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Misuse of Article 356 by the Governor

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Abstract

Article 356 of the Constitution was one of the most keenly debated and discussed in the Constituent Assembly. In the words of Dr. Ambedkar "such articles will never be called into operation and that they would remain a dead letter". The Founding Fathers apprehended that, if and when it would be misused, it would violate not merely the federal character of the polity envisaged by them but also make a mockery of democratic principles. It seems that they were very much sure that the provision of the article would not be used to strengthen the corporative federalism [1] but it would be used in resolving the ministerial crisis in the State.2 As observed by Shiban Lal Saksena "… I feel that by these articles we are reducing the autonomy of the States to a farce. These articles will reduce the State Governments to great subservience to the Central Government". [2]

Keywords: - Article 356, Corporative federalism, democratic principles & federal character

The framers nevertheless entertained this hope that the provision will be used sparingly and will remain a dead letter. Such a hope got buried within one year of the working of the Constitution when in June 1951 the Punjab Government was dismissed despite having a clear majority in the Assembly. Since then, till now Article 356 has been used approximately 120 times (112-115 being the exact figure.) According to the Sarkaria Commission's Report [3] , which analysed 75 cases of President's Rule from June 1951 to May 1987 and found in

52 cases out of 75, Article 356 has been used not meant for. This is precisely the reason why one of the authorities on Indian Constitutional Law Acharya Durga Das Basu opined that no provision of the Constitution has been so often used, misused, and abused as Article 356. [4] This project analyses the role of governor under Article 356 in light of the judgment of the Apex Court in Rameshwar Prasad v. Union of India. [5]

THE SCOPE OF ARTICLE 356

Under Article 356(1) if the President, on the receipt of report from the Governor of a State or otherwise is satisfied that a situation has arisen in which the government of the State cannot be carried in accordance with the Provisions of the Constitution, the President may by proclamation:

Assume to himself all or any of the functions of the government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State.

Declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament.

Make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or part the operation of any provisions relating to any body or authority in the State.

The proviso to Article 356 (1) rules out the assumption of the powers of the High Court. The proclamation of dissolution has to be ratified within 2 months by both Houses of the Parliament.

The power under Article 356 (1) is an emergency provision but is not an absolute power. The power is conditional, the condition being the formation of satisfaction of the President as

contemplated by Article 356(1). [6] Thus, the power is to be exercised by the President in exceptional circumstances, as Emergency itself means a situation which is not normal, a situation which calls for urgent, remedial action. But interestingly, Article 356 nowhere uses the expression 'Emergency'. [7] The expressions under Article 356 may be elaborated as follows:

'On the receipt of a report from the Governor or otherwise Like the President, the Governor is to act in accordance with the aid and advice of the Council of Ministers by virtue of Article 163(1). The Governors report for the imposition of President's rule will fall within the ambit of the discretionary power as in Article 163(2) of the Constitution. This is so because the Governor cannot possibly act in accordance with the advice of the Council of Ministers, who cannot give an advice prejudicial to their interest. [8]

The expression 'or otherwise' means that the President may act on the information received from sources other than the Governor's report. This includes reports from a Union Minister or from the Council of Ministers. The President can only act in accordance with the advice of the Council of Ministers. The dissolution can also be ordered on the satisfaction that a situation has arisen in which the Government of the State cannot be carried in accordance of the provisions of the Constitution. Satisfaction can be reached by the President on report from the Governor of the State, or on other material or solely on the report itself. Even in the absence of report, other relevant materials can be taken into consideration by the President for dissolution. This expression 'or otherwise' is thus of very wide amplitude. [9]

The Governor however is not the decision making authority under Article 356. His report will be scrutinized by the Council of Ministers and the final decision is by the President under Article 174 of the Constitution. [10]

'A situation has arisen in which the government of the State cannot be carried in accordance with the provisions of this Constitution The marginal note to Article 356 uses the words 'failure of constitutional machinery in States' while Clause (1) uses the words

'cannot be carried on in accordance with the provisions of the Constitution'. The latter expression is of a very wide import meaning thereby failure to comply with each and every provision of the Constitution. The leading opinions in State of Rajasthan v. Union of India [11] , per Beg C.J. (vide paras. 28, 39 and 40) Chandrachud J (vide para. 124), Bhagawati J (vide para. 137) and Fazl Ali J (vide para. 209) gives a wider meaning to the expression equating it with 'breakdown of the constitutional machinery'. The interpretation will be discussed at length in light of the judicial pronouncement in S.R. Bommai and Rameshwar Prasad cases.

