stated earlier, the Emergency provisions of *our* Constitution enable the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

The Constitution provides for *three different kinds* of abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution:—
Different kinds of Emergencies. viz., (i) An emergency due to war, external aggression or *armed rebellion*¹ [Art. 352]. This may be referred to as 'national emergency', to distinguish it from the next category. (ii) Failure of constitutional machinery in the States [Art. 356]. (iii) Financial emergency [Art. 360].

An 'armed rebellion' poses a threat to the security of the State as distinguished from 'internal disturbance' contemplated under Art. 355.²

Where the Constitution simply uses the expression 'Proclamation of Emergency', the reference is [Art. 366(18)] to a Proclamation of the first category, i.e., under Art. 352.

The Emergency provisions in Part XVIII of the Constitution [Arts. 352-360] have been extensively amended by the 42nd and 44th Amendments. Amendment (1976) and the 44th Amendment (1978) Acts, so that the *resultant* position may be stated for the convenience of the reader, as follows:

I. A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or *armed rebellion*¹ [Art. 352]. It may be made even before the *actual occurrence* of any such disturbance, e.g., when external aggression is apprehended.

An 'Emergency' means the existence of a condition whereby the security of India or any part thereof is threatened by war or external aggression or *armed rebellion*.¹ A state of emergency exists under the Constitution when the President makes a 'Proclamation of Emergency'. The actual occurrence of war or any armed rebellion, is not necessary to justify a Proclamation of Emergency of

A. Proclamation of Emergency.

the President. The President may make such a Proclamation if he is satisfied that there is an imminent danger of such external aggression or *armed rebellion*. But no such Proclamation can be made by the President unless the Union Ministers of Cabinet rank, headed by the Prime Minister, recommend to him, *in writing*, that such a Proclamation should be issued [Art. 352(3)].

While the 42nd Amendment made the declaration immune from judicial review, that fetter has been removed by the 44th Amendment, so that the constitutionality of the Proclamation can be questioned in a Court on the ground of *mala fides*³.

Every such Proclamation must be laid before both Houses of Parliament and shall cease to be in operation unless it is approved by resolutions of both Houses of Parliament within *one month* from the date of its issue.

Until the 44th Amendment of 1978, there was no Parliamentary control over the revocation of a Proclamation, once the issue of the Proclamation had been approved by resolutions of the Houses of Parliament.

After the 44th Amendment, a Proclamation under Art. 352 may come to an end in the following ways:

(a) On the expiry of *one month* from its issue, unless it is approved by resolutions of both Houses of Parliament before the expiry of that period. If the House of the People is dissolved at the date of issue of the Proclamation or within one month thereof, the Proclamation may survive until 30 days from the date of the first sitting of the House after its reconstitution, provided the Council of States has in the meantime approved of it by a resolution [Cl. (4)].

How a Proclamation may terminate.

(b) It will get a fresh lease of six months from the date it is approved by resolutions of both Houses of Parliament [Cl. 5], so that it will terminate at the end of six months from the date of last such resolution.

(c) Every such resolution under Cls. (4)-(5), must be passed by either House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting [Cl. (6)].

(d) The President must issue a Proclamation of revocation any time that the House of the People passes a resolution *disapproving* of the issue or continuance of the Proclamation [Cl. (7)]. For the purpose of convening a special sitting of the House of the People for passing such a resolution of disapproval, not less than 1/10 of the Members of the House may give a notice in writing to the Speaker or to the President (when the House is not in session) to convene a special sitting of the House for this purpose. A special

sitting of the House shall be held within 14 days from the date on which the notice is received by the Speaker or as the case may be by the President [Cl. (8)].

It may be that an armed rebellion or external aggression has affected only a *part* of the territory of India which is needed to be brought under greater control. Hence, it has been provided, by the 44th Amendment, that a Proclamation under Art. 352 may be made in respect of the whole of India or only a part thereof.

The Executive and the Legislature of the Union shall have extraordinary powers during an emergency.

The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive; (ii) Legislative; (iii) Financial; and (iv) As to Fundamental Rights.

(i) *Executive.* When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [Art. 353(a)].

In normal times, the Union Executive has the power to give directions to a State, which includes only the matters specified in Arts. 256-257.

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on 'any' matter, so that though the State Government will not be suspended, it will be under the complete control of the Union Executive, and the administration of the country insofar as the Proclamation goes, will function as under a unitary system with local sub-divisions.

