Decision of the Supreme Court in S.R. Bommai v. Union Of India: A Critique

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Legislative History : Constitutional Assembly Debates

Article 356 of the Constitution which empowers the imposition of President's Rule in a State had its notorious counterpart in Section 93 of the Government of India Act 1935 which provided for Governor's Rule in the provinces. It is curious that despite the unhappy experience of the misuse of this 'disfiguring' provision during British colonial rule Article 356 was ultimately incorporated in the Constitution.

Apparently contemporary historical events cast a deep shadow on the deliberations of the Constituent Assembly. Our Founding Fathers believed that "the danger of a grave emergency arising in this country is not merely theoretical; it is very real"1. In the words of Alladi, "we are in grave and difficult times"2. They were convinced of the need for a strong Centre which could effectively deal with emergent situations.

Moreover, it was the general expectation that Article 356 would be invoked in extreme situations and would not be utilised as a "surgical operation for a mere cold or catarrh"3. The Founding Fathers shared the hope of Dr Ambedkar that this provision "will never be called into operation" and "would remain a dead letter"4. Dr Ambedkar had assured the Assembly that "the first thing the President will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. ..."5

Unfortunately Dr Ambedkar's hopes and assurances have been sadly belied. History has testified to the flagrant misuse of Article 356 which has been invoked by the Centre so far about 100 times. Sadly every party at the Centre has succumbed to its fatal fascination. The recent landmark judgment of the nine-judge bench of the Supreme Court in S.R. Bommai v. Union of India6 should be a salutary check to the temptation.

View of the High Courts about judicial review of Presidential Proclamation

Imposition of President's rule in some States was challenged and the question of justiciability of the Presidential proclamation arose for consideration by the High Courts. The conclusion reached by them was that there could be no judicial review of the Presidential proclamation although the reasons for reaching the conclusion varied.

The High Court of Kerala in K.K. Aboo v. Union of India7 found as a fact that the Governor had made a thorough enquiry as to the possibility of formation of a constitutional government in the State before he submitted his report to the President. It further held that the President had ample material for his satisfaction before he promulgated the impugned Proclamation dated 10-9-1964 dissolving the legislative assembly. In dealing with the question of maintainability of the writ petition it concluded that it is not open to the Courts to question the validity of a proclamation under Article 356.

By a Presidential proclamation dated 21-11-1967 President's rule was imposed in Haryana and the Haryana Legislative Assembly was dissolved. The High Court dismissed the writ petition challenging the proclamation for three reasons. Firstly, the Court cannot go into the validity of the proclamation because the President is not amenable to the jurisdiction of the Court in view of sub-art. (1) of Article 361. Secondly, reconsideration of the proclamation being specifically vested by the Constitution in Parliament excluded the Court's jurisdiction. Thirdly, the Court had no jurisdiction to require disclosure of material forming basis of the satisfaction of the President. The Court however considered the merits of the Presidential proclamation and held that there was ample and sufficient material in the report of the Governor that the administration of the State had been paralysed and there was no real functioning.8

The Calcutta High Court held that "the validity or legality of the incidental and consequential provisions contemplated by Article 356(1)(c) is not justiciable" because that is a matter entirely for the satisfaction of the President.9

In A. Sreeramulu Re,10 a single judge of the Andhra Pradesh High Court, Justice Chinnappa Reddy, held that a Presidential proclamation issued under Article 356 is not susceptible to judicial review because the issue of the President's satisfaction under Article 356 is basically a political issue, the Constitution does not enumerate the situations where President's rule can be imposed and there are no "satisfactory criteria for a judicial determination" of what are relevant considerations for invoking the power under Article 356. Consequently the question is intrinsically political and beyond the reach of the Courts. Moreover, any attempt to settle a controversy raised by a proclamation under Article 356 will necessarily be followed by tremendous consequences. The very vastness of those consequences makes it "impolitic or inexpedient"11 for a Court to assume jurisdiction. On the assumption that there is limited power of judicial review the Court held that there was sufficient justification for the President's proclamation.

In a subsequent decision in Hanumantha Rao v. State of A.P.12 the Andhra Pradesh High Court reached the zenith of abdication of judicial review. It held that Courts cannot examine the appropriateness or adequacy of the grounds for the

taking of a decision by the President, nor any bad faith can be permitted to be attributed to him. The Court must keep a "judicial hands-off" in connection with this Presidential exercise of emergency power.13

The legality of the Presidential proclamation dated 03-03-1973 dissolving the Orissa Legislative Assembly was questioned in Bijayananda v. President of India14 before a Division Bench of the Orissa High Court. The Court ruled that a Presidential proclamation is not justiciable on the following grounds: (a) the wide source of the information as contemplated by the expression 'otherwise' in Article 356(1), (b) the subjective nature of satisfaction, (c) the provisions of Article 74(2) and Article 361(1) which preclude the Court from testing the grounds of satisfaction, (d) the provision for Parliamentary approval for continuance of the proclamation beyond two months from the date of its promulgation, and (e) the emergency provisions under Articles 352, 356 and 360 in Chapter XVIII of the Constitution which render the satisfaction non-justiciable.15

The decision of the Supreme Court in the State of Rajasthan v. Union of India16

In the general elections to Parliament held in March 1977 the ruling Congress party suffered a massive defeat in nine States viz. Bihar, U.P., Himachal Pradesh, Haryana, Madhya Pradesh, Orissa, Punjab, Rajasthan and West Bengal. On 17-04-1977, the Union Home Minister addressed a letter to the Chief Minister of each of these States asking them to advise their respective Governors to dissolve the Assemblies and seek a fresh mandate from the people. This was followed by a broadcast of the Law Minister whose theme was that the government in the Congress ruled States had forfeited confidence of the electorate and their continuance in office was undemocratic.

Six states, viz. the States of Rajasthan, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh, and Orissa filed writ petitions in the Supreme Court under Article 32. The main submission of the petitioners was that the Home Minister's letter and the radio broadcast of the Law Minister constituted a clear threat of dissolution of the assemblies and disclosed grounds which were prima facie outside the purview of Article 356 of the Constitution.

The central issue before the Court was about the availability of judicial review. This has been delineated differently by the judges constituting the seven judge bench.17 The area of judicial review was narrowly carved out particularly having regard to Article 74(2) of the Constitution which was construed to preclude the Court from scrutinising the material and reasons in support of a Presidential proclamation. However every judge rejected the contention that judicial review of the Presidential proclamation was totally barred and on the facts of the case held that the proposed action and exercise of power were not mala fide nor vitiated by incorporation of irrelevant or extraneous matter.18

The leading judgment of Justices Bhagwati and A.C. Gupta19 categorically rejected the contention that the exercise of power under Article 356 involved essentially a political question and was not amenable to judicial determination. They held that

"merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. ... merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'judicial hands off'.20

After this categorical pronouncement the learned judges observed as follows:

"The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of the United States has described as 'judicially discoverable and manageable standards'. It would largely be a political judgment based on assessment of diverse and varied factors".21

Thereafter the scope of judicial review was formulated thus:

"But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it ...22 This is the narrow minimal area in which the exercise of power under Article 356, clause (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists."23

It needs to be emphasised that the observations regarding a wide range of situations which may arise were made in the context of the contention of the Union that no Presidential proclamation was issued, the grounds stated in the letter of the Home Minister and the radio talk of the Law Minister were not and could not be the sole basis of the contemplated action and other situations could arise which the Court had no means of knowing or anticipating and which could well warrant action under Article 356.

In view of their decision on this aspect, the learned judges thought it "not necessary to consider the question"24 whether grounds articulated in the aforesaid letter and radio talk were wholly extraneous and irrelevant to exercise of power under

Article 356. Nonetheless since the question was argued they expressed their opinion and held that the defeat of the ruling party in a State at the Lok Sabha elections cannot by itself, without anything more, support the inference that the government of the State cannot be carried on in accordance with the provisions of the Constitution (emphasis added). But according to them the situation was wholly different. It was not a case where just an ordinary defeat had been suffered by the ruling party in a State at the elections to the Lok Sabha but there has been a total rout of its candidates which reflected a wall of estrangement and resentment and antipathy in the hearts of the people against the Government which may lead to instability and even the administration may be paralysed. Therefore, on the facts this ground was held to be clearly a relevant one.25

The Supreme Court in the Rajasthan case also laid down that a proclamation under Article 356(1) had immediate force and effect and was not dependent on the approval of both Houses of Parliament.26 The Court also rejected the contention that the proclamation cannot be issued when either or both Houses of Parliament are in session.27 It was further held that "even if the Parliament disapproves the proclamation within the said period of two months, the proclamation continues to be valid for two months" and that "even if both the Houses do not approve or disapprove the proclamation, the government which has been dismissed or the Assembly which may have been dissolved do not revive"28.

