

CHAPTER 13

EMERGENCY POWERS

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I. INTRODUCTION

PART XVIII of the Constitution of India provides for three types of extraordinary situations: national security emergencies owing to military conflict or armed rebellion; failures of constitutional machinery in the States; and financial emergencies. An observer surveying the contemporary record might conclude that Parliament's veto power, the Supreme Court's activism, and the growing pluralism of the body politic have 'tamed' these provisions. Consider the facts: no financial emergency has ever been declared; no security emergency has been declared since 1975; and proclamations of failure of constitutional machinery have declined steeply since 1994 (after serial abuse prompted the Court to enhance procedural safeguards). Yet it would be a mistake to conclude from these facts that all is well. This chapter contends that the Constitution's emergency provisions have escaped controversy only because contingent factors—relative calm on the international front and the feebleness of the Centre in an era of coalition politics—have made it harder to exploit these provisions' ambiguities.

This chapter proceeds as follows. Section I briefly outlines the emergency provisions enumerated in Part XVIII of the Constitution. Section II investigates why Articles 356 and 360, which address failures of constitutional machinery in the States and threats to financial stability and credit, respectively, were included in Part XVIII of the Constitution. Sections III and IV survey how Articles 352 and 356 have been interpreted over time. The chapter concludes in Section VI with the warning that the safeguards found in Part XVIII of the Constitution may not be as resilient as they seem.

II. THE PROVISIONS

As mentioned above, Part XVIII of the Constitution contains provisions directed at three types of extraordinary situations. The first is Article 352, which allows the President to

* This chapter is dedicated to my father, Jyoti Sagar, who taught me to love the rule of law. I am indebted to Madhav Khosla and Varun Srikanth for their advice and help in crafting this chapter.

proclaim an emergency when 'satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion'.¹ Following such a proclamation, the Union is allowed to direct, and Parliament is allowed to legislate for, any State.² This includes the authority to control the distribution of revenues.³ In the event of military conflict, the President is also authorised to suspend Article 19 (which protects freedom of speech, assembly, association, and movement). More generally, the President is permitted to restrict the ability of citizens to move courts for the enforcement of the fundamental rights listed in Part III of the Constitution (except for Articles 20 and 21).⁴

The invocation and exercise of powers during an emergency is hedged about by various safeguards. First, the President may not issue or alter a proclamation unless directed to do so, in writing, by the Union cabinet.⁵ Secondly, no proclamation shall extend beyond a month, unless confirmed by both Houses of Parliament (and then too by majorities of the total membership of each House and two-thirds of those present and voting).⁶ Thirdly, proclamations approved by both Houses must be reconfirmed on a six-monthly basis (by similar majorities, as described above).⁷ Fourthly, if one-tenth of the members of the Lok Sabha submit in writing to the President or the Speaker their intention to move a resolution disapproving the proclamation, a special session of the Lok Sabha must be called within fourteen days for the purposes of considering such a resolution, whereupon a simple majority vote in favour of revoking the proclamation would be conclusive.⁸ Finally, once a proclamation has been issued, laws or actions that curtail rights or remedies under Part III of the Constitution must contain a 'recital' making explicit that they are 'in relation to the Proclamation of Emergency' (with the additional proviso that laws or actions suspending remedies must also be laid before Parliament).⁹

A second extraordinary situation foreseen by Part XVIII relates to the failure of constitutional machinery in States. Article 356 permits the President to proclaim such a breakdown should he be satisfied 'that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution'.¹⁰ A number of consequences follow from such a proclamation, the most important being that the President can 'assume to himself all or any of the functions of the Government of the State', and that 'the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament'.¹¹ Concomitantly, Article 357 allows Parliament to delegate the legislative power of the State to the President (or to another specified authority).¹² This includes the power to impose duties and powers on officers of the Union, and to sanction expenditure from the Consolidated Fund of the affected State.¹³ The completeness of these powers explains why commentators typically describe Articles 356 and 357 as leading to 'President's Rule'.

¹ Constitution of India 1950, art 352(1).

² Constitution of India 1950, arts 353(a) and 353(b).

³ Constitution of India 1950, art 354(1).

⁴ Constitution of India 1950, art 359(1).

⁵ Constitution of India 1950, art 352(3).

⁶ Constitution of India 1950, arts 352(4) and 352(6).

⁷ Constitution of India 1950, art 352(5).

⁸ Constitution of India 1950, arts 352(7) and 352(8).

⁹ Constitution of India 1950, arts 358(2), 359(1B), and 359(3).

¹⁰ Constitution of India 1950, art 356(1).

¹¹ Constitution of India 1950, arts 356(1)(a) and 356(1)(b).

¹² Constitution of India 1950, art 357(1)(a).

¹³ Constitution of India 1950, arts 357(1)(b) and 357(1)(c).

There are a number of safeguards with respect to Article 356. Most immediately, a proclamation expires after two months unless its continuance is approved by Parliament, whereupon its life is extended to six months.¹⁴ Extensions are not permitted beyond one year unless there is a national security emergency, and the Election Commission certifies 'difficulties' in holding elections to the Legislative Assembly of the State in question.¹⁵ And even when these conditions are met, proclamations under Article 356 still cannot be extended beyond three years. Furthermore, Article 356 does not allow the President (or the Union) to assume 'any of the powers vested in or exercisable by a High Court'.¹⁶

The third extraordinary situation anticipated in Part XVIII is financial emergency. Article 360 allows the President to proclaim such an emergency when he is 'satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened'.¹⁷ Thereupon the Union receives the right to give 'directions to any State to observe such canons of financial propriety', and Money Bills passed by States are 'reserved for the consideration of the President'.¹⁸ The President may also reduce the salaries of public officials, including judges.¹⁹ The safeguards associated with Article 360 are comparatively minimal: a proclamation of financial emergency must be laid before Parliament, and stands to expire after two months, unless extended by resolutions approved by both Houses.²⁰

III. A CURIOUS FEATURE

A curious feature of Part XVIII is the inclusion of Articles 356 and 360. An emergency is typically described as 'an unexpected and usually dangerous situation that calls for immediate action'.²¹ Since the extraordinary situations envisaged by Articles 356 and 360 are not likely to be characterised by the sense of immediate danger associated with the usual meaning of the term 'emergency', the framers' thinking with respect to the inclusion of these provisions in Part XVIII is not self-evident.