(ii) *Legislative.* (a) While a Proclamation of Emergency is in operation, Parliament may, by law, extend the normal life of the House of the People (5 years) for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Proclamation has ceased to operate [Proviso to Art. 83(2), *ante*]. (This power also was used by Mrs. Gandhi in 1976—Act 109 of 1976).

(b) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed as regards List II, by Art. 246(3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [Art. 250(1)]. Though the Proclamation *will not suspend the State Legislature*, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary as if the Constitution were unitary.

(c) In order to carry out the laws made by the Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring powers, or imposing duties (as may be necessary for the purpose), upon the Executive of the Union in respect of

any matter, even though such matter normally belonged to State jurisdiction [Art. 353(b)].

(iii) *Financial*. During the operation of the Proclamation of Emergency the President shall have the constitutional power to modify the provisions of the Constitution relating to the allocation of financial resources [Arts. 268-279] between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament [Art. 354].

(iv) *As regards Fundamental Rights*. Articles 358-359 lay down the effects of a Proclamation of Emergency upon fundamental rights. As amended up to 1978, by the 44th Amendment Act, the following results emerge—

I. While Art. 358 provides that the State would be free from the limitations imposed by Art. 19, so that these rights would be non-existent against the State during the operation of a Proclamation of Emergency, under Art. 359, the right to *move the Courts* for the enforcement of the rights or any of them, may be suspended, by Order of the President.

II. While Art. 359 would apply to an Emergency declared on any of the grounds specified in Art. 352, *i.e.*, war, external aggression or armed rebellion, the application of Art. 358 is confined to the case of Emergency on grounds of war or external aggression only.

III. While Art. 358 comes into operation automatically to suspend Art. 19 as soon as a Proclamation of Emergency on the ground of war or external aggression is issued, to apply Art. 359 a further Order is to be made by the President, specifying those Fundamental Rights against which the suspension of enforcement shall be operative.

IV. Art. 358 suspends Art. 19; the suspension of enforcement under Art. 359 shall relate only to those Fundamental Rights which are specified in the President's Order, *excepting Arts. 20 and 21*. In the result, notwithstanding an Emergency, access to the Courts cannot be barred to enforce a prisoner's or detenu's right under Art. 20 or 21.⁴

V. Neither Art. 358 nor 359 shall have the effect of suspending the operation of the relevant fundamental right unless the law which affects the aggrieved individual contains a recital to the effect that "such law is in relation to the Proclamation of Emergency". In the absence of such recital in the law itself, neither such law nor any executive action taken under it shall have any immunity from challenge for violation of a fundamental right during operation of the Emergency [Cl. (2) of Art. 358 and Cl. (1B) of Art. 359].

A. The *first* Proclamation of Emergency under Art. 352 was made by the President on October 26, 1962, in view of the Chinese aggression in the NEFA. It was also provided by a Presidential Order, issued under Art. 359, that a person arrested or imprisoned under the Defence of India Act would not be entitled to move any Court for the enforcement of any of his Fundamental

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Rights under Art. 14, 19 or 21. This Proclamation of Emergency was revoked by an order made by the President on January 10, 1968.

B. The *second* Proclamation of Emergency under Art. 352 was made by the President on December 3, 1971 when Pakistan launched an undeclared war against India.

A Presidential Order under Art. 359 was promulgated on December 25, 1974, in view of certain High Court decisions releasing some detenus under the Maintenance of Internal Security Act, 1971 for smuggling operations. This Presidential Order suspended the right of any such detenu to move *any* Court for the enforcement of his fundamental rights under Arts. 14, 21 and 22, for a period of six months or during the continuance of the Proclamation of Emergency of 1971, whichever expired earlier.

Though there was a ceasefire on the capitulation of Pakistan in Bangladesh in December, 1971, followed by the Shimla Agreement between India and Pakistan, the Proclamation of 1971 was continued, owing to the persistence of hostile attitude of Pakistan. It was thus in operation when the third Proclamation of June 25, 1975 was made.

C. While the two preceding Proclamations under Art. 352 were made on the ground of *external* aggression, the *third* Proclamation of Emergency under Art. 352 was made on June 25, 1975, on the ground of "*internal disturbance*".⁵

The "*internal disturbance*", which was cited in the Press Note relating to the Proclamation, was that 'certain persons have been inciting the Police and the Armed Forces against the discharge of their duties and their normal functioning'.⁵ Both the second and third proclamations were revoked on 21st March, 1977.