In A.K. Roy v. Union of India,29 a Constitution Bench of the Supreme Court observed that after the deletion of Clause 5 of the 44th Constitutional Amendment, which was in existence when the Rajasthan case was decided "any observations made in the Rajasthan case on the basis of that clause cannot any longer hold good"30.

It may be pointed out that more than one member of the Bench in the Rajasthan case held that judicial review was available notwithstanding Article 356(5) of the Constitution.31 Consequently its deletion does not really enlarge the scope of judicial review from what was laid down in that case.32

High Court decisions after State of Rajasthan case

After the decision of the Supreme Court in the Rajasthan case the question of judicial review of Presidential proclamation issued under Article 356 arose for consideration in the Gauhati and Karnataka High Courts.

Challenge in the Gauhati High Court to Presidential rule imposed in Nagaland on 7-8-1988 led to a difference of opinion between Chief Justice Raghuvir and Justice Hansaria.33 The Presidential satisfaction set out in the proclamation imposing President's rule in Nagaland was based on the Governor's report and on "other information". Chief Justice Raghuvir held that the Union of India cannot be compelled to tender any information to the Court because of Article 74 of the Constitution. The learned Chief Justice further held that since the Nagaland Legislative Assembly was dissolved by the two Houses of the Parliament no relief could be granted.34

On the other hand Justice Hansaria held that as the material which formed part of "other information" was not before the Court and as the same did not form part of the advice tendered by the Council of Ministers under Article 74(1), Union of India should be given an opportunity to disclose the information to the Court. Justice Hansaria ruled that should the Union of India fail to give the "other information" the Court would have no other alternative but to decide the matter on the basis of the materials placed before it.35

Imposition of President's rule in the State of Karnataka on 21-4-1989 and dissolution of the Legislative Assembly was challenged before the Karnataka High Court. The Presidential satisfaction was based on the Governor's report and on "other information". The Full Bench held36 that Presidential proclamation was justiciable. The Court declined to decide the scope of Article 74(2) with reference to the question whether the "other information" could be called for on the ground that the Courts should base their decision on the disclosed material and probing at any greater depth would be to enter a field from which judges must scrupulously keep away. The Court held that the facts stated in the two reports of the Governor were relevant. The Full Bench further ruled that recourse to floor test was neither compulsory or obligatory on the part of the Governor for reaching the conclusion that the ruling ministry had lost the confidence of the House.

Appeals were carried to the Supreme Court from the above judgments of the Gauhati and the Karnataka High Courts.

After the demolition of the Babri mosque at Ayodhya President's rule was imposed in the States of Uttar Pradesh, Rajasthan, Madhya Pradesh and Himachal Pradesh where the ruling party was the Bharatiya Janata Party (BJP). Imposition of President's rule in Madhya Pradesh, Rajasthan and Himachal Pradesh was assailed in the High Courts. The High Court of Madhya Pradesh held that imposition of President's rule in Madhya Pradesh was unconstitutional and there was no relevant material to justify the action Sunderlal Patwa v. Union of India37. The Union of India filed an appeal to the Supreme Court.

Supreme Court decision in S.R. Bommai v. Union of India6

Appeals from the judgments of the Gauhati, Karnataka and Madhya Pradesh High Courts and the writ petitions filed in Rajasthan and Himachal Pradesh High Courts, which were transferred to the Supreme Court, were heard by a nine-

judge Bench. The arguments in the case commenced in the first week of October 1993 and were concluded in the last week of December 1993. The hearing was interrupted thrice because of intervening Dussehra and Diwali holidays and a brief absence of Justice Pandian from the Bench. The judgment was pronounced on March 11, 1994.

Separate judgments have been delivered by Justices Pandian38, Ahmadi39, by Justice Verma for himself and Justice Dayal40, by Justice Sawant on behalf of himself and Justice Kuldip Singh41, by Justice K. Ramaswamy42, and by Justice Jeevan Reddy for himself and Justice Agrawal.43 These judgments reveal sharp judicial divergence on many points. The majority judgments are of Justices Sawant, Kuldip Singh, Jeevan Reddy, Agrawal and Pandian. The judges who are in the minority are Justices Ahmadi, Verma, Dayal and K. Ramaswamy.

At the outset it is necessary to determine what is the majority view and what is the declaration of law by the Supreme Court in regard to the following questions: (a) the interpretation of the expression in Article 356, namely "a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution"; (b) the scope and area of judicial review in case of a Presidential proclamation issued under Article 356 and the grounds for judicial interference; (c) whether the norms and yardstick applied in adjudging the validity of administrative or executive action are also applicable in determining the constitutionality of a Presidential proclamation; (d) the correct construction and ambit of Article 74(2); (e) whether the power of dissolving legislative assemblies can be exercised only after the Presidential proclamation is approved by both Houses of Parliament under Article 356(3) and not before; (f) whether it is permissible to take over some of the functions and powers of the State government while at the same time keeping the State government in office; (g) the correct interpretation of Article 365 of the Constitution; (h) whether the doctrine of basic structure can be invoked for exercising power under Article 356; (i) whether secularism is a basic feature of the Constitution; (j) whether under our Constitution no party or organisation can simultaneously be a political and a religious party; (k) the requirement of a warning by the Centre to the State before issuing a Presidential proclamation; (l) the necessity of holding a floor test in order to determine whether the Ministry enjoys the confidence of the House or has lost it; (m) the status of the Sarkaria Commission report and the weight to be attached to its recommendations; (n) the extent to which the Supreme Court decision in State of Rajasthan44 is still good law; (o) power of the Court to grant interim relief and its extent in case of a Presidential proclamation; (p) whether it will be open to the Court to restore the legislative assembly and the dismissed Ministry in the event of a Presidential proclamation being adjudged invalid; (q) whether the Court may consequent upon its determination of the invalidity of the Presidential proclamation mould the relief and confer validity on acts done, orders passed and laws made during the interregnum.

Determination of the ratio of Supreme Court judgment45

The task of determining the ultimate ratio has not been rendered easy because there is no order of the Court signed by all the judges enunciating the conclusions of the Court on the various issues decided by it. The exercise becomes more difficult because of the selective concurrence of Justice Pandian with some of the conclusions reached by Justices Sawant and Kuldip Singh, and his agreement with the reasoning and other conclusions arrived at by Justices Jeevan Reddy and Agrawal.

The legal position is that in ascertaining the law declared by the Supreme Court regard must be had to the judgments of the Judges who are in the majority. Separate concurring judgments form a part of the majority judgment of the Court. In Guardians of the Poor of the West Derby Union v. Guardians of the Poor of the Atcham Union46 it was observed as follows:

"... four of the learned Judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgment of the others. If they mean to differ in their view, they say openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgment of the others."

In a subsequent decision, Overseers of Manchester v. Guardians of Ormskirk Union47 it was held that "where in the House of Lords one of the learned Lords gives an elaborate explanation of the meaning of the statute, and some of the learned Lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it."

No doubt, the conclusions arrived at by the judges in the majority have been reached by different processes of reasoning. But they cannot be ignored for that reason because "one would rather have thought that a conclusion stands more fortified when it can be supported not on one but on several lines of reasoning".48

It is significant that Pandian, J. has not dissented from or disapproved of any of the conclusions reached by Sawant and Kuldip Singh, JJ. Again these conclusions have not been dissented from in the judgment of Jeevan Reddy and Agrawal, JJ. There is a difference in emphasis, but not with the conclusions. Accordingly it is submitted that the judgments of Sawant and Kuldip Singh, JJ. to the extent they are not directly or by necessary implication inconsistent with judgments of Justices Jeevan Reddy and Agrawal, are part of the majority judgment and constitute the law of the land under Article 141 of the Constitution.

