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**ROLE OF CONSTITUTIONAL INSTITUTIONS IN TAMING DOWN
MISUSE OF ARTICLE 356**- Aryan Birewar¹**1. ABSTRACT**

Article 356 was one of the most debated and contentious provisions in the Constituent Assembly. Unfortunately, since 1950, it has been invoked more than 125 times. In the garb of solving ministerial crisis, mismanagement, executive inefficiencies or maladministration, it has become a tool in the hands of the Centre to further their political prejudices. The research article delves deep into analyzing whether Article 356 – Proclamation of President's Rule is *Justiciable*. Secondly, how and whether the Constitutional Office of *Governor* with his discretionary powers can prohibit the misuse of Article 356. The method of research has been *qualitative* and *secondary*. Understanding of the research topic entailed collection and analysis of non-numerical concepts, opinion pieces, commentaries and papers. Secondary sources like books, journal articles, research papers, constitution commentaries and news articles were used. *Judicial review* is part of the Basic Structure of our Constitution. No constitutional institution has unfettered power to exploit the authority granted by any provision. Proclamation of President's Rule under Article 356 is no exception. The Courts can review the proclamation, if it was based on material or cogent evidence or if it was a blatant *malafide* exercise of Power by the President. The *Governor* drafts the report on the failure constitutional machinery of the state to send it to the President. The Governor should ensure the report for proclamation of state emergency is based on material facts and not *malafide*. In the line of constitutional morality, the Governor should examine all possible alternatives. The President develops satisfaction of the failure of constitutional machinery in the state based on the Governor's report, perhaps, why the role of the governor in controlling the misuse is crucial.

Key Words: *Emergency, Judicial Review, Misuse, Substantive Evidence, Subjective*

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Satisfaction, Political Question, Governor's Report and President's Rule.

2. INTRODUCTION

Article 356(1) gives power to the President to proclaim state emergency, on the satisfaction of the receipt of the Governor's report, stating failure of the constitutional machinery in the state. The President shall assume all vested or exercisable powers of the State Government and that the Legislative powers of the state will be exercised by the Parliament of India. Essentially, the objective of Article 356(1) is *Constitutional Order*². This is to prevent political forces coming to power through public mandate from obliterating constitutional democracy.

The outright abuse of Article 356 required to be tamed down by judicial intervention and the Office of Governor. The question at hand is if the Declaration of State Emergency under Article 356 justiciable³? The absence of such judicial review would give unfettered power to the President to proclaim state emergencies, thereby harming the federal fabric and centre-state relationship. The Supreme Court through its landmark established that the Courts could inquire into the objective element of Article 356(1), which is the presence of substantive evidence, any *mala fide* element or proclamation on wholly irrelevant grounds⁴. The offices of President and the Governor both have conditioned power, and their exercise of executive powers do not enjoy blanket immunity from judicial review⁵.

The second question is if the Office of Governor can and how bridles the misuse of Article 356? Governor plays the most crucial role in the proclamation of state emergency. I strongly hold the position that Governor can thwart the misuse of Article 356. Under Article 163(2), the report shall be drafted in advice with the Chief Minister and his Council of Ministers, however, the advice is not binding on him, in that, he does not have to act in accordance with the same, unlike the President⁶. The dissolution of the State Assembly by the President takes place on the relevant material facts provided in the Governor's Report, sent as per his discretion. The Governor is a bridge between the Union-State relations; a malafide exercise of his discretion

² Akhilesh Patel, *Constitutional Dynamics of Article 356 in India*, 23 NLSIU Law Review 140, 145-150 (2011).

³ 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).

⁴ Kajal Nayak, *Article 356 – Use or Abuse*, 5 Journal on Contemporary Issues of Law, 4-12 (September 2015).

⁵ 13th Ed., V.N. Shukla, *Constitution of India* (2016).

⁶ Mamata Sawakar, *Governor and Article 356*, 6 Journal of Technology and Innovative Research 15, 20-25 (2019).

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can cause friction between the two.⁷

3. RESEARCH & ANALYSIS

3.1 Proclamation of State Emergency is Justiciable

3.1.1 Position of “Doctrine of Political Thicket” in India

The primary opposition to justiciability of Article 356(1) is the interference of the Judiciary in political questions. This stems from the doctrine of “Political Thicket”, which is based on the Separation of Powers Theory to allow some determination to the Legislature and Executive non-examinable by the Judiciary⁸. The examination of validity of the proclamation would entail enquiring into the political judgment of the President, which is anti-thesis to this doctrine. In USA, the Supreme Court, in *Baker v. Carr*⁹, developed test of “Primary Justiciability” to refrain from judicial interference in political questions. Indian Courts have been averse to the concept of non-justiciability of political questions. Justice Shah in *A.K. Roy v. Union of India*¹⁰ said, “Constitutional Democracy does not consider any public function to be political, in a way to not be liable to get tested on its validity by the Courts.” This was furthered by Justice Bhagwati in *Minerva Mills v. UOI*¹¹, where she said, “Merely because a question has political undertones, by no means affects the Constitutional duty of Courts to examine the question if it raises an issue of Constitutional determination.” The power given to the President under Article 356(1) is conditioned and not absolute, he does not enjoy blanket immunity from judicial review of his proclamation. The concentration of indeterminate power in the legislature and executive will lead to arbitrariness and totalitarianism¹².

