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THE SARKARIA COMMISSION REPORT'S STAND ON ARTICLE 356: AN ANALYSIS OF THE GOVERNOR'S OBLIGATION TO EXPLORE ALTERNATIVES*

INTRODUCTION

Article 356 of the Indian Constitution has acquired quite some notoriety due to its alleged misuse. The essence of the Article is that in certain situations wherein the State Government fails to follow the Constitution, as ascertained and reported by the Governor of the concerned State; the President concludes that the 'constitutional machinery' in the State has failed. Thereupon, the President makes a 'Proclamation of Emergency,' dismissing the State Legislature and the Executive.

Having just gained independence after a long and continuous struggle, it was in the national interest to preserve all the freedoms envisioned in a democratic society. Therefore, during a state of emergency, the President is vested with tremendous discretionary powers.

It is an undisputed fact that Art.356 was included by the Drafting Committee of the Constitution as a provision only to deal with the direst of circumstances and nothing less. However, it seems that the remedial nature of Art.356 has digressed from the original manner it was to be purported in, to such an extent of being misused by the Central Government to impose its domination upon the State Governments at various points of time since the Constitution has come into force.

Article 356 was designed to preserve the integrity and unity of the nation and to provide for a safety valve to counter disruption of political machinery but what remains to be seen is whether it is being used at the cost of democratic freedoms.

THE DEVELOPMENT AND SCOPE OF ARTICLE 356

1.1. The Government of India Act, 1935

The Act introduced the concept of 'Division of Powers' in British India. The British government entrusted limited powers to the provinces and precautions were taken to keep a check on the powers given to the Provinces. These precautions were manifested in the form of emergency under sections 45 and 93 of this Act, where the Governor General, under extraordinary circumstances exercised near absolute control over the Provinces.[1]

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[1] National Commission to Review the Working of the Constitution, *A Consultation Paper on Article 356 of the Constitution, II*, at para 2.1 (2002), at http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm (last visited on Feb. 11, 2015).

1.2. Drafting Committee of the Constitution Assembly

When it was suggested in the Drafting Committee to confer similar powers of emergency as had been held by the Governor-General under the Government of India Act, 1935, upon the President, many members of the eminent committee opposed the idea. Dr. Ambedkar then stated that *"…it is expected 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 and issue a clear 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*".[2]

If the members of the Drafting Committee of the Constitution included a provision that permits the Central Government to dismiss a duly elected representative body of the people and suspend those freedoms in violation of even the crudest interpretation of a 'separation of powers,' then it goes without saying that it must be to deal with the direst of circumstances and nothing less.

1.3. Use or Misuse of Article 356

Art. 356 provides for imposition of President's rule in States to combat a situation 'in which the State Government cannot be carried on with the provisions of the Constitution.' The President is authorized to act on receipt of a report by the Governor of the State or 'otherwise' (i.e. without such report). Under this provision a built-in safety valve was made available to deal with the breakdown of the Constitutional machinery in the States. The Framers of the Constitution expected it to be used as a 'last resort' after exhausting all other remedial measures available within the framework of the parliamentary system. The rather discriminate use of this provision has become a matter of controversy in the academic sphere.

During 1967, the imposition of President's rule was not quite frequent as the ruling party at the Centre and in the States was the same and hence tensions could be easily resolved. It was only after the Fourth General Elections in 1967 that Art.356 gained significance when Congress monopoly ceased to exist. By 1994, the said power had been exercised on more than 90 occasions.[3] The decision of the Supreme Court in *S.R. Bommai* v. *Union of India*[4] supports this assertion as in this case, S.R. Bommai who was the Chief Minister of Karnataka was not given the opportunity to prove his majority and recommended the dismissal of his ministry by the Governor of the State.

Granville Austin observed that misuse of President's rule seemed toying with the constitution, amounting to an attack on participative governance within a State and between the State and the Union government. Its misuse "undermined the credibility of an office under the Constitution designed to serve national unity and effective federalism: the Governors."[5]

The power conferred by Art.356 is a conditional power, and not an absolute one. The existence of relevant material is a precondition to the formation of 'satisfaction'. In the *State of Rajasthan* case[6], that "the satisfaction of the President is a condition precedent to the exercise of power under Article 356(1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid."[7]