The expression 'satisfaction' means not the personal satisfaction of the President but a legitimate inference drawn from the material placed before him. This satisfaction is the satisfaction of the Council of Ministers. Under Article 74(1), the President is to act on the aid and advice of the Council of Ministers.

JUDICIAL REVIEW UNDER ARTICLE 356

The question of judicial review under Article 356 has come up for consideration before the Courts in several circumstances. The first such instance was in the Kerala High Court in K.K. Aboo v. Union of India. [12] In that case the Court refused to go into the constitutionality of the proclamation under Article 356. Later in Rao Birender Singh v. State of Haryana [13] , it was held that the President while exercising power under Article 356 did not act on behalf of the executive of the Union but in a constitutional capacity and hence the exercise of power by the President was not amenable to the jurisdiction of the Court. The scope was considered in greater detail in A. Sreeramula, In Re [14] , where it was held that judicial review was barred for a proclamation under Article 356 as the Presidential satisfaction is basically a political issue and the Court did not want to go into an intrinsic political question. The same view was followed by the Andhra Pradesh High Court in Hanumantha Rao v. State of Andhra Pradesh [15] and the Orissa High Court in Bijayananda Patnaik v. President of India. [16] Thus, the Courts gave support to the action of the Central Government. Interestingly, none of them came for consideration before the Supreme Court.. The Supreme Court faced the question for the first time in State of Rajasthan v. Union of India. [17] (Hereinafter the State of Rajasthan

case).

THE APPROACH IN STATE OF RAJASTHAN CASE

The facts leading to the State of Rajasthan case was as follows:The Janata Party came to power in the Centre after the 1977 elections but it was not in power in any of the States. On April 18, 1977, the Union Home Minister addressed letters to the Chief Ministers of nine states, namely: Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Punjab, Orissa, Rajasthan, U.P. and West Bengal, asking them to advise the Governors of their respective states to dissolve their legislative assembly in exercise of their power under Article 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.
A 7 judge constitutional bench heard the matter. [18] The Supreme Court upheld the action of the Centre and held it to be a valid exercise of Article 356 as the rout of the ruling party in these States did mean that the government of the State cannot be carried on in accordance of the provisions of the Constitution. However, it made a sharp departure from the views of the different High Courts regarding judicial review of proclamation under certain circumstances. Bhagwati and Gupta JJ elaborated the limited grounds at para. 144 of the judgment. [19]

The Court thus allowed judicial review on limited grounds. It also made a difference between 'satisfaction' and 'existence of satisfaction' appearing in Article 361(1) that provided immunity for Presidential action, wherein the later could not exist in mala fide or irrelevant grounds. The decision will be examined critically in the project.

POST STATE OF RAJASTHAN DEVELOPMENTS

During the State of Rajasthan case, Article 356 contained clause (5) which was inserted by the Thirty-eighth Amendment by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any

court on any ground. Clause (5) has been deleted by the Forty-fourth Amendment in 1978, making observations in State of Rajasthan on Clause (5) useless.

After Rajasthan case38 the question of judicial review of Presidential Proclamation under Article 356 arose for consideration in the Gauhati and Karnataka High Courts. The Assam Assembly was dissolved on the ground of defection. This was challenged in the Gauhati High Court in Vamuzo v. Union of India. [20] There was a difference of opinion between Chief Justice Raghaur and Justice Hansaria in this case. The former did not allow while the latter was of the opinion that judicial review is available under Article 356. The High Court of Karnataka discussed the law at length in S.R. Bommai v. Union of India [21] when the Presidential Proclamation was challenged in the Court. The Governor made a report to the President of India to impose the President's Rule in the State. The imposition of President's Rule in Karnataka on 29-4-1989 and the dissolution of the Legislative Assembly based on the Governor's report and on "other information" was challenged before the Karnataka High Court. The Full Bench held that Presidential Proclamation was justiciable. [22]

In the end, however, the High Court dismissed the petition holding that the facts stated in the Governor's report could not be held to be irrelevant. The Governor's bona fides were not questioned and his satisfaction was based upon reasonable assessment of all facts. The Court also ruled that recourse to floor test was neither compulsory nor obligatory and was not a prerequisite to the sending of the report to the President. Satisfaction is to be of the President and President alone.

These views in fact culminated in a historic judgment of the Madhya Pradesh High Court in Sunderlal Patwa v. Union of India. [23]

In that case after the demolition of Babri Masjid at Ayodhya on 6-12-1992, the President's Rule was imposed in M.P and this was challenged in the High Court. The Madhya Pradesh High Court departed from the earlier decisions and held that the Presidential Proclamation can be challenged in a court of law. The Court held that after the Forty-fourth Amendment of

the Constitution, clause (5) of Article 356 has been repealed resulting in enlarging the 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 Article 356 has to be sparingly used considering its federal nature. It is the first case where the Court struck down a Presidential Proclamation as unconstitutional.