The present categorisation of emergencies was not inherited from the colonial period. As Gopal Subramaniam has observed, Article 356 derives from Section 93 of the Government of India Act 1935, which was not categorised as an emergency provision.²² So why did the framers include Article 356 in Part XVIII? The Constituent Assembly debates reveal that when Article 356 was criticised as contrary to federalism, the delegates who stood

¹⁴ Constitution of India 1950, arts 356(3) and 356(4).

¹⁵ Constitution of India 1950, arts 356(5) and 356(6).

¹⁶ Constitution of India 1950, art 356(1). ¹⁷ Constitution of India 1950, art 360(1).

¹⁸ Constitution of India 1950, arts 360(3) and 360(4)(ii).

¹⁹ Constitution of India 1950, arts 360(4)(a)(i) and 360(4)(b).

²⁰ Constitution of India 1950, arts 360(2)(b) and 360(2)(c).

²¹ Merriam Webster <<http://www.merriam-webster.com/dictionary/emergency>>, accessed November 2015.

²² Gopal Subramaniam, 'Emergency Provisions Under the Indian Constitution' in BN Kirpal and others (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2004) 14.

up to defend it pointed to dark clouds on the near horizon. Algu Rai Sastri, for instance, observed that:

Freedom brings in its wake various problems, and difficulties which have to be faced by a nation. Anti-social elements are very active in Bengal today. They are trying to uproot the Government of the Province. The same thing is happening in Madras. Hyderabad too has been the scene of these activities. All these disturbances that we are witnessing today are no doubt local in character but they may create a grave situation necessitating immediate intervention.²³

Such statements indicate that the delegates that spoke up on behalf of Article 356 misunderstood its purpose. The threats they cited—the States being afflicted by insurrection and disorder—did not actually fall under the purview of Article 356. Such threats came under the purview of Article 352, which, at the time at least, authorised the President to proclaim an emergency on account of ‘internal disturbance’ (subsequently amended to ‘armed rebellion’ by the Forty-fourth Amendment in 1978).

The Drafting Committee saw Article 356 quite differently. They seem to have been thinking along the lines of what Karl Loewenstein has termed ‘militant democracy’.²⁴ That is, their objective was to establish a provision that could be used to tackle political forces, principally communism, that might come to power in the States through the ballot box and then proceed to subvert constitutional democracy. The Committee hoped that Article 356 would be a ‘dead letter’—that is, they hoped that Indian democracy would not need to resort to militant methods to preserve itself against extremism.²⁵ But unwilling to take chances, they wanted the Union to have in reserve legal authority suitable for dealing with the menace of communism.

The delegates who spoke up on behalf of Article 356 also had the threat of communism on their minds, but they appear to have thought that communism would advance through violence and destabilisation rather than through the ballot box. This appears to be the reason why *they* did not find it problematic to place Article 356 under the heading ‘Emergency Provisions’. This explanation still leaves unanswered why the Drafting Committee included Article 356 in Part XVIII. This was a puzzling choice on their part, since militant democracy is a considered response to an incipient threat to the constitutional order rather than an immediate response to a clear threat to public safety.

The inclusion of Article 360 under the heading ‘Emergency Provisions’ is equally perplexing since financial crises typically follow in the wake of prolonged financial mismanagement, and do not simply spring out of nowhere. What kind of situation did the framers envisage when they endorsed this provision? The debates show members worrying about a particular source of trouble well before Article 360 was drafted. K Santhanam summarised the fear vividly:

Suppose for instance in a State the Ministry is all right, but it wants to make itself popular by reducing or cancelling all taxes and running its administration on a bankrupt basis. Suppose the Government servants are not paid and the obligations are not met and the State goes on accumulating its deficits. Of course this also is a difficult case. The Centre will have to be very

²³ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 173, 4 August 1949.

²⁴ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31(3) *The American Political Science Review* 417, 430–31.

²⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 177, 4 August 1949.

careful and indulgent; it will have to give the longest possible rope but at some time or other in the case of economic breakdown also the Centre will have to step in because ultimately it is responsible for the financial solvency of the whole country and if a big province like the United Provinces goes into bankruptcy it will mean the bankruptcy of the whole country.²⁶

This presentation did not go unchallenged. Hriday Nath Kunzru observed that the scenario Santhanam had sketched out need not amount to an emergency, as the term was commonly understood. 'If misgovernment in a province creates so much dissatisfaction as to endanger the public peace,' Kunzru argued, then the Union could rely on Article 352 to intervene.²⁷ But in the absence of violence and disorder, electors ought to be allowed to apply the 'proper remedy' themselves.²⁸ Kunzru subsequently cornered BR Ambedkar on this point before Article 356 went to vote. Pushed by Kunzru to clarify whether Article 356 allowed the Union to intervene in the States for the sake of 'good government,' Ambedkar responded firmly that 'whether there is good government or not in the province is [not] for the Centre to determine.'²⁹

It would seem that after the exchange between Kunzru and Ambedkar clarified that Article 356 would not allow the Union to pre-empt the mismanagement of State-level finances, the Drafting Committee felt compelled to insert Article 360. This is not, however, the explanation that Ambedkar offered when introducing the provision. He informed the assembly that the Article 'more or less' followed 'the pattern' of the United States' National Industrial Recovery Act 1930, which sought to restructure the American economy in the face of the Great Depression.³⁰

Kunzru promptly pushed back. Ambedkar's claim was unpersuasive, he asserted, because unlike the National Industrial Recovery Act, which had sought to stimulate economic growth, Article 360 was aimed at enforcing fiscal prudence.³¹ As such the real purpose of Article 360, Kunzru contended, was to address the kind of scenario previously envisioned by Santhanam. The drafters were concerned about the fiscal impact of populism at the State level, as a number of States had recently enacted laws prohibiting the sale of liquor and narcotics, thereby denying themselves an important source of revenue. The introduction of such laws was indeed unwise, Kunzru conceded—the States in question ought to have shown 'self-restraint' in view of prevailing 'financial difficulties.'³² Nonetheless the Union ought not to be allowed to intervene, he insisted, for a 'Province can by itself hardly do anything that would jeopardise the financial stability or credit of India.'³³ Moreover, 'even if a province by its foolishness places itself in a difficult financial position, why should it not be allowed to learn by its mistakes?'³⁴

Kunzru's critique was immediately rebutted by KM Munshi, a key member of the Drafting Committee, who deemed such a laissez-faire approach impractical. The financial

²⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 154, 3 August 1949.