There is a another difficulty. There are observations in the minority judgments which are not in direct conflict with the reasoning and conclusions reached by the majority. Furthermore the majority judgments have not dissented from nor expressed any reservation about these observations. For example, Justice Ramaswamy in illustrating situations which in his opinion can warrant the inference of break down of constitutional machinery has mentioned "gross mismanagement of affairs by a State Government; corruption or abuse of its power".49 Another such situation hinted by the learned Judge is wasteful public expenditure by the Chief Minister of a State whose life size photo is published in all national and regional dailies everyday at great public expenditure despite sufficient warning by the Centre.50

What is the legal effect of these off the cuff observations? Do they constitute the law of the land under Article 141 of the Constitution? How are the High Courts to understand them? Should they be regarded as binding on them? The position is further complicated because the Supreme Court has referred with approval to minority opinion in a judgment because the majority has not expressed any different opinion on the point.51

It is respectfully submitted that most of these difficulties would not arise if judges strictly adhered to the wholesome rule evolved by the apex court that in adjudication of constitutional issues it is essential that no opinion should be expressed nor observations made on matters which are not directly in issue.52 It would also be helpful if judges clearly expressed their disagreement with or reservations about questions on which opinions have been expressed by other members of the bench.53

Now to the daunting task: What has the Supreme Court decided in Bommai case?54

The Ratio of S.R. Bommai case

(A) Interpretation of Article 356(1):

According to Justices Sawant and Kuldip Singh situations contemplated by Article 356 must be such where the governance of the State is not possible to be carried on in accordance with the provisions of the Constitution. The word "cannot" emphatically connotes a situation of impasse.55 Accordingly situations which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the State according to the Constitution would not merit the issuance of a Presidential proclamation under the Article.56

In reaching the above conclusion reference was made to the observations in the judgment of the Supreme Court of Pakistan in Ahmad Tariq Rahim v. Federation of Pakistan57 that the power conferred by Article 58(2)(b) of the Pakistan Constitution, which is analogous to Article 356, "is an extreme power to be exercised where there is actual or imminent breakdown of the constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution". Reference was also made to Justice Rustam Sidhwa's observations in the same case that it will amount to an abuse of power to dissolve the National Assembly because a particular provision of the Constitution was not complied with unless such violation was so grave that a Court could come to no other conclusion but that it alone directly led to the breakdown of the functional working of the Government.58

The reasoning and conclusion of Justices Jeevan Reddy and Agrawal on this aspect are similar:

"... it is not each and every non-compliance with a particular provision of the Constitution that calls for the exercise of the power under Article 356(1). The non-compliance or violation of the Constitution should be such as to lead to or give rise to a situation where the government of the State cannot be carried on in accordance with the provisions of the Constitution".59

It is noteworthy that the minority judgments do not express a contrary view on this aspect.

In view of this position it is clear that Article 356 can be invoked only in cases where non-compliance with the Constitution is of such a nature that it results in situations which create an impasse and are not capable of being remedied and where governance of the State has become impossible.

It is respectfully submitted that the majority view is sound and well-founded. It gives effect to the intent of the Founding Fathers, takes into account the experience of the actual operation of Article 356 in our country, pays due regard to the principle of federalism and Centre-State relations and provides a salutary and much needed check on the deep potential for misuse of Article 356.

(B) Scope and extent of judicial review of Presidential proclamation issued under Article 356

On the all important question of judicial review of exercise of power under Article 356 of the Constitution it needs to be emphasised that every member of the nine-judge bench agreed that a Presidential proclamation issued under Article 356 of the Constitution is not completely beyond judicial review. All the judges are also agreed that mala fides provides a ground for judicial interference. The main zone of disagreement has been about the area and extent of judicial review and justiciability of the Presidential proclamation.

The most expansive scope of judicial review is in the judgment of Justices Sawant and Kuldip Singh. Their Lordships held that the President's satisfaction has to be based on objective material and further that the objective material available either from the Governor's report or from other information or both must indicate that the government of the State cannot be carried on in accordance with the provisions of the Constitution. Consequently, the validity of the proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the mala fide exercise of the power. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question.60 (emphasis added)

The reasoning of Justices Sawant and Kuldip Singh and their conclusion reached by them indicate that the Court can examine the existence of the material and the grounds for the issue of the Presidential proclamation under Article 356. Suppose the ground given is that the legislative assembly of a State has not transacted any business at all for four months and its sessions have broken up in pandemonium. If the petition disputes the existence of these facts and makes out a prima facie case supported by cogent and credible material then "the burden is on the Union Government to prove that the relevant material did in fact exist".61 (emphasis added) The logical sequitur is that the Court can go into the correctness and the truth or otherwise of these basic facts.

Justices Sawant and Kuldip Singh rejected the contention urged on behalf of Union of India that there is difference in the nature and scope of the power of judicial review in administrative law and constitutional law. They rightly held that "many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by constitutional law".62 They introduced, albeit tentatively, the principle of proportionality as "a possible ground for judicial review for adoption in the future. It may be stated here that we have already adopted the said ground both statutorily and judicially in our labour and service jurisprudence".63

Justices Jeevan Reddy and Agrawal emphatically rejected the submission that judicial review of Presidential proclamation is available only in an extremely narrow and limited area since it is a power committed expressly to the President by the Constitution and also the contention that the issue is not one amenable to judicial review because it cannot be resolved by applying known judicially manageable standards. Their Lordships held that "if a proclamation is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be struck down".64

Although there is a broad concurrence with the views expressed by Justices Sawant and Kuldip Singh, their approach, reasoning and conclusion are not similar; indeed in some respect they are different. According to Justices Jeevan Reddy and Agrawal "the truth or correctness of the material cannot be questioned by the court".65 This is not in accord with the conclusion No. 1 of Justices Sawant and Kuldip Singh that the Court can examine the question whether the Presidential proclamation was issued on the basis of any material at all and that after a prima facie case is made out then the Union government has to prove that the relevant material "did in fact exist".66

The reasoning and conclusion of Justices Jeevan Reddy and Agrawal are also coloured by their conclusion (No. 1) that the satisfaction contemplated by Article 356 is subjective in nature.67 These learned judges have further observed, though tentatively, that in case of exercise of power under Article 356 "it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities - nor at any rate, in their entirety".68 To that extent they have differed from the views expressed by Justices Sawant and Kuldip Singh and on this aspect seem to agree with the view of Justices Ahmadi, Verma and Dayal and Justice K. Ramaswamy. The fallacy of this view is pointed out hereinafter. The point is that if there were nothing more, the views of Justices Sawant and Kuldip Singh on this aspect cannot be considered to constitute the majority judgment. But the curious part is that Justice Pandian agrees with conclusion No. 1 of Justices Sawant and Kuldip Singh69 and the more curious part is that Justices Jeevan Reddy and Agrawal find themselves in agreement with conclusion No. 1 "in the judgment of our learned brother Sawant, J. delivered on behalf of himself and Kuldip Singh, J.".70

In view of this curious admixture of agreement with conclusions based on divergent reasoning it is beyond the capacity of ordinary mortals to say with any degree of certainty whether judicial review of Presidential proclamation extends to examining the truth or correctness of basic facts and also whether the tests applicable in administrative law to adjudge the validity of administrative orders and executive action are equally applicable to adjudging the validity of exercise of power under Article 356.

The further modification, or rather dilution, of judicial interference, namely that "even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken"71 is to be found only in the judgments of Justices Jeevan Reddy and Agrawal and is expressed in their conclusion No. 7.72 However, this view can be regarded as the view of the majority and a declaration of the law by the Supreme Court inasmuch as Justice Pandian agrees with it and there is no dissent from this view by Justices Sawant and Kuldip Singh.

The sharpest divergence about the scope and extent of reviewability of action taken under Article 356(1) is found in the

minority judgments. The major premises on which they are based may be briefly summarised. A. Presidential proclamation issued under Article 356 is not justiciable because there are no judicially manageable standards for resolving the controversy about failure of constitutional machinery in a State and by its very nature such controversy cannot be justiciable. The issue of a Presidential proclamation entails a political question and hence the Courts should refrain from entering into the political thicket and in the words of Justice Verma "these political decisions call for judicial hands off".73 B. The repository of power or discretion exercisable under Article 356 is the highest executive of the State, viz. the President. The satisfaction of the President is basically subjective and a wide discretion is conferred upon him under Article 356. These features severely narrow the area of judicial review. Consequently judicial review is limited to cases where the action is mala fide or plainly ultra vires. C. The norms and yardsticks applied in administrative law to test the validity of administrative action are inapplicable in judging the validity of exercise of power under Article 356 of the Constitution. D. Article 356 is in the family of emergency provisions. If judicial review is available in case of exercise of power under Article 356 the same principle may be applied to exercise of power under Article 352 to declare emergency which, it is assumed, is impermissible.

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It is proposed to deal with each of the aforesaid premises seriatim.

