On the wrong side

The PCI must act in the interest of a free media and not kowtow to the government

The Press Council of India (PCI)'s support of government restrictions on communication last week was brazenly contrary to its mandate and purpose. It has sought to intervene in a petition by *Kashmir Times* executive editor Anuradha Bhasin, pending before the apex court, seeking an end to the restrictions on communication in Jammu and Kashmir that were imposed before the Government's decision on August 5 to revoke the special constitutional status of the erstwhile State. The petitioner has cited Articles 14 (equality before the law) and 19 (freedom of speech and expression) of the Constitution of India, and the PCI's intervention, if any, should have been on the side of the petitioner. Instead, it has justified restrictions on communication "in the interest of the integrity and sovereignty of the nation". The notion that an open society, and an independent media, are somehow a threat to the nation's integrity and sovereignty is nothing less than a rationale for despotism. That it is coming from a statutory, quasi-judicial, autonomous body whose mandate it is to protect and reinforce a professional and objective media is shocking.

The PCI explains its raison d'tetre as "rooted in the concept that in a democratic society the press needs at once to be free and responsible". Of course, freedom of expression like any other freedom is subject to reasonable restrictions. But the operative word is 'reasonable'. "Where the norms are breached and the freedom is defiled by unprofessional conduct, a way must exist to check and control it. But, control by Government or official authorities may prove destructive of this freedom... Hence, the Press Council," it says. The PCI's stance in the instant case goes against the letter and spirit of this claim. Its track record may not have been stellar; nevertheless, its interventions occasionally held the mirror to deviant journalists and publications and, at the same time, sought to shield the profession and professionals from the highhandedness of the state and non-state actors. It supported the Punjab Press in its "efforts to inform the people truthfully and impartially" during the years of militancy in the early 1990s; around the same period, it pulled up several publications that showed communal bias in coverage of the Ayodhya agitation. In fact, the PCI considers "defaming a community a serious matter" and believes "ascribing to it a vile, anti-national activity is reprehensible and amounts to journalistic impropriety". India is currently witnessing a disturbing debasement of standards in journalism, and the PCI's legal and ethical obligation has never been so critical. Media is often called upon by the state to privilege a narrowly defined national interest over truthful reporting; professional media in a democracy must view truthful reporting in itself as in national interest. The PCI must play its mandated role and not kowtow to the government of the day.

Currency capers

The rupee is falling, but it is too early to start worrying

The rupee is back in the news following a sharp depreciation in its value versus the dollar in the last one month after a prolonged period of relative stability. It has weakened by a little over 4% since mid-July and on Friday nudged the 72 mark to a dollar before retracing its steps. The fall has to be seen in the context of the overall weakness in currencies of emerging markets and Asia in August. The Turkish lira, Brazilian real, South Africa's rand, the Mexican peso have all uniformly lost value versus the dollar with the Argentine peso losing the most, but this has more to do with the Argentine economy's woes. The trigger was China's devaluation of the yuan to below the 7 per dollar level for the first time in more than a decade; the last time that the yuan was seen below the 7 per dollar mark was during the global financial crisis in 2008. The yuan's devaluation is itself a part of the complex trade war that Beijing is now waging with the United States whose President has labelled China a currency manipulator. Emerging market currencies have also been depressed more since the bond yield curve inverted in the U.S. last week when yields on 10-year bonds fell below the two-year note signalling the market's fear of a recession in the U.S. economy. While there's no data to support such fears as of now, the trade spat with China seems to be giving the jitters to the market.

The fall in the rupee is, of course, influenced to some extent by the overall economic slowdown and the sell-out in the equity markets in the last couple of months leading to capital withdrawal by foreign portfolio investors. The capital outflow particularly has hit the currency's valuation. But the fall is no cause for alarm as yet because there is stability on the external account with the current account deficit at a comfortable 0.7% in the quarter ended March 2019. Of course, export growth is depressed but the forex reserves are at historically high levels of $430 billion. In fact, the fall will make India's exporters competitive. Economists often complain that the rupee is over-valued in terms of the real effective exchange rate making exports uncompetitive. Interestingly, the Reserve Bank of India does not appear to have intervened in support of the rupee, signalling that it is not uncomfortable with the fall. The central bank can be relied upon to enter the market if things get too depressing for the currency. The Finance Minister's announcements on Friday are sure to perk up the markets on Monday and the rupee may yet bounce back. But, eventually, in an environment where other major emerging market currencies are depreciating, the rupee cannot be an outlier.