²⁷ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 155, 3 August 1949.

²⁸ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 156, 3 August 1949.

²⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 176, 4 August 1949.

³⁰ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 361, 16 October 1949.

³¹ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 368, 16 October 1949.

³² *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 370, 16 October 1949.

³³ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 369, 16 October 1949.

³⁴ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 369, 16 October 1949.

health of the States and the Centre was too interlinked to permit such laxity, he argued. As he put it:

This article in the Constitution is the realization of one supreme fact that the economic structure of the country is one and indivisible. If a province breaks financially, it will affect the finances of the Centre: if the Centre suffers, all the provinces will break. Therefore the interdependence of the provinces and the Centre is so great that the whole financial integrity of the country is one and a time might arise when unitary control may be absolutely necessary.³⁵

If we take Munshi's response as indicative of the Drafting Committee's position, then it seems reasonable to interpret Article 360 as the financial equivalent of the concept of militant democracy. That is, the provision was intended to provide the Union with the authority to arrest the sort of profligacy that could undermine the Union's own financial standing. Even so we are still left wondering why the Drafting Committee included this provision in Part XVIII, since what Article 360 addresses is not an immediate threat to the survival of the Union but rather a slow-growing poison.

IV. ARTICLE 352: CENTRAL ISSUES

Let us now examine how Article 352 has been interpreted. As a comprehensive review cannot be undertaken here, the following discussion focuses on two questions: first, how extensive is the President's power once an emergency has been proclaimed, and secondly, is the President's proclamation subject to judicial review? It is contended below that the Court's answers to both these questions have been overly deferential, rendering Article 352 a graver threat to liberty than it need be.

Article 352 has been invoked three times since the Constitution was adopted: in 1962, following war with China; in 1971, following war with Pakistan; and in 1975, following 'internal disturbances'. In each of these periods the Court has interpreted Article 352 in new ways. An early landmark case was *Sree Mohan Chowdhury v Chief Commissioner*, where the Court heard a *habeas corpus* petition filed by an individual detained under the 1962 Defence of India Act.³⁶ Pointing to the Presidential Order issued under Article 359 that prohibited individuals from approaching any court for the enforcement of rights conferred by Articles 21 and 22, the Court declined the appeal, declaring that 'as a result of the President's Order aforesaid, the petitioner's right to move this Court... has been suspended during the operation of the Emergency, with the result that the petitioner has no *locus standi* to enforce his right, if any, during the Emergency'.³⁷ The Court also refused to inquire into the validity of the Act on the grounds that the appellant was 'arguing in a circle' since:

In order that the Court may investigate the validity of a particular ordinance or act of a legislature, the person moving the Court should have a *locus standi*... In view of the President's Order passed under the provisions of Art. 359 (1) of the Constitution, the petitioner has lost his *locus standi* to move this Court during the period of Emergency.³⁸

³⁵ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 371, 16 October 1949.

³⁶ AIR 1964 SC 173. ³⁷ *Sree Mohan Chowdhury* (n 36) [5].

³⁸ *Sree Mohan Chowdhury* (n 36) [6].

Shortly after came *Makhan Singh Tarsikka v State of Punjab*, where the appellants questioned whether the High Courts of Bombay and Punjab were justified in refusing to entertain their petitions questioning the constitutionality of the Defence of India Act.³⁹ The appellants argued that strictly construed Article 359 did not forbid their seeking the High Court's intervention under Section 491 of the 1898 Code of Criminal Procedure provided that 'any High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public custody be set at liberty'.⁴⁰ The Court disagreed, declaring that seeking any writ in 'the nature of *habeas corpus*' fell foul of the 'substance', if not the 'form', of Article 359.⁴¹

Though the *Makhan Singh* Court concurred with *Mohan Chowdhury* that detainees had no locus standi to question the validity of the Act, it voluntarily addressed the question of what avenues remained open to detainees wishing to challenge 'the legality or the propriety of their detentions'.⁴² It indicated at least three possible grounds. First, a detainee could approach the courts to enforce fundamental rights not specified in the Presidential Order.⁴³ Secondly, a detainee could move the courts on the ground that his detention 'has been ordered *mala fide*'.⁴⁴ Thirdly, a detainee could challenge the Act on the grounds that they suffer 'from the vice of excessive delegation', that is, they transferred to the executive 'essentially legislative powers'.⁴⁵

The Court was willing to venture only so far though. When pressed on the point that a prolonged emergency could leave citizens bereft of their rights for an extended duration, PB Gajendragadkar J responded that this spectre:

[H]as no material bearing on the points with which we are concerned. How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crisis, such as our country is facing today.⁴⁶

The appellants decried the Court's reticence, arguing it would leave citizens exposed to the 'abuse of power'. Unmoved, Gajendragadkar J replied:

This argument is essentially political and its impact on the constitutional question with which we are concerned is at best indirect. Even so, it may be permissible to observe that in a democratic State, the effective safeguard against abuse of executive powers whether in peace or in emergency, is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion.⁴⁷

Unfortunately, the Court chose not to reflect on the soundness of these recommendations. It did not discuss whether public opinion could be reliably informed and aware when Article 358 allowed the President to suspend Article 19. It also failed to address whether the preventive detention could be used to intimidate or silence critics.

³⁹ AIR 1964 SC 381. ⁴⁰ *Makhan Singh Tarsikka* (n 39) [20].

⁴¹ *Makhan Singh Tarsikka* (n 39) [30]. ⁴² *Makhan Singh Tarsikka* (n 39) [36].

⁴³ *Makhan Singh Tarsikka* (n 39) [36]. ⁴⁴ *Makhan Singh Tarsikka* (n 39) [37].

⁴⁵ *Makhan Singh Tarsikka* (n 39) [39]. ⁴⁶ *Makhan Singh Tarsikka* (n 39) [47].

⁴⁷ *Makhan Singh Tarsikka* (n 39) [47].