It should be noted that after 1978, it is not possible to issue a

Internal Distur-
bance no more
ground of
Emergency.

Proclamation of Emergency on the ground of '*internal disturbance*', short of an armed rebellion, for, the words '*internal disturbance*' have been substituted by the words '*armed rebellion*', by the Constitution (44th Amendment) Act, 1978.¹

II. The Constitution provides for carrying on the administration of a State in case of a failure of the constitutional machinery.

(a) It is a duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution [Art. 355]. So, the President is empowered to make a Proclamation, when he is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution, either on the report of the Governor of the State or otherwise [Art. 356(1)]. (For uses of this power, see *below*.)

B. Proclamation of Failure of Constitutional Machinery in a State.

(b) Such Proclamation may also be made by the President where any State has failed to comply with, or to give effect to, any directions given by the Union, in the exercise of its executive power to the State [Art. 365].⁶

By such Proclamation, the President may—

(a) assume to himself all or any of the functions of the Executive of the State or of any other authority save the High Court; and

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. In short, by such Proclamation, the Union would assume control over all functions in the State administration, except judicial.

When the State Legislature is thus suspended by the Proclamation, it shall by competent—

(a) for Parliament to delegate the power to make laws for the State to the President or any other authority specified by him; (b) 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 from Parliament; and (c) for the President to promulgate Ordinances for the administration of the State when Parliament is not in session [Art. 357].

The duration of such Proclamation shall ordinarily be for *two* months. If, however, the Proclamation was issued when the House of the People was dissolved or dissolution took place during the period of the two months above-mentioned, the Proclamation would cease to operate on the expiry of 30 days from the date on which the reconstituted House of the People first met, unless the Proclamation is approved by Parliament. The two months' duration of such Proclamation can be extended by resolutions passed by both Houses of Parliament for a period of six months at a time, subject to a maximum duration of three years [Art. 356(3)-(4)]; but if the duration is sought to be extended beyond *one* year, two other conditions, as inserted by the 44th Amendment Act, 1978, have to be satisfied, namely, that—

(a) 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, at the time of the passing of such resolution, and

Conditions for extension of duration beyond one year.

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under Cl. (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

By the 42nd Amendment, 1976, the President's satisfaction for the making of a Proclamation under Art. 356 had been made immune from judicial review; but the 44th Amendment of 1978 has removed that fetter, so that the Courts may now interfere if the Proclamation is *mala fide*³ or the reasons disclosed for making the Proclamation have no reasonable nexus with the satisfaction of the President.³

The Author's views expressed above have been upheld by the Supreme Court in *S.R. Bommai's case*⁷ where a nine-Judge Bench held that the validity of a Proclamation under Art. 356 can be judicially reviewed to examine (i) whether it was

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issued on the basis of any material, (ii) whether the material was relevant, (iii) whether it was issued *mala fide*.

The Proclamation in case of failure of the constitutional machinery differs from a Proclamation of 'Emergency' on the following points:

(i) A Proclamation of Emergency may be made by the President only when the *security* of India or any part thereof is threatened by war, external aggression or armed rebellion. A Proclamation in respect of failure of the constitutional machinery may be made by the President when the constitutional government of State cannot be carried on for any reasons, not necessarily connected with *war* or *armed rebellion*.

Arts. 352 and 356 compared.

(ii) When a Proclamation of Emergency is made, the Centre shall get no power to *suspend* the State Government or any part thereof. The State Executive and Legislature would continue in operation and retain their powers. All that the Centre would get are *concurrent* powers of legislation and administration of the State.

But under a Proclamation in case of failure of the constitutional machinery, the State Legislature would be suspended and the executive authority of the State would be assumed by the President in whole or in part. [This is why it is popularly referred to as the imposition of the 'President's rule'.]

(iii) Under a Proclamation of Emergency, Parliament can legislate in respect of State subjects only by itself; by under a Proclamation of the other kind, it can delegate its powers to legislate for the State,—to the President or any other authority specified by him.