(A) The minority judgments74 are broadly in agreement with the decision in the State of Rajasthan75 regarding the limited scope and ambit of judicial review in case of exercise of power under Article 356. In that decision the Court specifically rejected the contention that exercise of power under Article 356 raises a political question and the subject matter is not amenable to judicial determination. It held that "... merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'judicial hands off' ".76 (emphasis added)

This view was reiterated by Bhagwati J in Minerva Mills v. Union of India77 without any dissent or reservation by the majority as follows:

"This is also the view taken by Gupta, J. and myself in State of Rajasthan v. Union of India.78 I pointed out in my judgment in that case and I still stand by it, that merely because a question has a political colour, the court cannot fold its hands in despair and declare 'judicial hands off' ".79

Subsequently in Kehar Singh's case80 some of these observations were cited with approval. It is submitted that the conclusion of Verma, J. that the decisions under Article 356 are "political decisions which call for judicial hands off"81 runs counter to the aforesaid well settled legal position.

The minority judgments failed to appreciate that the observations of Justice Bhagwati in the State of Rajasthan82 about fast changing situations, potential consequences, public reaction etc. were made in the context of the fact that no presidential proclamation was issued when the matter was argued before the Supreme Court. One of the submissions of the Union of India was that many things could happen between the date of despatch of the Home Minister's letter and the Law Minister's radio broadcast and the ultimate presidential proclamation that may be issued under Article 356 and consequently it was not possible for the Court to guess or anticipate such events.

The examples given by Justices Ahmadi and Ramaswamy for exercise of judicial review are inconsistent with their conclusion about the non-justiciability of the Presidential proclamation and the inability of the Courts to question political decisions and examine the merits of the decision. For example, Ahmadi, J. has held,83 with respect rightly, that the issue of Presidential proclamation under Article 356 and dissolution of State Assemblies solely on the ground that a new political party has come to the power at the Centre would be an exercise of power on considerations extraneous to the

said provision. The necessary sequitur is that in such a case the court can exercise judicial review and strike down the proclamation. That can only be on the basis that the subject matter of exercise of power under Article 356 is justiciable and in such a case there is no question of "entering the political thicket and questioning the political wisdom which the Courts of law must avoid"84 nor is it an instance of "yielding to the temptation of questioning the political wisdom".85

The examples given by Justice Ramaswamy where judicial review would be available in the case of Presidential proclamation are : (a) recommendation by the Governor for dissolution of the assembly on the resignation of the Chief Minister without attempting to form an alternative government; (b) dissolution of the assembly under Article 356 on account of the Chief Minister's inability to cope with his majority in the legislature.86 It will be observed that these relate to 'political questions' and necessarily entail adjudication of the merits of the matter. It is difficult to reconcile this part of the judgment with the learned judge's decision about non-justiciability of the Presidential proclamation and his conclusion that judicial review is concerned with the decision making process and not with the merits of the matter. However, a closer reading of his Lordship's judgment indicates that the grounds for judicial interference set out under the high sounding caption of "high irrationality"87 are not really different from those formulated by the majority as is evident from the following grounds for interference set out in his judgment:

"If the court, upon the material placed before it finds that the satisfaction reached by the President is unconstitutional, highly irrational ... bears no nexus between purpose of the action and the satisfaction reached by the President...".88

(B) The reason for limiting judicial review on the premise that the repository of power is the highest executive of the State is fallacious. The well settled constitutional position is that every function to be discharged by the President under our Constitutional scheme including the power to issue a proclamation under Article 356 has to be discharged only upon and in accordance with the advice of the Council of Ministers. The Constitution Bench in Maru Ram case89 reiterated the settled legal position by holding that the expression President wherever it occurs in the Constitution is a shorthand for the Central government. There is no scope for exercise of individual judgment or discretion on the part of the President in the matter of issuance of a Presidential proclamation under Article 356. The satisfaction, in reality, is that of the Council of Ministers and which when challenged becomes the subject matter of judicial review. Consequently repeated references to the high position occupied by the President and his being the head of the State are devoid of legal and constitutional significance and are totally irrelevant in determining the scope and ambit of judicial review.

In any event, the correct legal position is that "the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision, and not upon the personality or individual circumstances of the person called upon to make the decision".90 (emphasis added)

Furthermore the conclusion about non-justiciability based on the implied premise that the President exercises prerogative power in issuing a proclamation under Article 356 is unwarranted. Our Constitution does not recognise the doctrine of prerogative91 and power under Article 356 cannot be regarded as a prerogative. Moreover, according to Lord Roskill in Council of Civil Service Unions v. Minister for the Civil Service92, prerogative powers include the prerogative of mercy and which according to him is not "susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process"93. This is clearly contrary to the decision of the Supreme Court in Kehar Singh v. Union of India94 in which the Constitution Bench has unanimously held that the order of the President under Article 72 which confers upon him the power to grant pardon is not completely beyond judicial review which is available for determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power. The arguments of the Attorney General were that the power of pardon can be exercised for political considerations and therefore is not amenable to judicially manageable standards and consequently the subject matter of grant of pardon is not justiciable.95 These were rejected by the Constitution Bench which held in terms that the question as to the area of the President's power under Article 72 can be examined by way of judicial review.96 It is respectfully submitted that in view of the judgment in Kehar Singh, which is good law and whose correctness has not been questioned or doubted, the observations of Lord Roskill have no application in our constitutional jurisprudence and the reliance placed on them by Justice Verma97 is misplaced.

Another infirmity in the minority judgments lies in the undue homage paid to the subjective formula employed in Article 356 in reaching the conclusion that the satisfaction under Article 356 is basically subjective. What has been overlooked is that the power under Article 356 is not unfettered or unlimited. The words of Article 356 are not simpliciter "if the President is satisfied" or "if he deems fit" or "if he thinks it necessary or appropriate" he may issue a proclamation. It is a conditional power and it can only be exercised provided the requisite factual situation which is a condition precedent to the exercise of power exists.

The minority also failed to appreciate that the "language of this kind is merely one of many devices for disarming the courts".98 The present trend is of hardening judicial attitude to this device. Courts are not impressed nor disarmed by the subjective phraseology and have exercised judicial review for determining the basic question namely whether the requisite satisfaction or opinion was reasonably reached on relevant material.99 The hey-day of subjective satisfaction is over and the nail on its coffin was firmly fixed by the House of Lords in the celebrated Tameside case.100 In the words of Lord Wilberforce:

"The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self- direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account".101

(emphasis added)

The same approach was adopted after an elaborate discussion of the law much earlier by Justice Tulzapurkar in the Bombay High Court in Minoo Kalifa v. Union of India.102

The Supreme Court has despite the subjectivity formula applied an objective test. In Harakchand Ratanchand Banthia v. Union of India103 the Court notwithstanding the expression "so far as it appears to him to be necessary or expedient for carrying out the provisions of this Act" held that "the opinion of the Administrator as to the necessity or expediency of making the order must be reached objectively after having regard to the relevant considerations and must be reasonably tenable in a court of law".104

A similar approach was adopted in M.A. Rashid v. State of Kerala105 where the Supreme Court held that "where powers are conferred on public authorities to exercise the same when 'they are satisfied' or when 'it appears to them' or when 'in their opinion' a certain state of affairs existed", the courts will find out "whether conditions precedent to the formation of the opinion have a factual basis". (emphasis added)

The Pakistan judiciary has in construing Articles 48(2) and 58(2)(b) of the Constitution of Pakistan 1973, which are analogous to Article 356(1), applied the objective test in Federation of Pakistan v. Mohammad Saifullah Khan106, a decision of a Bench of twelve-judges of the Pakistan Supreme Court. Despite the subjective formula "in his opinion" the Pakistan Supreme Court in the recent decision in Nawaz Sharif case held that

"if it could be shown that no grounds existed on the basis of which a honest opinion could be formed 'that a situation had arisen in which the government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary' the exercise of the power would be unconstitutional and open to correction through judicial review".107

The Lahore High Court108 held that :

"No doubt, the Courts will be chary to interfere with the President's 'discretion' or formation of the 'opinion' about the 'situation'. But if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena ...".109

It was further observed that the reasons given for the action must be "supportable by law in a Court of Justice. ... Not reasons which have no nexus to the action, are bald, vague, general or such as can always be given ...".110

The approach and reasoning of the Pakistan Courts are sound and commendable and the majority judgments have rightly adopted them. No convincing reason has been given in the minority judgments for not accepting the Pakistan decisions except the cryptic observation of Justice Ramaswamy that these judgments "do not assist us".111

(C) There is no warrant either in principle or in precedent for the conclusion that the norms and parameters for adjudging the validity of administrative action are not applicable for testing the validity of exercise of constitutional power and in particular the action taken under Article 356. The leading judgment of Bhagwati and Gupta, JJ. on the aspect of limited judicial review in the State of Rajasthan112 with which the judges in the minority profess to largely agree, formulated the scope of judicial review in the following words:

"But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it ...".113 (emphasis added)

It needs to be emphasised that the grounds for judicial review thus formulated are precisely the same as those which are applied in administrative law to test the validity of administrative and executive action. The yardstick is the same and not different as observed by Justice Ahmadi.114 Indeed Justice Bhagwati's formulation is in substance the same as that of Lord Upjohn in Padfield case115 - a landmark decision in administrative law. According to Lord Upjohn one of the grounds which would vitiate administrative orders or action would be "... by taking into account some wholly irrelevant or extraneous consideration, or by wholly omitting to take into account a relevant consideration".

