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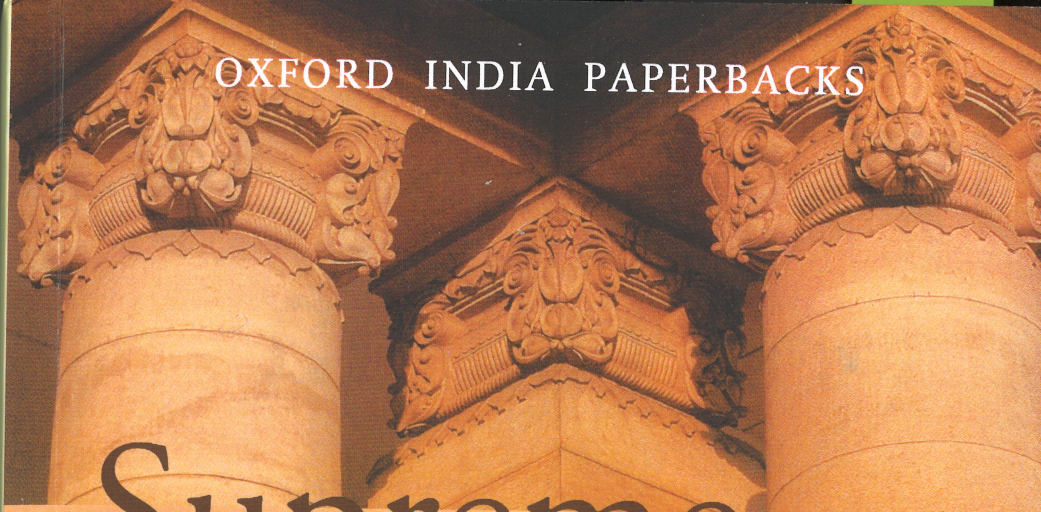

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Essays in Honour of the
Supreme Court of India

edited by
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Nine

Emergency Provisions Under the Indian Constitution

Gopal Subramanium

While every Constitution strives to be imaginative and provides for measures to tackle extraordinary situations of an emergent nature, a state of emergency is clearly definable and distinct, making available an enormous reservoir of prerogative and discretionary power.

An emergency is a state of affairs unexpectedly arising and urgently demanding immediate action.[1] An emergency power is ordinarily equated with war power. The 'War Power' in the US Constitution,[2] and the 'Peace, Order and Good Government' (usually referred to as POGG) power in section 91[3] of the British North America Act, 1867 and section 51 of the Commonwealth of Australian Constitution Act, 1900[4] are all similarly constructed. In the UK too the discretionary power of the sovereign expands in emergencies.

In the US, Australian, and Canadian constitutions, there is no specific treatment of emergencies and emergent conditions. Oblique inferences have to be made from the delineation of the federal power to make inroads into the turf of units. Such inroads can even be made in ordinary times, as is the case with the 'concurrent list' in the Constitution of India.

In a unitary state like the UK, emergency powers flow out of the prerogative of the Crown. In emergencies, the Crown is responsible for defence of the realm and is the only judge of the existence of threats from external enemies.[5] The requisitioning of ships at short notice during the 1982 Falklands conflict is illustrative of royal prerogative during emergencies.

In Canada, the POGG clause in section 91 of the British North America Act, 1867 has been invoked in three types of contingencies: (i) as a 'gap' measure, i.e. whatever is not clearly defined as falling into the ambit of either the federal or the states' powers being relegated to that of the federal legislature, (ii) as a matter measuring up to one of 'national concern', and (iii) as an 'emergency measure'.

The War Measures Act (Canada), enacted during the First World War (1914), was invoked during the First and Second World Wars, and once subsequently in October 1970 in the wake of the challenge of insurrection posed by the Front de Liberation du Quebec. Despite substantial suspension of civil liberties, the constitutionality of the War Measures Act was never reviewed by the courts. An interesting area of extension of the POGG clause in section 91 to an emergency was in the Anti-inflation Reference 1976,[6] when the Supreme Court of Canada upheld the Federal Anti-Inflation Act as an emergency measure and legitimized the federal regulations for control on wages, prices, profits, and dividends. The then prevalent double-digit inflation and high rate of unemployment were considered to be a situation that could legitimately be characterized as an emergency.