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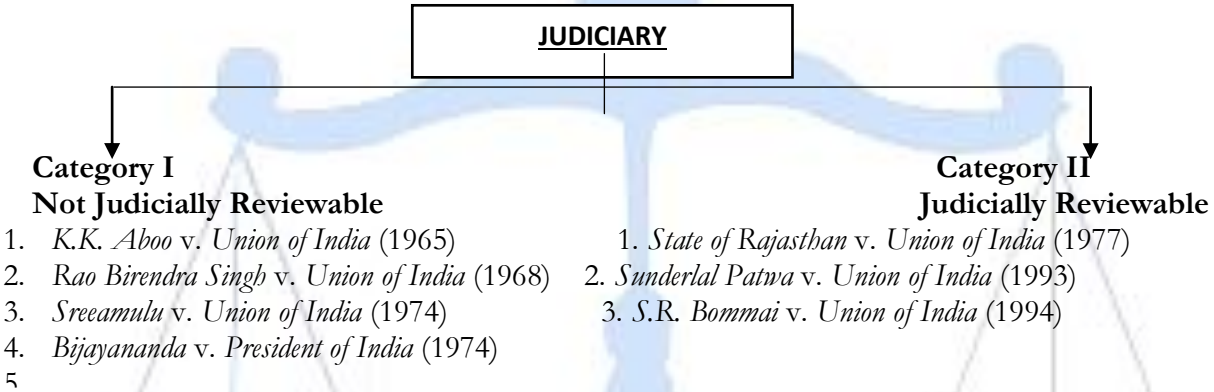
[2] *Constituent Assembly Debates*, Vol IX, at page 177.
[3] Sarkaria Commission Report, 1987, Chapter VI, Annexure VI (III-IV) at http://interstatecouncil.nic.in/Sarkaria/CHAPTERVI at page 29-36. (Last visited on Feb. 13th, 2015).
[4] *S.R.Bommai* v. *Union of India* AIR 1994 SC 1918.
[5] Austin, Granville (1999), *Working A Democratic Constitution: The Indian Experience*, Oxford University Press: New Delhi, p. 612.
[6] *State of Rajasthan* v. *Union of India* AIR 1977 SC 1361.
[7] *Ibid*, at page 1362.

In the case of *S.R. Bommai*,[8] it was stated that, "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".[9] The exercise of the power is made subject to the approval by both Houses of Parliament. Art.356 (3) is both a check on the power and a safeguard against abuse of power.

Chapter II: Judicial Review Vis-à-Vis Art.356

The Constitution neither expressly provides for nor does it exclude the judicial review of President's power under Art.356. Therefore, the High Courts and the Supreme Court have limited scope for judicial review of the proclamation of President's Rule. This power has been challenged several times and the question of judiciability has arisen for consideration in many occasions. In this regard, the judgments fall into two categories, which is shown by the following chart:



Category I: A critical examination of these decisions reveal that the Courts have inclined towards favoring the Union Government consistently. They have taken the position that they could not go into the validity of a Proclamation under Art.356, because of the non-justiciable nature of President's satisfaction. It is considered that the Parliament is the final arbiter of the Proclamation and the Courts cannot question the same on grounds of it being mala fide or on the ground of there being no basis for the action. Thus, in all these cases, it was held that there could be no judicial review of the Presidential Proclamation.[10]

Category II: This category includes the cases decided in accordance with the opinion that the President's 'satisfaction' under Art.356 would be open to judicial review, where the same is based on mala fide intent or based on wholly extraneous or irrelevant grounds.[11] Few of the cases are critically analyzed as follows:

- ***State of Rajasthan* v. *Union of India* (AIR 1977 SC 1361)**

The Janta Party came into power in the Centre after the 1977 elections but it was not in power in any of the states. On April 18th, 1977, the Union Home Minister addressed letters to the Chief Ministers of nine states (Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Punjab, Orissa, Uttar Pradesh and West Bengal) asking them to advise the respective Governors of the states to dissolve the legislative assembly in exercise of their power under Art.174(2)(b) and seek a fresh election. The reason was that these Governments no longer enjoyed the confidence of the people, as they were rejected in the recent Lok Sabha elections.

[8] *Supra,* note 4, page 4.
[9] *Ibid,* at page 1932.
[10] Suryaprasad, K. (1999), *"Judicial Review of Presidential Proclamation under Article 356 of the Constitution of India- A Critical Analysis," Journal of Constitutional and Parliamentary Studies,* The Institute of Constitutional and Parliamentary Studies; New Delhi, pp. 46-47.
[11] *Supra,* note 4, page 4.