3.1.2 Evolution of Supreme Court Judgments on the Judicial Review of Article 356

1st Phase (1965-1974): The first case where judicial review of Article 356 came into question was *K.K. Aboo v. Union of India*¹³. In this case, the house had never been summoned under Article 174(1), however, the V.P. acting in President’s absence issued fresh proclamations. On this basis, the proclamation was argued to be illegal, void and *mala fide*. The Kerala HC held

⁷ Sanjay Hegde, *Judicial Intervention can stop Misuse of Article 356*, The Wire, (April 7, 2016), <https://thewire.in/law/the-judiciary-can-stop-the-misuse-of-article-356-if-it-chooses-to-act>

⁸ Advocate NL Rajah, *Conundrum of a “Political Question”*, Bar & Bench (April 25, 2020), <https://www.barandbench.com/columns/litigation-columns/the-conundrum-of-a-political-question>

⁹ *Baker v. Carr*, 369 U.S. 186, (1962).

¹⁰ *A.K. Roy v. Union of India*, AIR 1982 SC 710.

¹¹ *Minerva Mills v. Union of India*, (1982) 1 SCR 206.

¹² Advocate Rahul Unnikrishnan, *Doctrine of Political Thicket and Justiciability Seemingly Political Matters*, Bar & Bench, (May 15, 2020), <https://www.barandbench.com/columns/the-political-question-doctrine-and-justiciability-of-seemingly-political-matters>

¹³ *K.K. Aboo v. Union of India*, AIR 1965 Ker 229.

that on the issue of maintainability of the writ petition, the Court cannot inquire into the validity of the proclamation. Further, in *A. Sreeramalu Re*¹⁴, the Andhra HC held that Presidential Proclamation is based on President's subjective satisfaction, which is a "Political Question". There is no objective criteria or grounds for presidential proclamation in the Constitution. Thus, validity of proclamation under Article 356(1) is beyond judicial determination.

2nd Phase (1977-1994): The first judgment of the Supreme Court which overruled the cases of the 1st phase was *State of Rajasthan v. UOI*¹⁵. In this case, the Janata Party had come to power after the 1977 general elections. It wrote letters to CM's of opposition ruled 9 states to advise the governor to dissolve the respective state legislatures under Article 174(2), as those governments didn't enjoy public's confidence anymore after the general election defeat. The 7-judge SC Bench held that Court cannot interfere in exercise of power by the central executive on political grounds. Justice Bhagwati said, "*Satisfaction of President is subjective. There cannot be an objective test or a set standard measure for testing the validity of proclamation.*" However, the Court established that under certain exceptional circumstances like if the proclamation is exercised *mala fide* or based on extraneous grounds, the validity of the proclamation will be subject to judicial review. Article 356(5), which was added by the 38th Constitutional Amendment, 1975, stated that President's satisfaction under Clause 1 was final and not subject to any judicial review¹⁶. Subsequently, by the 44th Constitutional Amendment 1978, Article 356(5) got deleted and the judicial review of presidential proclamation again came into question. However, the Judiciary must not enquire into the President's satisfaction as to whether there has been a failure of constitutional machinery or not. This is because the question whether proclamation of emergency is to be made or not depends on president's satisfaction, which is a "*Political Question*". The nature of this matter per se falls within executive's exercise of power and so the decision must be left upon them¹⁷.

3.1.3 Consolidation of Judicial Review upon Declaration of State Emergency

S.R. Bommai v. Union of India¹⁸: This Supreme Court case is considered to be the ultimate deciding case on the judicial review of Article 356(1). In 1989, the Janata Dal government in Karnataka under the Chief-Minister, *S.R. Bommai*, faced a constitutional crisis as a group in the party broke-off. Article 356 was invoked, and the legislative assembly was dissolved. The 9-

¹⁴ *A. Sreeramalu Re*, AIR 1974 AP 106

¹⁵ *State of Rajasthan v. UOI*, (1977) 3 SCC 592.