The War Measures Act was in vogue till 1988 when it was repealed in favour of the Emergencies Act, 1988. This provides for four types of emergencies: (i) Public welfare emergencies (national disaster, disease, accident, pollution), (ii) Public order emergencies (the Quebec crisis of 1970), (iii) International emergencies (sanctions, embargoes, oil crises, etc.), and (iv) War emergencies.

The normal pattern in emergencies is for the executive power to be expanded and exercised in its discretion with a view to cope with the abnormal situation arising in a war situation. Section 45 of the Government of India Act, 1935[7] stated exactly this, providing for the assumption of powers by the Governor General to be exercised in his descretion. Winston Churchill, while intervening on the 1935 Constitutional proposals before they were adopted, had even described the sweeping character of the Governor General's powers as likely to arouse Mussolini's envy.[8] The occurrences following the enactment of the 1935 Act provided the backdrop against which the Constitution-makers considered the discretionary powers to be given to the President and the Governors. They naturally decided in favour of all functions of the President, including those under emergencies being exercised only on the advice of the Council of Ministers.[9] They were also reluctant to allow the Governor to declare an emergency at will and instead agreed to empower him only to report to the President the existence (or threat) of an emergency.[10]

II

The discussion on the discretionary powers of the Governor led to a debate on situations in which constitutional governance of states broke down, resulting in Article 356 empowering the President to supersede the normal structures in states even when there was no proclamation of emergency. Pious hopes were expressed during the debate that this provision would 'never be called into operation' and 'would remain a dead letter.'[11] Additional provisions were provided to cope with emergencies of a financial nature (Article 360).[12]

This resulted in the introduction of Part XVIII of the Constitution dealing with three types of emergencies:

i) National Emergency (Articles 352, 353, 354, 358, and 359);
ii) Emergency in states due to failure of the constitutional machinery there (Articles 356, and 357);
iii) Financial Emergency (Article 360).

A National Emergency, as in (i), has been invoked three times, twice in conditions of war and external aggression, in 1962 (Chinese aggression) and in 1971[13] (Indo–Pak conflict), and once on grounds of 'internal disturbance' (since deleted by the Constitution (Forty-fourth Amendment) Act, 1978) in 1975.[14] Contrary to the expectations of Constitution-makers, Article 356 has been invoked over a hundred times. Article 360 (Financial Emergency) has never been invoked.

The Emergency provisions assume significance in the following:

(i) the modification of the federal structure;
(ii) the reconciliation of the inherent conflict between the fundamental rights of citizens and the power of the state in emergent conditions.

Before proceeding to analyse these, it appears necessary to examine whether the provisions throw light on themselves.

Article 352 deals with the proclamation of emergency. This article underwent substantial alteration through the Forty-second Amendment, 1976 and Forty-fourth Amendment, 1978. The Forty-second Amendment came in the wake of the June 1975 emergency declared to meet 'Internal Disturbance' by the government of Indira Gandhi. The Forty-fourth Amendment was at the initiative of the Janata government which was installed after the 1977 elections. The original article provided for a presidential proclamation in circumstances of grave emergency threatening the security of India or any part of its territory, due to (1) war, (2) external aggression, and (3) internal disturbance or imminent danger of this. The third prerequisite of 'internal disturbance' was deleted and replaced with the words 'armed rebellion' by the Forty-fourth Amendment.

Curiously, the words 'internal disturbance' were retained undisturbed in Article 355 which declares that it is the duty of the Union to protect every state against external aggression and internal disturbance. In order to fulfil this obligation, the Union can resort to a proclamation of emergency in the event of external aggression, but to contain an internal disturbance, it can only resort to its non-emergency powers. A proclamation of emergency may cover the whole of the Union of India or part of its territory. As the June 1975 proclamation of emergency on account of 'internal disturbance' had to be imposed even while the 1971 emergency, on account of external aggression, was still operative, the Forty-second Amendment permitted the overlap of different proclamations issued on various grounds.[15] The June 1975 emergency was declared on the recommendation of the Prime Minister (Indira Gandhi); the Forty-fourth Amendment inserted a clause (clause 3 in Article 352) that the President shall not issue such a proclamation in the absence of a specific recommendation to the effect by the Union Cabinet. The elaborate wording makes it even appear obligatory that such a recommendation has to be unanimous.[16]

The Forty-second Amendment had placed the action taken under Article 352 beyond the purview of judicial review. By deleting this provision, the Forty-fourth Amendment has subjected the promulgation of emergency to both legislative and judicial scrutinies. The proclamation has to be approved in both Houses of Parliament by a clear majority of total membership and a two-thirds majority of those present and voting within a period of one month. If the Lok Sabha has been dissolved in the interim, ratification has to be effected within a month of the newly elected House being convened after the elections. The Forty-fourth Amendment also provided that a special sitting of the Lok Sabha be convened if a notice in writing of disapproval has been given by not less than one-tenth of the members of the Lok Sabha. The proclamation can be reviewed and approved afresh at intervals of six months.