The cases that followed immediately thereafter, principally *Ananda Nambiar v Chief Secretary*⁴⁸ and *Ram Manohar Lohia v State of Bihar*,⁴⁹ solidified the precedents set by *Makhan Singh*. In *Ananda Nambiar*, the Court outlined two further scenarios under which detention might be challenged in spite of the Presidential Order—namely by contending that the detention order was employed by a person or under circumstances not authorised by the Defence of India Act.⁵⁰ The latter criterion was employed in *Ram Manohar Lohia*, where the appellant's detention was overturned on the ground that the detention had been justified on the grounds of maintaining 'law and order' when the Act only permitted detention for reasons of 'public order'.⁵¹

A final case from this period that deserves mention is *Ghulam Sarwar v Union of India*.⁵² Note that in *Lohia* the Court had declined to allow the appellant to argue, contra *Makhan Singh*, that 'the satisfaction of the President under Art 359 is open to scrutiny of the court'.⁵³ In another case, *PL Lakhanpal v Union of India*, the Court dismissed the appellant's claim that the continuance of Emergency was a 'fraud on the Constitution' because 'for some time past there was no armed aggression against the territory of India'.⁵⁴ A proclamation of Emergency, AK Sarkar CJ opined, could only be revoked by Parliament.⁵⁵ But in *Ghulam Sarwar* the Court's opinion, penned by K Subba Rao CJ, now prevaricated on this crucial point. At first glance the Court implicitly concurred with *Makhan Singh*, observing that:

[T]he question whether there is grave emergency... is left to the satisfaction of the Executive, for it is obviously in the best position to judge the situation. But there is the correlative danger of the abuse of such extra ordinary power leading to totalitarianism... What is the safeguard against such an abuse? The obvious safeguard is the good sense of the Executive, but the more effective one is public opinion.⁵⁶

But pushed by the appellant to note the continuation of the emergency—'four long years after the cessation of the hostilities'—the Chief Justice remarked:

A question is raised whether this Court can ascertain whether the action of the Executive in declaring the emergency or continuing it is actuated by *mala fides* and is an abuse of its power. We do not propose to express our opinion on this question as no material has been placed before us in that regard. It requires a careful research into the circumstances obtaining in our country and the motives operating on the minds of the persons in power in continuing the emergency. As the material facts are not placed before us, we shall not in this case express our opinion one way or other on this all important question which is at present agitating the public mind.⁵⁷

The full force of the concern highlighted above was made clear by *Additional District Magistrate Jabalpur v Shivakant Shukla*.⁵⁸ This case arose after individuals detained under the 1971 Maintenance of Internal Security Act filed writs of *habeas corpus* in various High Courts. The High Courts declared that they were entitled to examine the propriety of the detention orders notwithstanding the 1975 Proclamation of Emergency on grounds of

⁴⁸ AIR 1966 SC 657.

⁴⁹ AIR 1966 SC 740.

⁵⁰ *Ananda Nambiar* (n 48) [7].

⁵¹ *Ram Manohar Lohia* (n 49) [55]–[58].

⁵² AIR 1967 SC 1335.

⁵³ *Ram Manohar Lohia* (n 49) [57].

⁵⁴ AIR 1967 SC 243 [4].

⁵⁵ *PL Lakhanpal* (n 54) [4].

⁵⁶ *Ghulam Sarwar* (n 52) [11].

⁵⁷ *Ghulam Sarwar* (n 52) [11].

⁵⁸ (1976) 2 SCC 521.

‘internal disturbance’, and a subsequent Presidential Order suspending the enforcement of Articles 14, 21, and 22. Upon appeal the Court disagreed, arguing that unlike the 1962 Presidential Order, which suspended appeal only with respect to detentions under the Defence of India Act, the 1975 Presidential Order was ‘unconditional’, that is, it suspended appeal without reference to any particular statute, leaving the High Courts no standard against which to evaluate detentions.⁵⁹ Hence, the Court concluded, ‘no person has any locus standi to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous consideration.’⁶⁰

The ‘startling consequence’ of this decision, HR Khanna J’s famous dissent summarised, was that:

[I]f any official, even a head constable of police, capriciously or maliciously, arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts against such detention during the period of emergency... In other words, the position would be that so far as executive officers are concerned, in matters relating to life and personal liberty of citizens, they would not be governed by any law, they would not be answerable to any court and they would be wielding more or less despotic powers.⁶¹

Khanna J declared this outcome unacceptable because ‘the essential postulate and basic assumption of the rule of law’ is that ‘the State has got no power to deprive a person of his life or liberty without the authority of law.’⁶² This observation provoked strong reactions from the Court’s majority, who argued that the rule of law actually lay on the side of the Presidential Order, which was issued under Article 352. As Mirza Beg J sharply replied:

If on a correct interpretation of the legal provisions, we find that the jurisdiction of Court was itself meant to be ousted, for the duration of the emergency... because the judicial process suffers from inherent limitations in dealing with cases of this type, we are bound... to declare that this is what the laws mean... it does not follow from a removal of the normal judicial superintendence... that there is no Rule of Law during the emergency.⁶³

Khanna J’s retort was that a ‘state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute.’⁶⁴ To this an exasperated Beg J replied, not entirely unreasonably, that Khanna J’s reasoning passed over the positive law in favour of a ‘brooding omnipotence’. He observed:

It seems to me to be legally quite impossible to successfully appeal to some spirit of the Constitution or to any law anterior to or supposed to lie behind the Constitution to frustrate the objects of the express provisions of the Constitution... What we are asked to do seems nothing short of building some imaginary parts of a Constitution, supposed to lie behind our existing Constitution, which could take the place of those parts of our Constitution whose enforcement is suspended and then to enforce the substitutes.⁶⁵

⁵⁹ *Shivakant Shukla* (n 58) [273].

⁶⁰ *Shivakant Shukla* (n 58) [596].

⁶² *Shivakant Shukla* (n 58) [530].

⁶⁴ *Shivakant Shukla* (n 58) [544].

⁶¹ *Shivakant Shukla* (n 58) [538].

⁶³ *Shivakant Shukla* (n 58) [304].

⁶⁵ *Shivakant Shukla* (n 58) [165].