S.R. BOMMAI CASE

The President, acting under Article 356 of the Constitution of India had promulgated President's rule in six States during 1989 to 1992 which were challenged at different times and they were heard together by the Supreme Court in S.R. Bommai v. Union of India. [24] In a near unanimous opinion, with K.Ramaswamy J partly dissenting, the Court laid down the following propositions:

(1) That the proclamation has been made upon a consideration which is wholly extraneous or irrelevant to the purpose for which the power under Article 356 had been conferred by the Constitution, namely, a breakdown of the constitutional machinery in a State, or, in other words, where there is no 'reasonable nexus' between the reasons disclosed and the satisfaction of the President, because in such a case, it can be said that there has been no 'satisfaction' of the President which is a condition for exercise of the power under Article 356.

(2) That the exercise of the power under Article 356 has been mala fide, because a statutory order which lacks bona fides has no existence in law."

Justice K. Ramaswamy did not support the line with that of the satisfaction of an administrator. He observed at paras. 215-216 that:

"Judicial review of the Presidential Proclamation is not concerned with the merits of the decision but to the manner in which the decision had been reached. The satisfaction of the

President cannot be equated with the discretion conferred upon an administrative agency, of his subjective satisfaction upon objective material like in detention cases."

The writer submits that Bommai concurred with State of Rajasthan on judicial review that it cannot be dispensed on the ground that the issue raises a political question. The minimal area of review as stated in State of Rajasthan was abandoned in Bommai, giving it a wider scope and extent. The observations in Bommai will be analysed critically in the project.

THE ROLE OF GOVERNOR

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

The part played by some Governors, particularly in recommending President's rule and in reserving States Bills for the consideration of the President, has evoked strong resentment. Frequent removals and transfers of Governors before the end of their tenure has lowered the

prestige of this office. Criticism has also been levelled that the Union Government utilizes the Governor's for its own political ends. Many Governors, looking forward to further office under the Union or active role in politics after their tenure, came to regard themselves as agents of the Union.

The Governor plays a very vital role under Article 356. His report is normally the ground for the President to arrive at the satisfaction mandated by Article 356. Article 356 is normally put into operation following the Governor's report. Thus, the Governor plays a crucial role. His role was aptly explained by India's first Attorney General M.C. Setalvad in his Tagore Law Lectures in 1974 on "Union State Relations".

"The powers of the President under Article 356 have been frequently exercised since the commencement of the Constitution. The occasions for its exercise emphasise not only the importance of the power in maintaining stable governments in the State, but also the vital role which the Governor has to play in enabling the Union Executive to exercise the powers vested in it under Article 356. The Constitutional machinery in a State may fail to function in numerous ways. There may be a political deadlock; for example, where a Ministry having resigned, the Governor finds it impossible to form an alternative government; or, where for some reason, the party having a majority in the Assembly declines to form a Ministry and the Governor's attempts to find a coalition Ministry able to command a majority have failed. The Government of a State can also be regarded as not being carried on in accordance with the Constitution in cases where a Ministry, although properly constituted, acts contrary to the provisions of the Constitution or seeks to use its powers for purposes not authorised by the Constitution and the Governor's attempts to call the Ministry to order have failed. There could also be a failure of the constitutional machinery where the Ministry fails to carry out the directives issued to it validly by the Union Executive in the exercise of its powers under the Constitution. The very statement of some of the situations, which may bring about the use of the machinery provided by Article 356 shows the pivotal position which the Governor occupies in respect of these situations and the grave responsibility of his duties in the matter of reporting to the President under Articles 355 and 356 of the Constitution."

This was quoted by Beg C.J. in paragraph 63 of State of Rajasthan case. The observations regarding the role of Governor as laid in S.R. Bommai and Rameshwar Prasad [25] will be analysed along with the Sarkaria Commission Report on Role of the Governor. All the opinions in Rameshwar Prasad talks of the importance of appointing Governors in accordance with the recommendations of Sarkaria Commission. This will be discussed in the project.

5.RAMESHWAR PRASAD CASE: A CRITIQUE

In the recent years the lengthiest decision of the Supreme Court on Article 356 came in Rameshwar Prasad v. Union of India. [26] The case arose out of the following facts: Following the elections to the Bihar Legislative Assembly in 2005, no party was able to form government on its own. Under such a situation a notification was issued on 7-3-2005 under Article 356 imposing President's rule and the Assembly was kept in suspended animation. This was to be of a temporary nature. Later on a report of the Governor dated 27-4-2005, it was expressed that there is likelihood of horse trading and large scale defections with the objective of gaining power. Further it was said that it would not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll. In another report dated 21-5-2005, the Governor reiterating the above view opined that it would be desirable in the interest of the State that the Assembly which had been kept in suspended animation be dissolved so that the electorate could be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course. Upon this report, the Assembly was dissolved on 23-5-2005. This was challenged and the following questions arose for consideration before the Supreme Court:

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

Whether the proclamation is illegal and unconstitutional?