The major restructuring of Article 352 was a sequel to an unprecedented series of repressive measures introduced by the Congress government in 1975, ushering in emergency as a system of governance rather than invocation of constitutional emergency powers. By deleting 'internal disturbance' and introducing elaborate checks and balances, the prospect of the misuse of power has undoubtedly been sought to be curtailed. It is however worth pondering whether over-reaction to a situation (the June 1975 proclamation of emergency) has not led to a self-inflicted emasculation, impairing the capacity of the Union to quell internal disturbance without resort to emergency provisions and to dis-

charge the duty cast upon it under Article 355 to protect every state against internal disturbance.

This observation assumes relevance when one reflects on it against the backdrop of the Constitution (Fifty-ninth) Amendment Act, 1988 and the Constitution (Sixty-third) Amendment Act, 1989. The Fifty-ninth Amendment inserted a new Article 359-A[17] in the Constitution. The piquant situation resulting from the deletion of the words 'internal disturbance' by the Forty-fourth Amendment, by depriving the government of resort to emergency powers, emasculated its ability to take effective measures in the wake of the widespread terrorism in Punjab. The statement of objects and reasons to the Fifty-ninth Amendment mentioned that

> it may be necessary to invoke the provisions of Article 352 of the Constitution to declare a partial Emergency either in the whole of the State of Punjab or in particular districts of the State. If such a situation arises, the expression 'armed rebellion' included in that Article as one of the grounds for declaration of Emergency (which alone could be resorted to in the case of an internal Emergency) may not be appropriate in the prevailing situation in Punjab to declare a Proclamation in the State. It is, therefore, felt that Article 352 may be suitably amended in its application to the State of Punjab to include 'internal disturbance' in any part on the grounds that the integrity of India is threatened by internal disturbance in any part of the territory of India so as to facilitate the taking of action under that article if it becomes necessary at a future date. The expression 'internal disturbance' was one of the grounds included in that Article from the commencement of the Constitution till it was amended by the Constitution (44th Amendment) Act, 1978. Consequentially, Article 358 and 359 are also proposed to be amended so as to provide for the suspension of Article 19 of the Constitution and the issuing of an order by the President suspending the operation of any provisions of the Constitution and the other provisions contained in Part III (except Article 20) under Article 359, if and when a Proclamation of Emergency on the ground of internal disturbance is issued in relation to the whole or any part of the State of Punjab.

The newly introduced Article 359-A had a very short life, being withdrawn after barely a year by the Constitution (63rd Amendment) Act, 1989. Both these Acts of Amendment could have been avoided had the Forty-fourth Amendment not deleted 'internal disturbance' and substituted it with 'armed rebellion'.

There is yet another lapse. The proviso to Article 83(2) enables the extension of the life of the Lok Sabha during the operation of an emergency by a period not exceeding one year at a time and not beyond six months after the cessation of the emergency. While this has been done, the Constitution is silent on the extension of the period of six months

between two consecutive sessions of Parliament, as in Article 85. What happens if an emergency arises during the period when one Lok Sabha has been dissolved and the subsequent one has yet to be constituted? The emergency may be such that the conduct of elections to the Lok Sabha may itself become difficult, making it necessary to extend the obligatory six-month period between two sessions of Parliament.[18]

Besides Article 83(2) there is another article outside Part XVIII which concerns emergency. Article 250 empowers Parliament to legislate on the State List during an emergency, which together with Articles 353 and 354, impact on the federal structure during its pendency. Article 353 enables the executive power of the Union to make inroads into state turf. The Forty-second Amendment introduces a proviso to this article through which the executive powers of the Union and the legislative powers of Parliament are extended even to territories other than those in which the emergency may be in operation. To some extent it may be necessary to go beyond geographic boundaries for effective enforcement, but this opens up scope for misuse of this special provision. It is a matter of surprise that the far-reaching nature of this proviso escaped the attention of the Fourty-fourth Amendment. Article 354 provides for modifications of the scheme of distribution of revenues delineated in Articles 268 to 279 during an emergency.