Under the cover of President's Rule

Unless some limitations are read into the Centre's role under Article 356, the designated powers of States are in peril

K. VENKATARAMANAN

The lynchpin of the government's legal measures to declare Article 370 inoperative and reorganise Jammu and Kashmir (J&K) into two Union Territories is the Constitution (Application to Jammu and Kashmir) Order of August 5, 2019. However, the task was not accomplished by that Order alone. The Centre and Parliament also used the fact that the State was under President's Rule to act on behalf of the State government and the State Assembly. This means that another principal source of the government's power was the President's proclamation issued on December 18, 2018, imposing Central rule.

Much has been written about the constitutionality or otherwise of the two principal moves of the Centre: hollowing out Article 370 using the two-pronged mechanism referred to above, and downgrading the State into two Union Territories. One clear way to question and challenge the legality of the measures is to find out whether there are any limitations on the Centre or Parliament using the prevalence of President's Rule to do anything that is not realistically possible to be done if there were a popularly elected legislature in a State.

Proviso suspension

While assuming to himself the functions of the State government and Assembly under Article 356 of the Constitution, the President also suspends portions of the Constitution. One such suspended part is the proviso to Article 3 (this Article empowers Parliament to create or divide States and alter their boundaries). The proviso says the President must refer any proposal to alter a State's name or boundaries to the State legislature for its views. It is an acknowledged fact that under the constitutional scheme, Parliament has overriding powers over the States in this matter. However, in respect of J&K, there is an additional proviso, one found only in the State's own Constitution. This says J&K's legislature has to give its consent to any altering of its boundaries or size or name. Significantly, the Presidential proclamation suspends the second proviso too.

Consider the following: (a) the issuance, "with the State government's concurrence", of the Order of 2019, by which the Order of 1954 was superseded and the reference to 'Constituent Assembly of Jammu and Kashmir' was to be read as the 'Legislative Assembly' (b) the passage of a statutory resolution in Parliament recommending the declaration of Article 370 as inoperative (c) the adoption of a resolution accepting the Jammu and Kashmir Reorganisation Bill, 2019 and, finally, (d) the issuance of a notification by the President on August 6 midnight, declaring Article 370 inoperative. All these were made legally and constitutionally possible only because the State was under President's Rule and the President's Proclamation under Article 356 provided for it.

The legal fiction is that whatever Parliament or the President does in respect of J&K, it is the State Assembly or the State government that is actually doing it. How far should this legal fiction be allowed to prevail? Are there any legal limitations on this substitution of the State's powers and functions with the Centre's own, even if one concedes the wide amplitude of executive power under Article 356?

Extent of judicial intervention

A presidential proclamation under Article 356 is subject to judicial review, going by the verdict of the nine-judge Bench of the Supreme Court in *S.R. Bommai vs. Union of India* (1994). However, the scope for judicial intervention is limited to the adequacy and relevance of the material on the basis of which

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the President comes to the subjective satisfaction that the governance of a State cannot be carried on in accordance with the Constitution. At the same time, the court read another limitation into the same Article. It said the initial exercise of the power is limited to taking over the executive and legislative functions without dissolving the Assembly. Once Parliament approves the proclamation, the Assembly may be dissolved.

India's quasi-federal Constitution is admittedly weighted in favour of the Centre, but the courts have always emphasised that, in their limited domain, States remain 'supreme'. They are not "mere appendages of the Centre". Notwithstanding the Centre taking over all the State government's functions under Article 356, there are certain functions that the States alone can do. If these functions are allowed to be performed by the Centre in lieu of the State government or Assembly in the garb of President's Rule, the concept of States being supreme in their own domain is completely destroyed.

In the realm of law and policy, the Centre may issue orders or enact laws that fundamentally alter the State's policies and programmes. This appears to be permissible under the Constitutional scheme of Article 356, which says the President may assume to himself all or any of the functions of the State government; and Parliament may perform the functions of the State legislature, but the President shall not assume any power vested in the respective High Courts. This schema poses a real danger to the will of the people of a State, as decisions that a popular regime would never make may become possible under President's rule.

What could happen

Some of the possibilities of the kind of anti-federal damage that may be done while a State is under Central rule can be listed: (a) suits instituted by the State against other States or the Centre under Article 131 may be withdrawn or claims against it conceded (b) the power of a State Assembly to ratify Constitution amendments may be exercised by Parliament, and (c) the Assembly may be denied the opportunity to give its views on a proposal to alter the boundaries of the State. In the case of J&K, the consent of its legislature was mandatory, but the State Assembly's consent was given by Parliament itself. The resolution adopted in Parliament stated that since the State legislature's powers are vested in Parliament, "This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019."