(iv) In the case of a Proclamation of failure of constitutional machinery, there is a maximum limitation to the power of Parliament to extend the operation of the Proclamation, namely, three years [Art. 356(4), *Proviso 1*], but in the case of a Proclamation of Emergency, it may be continued for a period of six months by each resolution of the Houses of Parliament approving its continuance, so that if Parliament so approves, the Proclamation may be continued indefinitely as long as the Proclamation is not revoked or the Parliament does not cease to make resolutions approving its continuance [*new Cl. (5) to Art. 352, inserted by the 44th Amendment Act, 1978*].

It is clear that the power to declare a Proclamation of failure of constitutional machinery in a State has nothing to do with any external aggression or armed rebellion; it is an extraordinary power of the Union to meet a *political* breakdown in any of the units of the federation [or the failure by such Unit to comply with the federal directives (*Art. 365*)], which might affect the national strength. It is one of the coercive powers at the hands of the Union to maintain the democratic form of government, and to prevent factional strifes from paralysing the governmental machinery, in the States. The importance of this power in the political system of India can hardly be overlooked in view of the fact that it has been used not less than 108 times during the first 50 years of the working of the Constitution (till March 2001).

Use of the Power.

For details see Table XXI.

Frequent and improper use of the power under Art. 356, deprecated.

From the foregoing history of the use of the power conferred upon the Union under Art. 356, it is evident that it is a drastic coercive power which takes nearly the substance away from the normal federal polity prescribed by the Constitution. It is, therefore, to be always remembered that the provision for such drastic power was defended by Dr. Ambedkar in the Constituent Assembly⁸ on the plea that the use of this drastic power would be a *matter of the last resort*:

... 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 this power *will take proper precautions* before actually suspending the administration of the Province.

It is natural, therefore, that the propriety of the use of this provision (which was envisaged by Dr. B.R. Ambedkar⁸ to 'remain a dead-letter'), on numerous occasions (more than any other provision of the Constitution), has evoked criticism from different quarters. The judgment of the Supreme Court in the *Rajasthan* case⁶ also did not lay down the law correctly. The views of the Author were expressed in detail in the 16th Edition of this book (at pp. 336-37). In view of *S.R. Bommai's* case⁷ (nine-Judge Bench) the comments have been replaced by the law as declared by the Supreme Court, which affirm the Author's view.

Power under Art. 356 must be used rarely. In *S.R. Bommai's* case⁷ the Court has clearly subscribed to the view that the power under Art. 356 is an exceptional power and has to be resorted to only occasionally to meet the exigencies of special situations. The Court quoted the Sarkaria Commission Report to give examples of situations when such power should *not* be used. It made it clear that Art. 356 cannot be invoked for superseding a duly constituted ministry and dissolving the Assembly on the sole ground that in the elections to the Lok Sabha, the ruling party in the State suffered a massive defeat.

After *Bommai's* case⁷ it is settled that the Courts possess the power to review the Proclamation on the grounds mentioned above [see under "JUDICIAL REVIEW", *ante*]. This will surely have a restraining effect on the tendency to use the power on flimsy grounds.

President not to take irreversible steps under Art. 356(1) (a), (b) & (c). In *S.R. Bommai's* case⁷ it has been pronounced that till the Proclamation is approved by both Houses of Parliament, it is not permissible for the President to take any irreversible action under Cls. (a), (b) and (c) of Art. 356(1). Hence the Legislative Assembly of a State cannot be dissolved before the Proclamation is approved by both Houses of Parliament.

Court's Power to restore status quo ante. If the Court holds the Proclamation to be invalid then in spite of the fact that it has been approved by the Parliament, the Court has the power to restore, in its discretion, *status quo ante*, i.e. the Court may order that the dissolved Ministry and Assembly will be revived.⁷

Illustration of cases where resort to Art. 356 would not be proper

Some of the situations which do *not* amount to failure of constitutional machinery are given below. They are based on the report of the Sarkaria Commission and have the approval of the Court in *S.R. Bommai's case*.⁹

- (1) a situation of maladministration in a State, where a duly constituted ministry enjoys support of the Assembly.
- (2) where a Ministry resigns or is dismissed on losing majority support and the Governor recommends imposition of President's Rule without exploring the possibility of installing an alternative government.
- (3) where a Ministry has not been defeated on the floor of the House, the Governor on his subjective assessment recommends supersession and imposition of President's Rule.
- (4) where in general elections to the Lok Sabha the ruling party in the State has suffered a massive defeat.
- (5) where there is situation of internal disturbance but all possible measures to contain the situation by the Union in discharge of its duty, under Art. 355, have not been exhausted.
- (6) where no prior warning or opportunity is given to the State Government to correct itself in cases where directives were issued under Arts. 256, 257 etc.
- (7) where the power is used to sort out intra-party problems of the ruling party.
- (8) the power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.
- (9) the power cannot be invoked merely on the ground that there are serious allegations of corruption against the Ministry.
- (10) exercise of the power for a purpose extraneous or irrelevant to those which are permitted by the Constitution would be vitiated by legal *mala fides*.