III

An emergency also impinges upon the fundamental rights of citizens. The earliest landmark case under the Emergency provisions was the *Makhan Singh* case.[19] In this the Presidential Order under Article 359 provided that the right of any person to move any court for the enforcement of a right conferred by Articles 14, 21, and 22 of the Constitution would remain suspended if such person had been deprived of any such right under the Defence of India Act, 1962 or any Rule or Order promulgated under it. Two judgements were delivered in the *Makhan Singh* case, one by Justice Gajendragadkar for himself, A.K. Sarkar, K.N. Wanchoo, M. Hidayatullah, K.C. Das Gupta, and J.C. Shah JJ. Subba Rao J delivered a partially concurring and partially dissenting opinion. Gajendragadkar J in an extremely learned judgement, traced the history of the right to move for a writ of habeas corpus and held that the rights under Articles 32 and 226, and that under section 491(1)(b) of the Code of Criminal Procedure, were distinct remedies but the right claimed was the same and both remedies stood suspended during the subsistence of the Presidential Order. In a brilliant statement, Gajendragadkar J, rightly excluded malafide actions and excessive delegation from such

immunity. Yet Mr Setalvad's prophetic argument that during the operation of the Presidential Order, the executive may abuse its powers and citizens would have no remedy was strangely termed as 'essentially political' and its impact on the constitutional question was at best indirect!

Gajendragadkar J hastened to add that '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'.

After the *Makhan Singh* case, the next important judgement was in the *Habeas Corpus* case.[20] The *Habeas Corpus* case was one of great expectation in judicial history. A large number of people were being detained primarily on the basis of their political association after the emergency was declared on 25 June 1975 on the ground of internal disturbance. Many of these detention orders were passed under the provisions of the Maintenance of Internal Security Act, 1951 (MISA). Writ petitions were filed in the various high courts. The high courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab, and Rajasthan held in favour of the detenus and took the view that notwithstanding the very wide wording of the Presidential Order dated 27 June 1975 read with the proclamation of emergency of 25 June 1975 the high courts had the power of judicial review under Article 226 of the Constitution of India to examine the detention orders in order to verify whether they had been passed in accordance with the provisions of the MISA or were mala fide or had been issued on the basis of relevant material.

In an appeal by the State, the Supreme Court framed two issues for consideration:

(a) Whether, in view of the Presidential Orders dated 27 June 1975 and 8 January 1976 under Clause (1) of Article 359 of the Constitution, any writ petition under Article 226 before a high court for habeas corpus to enforce the right to personal liberty of a person detained under the Act, on the ground that the order of detention or the continued detention is for any reason not under or in compliance with the Act, is maintainable?
(b) If such a petition is maintainable, what is the scope of extent of judicial scrutiny?

The majority decision (Ray, CJ, Beg, Chandrachud and Bhagwati, JJ) appears to have been simplistically based upon the open-ended nature of the words in the Presidential Order of 27 June 1975. Ray CJ extracted the 1962 Presidential Order which was considered in the

Makhan Singh case and the 1975 Presidential Order which came up for consideration in the *ADM, Jabalpur* case. The 1962 Presidential Order declared that:

> ... the right of any person to move any court for the enforcement of the right conferred by Article 21 and Article 22 should remain suspended for the period during which the proclamation of emergency issued under Clause (1) of Article 352 on 26 October 1962 is in force, if such a person has been deprived of any right under the Defence of India Ordinance, 1962 or any Rule or Order made thereunder.

The 1975 Presidential Order did not carry the words 'if such a person has been deprived of any such rights under the Defence of India Ordinance, 1962 or any Rules of Order made thereunder'. The majority held that it was confined and limited by the condition of deprivation of rights under the Defence of India Ordinance or any Rule or Order made thereunder, whereas in the 1975 Presidential Order no statute was mentioned.

It is respectfully submitted that the majority judgement violates the rigour of reasoning in *Makhan Singh* and lacked the strength of spirit of a zealous sentinel safeguarding the rights of the citizen. The distinction sought to be drawn by the majority is no distinction at all, and further that the majority judgement in the *ADM, Jabalpur* case does not do justice to the enunciation in the *Makhan Singh* case that the validity of a detention order based on any right other than those mentioned in the Presidential Order would be challenged. Even otherwise, the ratio in the *Makhan Singh* case (Bench of seven judges) was binding on the Bench of the learned judges in the *Jabalpur* case.