To this list of State responsibilities that ought not to be discharged by the Centre while a State is under President's Rule, one may add two more aspects in respect of J&K. One is the power of the J&K government to concur with proposals to modify the way in which provisions of the Constitution apply to the State; and two, the recommendation of the State 'Constituent Assembly' to the President to declare Article 370 inoperative. These two measures have been adopted by the Centre in the name of the Governor and by reading the term 'Constituent Assembly' as 'Legislative Assembly', and using the factum of the State being under President's Rule to make Parliament itself perform the duty of recommending the step.

It may be argued that Article 356 empowers the Centre to assume and perform these two functions. However, these are clearly powers exercisable by elected regimes, and not by the Centre discharging its emergency powers. The implicit limitation on the Centre performing nothing more than routine governance functions on behalf of the State will have to be traced to the overall scheme of Article 356 itself. First, the power is invoked only with the objective of restoring constitutional governance in the State, and not to exercise absolute powers to change policies, laws and programmes of the State in the limited period during which a State is under President's rule. Parliament may pass the State Budget, or essential legislation so that existing programmes and statutory measures survive, but Article 356 does not give a blanket power to the President or Parliament to alter any matter in which the political leaders and the electorate of the State have a legitimate stake. Unless these implied limitations on the way the President or Parliament performs the functions of a State under Central rule, no State law or policy is safe.

Another example may drive home the point. Let us suppose the Centre finds that it does not have the requisite number of State Assembly resolutions ratifying a Constitution amendment it has managed to pass with a two-thirds majority in both Houses of Parliament. Can a few State governments be dismissed, and Parliament used to adopt resolutions ratifying the amendments on behalf of those States?

This may happen in other ways too. A State law may be amended by Parliament during President's Rule, and thereafter, the subject it falls under may be shifted to the Union or Concurrent List through a Constitution amendment; and the latter may be ratified on behalf of several State governments by placing them under President's Rule for a limited period. This route may be used to abrogate any State law, and thereafter future elected regimes in the State may be prevented from restoring its old law, by stripping it of its legislative competence.

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Privacy no longer supreme

Two years on, the judgment in 'K.S. Puttaswamy' has hardly resulted in a rights-based handling of personal data

PRASANNA S.

Two years ago, this month, a nine-judge bench of the Supreme Court unanimously held that Indians have a constitutionally protected fundamental right to privacy. It held that privacy is a natural right that inheres in all natural persons, and that the right may be restricted only by state action that passes each of the three tests: First, such state action must have a legislative mandate; Second, it must be pursuing a legitimate state purpose; and third, it must be proportionate i.e., such state action – both in its nature and extent, must be necessary in a democratic society and the action ought to be the least intrusive of the available alternatives to accomplish the ends.

Prescribing a higher standard

That judgment in *Justice K.S. Puttaswamy (Retd) vs Union Of India* fundamentally changed the way in which the government viewed its citizens' privacy, both in practice and prescription. It undertook structural reforms and brought transparency and openness in the process of commissioning and executing its surveillance projects, and built a mechanism of judicial oversight over surveillance requests. It demonstrated great care and sensitivity in dealing with personal information of its citizens. It legislated a transformative, rights-oriented data protection law that held all powerful entities that deal with citizens' personal data (data controllers), including the state, accountable.

The data protection law embodied the principle that the state must be a model data controller and prescribed a higher standard of observance for the state. The law also recognised and proscribed the practice of making access to essential services contingent on the citizen parting with irrelevant personal information. This law established an effective privacy commission that is tasked with enforcing, protecting and fulfilling the fundamental right to privacy implemented through the specific rights under the legislation.

The data protection law also revolutionised the technology sector landscape in the country, paving way for innovative privacy-aware and privacy-preserving technical solution providers to thrive and flourish, and establishing the country as a global leader in the space.

This fairytale would have been

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the story of the last two years if the government had followed the script. But it did the exact opposite. The judgment in *K.S. Puttaswamy* effected little change in the government's thinking or practice as it related to privacy and the personal data of its citizens.

National security as reason

It continued to commission and execute mass surveillance programmes with little regard for necessity or proportionality, with justifications always voiced in terms of broad national security talking points. The Ministry of Home Affairs, in December last year, authorised 10 Central agencies to "intercept, monitor and decrypt any information generated, transmitted, received or stored in any computer in the country". This notification is presently under challenge before the Supreme Court. In July last year, it became known that the Ministry of Information Broadcasting had floated a tender for 'Social Media Monitoring Hub', a technical solution to snoop on all social media communications, including e-mail. The government had to withdraw the project following the top court's stinging rebuke. A request for proposal for a similar social media surveillance programme was floated in August last year by the Unique Identification Authority of India (UIDAI), which is presently under challenge before the Supreme Court. The Income-Tax department has its 'Project Insight' which also has similar mass surveillance ends. These are but a few examples.