The Supreme Court following Padfield116 has formulated the grounds for interference with regard to executive decision

in Hochtief Germany v. State of Orissa117 as follows:

"The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration".118

Furthermore the Privy Council, which cannot be accused of being a radical or an over-liberal judicial tribunal, has in Teh Cheng Poh v. Public Prosecutor, Malaysia119 applied the same test in the case of exercise of emergency power under the Malaysian Constitution in the context of Section 47 of the Internal Security Act 1960 of Malaysia. The section was couched in subjective formula and power to proclaim an area as a security area was left to the opinion of the Yang di-Pertuan Agong. The Privy Council recognised that the power to proclaim a security area was "a discretionary one". It however held that this did not exclude the jurisdiction of the court to inter alia inquire whether in exercising the power, "he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration".120 The Privy Council applied administrative law norms to adjudge the validity of exercise of constitutional power under provisions dealing with public security and emergency. The Privy Council judgment negatives the view about different yardsticks to be applied. Unfortunately this judgment which was cited has not been referred to.

(D) The reasoning that the Presidential proclamation under Article 356 is not justiciable because on a parity of reasoning proclamation of emergency under Article 352 may also become justiciable is untenable. In the first place, Article 352 and 356, although they are in the 'family' of emergency provisions, are not comparable both with regard to the nature of the power and the consequences of its exercise. Moreover the assumption that the proclamation of emergency is indubitably non-justiciable is unfounded. In Minerva Mills case121 Justice Bhagwati has clearly held that:

"A proclamation of emergency is undoubtedly amenable to judicial review though on the limited ground that no satisfaction as required by Article 352 was arrived at by the President in law or that the satisfaction was absurd or perverse or mala fide or based on an extraneous or irrelevant ground".122

The majority judgment has not dissented from this view nor expressed any reservations about it.

Besides, the general judicial trend in other countries and in international tribunals is in favour of reviewability of declarations of emergency, albeit on limited grounds. The human rights jurisprudence developed by the European Commission and the European Court of Human Rights functioning under European Convention on Human Rights (ECHR) at Strasbourg has established that the existence of a 'public emergency threatening the life of the nation' is a justiciable issue.123 The Inter-American Commission, has asserted its authority to consider the validity of declaration of emergency by analysing whether the circumstances warranted such a declaration.124

It is significant to note that in the interim South African Constitution power of judicial review of the declaration of emergency and its extension has been expressly conferred upon the superior courts.125 The Philippine Constitution also empowers the Supreme Court to examine the legality of the declaration of martial law both on law and facts.126 This negatives the theory that judges do not have the expertise to decide these questions.

Suppose emergency was clamped down in the entire country in the wake of widespread communal riots consequent upon the destruction of the Babri mosque on the ground of 'armed rebellion' mentioned in Article 352. Could the Court not interfere and strike down the proclamation on the ground that it was ultra vires and based upon a patent misconstruction of the expression 'armed rebellion'? Or suppose, sporadic military encounters with the Pakistani or Chinese troops is made a pretext for declaring emergency on the ground of external aggression. Are Courts powerless to even inquire whether the basic conditions precedent were satisfied? Undoubtedly the occasion for the exercise of the power would be extremely rare and Courts would give wide latitude and accord a substantial margin of appreciation to the executive's assessment of the reality and gravity of the situation. But that is no reason for denying the existence of power of judicial review.

Article 74(2)

True interpretation and effect of Article 74(2) was one of the vexed issues before the Court, particularly in view of certain observations made in the State of Rajasthan.127

The main argument centered upon the question whether Union of India was obliged to disclose the grounds or reasons and material which formed the basis of the action under Article 356 and the legal consequence of such non-disclosure. The contention of the Union was that disclosure of reasons and material would really amount to disclosure of advice and that was expressly barred by Article 74(2) of the Constitution.

Justices Sawant and Kuldip Singh neatly summed the legal position as follows:"

... The object of Article 74(2) was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary

to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable".128

Justices Jeevan Reddy and Agrawal after an elaborate discussion about the underlying object of Article 74(2), which is a reproduction of Section 10(4) clause 2 of Government of India Act, 1935, held that Article 74(2) is "confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers". Its scope cannot be extended beyond its legitimate field and "cannot override the basic provisions in the Constitution relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same ... by disclosing the material which formed the basis of the act/order". It was held that "the material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice". It was further observed that "even if the material is looked into by or shown to the President, it does not partake the character of advice".129

The reasoning and conclusions of Justices Jeevan Reddy and Agrawal, in view of the agreement of Justice Pandian and the broad concurrence of Justices Sawant and Kuldip Singh represent the majority view and authoritatively declare the law about the scope and effect of Article 74(2).

The minority judgments do not reflect wide divergence on this point. In Justice Ahmadi's view "since reasons would form part of the advice, the Court would precluded from calling for their disclosure". However the learned judge agrees that "Article 74(2) is no bar to the production of all the material on which the ministerial advice was based".130

Justices Verma and Dayal and Justice Ramaswamy are also of the view that "Article 74(2) is no bar to production of the materials on which the ministerial advice is based".131 All judges have stated that the production of material which is not barred by Article 74(2) may yet be subject to a claim for privilege under Section 123 of the Evidence Act.132

'Or Otherwise' in Article 356

A frequent expedient employed to disable Courts from exercising effective judicial review was to state in the Presidential proclamation that in addition to the Governor's report the satisfaction was also based on 'other information' and then contend that the same could not be disclosed to Court and therefore the Court would have no basis for determining whether the material relied upon was irrelevant or irrational. Short shift was given to this line of argument by Justice R.S. Sidhwa in the Lahore High Court who held that if the government did not "choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer".133 Justice Hansaria in the Gauhati High Court adopted the same approach134 which has commended itself to Justice Jeevan Reddy.135 Similar trend is reflected in Padfield case136 where it was observed by Lord Upjohn that if no reasons are disclosed in support of the decision Court would assume that none existed.137 In Bommai case Justice Sawant has cited with approval the aforesaid observations of Justice Sidhwa.138 Justice Jeevan Reddy is more emphatic. He held that if "the Union of India does not indicate or state that any other information/material was available to the President or the Union Council of Ministers other than the report of the Governor - much less disclose it" the Court "must hold that there was no other information before the President except the report of the Governor and that the word 'and other information received by me' were put in the proclamation mechanically".139 This is a welcome development which would have deeply heartened our Founding Fathers, especially H.V. Kamath, who condemned the insertion of the expression 'or otherwise' in the Article as a diabolic word.140

No dissolution of assembly before Parliamentary approval

One of the important issues decided by the majority is that State legislative assembly cannot be dissolved merely upon issue of Presidential proclamation and before Parliamentary approval is accorded as required by Article 356(3). The plain language of the provision does not impose any such requirement. The impelling consideration for reading into the article such limitation was the anxiety to place a check on the executive and also to ensure that grant of final relief does not become difficult if not infructuous.141 Historical realism prevailed over literalism.

The majority further held that until Parliament grants approval the legislative assembly can be suspended by "suspending the provisions of Constitution relating to the legislative assembly under sub-clause (c) of clause (1)".142 Justices Jeevan Reddy and Agrawal disagreeing with Justices Sawant and Kuldip Singh held that it is impermissible to take over some of the functions and powers of the State government while keeping the State government in office because "there cannot be two governments in one sphere".143

Article 365

Article 365 of the Constitution was introduced almost fugitively towards the fag end of the Constituent Assembly Debates.144 It provides that:

"Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution."