Khanna J, in what must be considered to be a brave, courageous, conscientious dissent, took the view that even in the absence of Article 21 of the Constitution the State has no power to deprive a person of his life or liberty without the authority of law. The discussion on the rule of law in Khanna J's opinion is far more exacting and elaborate than in the opinion of the majority. It is submitted that Khanna J, while dealing with the question of rule of law, rightly took the view that even in the absence of Article 21 the State has no power to deprive a person of his life and liberty without the authority of law. This, he rightly said, is the essential postulate and basic assumption of the rule of law. The rule of law was meant to flow out of this very concept and was meant to be the benchmark of balancing individual liberty and public order which again was to be ensured by independent courts. Without the sanctity of life and liberty, the distinction between a lawless society and one gov-

erned by laws would cease to have any meaning. Life and liberty were described as priceless possessions, and the mere mention of Article 21 in the Presidential Order could not lead automatically to a suggestion that a person could be deprived of these without the authority of law. Khanna J's opinion looks at the practical effect of the Presidential Order upon the rights of the citizen; the opinions of the majority evades even examining, far from appreciating, the direct impact on the individual rights of a citizen while such an immunity favoured the executive. The majority legalistically examined the interpretation of the 1975 Presidential Order while failing to appreciate that any guarantee of right is matched by enforceability. After all, what is a right unless it is enforceable and capable of being subject to redress? Khanna J quoted the felicitous words of Lord Mansfield in *James Sommersett*:[21] 'It is so odious that nothing can be suffered to support it but positive law: whatever inconvenience may follow from this decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged....'

He also quoted the words of Lord Mansfield in *Fabrigas v Mostyn*:[22] 'To lay down in an English court of justice that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His majesty's subjects both in their liberty and property, with impunity, is a doctrine that cannot be maintained....'

Khanna J also referred to Articles 8 and 9 of the Universal Declaration of Human Rights[23] and held that the Presidential Order must be capable of being construed as authorizing only bona fide executive action, thus, 'the Presidential order, therefore, should be so construed not to warrant arbitrary arrest or to bar right to an effective remedy by competent national tribunals for acts violating basic right or personal liberty granted by law'. According to the law in India before the Constitution came into force, no one could be deprived of his life and personal liberty without the authority of law, and in view of Article 372, this continued to be the law even after the Constitution was adopted. The judgement of the majority evoked justifiable disappointment both in the legal profession and public opinion.

Before analysing the situation post the Forty-fourth Amendment, it would be relevant to recall the grim happenings during the 1975 emergency. The torture in police custody leading to the death of Rajan, an engineering student in Kerala, during the emergency is a classic example of the extent to which Article 359 could be misused. Rajan's detention, torture, and untimely death were not acknowledged by the Kerala gov-

ernment for a long time and their disclosure at a late hour led to the resignation of Karunakaran as Chief Minister. Some observations of the majority appear to be plainly out of place.[24] The consequences of this judgement were of such magnitude that the censors prevented its disclosure at that time.[25] It was the lone voice of Justice Khanna, who quoted Hughes CJ: 'a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed'. This sentence was indeed prophetic, as was witnessed soon thereafter by the Forty-fourth Amendment.

Sub-article (5) of Article 352 introduced by the Forty-second Amendment made the President's satisfaction in a proclamation of emergency as final and conclusive, and stipulated that such satisfaction shall not be questioned in any court on any ground. It further barred the jurisdiction of any court to adjudge the validity of a proclamation made by the President and also the continued operation of such proclamation. Article 352(5) thus exluded judicial scrutiny and review of proclamations of emergency. This sub-article (5) has since been totally deleted by the Forty-fourth Amendment.

Article 358 provides that Article 19 can remain suspended during an emergency imposed on grounds of (i) external aggression and, (ii) war, but not on grounds of armed rebellion. Law can be enacted and executive powers exercised inconsistent with Article 19 and their validity cannot be challenged during the pendency of the emergency or even thereafter. There is, however, a proviso that the protection to legislative and executive acts modifying rights under Article 19 will be available only when there is a specific recital to the effect that such law is in relation to the proclamation of emergency and the executive action is only under a law encapsulating such a recital.