Unfortunately, this sharp exchange did not address the central point of contention. Khanna J's fundamental objection was that the rule of law did not, in a deep sense, tolerate absolute power. The rule of law requires that powers must 'be granted by Parliament within *definable limits*'.⁶⁶ For the most part, the *Shivakant Shukla* majority ignored this point, preferring to defend their decision to focus on the letter of the law. PN Bhagwati J, for example, stated:

I do not think it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the constitution a construction which its language cannot reasonably bear... the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support, and its final resting place.⁶⁷

The only substantive response came from AN Ray CJ, who claimed there *were* limits: the Maintenance of Internal Security Act provided for periodic internal review of detentions; and the infringement of fundamental rights could be challenged in a court of law following the termination of the emergency.⁶⁸ But as in *Makhan Singh*, the Court did not address the satisfactoriness of these limits. As Khanna J noted, the safeguards cited by the Chief Justice left the executive with sole discretion to decide when, if ever, to release detainees.⁶⁹

The *Shivakant Shukla* Court also missed the opportunity to address whether it was entitled to review the underlying Proclamation of Emergency. A passing mention from Bhagwati J focused, once again, on formal rather than substantive legitimacy:

We must also disabuse our mind of any notion that the emergency declared by the Proclamation dated 25th June, 1975 is not genuine, or to borrow an adjective used by one of the lawyers appearing on behalf of the interveners, is 'phoney'. This emergency has been declared by the President in exercise of the powers conferred on him under Article 352, clause (1) and the validity of the Proclamation dated 25th June, 1975 declaring this emergency has not been assailed before us.⁷⁰

The only clear observation on this front came from YV Chandrachud J, who contradicted Subba Rao CJ's statement in *Ghulam Sarwar* by declaring in line with *Makhan Singh* that 'it is difficult to see how a Court of law can look at the declaration of emergency with any mental reservations', seeing as 'imminent danger of these occurrences depends at any given moment on the perception and evaluation of the national or international situation, regarding which the court of law can neither have full and truthful information nor the means to such information'.⁷¹

This question of justiciability received only slightly more consideration in a subsequent case, *Minerva Mills v Union of India*, where the petitioner challenged the constitutionality of legislation passed by the 1976 Parliament on the grounds that its life had been extended by Proclamations that were unreasonably prolonged (the 1971 Proclamation) or *mala fide* (the 1975 Proclamation).⁷² Confronted with the Attorney General's claim that a Proclamation was not justiciable because ascertaining whether the country faced a grave emergency was a 'political question', PN Bhagwati J responded that it would be improper

⁶⁶ *Shivakant Shukla* (n 58) [544] (emphasis added). ⁶⁷ *Shivakant Shukla* (n 58) [487].

⁶⁸ *Shivakant Shukla* (n 58) [130]–[132]. ⁶⁹ *Shivakant Shukla* (n 58) [583]–[587].

⁷⁰ *Shivakant Shukla* (n 58) [436]. ⁷¹ *Shivakant Shukla* (n 58) [347].

⁷² (1980) 3 SCC 625.

for the Court to decline to investigate whether the President had failed to abide by the provisions of Article 352.⁷³ Bhagwati J then speculated on what would follow should such a determination be made. Initially, per *Makhan Singh*, he argued that security was to be found in the political process:

It is true that the power to revoke a Proclamation of Emergency is vested only in the Central Government and it is possible that the Central Government may abuse this power by refusing to revoke a Proclamation of Emergency even though the circumstances justifying the issue of Proclamation have ceased to exist and thus prolong baselessly the state of emergency obliterating the Fundamental Rights and this may encourage a totalitarian trend. But the Primary and real safeguard of the citizen against such abuse of power lies in 'the good sense of the people and in the system of representative and responsible Government' which is provided in the Constitution.⁷⁴

However, he then abruptly wheeled around and made explicit what had been implicit in Subba Rao CJ's comments in *Ghulam Sarwar*:

Additionally, it may be possible for the citizen in a given case to move the court for issuing a writ of mandamus for revoking the Proclamation of Emergency if he is able to show by placing clear and cogent material before the court that there is no justification at all for the continuance of the Proclamation of Emergency.⁷⁵

Adding the usual caveat that:

This is not a matter which is a fit subject matter for judicial determination and the Court would not interfere with the satisfaction of the executive Government in this regard unless it is clear on the material on record that there is absolutely no justification for the continuance of the Proclamation of Emergency and the Proclamation is being continued *mala fide* or for a collateral purpose.⁷⁶

The foregoing review prompts three observations. First, the Court's substantive engagement with Article 352 has been patchy. It remains unclear, for instance, whether a Proclamation is justiciable, much less what would follow from an adverse determination. In *Waman Rao v Union of India*, which followed on the heels of *Minerva Mills*, YV Chandrachud J's opinion for the majority cast doubt on Bhagwati J's earlier forthright dicta, further muddying the waters.⁷⁷

It is now clear that detention orders passed during an emergency can always be reviewed. But this outcome is not a product of the Court having absorbed Khanna J's dissent in *Shukla*. It owes instead to the Forty-fourth Amendment to the Constitution in 1978, which disallows the suspension of the enforcement of Articles 20 and 21 during an emergency. This means that the Court does not have precedents favouring liberty to fall back upon should *habeas corpus* come to be suspended at a future date. And such a day may come. The framers who welded together a nation understood a fundamental truth—that Indian society is 'fissiparous'—and provided a remedy that may have to be reclaimed.

⁷³ *Minerva Mills* (n 72) [97]–[98].

⁷⁴ *Minerva Mills* (n 72) [101].

⁷⁵ *Minerva Mills* (n 72) [101].

⁷⁶ *Minerva Mills* (n 72) [101].

⁷⁷ (1981) 2 SCC 362.

A second observation follows from the above. India has not experienced national security emergencies since 1977. There is, however, no guarantee that these fortuitous circumstances will persist. There continue to be audacious attacks such as the attack on Parliament in 2001, which sought to wipe out the national leadership. Assuming, then, that emergencies will come, bringing with them demands for decisive action, how confident should we feel about the non-judicial safeguards established by the Forty-fourth Amendment? These safeguards, which are essentially parliamentary in nature, may prove fragile when tested, for Parliaments are not immune from panic; they may be misled; they may lack access to classified information; and they may simply lack courage, as they did between 1975 and 1977.

Here it is worth reflecting on the fundamental dichotomy exposed by 'The Emergency'. Its origin encapsulates the many perversities of Indian political culture—the personalisation of offices, the fragility of institutions, and the unmanly proclivity for sycophancy. Its end underscores the irrepressibility of political opposition—that often vexing but sometimes invaluable tendency of pluralistic societies to stymie the little and grand plans of those in positions of authority. The brevity of this chapter forbids venturing which of these tendencies can be counted upon more, but the question needs posing, because it focuses attention not on the 'parchment barriers' that lawyers and textbooks cite with great certainty, but on estimating whether the relevant safeguards will hold firm on the day of reckoning.