It is curious that this significant provision had escaped judicial attention until Supreme Court decision in Bommai. According to Justices Sawant and Kuldip Singh "Article 365 is more in the nature of a deeming provision".145 However, as explained by Justices Jeevan Reddy and Agrawal "the directions given must be lawful and their disobedience must give rise to a situation contemplated by Article 356(1)". Furthermore, "it is not as if each and every failure ipso facto gives rise to the requisite situation. The President has to judge in each case whether it has so arisen. Article 365 says it is permissible for him to say so in such a case. The discretion is still there and has to be exercised fairly."146

The interpretation placed by the Court on Article 365 will be a welcome check on any tendency to have recourse to this Article for imposing President's rule even though the situation contemplated by Article 356(1) has not arisen.

Criterion for determining strength of the Ministry : Floor test

One important question which arose in Bommai147 was the proper method for testing the strength of the Ministry and to determine whether it has lost or still retains the confidence of the House. The majority view is that the floor of the House is the sole constitutionally ordained forum. The assessment of the strength of the Ministry is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides.148 This rule can be departed from only in an extraordinary situation where because of all-pervasive violence a free vote is not possible in the House.149 Justices Jeevan Reddy and Agrawal also adverted to the importance of the Tenth schedule to the Constitution whose object is to prevent and discourage 'floor-crossing' and defections.150

No floor test was held by the Governors in Karnataka and Nagaland before dissolving the legislative assemblies and the Presidential proclamation was based on the personal assessment of the Governors about loss of confidence by the ministries in these States. Consequently the Presidential proclamations were struck down. Curiously no pronouncement is made about the Presidential proclamation in Nagaland by the minority judges.

The declaration of law by the majority is a salutary development. It is a notorious fact that some of the main players in the toppling game of President's rule have been the Governors of the State. The Orissa High Court151 had in 1974 taken a similar view. This is also in keeping with the unanimous report of the Five member committee of Governors152 as also with the recommendations of the Sarkaria Commission.153

Sarkaria Commission Recommendations

It is not clear whether the recommendations of the Sarkaria Commission can be regarded as having become the law of the land.

Justices Sawant and Kuldip Singh have expressed broad agreement with the illustrative instances of misuse of power set out in para 6.5.01 of the Report and have further endorsed recommendations of the Commission made in paras 6.8.01 to 6.8.04. One of the recommendations endorsed is about issue of a prior warning to a State government before imposing President's rule in a State unless the situation is urgent and cannot brook delay.154 Justices Jeevan Reddy and Agrawal have accorded great weight to these recommendations which in their view "do merit serious consideration" but have not endorsed them.155

According to Justice Ramaswamy the recommendations of the Sarkaria Commission "though they bear weight, it is for the consideration of the political parties or Governments, but judicially it would not be adopted as guidance as some of them would be beset with difficulties in implementation".156 We are not enlightened about the difficulties visualised by his Lordship.

In view of Justice Pandian's concurrence with the reasoning of Justices Jeevan Reddy and Agrawal it would appear that the recommendations of Sarkaria Commission, though entitled to great weight, are not legally binding. However, any departure from these recommendations would raise a prima facie presumption of illegality or impropriety of the action so taken.

Does State of Rajasthan survive after Bommai?

One of the points for consideration is whether State of Rajasthan157 survives the battering it has received in Bommai?158 Is it any longer good law and if so to what extent?

The decision is good law to the extent that it has held that judicial review is available in respect of exercise of power under Article 356 of the Constitution and that Courts cannot adopt the attitude of "judicial hands off" on the ground that the issue raises a political question. However, the limited minimal area of judicial review carved out by the decision has not been accepted by the majority in Bommai159 and consequently the decision no longer holds the field as regards the scope and extent of judicial review.

The decision is also no longer good law in so far it lays down or is interpreted as laying down the proposition that State assemblies can be dissolved solely on the ground of a new political party having come to power at the centre with a sweeping majority. Again the interpretation placed by it upon Article 74(2) which has the effect of barring the production of material on which the ministerial advice is based has been expressly dissented from. The view that Presidential proclamation can be issued before grant of Parliamentary approval has not been accepted. Thus for all practical purpose the decision deserves to be confined to the archives unless it is resurrected later by a new majority in the Supreme Court.

Reliefs

What are the reliefs that can be granted in case of actual or threatened exercise of power under Article 356?

There is unanimity that "the Court will not interdict the issuance of the proclamation or the exercise of any other power under the proclamation".160 There is divergence about whether the Court can by an interim injunction restrain the holding of fresh elections to the legislative assembly. The majority view expressed by Justices Sawant and Kuldip Singh is that Court can exercise this power to avoid judicial review "being rendered fruitless".161 Justices Jeevan Reddy and Agrawal are also of the view "the High Court/Supreme Court can also stay the dissolution of the assembly but not in such a manner as to allow the assembly to continue beyond its original term" provided the petition is disposed of within "two to three months".162 What is the position if that does not happen? No light is shed on the subject.

As regards the grant of substantive main relief the majority view is that if the proclamation issued is declared invalid it will be open to the Court to "restore the dismissed government to office and revive and reactivate the legislative assembly wherever it may have been dissolved or kept under suspension. ... While restoring the status quo ante, it will be open for the Court to mould the relief suitably and declare as valid actions taken by the President till that date."163

The majority view is based on sound principle and accords with basic fairness and commonsense. A mere declaration of unconstitutionality without granting consequential relief would be a teasing illusion and in effect confer immunity upon unconstitutional action. Moreover judicial review in the absence of grant of full and effective relief would be a futile exercise. The Pakistan judiciary has adopted a similar approach and granted full relief without any untoward consequences.164

Article 356 and the basic structure doctrine

The most hotly debated issue before the Supreme Court was the validity of the Presidential proclamations and the dismissal of BJP governments in the States of Madhya Pradesh, Himachal Pradesh and Rajasthan. The Court unanimously upheld the action albeit by different process of reasoning. There is no disagreement with the major fundamental premise that secularism is a basic feature of the Constitution. All judges are also agreed upon the far reaching proposition that violation of a basic feature of the Constitution, including the secular features of the Constitution, is a valid ground for exercise of power under Article 356. One criticism levelled is that the basic structure theory evolved by the Supreme Court specifically with reference to the amending power cannot be invoked for exercise of power under Article 356 particularly when, according to the Supreme Court,165 the validity of parliamentary legislation cannot be tested on the basic structure theory. This criticism is misconceived. Non-compliance with important provisions of the Constitution is undoubtedly a ground for imposing President's rule. Essential features of the Constitution are certainly an important part of the Constitution, indeed its basic structure. There is no reason in principle why Article 356 cannot be invoked when there is cogent and credible material that the government of a State is being carried on in violation of or defiance of the essential features of the Constitution.

As regards the merits of the Presidential proclamations the minority had little difficulty in upholding them in view of their narrow interpretation of the scope of judicial review and on the ground that they "are not justiciable" according to Justices Verma and Dayal166 and also because the "President's satisfaction cannot be said to be unwarranted".167

On what grounds did the majority uphold the proclamations and how can it be reconciled with their formulation of judicial review?

According to Justices Sawant and Kuldip Singh any professions and actions which go counter to the creed of secularism are a prima facie proof of conduct in defiance of the provisions of our Constitution.168 Justices Jeevan Reddy and Agrawal held that any party or organisation which seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution would certainly be guilty of following an unconstitutional course of action.169

After laying down these propositions the learned judges examined the material which was before the Central government for reaching the requisite satisfaction viz. (i) the BJP manifesto which declared that the party is committed to build Sri Ram Mandir at Janmasthan by relocating superimposed Babri structure with due respect; (ii) speeches of leaders of BJP to the same effect; (iii) the membership of RSS of some Chief Ministers and Ministers and the unlikelihood of implementing the ban on RSS by the State government whose Ministers were members of the banned organisation; (iv) exhortation by the Ministers to people to join kar seva in Ayodhya on 6-12-92; (v) public send off to kar sevaks and welcoming them on their return after the destruction of the mosque; and (vi) atrocities against the Muslims and loss of lives and destruction of property in two States, viz. Madhya Pradesh and Rajasthan.