Data use vs. privacy

The government has shunned a rights-oriented approach in the collection, storage and processing of personal data and has stuck to its 'public good' and 'data is the new oil' discourse. In other words, personal data in the custody of the state is for the state to use, monetise and exploit in any manner it desires so long as it guards against security incidents such as breaches and unauthorised access – i.e. unauthorised by the government. This convenient redux of the idea of privacy to mere information security appears to inform all its policies. This is evident from this year's Economic Survey as it commends the government for having been able to sell and monetise the vehicle owners' data in the Vahan database and exhorts it to replicate the success with other databases. The Justice Srikrishna committee which has published the draft Personal Data Protection Bill uses a similar language of 'free and fair digital economy', with the digital economy being the ends and the notion of privacy merely being a shaper of the means - not only misrepresenting the purpose of the bill, but also its history and the mischief that it intended to tackle. The committee made the choices it made despite being aware that the courts are likely to interpret every provision of the legislation purposively, taking note that the purpose is couched in terms of the economy as opposed to the bill having a singular focus on the fulfilment of the right to privacy.

As *K.S. Puttaswamy* ages and steps into its third year, the script is still on the table. A rights-oriented data protection legislation – which includes comprehensive surveillance reform prohibiting mass surveillance and institution of a judicial oversight mechanism for targeted surveillance – and which recognises the principle that the state ought to be a model data controller as it deals with its citizens' personal information; is still possible, one hopes.

Prasanna S. is a practising lawyer based in New Delhi

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Anything but normal

The treatment meted out to Opposition leaders Sitaram Yechury, D. Raja and Rahul Gandhi, who have all been turned away from Srinagar airport at different points in time in the last two weeks, is proof enough of the fact that no matter what the Centre claims, the situation in Jammu and Kashmir is anything but normal (Front page, "Opposition delegation turned back from Srinagar airport," Aug. 25).

After imposing a blackout on the Valley, arresting the local leaders and placing restrictions on the fourth estate, the government is only hoodwinking the gullible when it tries to present a picture of tranquility. The developments add more credence to the theory that the Bharatiya Janata Party (BJP) government always springs a surprise when it wants to divert the attention of the people from real issues. Amidst these events, the Prime Minister is back to doing what he does best – globetrotting.

G.B. SIVANANDAM,
Coimbatore

A consensus builder

Veteran parliamentarian Arun Jaitley, who set a high benchmark for integrity, had played a critical role in Narendra Modi becoming the Prime Minister in 2014. He has left a strong imprint on India's economic path, replacing archaic indirect tax laws with the modern GST (Front page, "BJP veteran Jaitley passes away," Aug. 25). Jaitley was a consensus-builder who treated political opponents with great respect. The Insolvency and Bankruptcy Code introduced by him was a masterpiece reform which aimed to protect the interests of small investors. Another major initiative was the merger of smaller banks with larger ones.

R. SIVAKUMAR,
Chennai

■ The BJP, still reeling from the passing away of top rung leaders like Manohar Parikkar and Sushma Swaraj, has suffered another blow in the untimely demise of Arun Jaitley. The leader, who graduated from being a student leader to a politician, was also a hotshot lawyer with a flourishing practice. He played the role of Finance Minister with distinction. Earlier, he had also excelled as the Leader of the Opposition and given many anxious moments to the treasury benches. Integrity, optimism and an unwavering patriotic streak were his hallmark.

C.V. ARAVIND,
Bengaluru

No winners in n-war

A change of policy will not alter the dynamics of a nuclear attack – both sides will suffer incalculable damage ("Should India tinker with its 'No First Use' policy?," Aug. 23). Both India and Pakistan need to find common ground to restart the stalled discussions. A nuclear attack can only lead to mutually assured destruction. Moreover, it will have grave economic consequences for both nations, at present making serious efforts to the raise the living standards of their citizens. It is not that the two arch-rivals have not had a constructive relationship. The Indus Water Treaty (IWT) has withstood the vicissitudes of time and has admirably served the irrigation needs of both nations. Back-channel efforts need to focus on de-escalating tensions. The ongoing debate on nuclear deterrence is mere speechcraft.

H.N. RAMAKRISHNA,
Bengaluru

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CORRECTIONS & CLARIFICATIONS:

A Business page story titled "Plan in the works to fix power sector woes" (Aug. 25, 2019) erroneously referred to Subash Chandra Garg as the Union *Finance* Secretary. It should have been Union *Power* Secretary.

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