The Court dismissed the case unanimously, but the observations made by the Court are very important as for the first time the Court permitted limited judicial review of the Presidential Proclamation under Art.356. Art.74 (2) disables the Courts from inquiring into the very existence or nature or contents of ministerial advice to the President. Art.356 (5) makes it impossible for the Courts to question the President's satisfaction "on any ground."[12]

However, the Court made it clear that the President's 'satisfaction' would be open to judicial review in exceptional cases where on facts admitted, it is manifested that it was in mala fide or was based on wholly extraneous or irrelevant grounds.[13] Thus, exercise of President's power under Article 356 was brought under judicial review to that extent.[14]

- ***Sunderlal Patwa* v. *Union of India* (AIR 1993 MP 214)**

After the demolition of the Babri Masjid at Ayodhya (6.12.1992), President's rule was imposed in Madhya Pradesh on 15th December, 1992. The then Governor of Madhya Pradesh, Kunwar Mahmood Ali Khan, in his letter to the President had mentioned the acts of omission and commission on the part of the State, but he did not specify them. This proclamation was challenged in the M.P. High Court. It was held that the satisfaction reached by the President in issuing the Presidential Proclamation imposing President's Rule in M.P and dissolving the State Assembly, was not based on circumstances relevant for invoking Art.356 of the Constitution and thus is liable to be quashed.[15] The Court further held that after the 44th Amendment of the Constitution, 1978 clause (5) of Art.356 had been repealed resulting in enlarged scope of judicial review. Therefore, the Presidential Proclamation is open to judicial review on the ground of irrationality, illegality and impropriety or mala fide or in short, on the ground of abuse of power. The Court was of the opinion that Art.356 has to be sparingly used taking into consideration its federal nature. This judgment is regarded as a significant milestone in legal history as this is the first case wherein a Presidential Proclamation was struck down on the grounds of it being unconstitutional.

- ***S.R. Bommai* v. *Union of India* (AIR 1994 SC 1918)**

In Karnataka, the Janata Dal Government led by the then Chief Minister, S.R. Bommai was thrown into constitutional crisis owing to the breaking away of a dissident group of the party. However, the Chief Minister was not given a chance to prove his majority in the State Legislative Assembly. Consequently, the S.R. Bommai Ministry was dismissed and President's Rule was imposed in April, 1989 along with the dissolution of the State Legislative Assembly. S.R. Bommai filed a writ petition and challenged the constitutionality of the Proclamation of President.[16]

The Court ruled that the Legislative Assembly of a State coming under President's Rule maybe suspended but should not be dissolved until the Presidential Proclamation is approved by the Parliament.[17] Further, the Court laid down the principle of the floor test to check the Ministry's strength on the floor of the State Legislative Assembly as it is not a matter within the subjective satisfaction of the Governor or the President.[18]

[12] *Supra*, note 6, page 4.
[13] *Ibid.*
[14] Kashyap, Subhash C. (2000), "*Need to Review the Working of the Constitution* in Subhash C, Kashyap et al. (2000, edn)," *Reviewing the Constitution*, Shipra: Delhi, p. 19.
[15] *Sunderlal Patwa* v. *Union of India* AIR 1993 MP 214, at page 217.
[16] Suryaprasad, K. (2001), *Article 356 of the Constitution of India: Promise and Performance*, Kanishka Publishers: New Delhi, p. 103.
[17] *Supra*, note 4, page 4 at p. 1928.
[18] *Supra*, note 4, page 4 at p. 1930.

It is obvious that the action of the President under Art.356 is judicially reviewable and the Court can restore the *status quo ante* i.e., the Court can restore the dissolved Council of Ministers and the State Legislative Assembly, if the Presidential Proclamation is found to be invalid.[19] As Durga Das Basu observed, "it is clear that judicial review of a Proclamation under Art.356 would lie on any of the grounds upon which an executive action founded on subjective satisfaction can be questioned, e.g.
(a). It was issued on the basis of no material at all,
(b). Where there is no reasonable nexus between the reasons disclosed and the satisfaction of the President, and
(c). That the exercise of the power under Art.356 has been mala fide, because a statutory order which lacks bona fides has no existence in law."[20]

The political significance of this landmark judgment is that it will act as a bar on arbitrary dismissal of duly elected State Governments by the Union Government for fulfilling its political ends. As K. Suryaprasad observed, "the general principles and guidelines which have been laid down by the Court in the *S.R. Bommai*[21] case will help to strengthen national unity and integrity, to sharply limit the constitutional power vested in the Union Government to dismiss the State Governments and to prevent the arbitrary and whimsical use of the power of the Governors in the name of exercising their discretionary powers conferred by the Constitution.[22]

SARKARIA COMMISSION REPORT

Background

In spite of the precautions laid down in Art.356, the Article was invoked on several occasions by the Centre. In 1983, the Sarkaria Commission, headed by Justice R.S. Sarkaria was appointed that spent four years researching reforms to improve Centre-State relations. The Sarkaria Commission Report was submitted in 1987 that cleared part of the obscurity surrounding Art.356.