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

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

In an interim order dated 7-10-2005 [27] , the Supreme Court held the dissolution to be unconstitutional but expressed its inability to restore the dissolved Assembly in view of the electoral process under way then to constitute a new Assembly. The present case was the first of its kind where even before the first meeting of the Legislative Assembly its dissolution had been ordered on the ground that attempts were being made to cobble together a majority by illegal means and to lay claim to form the government in the State. So, the main question before the Court at the outset was whether the dissolution of the Assembly under Article 356(1) of the Constitution could be ordered on the said ground. Linked with this question was the

correctness of the dissolution even before the Assembly met for the first time after its due constitution and the members took oath. The majority [28] while agreeing with the contentions of the petitioners held that no such power has been vested with the governor. Such a power would be against the democratic principles of the majority rule. If such a power is vested in the governor and/or the president, the consequences can be horrendous and would open a floodgate of dissolutions and will have far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or the state into another election. It further held that there was no material, let alone relevant, with the governor to recommend dissolution and the drastic and extreme action of dissolution cannot be justified on mere ipse dixit, suspicion, whims and fancies of the governor.

Justice K.G. Balakrishnan, in his separate dissenting judgment, while accepting the submissions of the Union of India came to the conclusion that the dissolution of the assembly was not mala fide and the facts stated in the Governor's report that some horse trading was

going on and some MLAs were being won over by allurements were certainly facts to be taken into consideration by the Governor. “If by any foul means the government is formed, it cannot be said to be a democratically-elected government. If the Governor has got a reasonable apprehension and reliable information such unethical means are being adopted by the political parties to get majority, they are certainly matters to be brought to the notice of the President and at least they are not irrelevant matters. The Governor is not the decision-making authority. His report would be scrutinized by the Council of Ministers and a final decision is taken by the President under Article 174 of the Constitution. Therefore, it cannot be said that the decision to dissolve the Bihar State Legislative Assembly is mala fide exercise of power based on totally irrelevant grounds." [29]

Justice Pasayat, in his dissenting opinion, termed the very assumptions of Governor as valid. He observed that the Governor cannot be a mute spectator when democratic process was tampered with by unfair means. When the sole object was to grab power at any cost even by apparent unfair and tainted means, the Governor cannot allow such a government to be installed. “It may be a wrong perception of the Governor. But it is his duty to prevent installation of a Cabinet where the majority has been cobbled together in the aforesaid manner... It may be in a given case be an erroneous approach, but it is certainly not irrational or irrelevant or extraneous." “The Governor had not in reality prevented anybody from staking a claim. It is nobody's case that somebody had staked a claim." [30]

Whether Article 361 grants immunity to the Governor?

In terms of Article 361 Governor enjoys complete immunity. Governor is not answerable to any Court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine validity of the action including on the ground of mala fides. [31] Judicial authority does support this view. [32]

6. CONCLUSION

In brief, the judgment in Rameshwar Prasad can well be regarded as a check on the arbitrary exercise of power of dissolution of legislative assemblies and an affirmation of democratic and federal principles. However, the two dissenting views highlight the position that more than one view is possible in a case like this. The majority seems adhered to the sparing use of Article 356 while minority did not air any such view. It was of the opinion that rather than forming a government by illegal means it is better to dissolve the Assembly. In terms of political morality, the writer agrees to the minority view. But constitutional morality allows for alternatives such as floor test to judge the strength of ministry, putting the legislature in suspended animation if occasion arises, speaking report by the Governor/advice based upon relevant material tendered by the Council of Ministers etc. If such alternatives do exist, the Governor should try them before recommending President's rule. Furthermore, the appointment of the Governor as per Sarkaria Commission's recommendations, is necessary to give clarity in the meaning of the expression 'failure of constitutional machinery in the State'.

Recent years have seen Bommai and Rameshwar Prasad judgments keeping a check on the abuse of Article 356. But still Article 356 is used. For e.g. in Jharkand recently. Therefore, the writer concludes that the Governors should act in a responsible manner and should minimize the use of Article 356, making its use only in rarest of rare cases, thus acting in consonance with the spirit of the framers while including Article 356 in the Constitution.

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