A proper occasion for use of this power would, of course, be when a Ministry *resigns* after defeat in the Legislature and no other Ministry commanding a majority in the Assembly can at once be formed. Dissolution of the Assembly may be a radical solution, but, that being expensive, a resort to Art. 356 may be made to allow the state of flux in the Assembly to subside so as to obviate the need for a dissolution, if possible. A similar situation would arise where the party having a majority *declines* to form a Ministry and the Governor fails in his attempt to find a coalition Ministry. Another obviously proper use is mentioned in Art. 365 of the Constitution itself; but curiously, none of the numerous past occasions *specifically* refers to this contingency. The provision in Art. 365 relates to the failure of a State Government to carry out the directives of the Union Government which the latter has the authority under the Constitution to issue (*e.g.*, under Arts. 256,

257). The Union may also issue such a directive under the implied power conferred by the latter part of Art. 355, "to ensure that the government of every State is carried on in accordance with the provisions of this Constitution".⁶

The only change that the 44th Amendment Act, 1978 (sponsored by the Janata Government), has made in this Article, is to substitute Cl. (5) to limit the duration of a Proclamation made under Art. 356 to a period of *one year* unless a Proclamation of Emergency under Art. 352 is in operation and the Election Commission certifies that it is not possible to hold elections to the Legislative Assembly of the State concerned immediately, in which case, it may be extended up to three years, by successive resolutions for continuance being passed by both Houses of Parliament.

It is to be noted that the foregoing amendment has not specified any conditions or circumstances under which the power under Art. 356 can be used. Hence, in the light of the *Rajasthan decision*,⁶ no legal challenge could be offered when Mrs. Gandhi repeated the Janata experiment in February, 1980, in the same nine States, on the same ground, *viz.*, that the Janata Party, which was in power in *those* States, was routed in the *Lok Sabha* election.

III. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect [Art. 360(1)].

The consequences of such a declaration are :

(a) During the period any such Proclamation is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions.

(b) Any such direction may also include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State.

(c) It shall be competent for the President during the period that any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts [Art. 360(3)-(4)].

The duration of such Proclamation will be similar to that of a Proclamation of Emergency, that is to say, it shall ordinarily remain in force for a period of *two* months, unless before the expiry of that period, it is approved by resolutions of both Houses of Parliament. If the House of the

People is dissolved within the aforesaid period of two months, the Proclamation shall cease to operate on the expiry of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period of thirty days it has been approved by both Houses of Parliament. It may be revoked by the President at any time, by making another Proclamation.

No use of Art. 360 has ever been made.

REFERENCES

1. Since the amendment of Art. 352 in 1978, it is no longer possible to make a Proclamation of Emergency, on the ground of mere 'internal disturbance' which does not constitute an 'armed rebellion'.
2. *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 S.C.C. 109 (paras 31 and 32) : A.I.R. 1998 S.C. 431.
3. Cf. *State of Rajasthan v. Union of India*, AIR 1977 S.C. 1361 (paras 124, 144); *Minerva Mills v. Union of India*, AIR 1980 S.C. 1789 (paras 103-04); *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.
4. This amendment, saving Arts. 20 and 21 from the mischief of Art. 359, has been made by the 44th Amendment Act, 1978 in order to *supersede* the view taken in the case of *A.D.M. v. Shukla*, AIR 1976 S.C. 1207, that when Art. 21 is suspended by an Order under Art. 359, the person imprisoned or detained "loses his *locus standi* to regain his liberty on any ground".
5. An official version of the reasons which impelled Mrs. Gandhi to assume that 'the security of India was threatened by internal disturbances' may be had from *India, 1976*, pp. i-ii. This Proclamation was revoked on March 21, 1977.
6. *State of Rajasthan v. Union of India*, AIR 1977 S.C. 1361 (paras 58-59).
7. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.
8. C.A. Debates IX, p. 177.
9. *Ibid.*, f.n. 7, para 82.