Sarkaria Commission's Stand on Art.356

The Sarkaria Commission recommended an extremely rare use of Art.356. The Commission stood by the intention of the Framers of the Constitution for Art.356 to be an exception to the rule as by virtue of Art.355 it is the duty of the Union to ensure that the State Governments are carried on in accordance with the provisions of the Constitution. Also, the Report observed that *"…each and every breach of a constitutional provision, irrespective of its significance, extent and effect, cannot be treated as constituting failure of constitutional machinery."*[23]

The Commission, after reviewing suggestions placed before it by several parties, individuals and organizations, decided that Art.356 should be used sparingly, as a last measure, when all available alternatives had failed to prevent or rectify a constitutional machinery in a State. The Commission is of the view that all attempts should be made to resolve the crisis at State level before taking recourse to the provisions of Art.356.[24]

[19] *Supra*, note 4, page 4 at p. 1937.
[20] Basu, Durga Das (1998), *Constitutional Law of India*, Prentice Hall of India: New Delhi, pp. 447-48.
[21] *Supra*, note 4, page 4.
[22] Suryaprasad. K. (1999), "*Judicial Review of the Presidential Proclamation under Art.356 of the Constitution of India: A Critical Analysis*," *Journal of Constitutional and Parliamentary Studies*, vol 33, nos. 1-4, Institute of Constitutional and Parliamentary Studies: New Delhi, January-December, 1999, p.60.
[23] The Sarkaria Commission Report (1987), para 6.3.23.
[24] *Ibid*, at para 6.8.01.

According to the Report, these alternatives maybe dispensed with only in cases of extreme exigency wherein failure on the part of the Union to take immediate action under Art.356 would lead to disastrous consequences.[25]

Governor's Obligation to Explore Alternatives

In a situation of political breakdown, the Governor should explore all possibilities of having a Governor 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 a delay, the report recommends that the Governor request the outgoing Ministry to continue as a caretaker government.[26] The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate.[27] During the interim period, the caretaker government should desist from taking any major policy decision.[28]

Every Proclamation of Emergency is to be laid before each House of Parliament at the earliest, in any case before the expiry of the two-month period stated in Art.356(3).[29]

The State Legislative Assembly should not be dissolved either by the Governor or the President before a Proclamation issued under Art.356 (1) has been laid before Parliament and the latter has had an opportunity to consider it. The Commission's Report recommends amending Art.356 suitably to ensure this.[30] Also, it recommends the usage of safeguards that would enable the Parliament to review continuance in force of a Proclamation.[31]

The Proclamation of Emergency and The Governor's Report

The Report recommends appropriately amending Art.356 to include Proclamation material facts and grounds which Art.356 (1) is invoked. This would make the remedy of judicial review on the grounds of mala fides more meaningful and the check of Parliament over the exercise of this power by the Union Executive more effective.[32] The Governor's Report, which is a pre-requisite for the President's Proclamation under Art.356, 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 or otherwise of the emergency situation contemplated in Art.356'. The Commission's report also recommends giving wide publicity in all media to the Governor's Report.[33]

It is seen from this preemptory examination of the important passages of the Sarkaria Commission Report that its recommendations are extensive and define the applicability and justification of Art.356 in full. The views of Sri P.V. Rajamannar, former Chief Justice of the Madras High Court, who headed the Inquiry Commission by the State of Tamil Nadu to report on Center-State relations, concur broadly with the views of the Sarkaria Commission. However, it is unfortunate that the principles and recommendations given by them are disregarded in the present day scenario and that actions have been taken that are *prima facie* against the letter and spirit of the Constitution of India.

[25] *Ibid,* at para 6.7.04.
[26] *Ibid,* at para 6.8.04.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid,* at para 6.8.05.
[30] *Ibid,* at para 6.8.06.
[31] *Ibid,* at para 6.8.07.
[32] *Ibid,* at para 6.8.08.
[33] *Ibid,* at para 6.8.09 and 6.8.10.

CONCLUSION

The Centre prior to imposition of President's rule should do its best to control the situation in the State and should not use Art.356 in haste and try to settle political scores. At the time of exercising Art.356, Centre is presumed to be very careful otherwise an injury maybe caused to the federal fabric of the Constitution.

The concept of the Governor merely being a constitutional head acting on the aid and advice of the Council of Ministers is right and sound if the ruling party is same at the Centre and the State Government. But if the State Government is run by a different party, then study of the discretionary power of the Governor reveals that under such circumstances many a times the Governor has acted as the agent of the Centre.

Lastly, it is opined that for proper functioning of a parliamentary form of government in India, it is compulsory that there should be a Governor, as the head of the State and he should not be affected by the rise and fall of the governments. When he uses his discretionary powers, he must play a constructive role between the Union and the States.