A third observation follows from the above. If we have reason to believe that India will sooner or later confront national security emergencies, and that Parliament cannot be relied upon to stand up to the executive, then the Court must be prepared to intervene. Thus far the Court has proven, to use Lord Atkin's famous phrase, 'more executive-minded than the executive'.⁷⁸ Consider, for instance, the views expressed in *Shivakant Shukla*: Ray CJ chided counsel for the detainees that it could 'never be reasonably assumed' that they would be mistreated, adding that 'people who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country'.⁷⁹ Beg J declared 'the care and concern bestowed by the State authorities upon the welfare of detenus... is almost maternal'.⁸⁰ Chandrachud J criticised the High Courts for having at the back of their minds a 'facile distrust of executive declarations which recite threat to the security of the country, particularly by internal disturbance'.⁸¹ Bhagwati J stated that though 'unlawful detentions' were a possible outcome of unchecked executive power, 'the fact remains that when there is crisis-situation arising out of an emergency, it is necessary to [trust] the Government with extraordinary powers in order to enable it to overcome such crisis'.⁸²

That the above are the views of four successive Chief Justices says much about the Court's steadfastness in the past. The point here is not that the separation of powers cannot be relied upon in the Indian context. Rather it is that if Article 352 is to be interpreted in consonance with the preamble, then much depends on the Court exhibiting a willingness to defer in the face of crisis and an unwillingness to bow in the face of indecency. This willingness remains to be estimated.

⁷⁸ *Liversidge v Anderson* [1942] AC 243 (HL).

⁷⁹ *Shivakant Shukla* (n 58) [36].

⁸⁰ *Shivakant Shukla* (n 58) [324-A].

⁸¹ *Shivakant Shukla* (n 58) [347].

⁸² *Shivakant Shukla* (n 58) [486].

V. ARTICLE 356: CENTRAL ISSUES

In Part II of this chapter we questioned the inclusion of Article 356 in Part XVIII of the Constitution on the grounds that this Article is not intended to address emergencies (as they are conventionally understood). Let us now briefly survey how Article 356 has since been interpreted. Since a comprehensive review is not possible here, the following discussion focuses on two key questions: first, under what circumstances may President's Rule be imposed; and secondly, who decides whether these circumstances exist? It is contended that the prevailing answers to these questions, as settled by the Supreme Court, exhibit some weaknesses.

Article 356 has been employed more than a hundred times since the adoption of the Constitution. This remarkable statistic can be attributed to the impudence of India's political leadership, as well as to a permissive interpretation of the purpose of the Article. At least the former of these points is widely acknowledged. From 1959 onward Union governments used Article 356 to dismiss (or to prevent the formation of) State governments controlled by rival political parties, ostensibly on the grounds that the latter had lost the trust of the people. This practice reached its apogee in the 1970s when, in the wake of the Congress Party's rout in the post-Emergency elections, the Janata Party sought to displace nine Congress-led State governments. The States responded by approaching the Supreme Court. The resulting case—*State of Rajasthan v Union of India*—led to the first important judgment on the purpose of Article 356.⁸³

In *Rajasthan*, the Court flatly rejected the contention that ascertaining whether Article 356 ought to be invoked was a non-justiciable 'political question'. The Court was entitled to investigate, Bhagwati J declared, 'whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits.'⁸⁴ With respect to Article 356 the relevant limit was that the President had to be *satisfied* that a situation had arisen where the government of the State *cannot* be carried on in accordance with the provisions of the Constitution.

On the whole, the Justices declined to establish a standard for satisfaction. As Bhagwati J explained:

The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. 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.⁸⁵

A number of explanations were offered in defence of this stance. The above passage from Bhagwati J's opinion references the *mutability* of circumstances. Fazal Ali J, by contrast, pointed to the Court's *incapacity*—it did not 'possess the resources which are in the hands of the government to find out the political needs that they seek to subserve and the feelings

⁸³ (1977) 3 SCC 592.

⁸⁴ *State of Rajasthan* (n 83) [150].

⁸⁵ *State of Rajasthan* (n 83) [150].

or the aspirations of the nation that require a particular action to be taken at a particular time.⁸⁶ A third explanation came from Beg CJ, who emphasised the problem of *subjectivity*:

What is the Constitutional machinery whose failure or imminent failure the President can deal with under Article 356? Is it enough if a situation has arisen in which one or more provisions of the Constitution cannot be observed? Now what provisions of the Constitution, which are not being observed in a State, or to what extent they cannot be observed, are matters on which great differences of opinion are possible.⁸⁷

These differences, Beg CJ went on to argue, were a consequence of the adoption of the 'rather loose' concept of the 'basic structure of the Constitution' established by *Kesavananda Bharati*,⁸⁸ which made it impossible for the Court to say 'that the Union Government, even if it resorts to Article 356 of the Constitution to enforce a political doctrine or theory, acts unconstitutionally, so long as that doctrine or theory is covered by the underlying purposes of the Constitution found in the preamble which has been held to be a part of the Constitution.'⁸⁹

Though the *Rajasthan* Court declined to second-guess the President's decision to invoke Article 356, the Justices agreed that scrutiny may follow should the circumstances indicate bad faith. They established, in other words, a threshold rather than a substantive test. Bhagwati J put the point most strongly:

Take, for example, a case where the President gives the reason for taking action under Art. 356, cl. (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so-called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all?⁹⁰

This declaration forced the *Rajasthan* Court to address an obvious question. In the cases before them the States had argued that 'the sole purpose of the intended Proclamations' was to dissolve the State legislatures 'with the object of gaining political victories'.⁹¹ Had not the Union acted *mala fides* then? The Court's response revealed that the threshold for satisfaction was so low that only an imprudent Union leadership would fail to meet it. Broadly, the Justices held that the charged political environment following the end of the Emergency meant that one could not conclusively impute *mala fides* to the Janata Party's proposal. As Beg CJ put it:

[A] dissolution against the wishes of the majority in a State Assembly is a grave and serious matter ... The position may, however, be very different when a State Government has a majority in the State Assembly behind it but the question is whether the State Assembly and the State Government for the time being have been so totally and emphatically rejected by the people that a 'critical situation' has arisen or is bound to arise unless the political sovereign is given

⁸⁶ *State of Rajasthan* (n 83) [208].

⁸⁷ *State of Rajasthan* (n 83) [46].

⁸⁸ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁸⁹ *State of Rajasthan* (n 83) [48].

⁹⁰ *State of Rajasthan* (n 83) [150].