According to Justices Sawant and Kuldip Singh "if the President had acted on the aforesaid 'credentials' of the Ministries in these States which had unforeseen and imponderable cascading consequences, it can hardly be argued that there was no material before him".170 In their view a reasonable prognosis of events to come and of their multifarious effects to follow can always be made on the basis of the events occurring. If such prognosis led to the requisite satisfaction that could hardly be faulted because in their Lordships' view there was enough material that the Governments of the three States could not be carried on in accordance with the provisions of the Constitution.171

According to Justices Jeevan Reddy and Agrawal "if the President was satisfied that the faith of these BJP governments in the concept of secularism was suspect in view of the acts and conduct of the party controlling these governments ... we are not able to say that there was no relevant material upon which he could be so satisfied". The situation following the destruction of the Babri mosque was "full of many imponderables, nuances, implications and intricacies. There were too many ifs and buts which are not susceptible of judicial scrutiny".172

Thus both on the ground of sufficiency of evidence and its relevance the majority upheld on the facts the dismissal of the three State governments.

It is not the conclusion reached by their Lordships which raises serious questions but their observations having far reaching effect made in the course of the judgment. According to Justices Jeevan Reddy and Agrawal "if a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favourable position". They further held that "under our Constitution, no party or organisation can simultaneously be a political and a religious party. It has to be either."173

There is no dissent or qualification or reservation by any of the other judges on this part. Accordingly the legal position enumerated by Justices Jeevan Reddy and Agrawal can be regarded as the law laid down by the apex Court. It is impossible to describe them as obiter dicta.

It is submitted that these propositions are over-broadly stated. It assumes that every religious party is necessarily and intrinsically anti-secular for which there is no warrant. Again there is no basis for the supposition that "if a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official religion".174 A religious party may have a humanistic creed and its activities may not be at all calculated to subvert or sabotage secularism. It all depends upon the constitution, organisation and, above all, the actual functioning of a party. It must be remembered that the right of association is a guaranteed fundamental right under Article 19(1)(c) which can be restricted reasonably only on the grounds mentioned in Article 19(4).

Epilogue

The decision in Bommai marks the high water mark of judicial review. It is a very salutary development and will go a long way in minimising Centre's frequent onslaught on the States who as rightly pointed out "are neither satellites nor agents of the Centre" and "have as important a role to play in the political, social, educational and cultural life of the people as the Union"175. However there is genuine concern about misuse by the Centre of Article 356 on the pretext that the State Government is acting in defiance of the essential features of the Constitution. The real safeguard will be full judicial review extending to an inquiry into the truth and correctness of the basic facts relied upon in support of the action under Article 356 as indicated by Justices Sawant and Kuldip Singh. If in certain cases that entails evaluating the sufficiency of the material, so be it. The line between the existence of material and its relevance is not a rigid one and is susceptible of flexible fluctuation depending on the facts of a particular case. And there can be no better instance than the conclusions reached by the Court on facts with regard to Presidential proclamations in the three BJP run States.

It is unfortunate that there could be no unanimity on this vital issue of scope of judicial review. The minority judgments display an over cautious approach and moreover have ignored the undeniable reality of blatant misuse of Article 356 by all political parties in our country. Any timorous retreat in future from the robust judicial activism reflected in Bommai will cause serious problems and lead to the pernicious consequence of one or more basic features of the Constitution being invoked to destroy another essential feature, Federalism.

The unanimity about secularism being a part of the basic structure is heartening and is most welcome. However, there are individual observations by some judges about what are the essential features of the Constitution and whether they

form part of the basic structure of the Constitution. The grave importance of a decision on this issue and its impact on the amending power under Article 368 of the Constitution as well as its implications for the exercise of power under Article 356 cannot be over-emphasised. A decision on this vital issue should be arrived at consciously by all the judges constituting the bench. The only issue in Bommai relating to the basic structure was whether secularism is an essential feature of the Constitution, which all the judges have wholeheartedly answered in the affirmative. There was no controversy about what other features of the Constitution can be regarded as part of its basic structure. Yet there are observations by Justice Ahmadi that "fundamental rights enshrined in Articles 15, 16 and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution"176. Justices Sawant and Kuldip Singh mention "social pluralism and pluralist democracy" as part of the basic structure177. Justice Ramaswami describes, amongst others, socialism and social justice, religious tolerance and fraternity as essential features178.

These observations cannot be regarded as declaration of the law by the Supreme Court nor can they be regarded as obiter dicta of the apex court which the High Courts are bound to follow because as pointed out no occasion arose for making them. Moreover there can be no general declaration about a permanent catalogue of essential features. The matter has to be decided on a case to case basis. March of events, political, economic and social developments and new trends in public and juristic thinking may lead to a different perception and formulation of essential features. However any change or qualification in this regard should be reached after full debate and deep deliberation by all the judges and there should be clear enunciation of the law on this all important issue so as to conduce to certainty and obviate the wasteful expenditure of time and energy in determining the status and effect of these observations and their binding effect or otherwise on the High Courts.

The sad part is that at the end of the day it is not possible to deduce with certainty the true ratio of the judgment with regard to various other issues on which separate and disparate pronouncements have been made.

An agreed order recording the final conclusions which flow from the majority decision was very necessary. Law, it is rightly said, should be clear and precise. The same wholesome prescription applies to declaration of law by the highest court of the land particularly as we are informed by it that "judges are presumed to know the tendency of parties concerned to interpret the language in the judgments differently to suit their purposes and the consequent importance that the words have to be chosen very carefully so as not to give room for controversy"179. (emphasis added)

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- Constituent Assembly Debates (CAD), Vol. IX, 170 Return to Text
- Ibid, 151 Return to Text
- Ibid, 132-35; 148 Return to Text
- Ibid, 177 Return to Text
- Ibid, 177 Return to Text
- (1994) 3 SCC 1 Return to Text
- AIR 1965 Ker 229 Return to Text
- AIR 1968 P&H 441 Return to Text
- AIR 1973 Cal 233 Return to Text
- AIR 1974 AP 106 Return to Text
- Ibid, 110 Return to Text
- (1975) 2 AWR 277 Return to Text
- Ibid, 301 Return to Text
- AIR 1974 Ori 52 Return to Text
- Ibid, 69-70 Return to Text
- (1977) 3 SCC 592 Return to Text
- 632 per Beg, C.J.; 644 per Chandrachud, J.; 662-663 per Bhagwati and A.C. Gupta, JJ.; 670 per Goswami, J.; 673 per Untwalia, J.; 694 per Fazal Ali, J. Return to Text
- Ibid, 629 para 78; 644 para 130; 665-666; 670; 675; 694 Return to Text
- Ibid, 646 Return to Text
- Ibid, 661 Return to Text
- Ibid, 662 Return to Text
- Ibid, 663 Return to Text
- Ibid, 664 Return to Text
- Ibid, 664, para 153 Return to Text
- Ibid, 665 Return to Text
- Ibid, 655 Return to Text

- Ibid, 655 Return to Text
- Ibid, 656-57 Return to Text
- (1982) 1 SCC 271 Return to Text
- Ibid, 297, para 27 Return to Text
- Supra, f.n. 16 at 663 Return to Text
- Supra, f.n. 6 at 270 Jeevan Reddy, J. has emphasised that by the deletion of Article 356 (5), "The cloud cast by the clause on the power of judicial review has been lifted." Return to Text
- (1982) 2 Gau LJ 468 Return to Text
- Ibid, 486, 488 Return to Text
- Ibid, 517. Justice Hansaria's view has been accepted by Justice Jeevan Reddy in Bommai, supra f.n. 6 at 284 Return to Text
- AIR 1990 Karn 5 Return to Text
- 1993 Jab LJ 387 (FB) Return to Text
- Ibid, 65 Return to Text
- Ibid, 67 Return to Text
- Ibid, 83 Return to Text
- Ibid, 87 Return to Text
- Ibid, 150 Return to Text
- Ibid, 210 Return to Text
- Supra, f.n. 16 Return to Text
- Supra, f.n. 6 Return to Text
- 24 QBD 117 at 120 Return to Text
- 24 QBD 678 at 682. These cases are referred to in CWT v. Dr Karan Singh, 1993 Supp (4) SCC 500 at 509 Return to Text
- Ramesh Birch v. Union of India, 1989 Supp (1) SCC 430 at 468 Return to Text
- Supra, f.n. 6 at 190, para 219 Return to Text
- Ibid, 190, para 220 Return to Text
- ITO v. M.C. Ponnoose, (1969) 2 SCC 351 at 354-5 Return to Text
- Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 at 7, para 16 Return to Text
- R.C. Cooper v. Union of India, (1970) 1 SCC 248 at 277 where Shah, J. speaking for the majority made an express reservation about the point regarding the jurisdiction of the Court to examine the validity of the ordinance on which aspect the dissenting judgment of Ray, J. had expressed an opinion. See also R.K. Jain v. Union of India, (1993) 4 SCC 119 at 134 where Ahmadi, J. clarified the extent of concurrence with the concurring but separate judgment of Ramaswamy, J. Return to Text
- Supra, f.n. 6 Return to Text
- Ibid, at 103 Return to Text
- Ibid, at 103 Return to Text
- 1992 PLD, SC 646 at 664 Return to Text
- Ibid Return to Text
- Supra, f.n. 6 at 220, para 281 Return to Text
- Ibid, at 93, para 59 Return to Text
- Ibid, at 148, para 153 Return to Text
- Ibid, at 94, para 62 Return to Text
- Ibid, at 95, para 63 Return to Text
- Ibid, at 148, para 153 Return to Text
- Ibid, at 268, para 374 Return to Text
- Ibid, at 148, para 153 Return to Text
- Ibid, at 296, para 434 Return to Text
- Ibid, at 267 (E-F) Return to Text
- Ibid, at 65, para 2 Return to Text
- Ibid, at 299, para 435 Return to Text
- Ibid, at 268 Return to Text
- Ibid, at 297 Return to Text
- Ibid, at 85, para 45 Return to Text
- Ibid, at 82; 85; 180 Return to Text
- Supra, f.n. 16 Return to Text
- Ibid, 661 Return to Text
- (1980) 3 SCC 625 Return to Text
- Supra, f.n. 16 Return to Text
- Supra, f.n. 77 at 693 Return to Text
- (1989) 1 SCC 204, 214-215 Return to Text
- Supra, f.n. 6 at 85 Return to Text
- Supra, f.n. 16 at 662 Return to Text
- Supra, f.n. 6 at 79 Return to Text
- Ibid, at 82 Return to Text