¹⁶ K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance*, Kanishka Publishers, 103 (2001).

¹⁷ 13th Ed., V.N. Shukla, *Constitution of India* (2016).

¹⁸ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

judge bench of Supreme Court unanimously held that Presidential proclamation under Article 356(1) is judicially examinable to the extent of reviewing the presence of material evidence, if the issue of proclamation was *mala fide* or if there was rational nexus between the material evidence and proclamation of emergency¹⁹.

The Presidential proclamation does not enjoy absolute immunity from judicial review, so Article 356(1) is justiciable. Justice K. Ramaswamy held, “*Judicial Review of Presidential Proclamation is not based on the merits of the President’s decision but on the manner adopted to arrive at it.*” This is because Article 74(2) bars the judicial review of the advice tendered by the Council of Ministers to the President but not the material evidence on which such advice was tendered²⁰. There is no objective standard to test the satisfaction of the President required for validly proclaiming emergency, the satisfaction is subjective but it being based on “Substantive Evidence” is an objective test and can be enquired into²¹. The Courts must only subject the presidential proclamation to judicial review, in the absence of such clear and cogent evidence. However, the Courts must refrain from examining the decision of the President. The fear of judicial review of presidential proclamation under Article 356(1) tamed down the misuse by political parties, as now the Supreme Court could invalidate the proclamation²². Thus, Article 356(1) is justiciable to the extent, where the substantive and material evidence is being examined. Presidential proclamation does not have immunity from judicial review based on the objective material evidence, based on which President was satisfied.

3.1.4 Enterprising Judicial Intervention

Besides subjecting presidential proclamation to judicial review, our Courts also take up the role of remedying constitutional infirmities concerning invalid declaration of state emergency. In 2016, 9 Congress MLA’s of Uttarakhand Legislative Assembly defected to the BJP. The speaker of the assembly gave 10 days to prove majority, but President’s Rule was imposed a day before the *floor-test*. The CM, Shri. Harish Rawat challenged the imposition of the President’s Rule in the HC, in *Harish Singh Rawat v UOI*²³, where the HC held that as per *S.R. Bommai*²⁴, the floor-test had to be conducted first for the CM to prove majority and then the president’s rule could be imposed, thus holding the proclamation to be unconstitutional. The

¹⁹ K. Madhusudhana Rao, *Authority to Recommend President’s Rule under Article 356*, 46 Journal of Indian Law Institute, 125-132 (March 2004).

²⁰ Prasad Singh, *Article 356 and Judicial Review*, NLUO Law Review, 4-10 (October 16, 2010).

²¹ *Rao Birender Singh v. Union of India*, AIR 1968 Punj 441.

²² Soli J. Sorabjee, *Decision of SC in S.R. Bommai Case*, (1994) 3 SCC (Jour) 1.

²³ *Harish Singh Rawat v. Union of India*, 2016 SCC Utt 654.

²⁴ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

HC ordered a floor-test on 29th April, in which majority was proven and the HC restored the assembly suspended in animation.

Thus, here the Uttarakhand HC displayed the Judiciary's role of being *outcome -determinative* to bridle the misuse of Article 356. Not only did the Court, hold the proclamation to be invalid, on the grounds of absence of clear and cogent evidence of constitutional breakdown; but also, ordered the floor-test to restore the Harish Singh Government. I do understand the invocation Separation of Powers doctrine, however, when the President itself didn't allow the *floor-test*, court's intervention became a necessity to strike down the unconstitutional declaration.

3.2 Role of the of the Office of Governor to Plummet Misuse of Article 356

3.2.1 Regulation of the Governor's Power

Sarkaria Commission Report, 1987²⁵: The committee report asserted that President's Rule should only be proclaimed in sparingly rare circumstances, more so as a measure of last resort. It held that violation of any constitutional provision, regardless of the extent and effect, is not "Constitutional Breakdown". It laid down set of conditions to be constituted as the same, one of them was:

A. Political Crisis – Constitutional breakdown because of political deadlock caused by parties or coalition failing to achieve full majority, which can be resolved by fresh elections.

Specifically, in the event of political deadlock, the governor must explore all possible alternatives to secure a government will full majority. If it's not possible, then he can declare fresh elections and ask the current government to continue as interim government and dissolve the legislative assembly²⁶. By this the issue of political crisis will be solved by the public mandate.