⁹¹ *State of Rajasthan* (n 83) [77].

an opportunity of giving a fresh verdict. A decision on such a question undoubtedly lies in the Executive realm.⁹²

Moreover, the Union government had merely proposed to 'give electors in the various States a fresh chance of showing whether they continue to have confidence in the State Governments'. Since 'one purpose of our Constitution and laws is certainly to give electors a periodic opportunity of choosing their State's legislature', the Chief Justice opined, 'a policy devised to serve that end could not be contrary to the basic structure or scheme of the Constitution'.⁹³

Following *Rajasthan*, the Janata Party proceeded to dismiss the nine Congress-led State governments. Upon its return to power in 1980, the Congress settled scores by dismissing nine Janata-led State governments. These depressing events contributed to the establishment in 1983 of the Sarkaria Commission, which was tasked with reviewing Union-State relations.⁹⁴ The Commission acknowledged the difficulty in supervising the employment of Article 356:

A failure of constitutional machinery may occur in a number of ways. Factors which contribute to such a situation are diverse and imponderable. It is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase, 'the government of the State cannot be carried on in accordance with the provisions of this Constitution'.⁹⁵

Nonetheless, the Commission went beyond the *Rajasthan* Court by identifying four conditions under which the exercise of Article 356 might be justified: a *political crisis* arising from the inability of any party to cobble together a workable majority in the State legislature; *internal subversion* resulting from an effort of a State government to undermine responsible government; *physical breakdown* following an inability to respond to internal disturbance or natural calamity; and *non-compliance* with the Union, for instance by failing to maintain national infrastructure or refusing to follow directions during war.⁹⁶ The last of these conditions, the Commission noted, is made explicit by Article 365 of the Constitution, which states 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... 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.⁹⁷

Based on the above criteria, the Commission had no trouble reaching the conclusion that Article 356 ought not to be employed, as it had in recent times, 'for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State has suffered a massive defeat'.⁹⁸

⁹² *State of Rajasthan* (n 83) [74].

⁹³ *State of Rajasthan* (n 83) [31]–[32].

⁹⁴ *Report of the Sarkaria Commission on Centre-State Relations* (Government of India 1988) ch 6 <<http://interstatecouncil.nic.in/Sarkaria/CHAPTERVI.pdf>>, accessed October 2015.

⁹⁵ *Report of the Sarkaria Commission on Centre-State Relations* (n 94) para 6.1.07.

⁹⁶ *Report of the Sarkaria Commission on Centre-State Relations* (n 94) para 6.5.01.

⁹⁷ Constitution of India 1950, art 365.

⁹⁸ *Report of the Sarkaria Commission on Centre-State Relations* (n 94) para 6.5.01.

The Commission also recommended bolstering the ‘tenuous’ standard of judicial review established by *Rajasthan*. The ‘[j]udicial remedy of seeking relief, even against a *mala fide* exercise of the power, will remain more or less illusory’, it warned, ‘if the basic facts on which the President, in effect, the Union Council of Ministers, reaches the satisfaction requisite for taking action under Article 356(1), are not made known.’⁹⁹ Hence it recommended:

[T]o make the remedy of judicial review on the ground of *mala fides* a little more meaningful, it should be provided, through an appropriate amendment, that notwithstanding anything in clause (2) of Article 74 of the Constitution the material facts and grounds on which Article 356 (1) is invoked should be made an integral part of the proclamation issued under that Article.¹⁰⁰

The Union government did not formally accept the Sarkaria Commission’s Report. Not surprisingly, controversies over the use of Article 356 then continued, eventually prompting a second prominent case, *SR Bommai v Union of India*.¹⁰¹ This case had its genesis in the decision of the Congress-led Union government to impose President’s Rule in six States. In half these cases, Article 356 was invoked without allowing rival political parties to prove they had the support of the Legislature; in the other half, State governments led by the Bharatiya Janata Party (BJP) had been dismissed in the wake of communal violence stemming from the destruction of the Babri Masjid. Following mixed verdicts in the relevant High Courts, the cases were brought before the Supreme Court, which was asked to clarify the constitutional position.

The *Bommai* Court followed the *Rajasthan* Court in emphasising that the Court was entitled to review the exercise of Article 356. Where the Justices differed was on the question of justiciability. AM Ahmadi, JS Verma, Yogeshwar Dayal, and K Ramaswamy JJ voiced a preference for the minimal standard established by the *Rajasthan* Court. As Verma J opined:

It would appear that situations wherein the failure of constitutional machinery has to be inferred subjectively from a variety of facts and circumstances, including some imponderables and inferences leading to a subjective political decision, judicial scrutiny of the same is not permissible for want of judicially manageable standards. These political decisions call for judicial hands off envisaging correction only by a subsequent electoral verdict, unless corrected earlier in Parliament.¹⁰²

But a slim majority composed of PB Sawant, Kuldip Singh, BP Jeevan Reddy, SC Agrawal, and SR Pandian JJ challenged the *Rajasthan* precedent in two important respects. Though they agreed that the Court ought not to question the President’s subjective satisfaction, they argued the Court was entitled to inquire into the material basis of the President’s satisfaction to ascertain the *relevance* of the evidence and the *reasonableness* of the inference drawn from it. Sawant J put the point most strongly, writing:¹⁰³

[T]he existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the President issues the Proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question. However, if there is no

⁹⁹ Report of the Sarkaria Commission on Centre–State Relations (n 94) para 6.6.24.

¹⁰⁰ Report of the Sarkaria Commission on Centre–State Relations (n 94) para 6.6.25.

¹⁰¹ (1994) 3 SCC 1. ¹⁰² *SR Bommai* (n 101) [45]. ¹⁰³ *SR Bommai* (n 101) [59].

such objective material before the President, or the material before him cannot reasonably suggest that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the Proclamation issued is open to challenge.