- Ibid, at 82 Return to Text
- Ibid, at 191 Return to Text
- Ibid, at 209, para 260 Return to Text
- Ibid, at para 227 and 193 Return to Text
- Maru Ram v. Union of India, (1981) 1 SCC 107 at 146-47. It is surprising that Jeevan Reddy, J. has at times succumbed to this fallacy supra f.n. 6 at 267 (E-F); 268, para 375. after correctly laying down that the power under Article 356 is that of the Union Council of Ministers; p. 266, para 372; p. 296, para 434. Return to Text
- Leech v. Deputy Governor of Parkhurst Prison, 1988 AC 533, 583; See Lord Acton's dictum: "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases." Letter dated 5.4.1887 to Mandel (Historical Essays and Studies, 1907) Return to Text
- Supra, f.n. 16 at 629 para 79; supra, f.n. 6 at 391; A.G. Kazi v. C.V. Jethwani, AIR 1967 Bom 235, 246 Return to Text
- 1985 AC 374 Return to Text
- Ibid, 418 Return to Text
- Supra, f.n. 80 Return to Text
- Ibid, 215-216 Return to Text
- Ibid, 216-217 Return to Text
- Supra, f.n. 6 at 84 Return to Text
- Wade : Administrative Law, 6th Edn., p. 450 Return to Text
- Ibid, 449, 451 Return to Text
- 1977 AC 1014 Return to Text
- Ibid, 1047. The observations of Jeevan Reddy, J. that "Since it is a case of subjective satisfaction, question of observing the principles of natural justice does not and cannot arise" were unnecessary. If they purport to lay down a general proposition about cases of subjective satisfaction they run counter to the trend of judicial decisions. See Durayappah v. Fernando, (1967) 2 AC 337 at 348; Minoo v. Union of India, (1974) 76 Bom LR 788 at 801. Return to Text
- (1974) 76 Bom LR 788 Return to Text
- (1969) 2 SCC 166 Return to Text
- Ibid, 182 Return to Text
- (1974) 2 SCC 687, 690-691 Return to Text
- (1989) PLD, SC 166 Return to Text
- (1993) PLD, SC 473 Return to Text
- Muhammad Sharif v. Federation of Pakistan, (1988) PLD Lah 725 Return to Text
- Ibid, quoted in supra f.n. 6 at 97 Return to Text
- Ibid, quoted in supra f.n. 6 at 98 Return to Text
- Supra, f.n. 6 at 187, para 215 Return to Text
- Supra, f.n. 16 Return to Text
- Ibid, 663 Return to Text
- Supra, f.n. 6 at 82 Return to Text
- (1968) 1 All ER 694, 717 (F-G) Return to Text
- Ibid Return to Text
- (1979) 2 SCC 649 Return to Text
- Ibid, 659, para 13 Return to Text
- 1980 AC 458 Return to Text
- Ibid, 472 Return to Text
- Supra, f.n. 77 Return to Text
- Ibid, 693-694 Return to Text
- Lawless case, 1 EHRR (European Human Rights Reports) Greek Case 1969 Year Book ECHR 1; Ireland v. U.K., 1978 (2) EHRR 25 Return to Text
- Report on the Situation of Human Rights in the Republic of Columbia, OEA/Ser.L/V/11.53, doc.22, 3 June, 1981; Report on the Situation of Human Rights in the Republic of Bolivia, OEA/Ser.L/V/11.53, doc.6, 1 July, 1981; Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/ V/11.62, doc.10 rev.3, 29 November, 1983. Justice Ahmadi states that counsel agreed that decision under Article 352 cannot be the subject matter of judicial scrutiny. Supra, f.n. 6 at 81 Return to Text
- Section 34(3) Return to Text
- Section 18 of 1986 Constitution of Phillippines Return to Text
- Supra, f.n. 16 Return to Text
- Supra, f.n. 6 at 109 Return to Text
- Ibid, 241-243; This enunciation of the law is in keeping with the decision in S.P. Gupta v. Union of India, 1981 Supp SCC 87. "... it is the advice and its reasons tendered by the Council of Ministers to the President which are protected from enquiry, and no such protection extends to the material from which the advice proceeds" per Pathak, J. at p. 749, para 943. Surprisingly there is no discussion of S.P. Gupta decision. Return to Text
- Ibid, 80 Return to Text
- Ibid, 85-86; 180-81 Return to Text
- Ibid, 80; 86; 109; 180; 242 Return to Text
- Supra, f.n. 108 Return to Text

- Supra, f.n. 33 at 517 Return to Text
- Supra, f.n. 6 at 284, para 409 Return to Text
- Supra, f.n. 115 Return to Text
- Ibid, 719 Return to Text
- Supra, f.n. 6 at 98 Return to Text
- Ibid, 278 Return to Text
- CAD, Vol. IX, p. 140 Return to Text
- Supra, f.n. 6 at 123, para 113; 149 Return to Text
- Ibid, 296, para 434, conclusion 3 Return to Text
- Ibid, 296, para 434, conclusion 4 Return to Text
- 15th, 16th November 1949, CAD, Vol. XI p. 506; 601 Return to Text
- Supra, f.n. 6 at 104 Return to Text
- Ibid, 273 Return to Text
- Supra, f.n. 6 Return to Text
- Ibid, 127-128 Return to Text
- Ibid, 278 Return to Text
- Id. Return to Text
- Supra, f.n. 14 Return to Text
- Report dated 1.1.1971 set out in "President's Rule in the States", ILI Publication, p. 191-237 Return to Text
- Report of Commission on Centre-State Relations, 1988 Return to Text
- Supra, f.n. 6 at 108; 121, para 109 Return to Text
- Ibid, 228; 231; 296 Return to Text
- Ibid, 192 para 224 Return to Text
- Supra, f.n. 16 Return to Text
- Supra, f.n. 6 Return to Text
- Ibid, 148; 253-254; 297 Return to Text
- Ibid, 149 Return to Text
- Id. Return to Text
- Ibid, 225 para 290 Return to Text
- Ibid, 298; 149 Return to Text
- Supra, f.n. 107 Return to Text
- Indira Gandhi v. Raj Narain, 1975 Supp SCC 1 Return to Text
- Supra, f.n. 6 at 85 Return to Text
- Ibid, 210, para 264 Return to Text
- Ibid, 148 Return to Text
- Ibid, 236, para 310 Return to Text
- Ibid, 148 Return to Text
- Id. Return to Text
- Ibid, 296 Return to Text
- Ibid, 236 para 310 Return to Text
- Id. Return to Text
- Ibid, 115 Return to Text
- Ibid, 78 Return to Text
- Ibid, 118, para 106 Return to Text
- Ibid, 205, para 248; 206, para 252 Return to Text
- CWT v. Dr Karan Singh, 1993 Supp (4) SCC 500 Return to Text