The Governor or President, however, cannot misuse their discretion, as Article 356(3) acts as a constitutional safeguard; the Assembly cannot be dissolved without the Parliament's assent. Another safeguard, which in my understanding, developed from *State of Rajasthan* and *S.R. Bommai* case was the immunity of President and Governors, under Article 361, limited by judicial review of the material evidence, mala fide nature and rational nexus between substantive evidence and proclamation²⁷. This would ensure that constitutional offices are not being misused by political parties to constitute their interests, and that there is no genuine

²⁵ Sarkaria Commission Report (1987), *Chapter IV – Role of Governor*, <http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERVI.pdf>

²⁶ Nupur Sharon, *Sarkaria Commission Report: Analysis of Governor's Role under Article 356*, 2 Journal of Law Mantra, 1-7 (2015).

²⁷ 13th Ed., V.N. Shukla, *Constitution of India* (2016).

political impasse in the State Assembly. Three decades after the Sarkaria Commission Report, in 2005, the Bihar State Assembly was dissolved by the President. However, the NDA subsequently proved majority, but the Governor wrote to the President that the shift happened because of financial motivations. The President dissolved the assembly on the governor's report recommendation. The President's Rule was challenged in *Rameshwar Prasad v. Union of India*²⁸, Justice Sabharwal held, "Judiciary can examine if the Governor's report contained relevant material evidence or if the facts were accurate for the President's satisfaction." Thereafter, the Supreme Court held the presidential proclamation to be unconstitutional.

3.2.2 Need for Valid Use of Governor's Powers

In this case, if the governor's report would have been on accurate evidence and not manipulated by political forces, the Bihar Assembly wouldn't have been dissolved without any rhyme or reason. Thus, we see how crucial the Office of Governor indeed is to protect Article 356(1) from being misused. He must send his report to the president after studying the facts and circumstances and then making his recommendations based on accurate material evidence. The objective substantive evidence under Article 356(1) is provided in the governor's report so the President's satisfaction wholly depends on the material facts presented therein²⁹. The office must not be hub for inter-party-political tussles and should be on the line of constitutional morality. Moreover, unlike the President under Article 74(1), the Governor under Article 163(1) is not bound to consult the CM and his council of ministers, the governor's actions cannot be challenged on the ground of no advice taken from the CM and his council³⁰. Coupled with Article 163(3), the judicial review of the advice, if so tendered, is also barred. Thus, it becomes vital for the Governor to use his discretion in the line of the constitutional provisions, and not make them a tool of convenient misuse³¹.

4. CONCLUSION

At last, we can conclude that constitutional institutions have yet again proved to be the bedrock of our democracy. Article 356 stood true to the apprehensions held by our constitution-makers concerning its vast abuse. Our Courts intervened to bring a halt to the misuse of this provision being used to further political interests of the Centre. The article maintains that Proclamation of

²⁸ *Rameshwar Prasad v. Union of India*, AIR 2006 SC 980.

²⁹ Prof. Mamata Sawakar, *The Governor and Article 356*, 6 Journal of Constitutional and Parliamentary Studies 15, 18-25 (2019).

³⁰ *Bijayananda Patnaik v. Union of India*, AIR 1974 Ori 52.

³¹ 13th Ed., V.N. Shukla, Constitution of India (2016).

President's rule is not immune from judicial review to the extent of examining the substantive and material evidence that led to the President's satisfaction or on malafide and wholly extraneous grounds. However, it also asserts that the satisfaction of the president is subjective; whether the emergency should be proclaimed is a "Political Question", thus examining the subjective satisfaction is beyond the scope of judicial determination. The imposition of state emergency bears a serious administrative change. Thus, in the line of the Sarkaria Commission recommendations, state emergency must be treated as a measure of "Last Resort".

The Office of the Governor is vested with significant powers in the issue of state emergency. Under Article 356(1), the President's satisfaction of constitutional breakdown in a state depends on the Governor's Report. Unlike the President, under Article 163(1), the governor is not bound to consult the CM and his Council of Ministers. The Governor must furnish accurate substantive evidence of failure of state's constitutional machinery to the President, without any political incentive and thus be married to his constitutional morality.

5. SUGGESTIONS/RECOMMENDATIONS

Based on my research study, I believe that Article 356 requires an amendment. A couple of recommendations, as per my understanding are:

- Before the President Issues proclamation, the State Government must be given an opportunity to present their stance and provide their defence on the constitutional breakdown of the state.
- The Presidential proclamation must contain grounds on which President was satisfied of the failure of constitutional machinery in the state. Further, it must be published for public access.
- The language of Article 356 needs to be amended. The words "Or Otherwise" in the provision give birth to ambiguity. This wide scope of interpretation sometimes allowed President to declare emergency, in the absence of the governor's report.
- The governor's report must be sent to the CJ of the High Court as well. Under Article 74, the President must consult the PM and his Council for declaration of emergency. To negate political bias of the Centre, the CJ's decision on the constitutional breakdown must be considered, and only then state emergency is to be declared.