The Justices also emphasised that should it *prima facie* appear that Article 356 had been invoked in bad faith, the Court would be entitled to demand the production of the material that had served as the basis of the President's decision. Once again Sawant J put the point most bluntly, warning the Union that it did not enjoy a blanket privilege against disclosing such evidence because:

[A]lthough Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it.¹⁰⁴

Applying the above standard, the *Bommai* Court declared unconstitutional the imposition of President's Rule in States where political formations had not been allowed to test their strength on the floor of the State legislature. In these cases the Union had failed to show that the States *cannot* be carried in accordance with the Constitution. To the contrary, the 'undue haste' shown by the Union in invoking Article 356 'clearly smacked of *mala fides*.'¹⁰⁵

The *Bommai* Court did not engage fully with the Sarkaria Commission's Report on the circumstances under which Article 356 may be legitimately invoked. Sawant and Singh JJ expressed their 'broad agreement' with the Commission's views, but did not enter into specifics,¹⁰⁶ whereas Jeevan Reddy and Agrawal JJ expressed some scepticism, stating that:

It is indeed difficult—nor is it advisable—to catalogue the various situations which may arise and which would be comprised within [the scope of Article 356]. It would be more appropriate to deal with concrete cases as and when they arise.¹⁰⁷

Ramaswamy J meanwhile passed over the Report and struck out on his own. Undeterred by the caution sounded by Reddy and Agrawal JJ, he identified a number of circumstances, aside from non-compliance with Union directions, where Article 356 could be lawfully invoked:

While it is not possible to exhaustively catalogue diverse situations when the constitutional breakdown may justifiably be inferred from, for instance (i) large-scale breakdown of the law and order or public order situation; (ii) gross mismanagement of affairs by a State Government; (iii) corruption or abuse of its power; (iv) danger to national integration or security of the State or aiding or abetting national disintegration or a claim for independent sovereign status and (v) subversion of the Constitution while professing to work under the Constitution or creating disunity or disaffection among the people to disintegrate democratic social fabric.¹⁰⁸

¹⁰⁴ *SR Bommai* (n 101) [86].

¹⁰⁵ *SR Bommai* (n 101) [118].

¹⁰⁶ *SR Bommai* (n 101) [80]–[82].

¹⁰⁷ *SR Bommai* (n 101) [281].

¹⁰⁸ *SR Bommai* (n 101) [219].

The only criterion that received support from seven of the nine members of the *Bommai* Court was that Article 356 could be invoked to dismiss a State government acting contrary to the 'basic structure' of the Constitution. As Sawant and Singh JJ pronounced:

Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.¹⁰⁹

Given the above, the *Bommai* Court held that the dismissal of the BJP-led State governments on account of their complicity in the destruction of the Babri Masjid, and the ensuing communal violence, was constitutional.

The foregoing review prompts three observations. First, in view of the political class's inability to develop and maintain conventions relating to the appropriate use of Article 356, the Court's decision in *Bommai* to scrutinise the procedures employed prior to the imposition of President's Rule is to be welcomed.¹¹⁰ This stance, combined with the Court's declaration that the imposition of President's Rule does not permit the dissolution of the State legislature unless Parliament concurs, provides a much-needed corrective against mala fides (as is borne out by the decline since 1994 in controversial invocations of Article 356).

Secondly, the *Bommai* Court's unwillingness to clarify the grounds on which Article 356 may be invoked is a cause of concern. As discussed earlier, the framers intended Article 356 to be employed to combat what the Sarkaria Commission described as 'internal subversion' or 'non-compliance'. By contrast, it is not clear how a political crisis (for example, a hung assembly) or physical breakdown (for example, due to extensive flooding) can be described as leading to a failure of constitutional machinery. Unless there is greater clarity on the purpose of Article 356, it may be employed to serve ends other than what the framers intended. For instance, in *Rameshwar Prasad v Union of India*, Arijit Pasayat J supported Governor Buta Singh's decision to dissolve the Bihar Assembly following allegations of horse trading on the grounds that Article 356 could be invoked to pre-empt the corruption of the political system:

When the sole object is to grab power at any cost even by apparent unfair and tainted means, the Governor cannot allow such a government to be installed. By doing so, the Governor would be acting contrary to very essence of democracy. The purity of electorate process would get polluted. The framers of the Constitution never intended that democracy or governance would be manipulated.¹¹¹

¹⁰⁹ *SR Bommai* (n 101) [153].

¹¹⁰ The procedures that the Court has started to scrutinise include the formulation of the Governor's Report, the efforts of the Union Council of Ministers to ascertain relevant facts, and the President's justification for the decision to suspend or dissolve the Legislative Assembly. On these fronts the Court has sought to examine the *cogency* of the grounds and the *necessity* of the remedy in order to *minimise* needlessly drastic action. It has, for instance, encouraged Union officers to employ objective floor tests rather than their subjective judgments to ascertain the extent of support enjoyed by claimants to office. It has also emphasised that it could reverse unjustified action, for instance, by reinstating a hastily dissolved Legislative Assembly. For such scrutiny in action, see *Rameshwar Prasad v Union of India* (2006) 2 SCC 1.

¹¹¹ (2006) 2 SCC 1 [223].

It is submitted that YK Sabharwal CJ's response was more in keeping with the framers' intentions:

The ground of maladministration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1).¹¹²

A final set of observations flows from the above. In both *Rajasthan* and *Bommai* the Court permitted Article 356 to be invoked on the grounds that the States had violated the 'basic structure' of the Constitution. This approach is troubling because the normative concepts the preamble references are 'essentially contested'. The Court's expositions on these concepts (for example, on the meaning of 'secularism' in *Bommai*) are therefore unlikely to eliminate the problem of vagueness. The preambles normative commitments may also conflict with each other. For instance, republican governments have historically featured a state-sanctioned religion, as Jean-Jacques Rousseau famously emphasises in *The Social Contract*.¹¹³ Had the *Bommai* Court been aware of this basic fact it would have struggled to reconcile the preambles commitments to Republicanism and Secularism. Finally, if violations of the 'basic structure' of the Constitution are sufficient grounds for the invocation of Article 356, then the Union will find the requisite evidence easy to come by because political reality rarely matches political ideals. Hence, if the Court does not want to hand the Union an excuse to employ Article 356—an excuse that has not been utilised in recent times because political fragmentation has made it harder for the Centre to secure parliamentary approval—then it ought to consider stating that Article 356 should be used only to combat internal subversion and non-compliance.

VI. CONCLUSION

This chapter has outlined the Constitution's emergency provisions and described how they have been interpreted over time. It has suggested that the lull in the employment of these provisions may owe less to how these provisions have been constructed and interpreted, and more to contingent factors—principally, relative calm on the international front and the weakening of the Centre in an era of coalition politics. These circumstances, which may prove transient, have made it much more difficult for the political class to exploit the ambiguities in Articles 352 and 356. Hence until these provisions are tested more thoroughly on the anvil of fear and cravenness, respectively, we should not assume that the Constitution's emergency provisions have been tamed.

¹¹² *Rameshwar Prasad* (n 111) [165].

¹¹³ Jean-Jacques Rousseau, *The Social Contract*, tr Marice Cranston (first published 1762; Penguin 1998).