Article 359 empowers the President to suspend the right to seek legal redress for enforcement of rights conferred by Part III of the Constitution except Article 20[26] and 21[27] (Forty-fourth Amendment). The protection of Article 21 nullifies the majority decision in *ADM v Shukla* (1976 Supp SCR 172). There are two differences between Article 358 as modified by the Forty-fourth Amendment and Article 359 similarly modified. The amendment Article 358 is operative only in the context of an emergency declared in the wake of (i) war and (ii) external aggression but not (iii) armed rebellion. The suspension under Article 359 of the right of resort to law courts is in the context of all the three types of emergencies. Article 358 is for the entire duration of emergency while

Presidential Orders under Article 359 can even be for short periods as may be specified in the order. The point of convergence between Articles 358 and 359 is that the laws impacted by both these articles should have a specific recital to the effect that these laws have been made in the context of the emergency. Under Article 359, the rights would revive on the cessation of emergency and can be enforced even in relation to the period of emergency.

IV

While emergency, as in Article 352 has been imposed only three times so far, Article 356 has been invoked more than a hundred times, making one wonder whether such a frequent recourse would not disqualify this provision being included in a chapter on 'emergencies'. Indeed, sections 45 and 93 of the Government of India Act, 1935 were not styled emergency provisions. A chronicle of the actual experience of the use of Article 356 reveals a yawning chasm between precept and practice, especially when one recalls the pious hope expressed by Dr B.R. Ambedkar that this provision would never be called into operation and would thus remain a dead letter.

Article 356 derives its origin from section 93 of the Government of India Act, 1935 which, along with section 45 of the Act, provided for situations arising out of a failure of the constitutional machinery in the federal government and the provinces. Under these sections, the Governor General (in relation to a federation) and the Governor (in relation to a province) were enabled to exercise their powers in their discretion and to assume to themselves the powers of the federal and provincial legislature respectively. Section 93 of the Government of India Act, 1935 empowered the Governor himself to issue a proclamation and assume to himself the necessary powers in conditions of a failure of the constitutional machinery in the state. The original draft Article 278 also followed the same pattern, since the earlier proposal was to make the office of the Governor an elective one, but when that provision was altered in favour of the Governor being appointed by the President the section 93 (Government of India Act, 1935) pattern had to be abandoned in favour of vesting the Governor with only a recommendatory role.

The power under Article 356 flows from the responsibility enumerated in Article 355, casting a duty on the Union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. The spirit of Article 355 is the same as that

of Article 4, section 4 of the United States Constitution which requires the United States to guarantee to every state a republican form of government. It also further elaborates the obligation of the United States to protect each state from foreign invasion; and on application by the legislature or the executive of a state, against domestic violence. A similar provision is available in Section 1.19 of the Australian Constitution.[28]

After enunciating in Article 355 the duty of ensuring that every state government is carried on in accordance with the provisions of the Constitution, Article 356 proceeds to elaborate on the remedial measures to be adopted in situations when the government of a state cannot be carried on in accordance with the provisions of the Constitution. Is the intention of Article 356 analogous to the POGG clause in the Canadian and Australian Constitutions? The answer is clearly in the negative.[29] Article 356 provides that if the President, on receipt of a report from the Governor or otherwise, is satisfied that the government of the state cannot be carried on in accordance with the provisions of the Constitution, the President may, by proclamation, (a) assume to himself the executive powers of the state, and (b) declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament. Significantly, the proviso to Article 356(1) rules out the assumption of the powers of the high court. The report from the Governor would appear to fall within the ambit of his discretionary power, as in Article 163(2) of the Constitution.[30] The Governor's power obviously cannot be limited to acting on the advice of his ministry, for it may indeed be necessary for him to report to the President that his council of ministers was conducting the affairs of the state in a way that was indicative of a failure of constitutional machinery.

The proclamation has to be ratified within two months by both Houses of Parliament. If the Lok Sabha stands dissolved, the proclamation ceases to operate at the end of thirty days after the reconstitution of the Lok Sabha, unless it is ratified by the reconstituted body.

A proclamation, unless revoked, will cease to operate on the expiration of a period of six months from the date of issue of the proclamation. Six-monthly extensions are permitted with the caveat however that extensions beyond one year up to a total of three years, are permissible provided the two criteria mentioned in Article 356(5), namely, (i) a proclamation of emergency is in operation in the whole of India, or, as the case may be, in the whole or in any part of the state at the time when the resolution for extension is passed, and (ii) the Election Commission certifies that the extension is necessary on account of the difficulties in holding general elections to the state legislative assembly concerned.

called that in *State of Rajasthan* it was held that the satisfaction of the President is a subjective matter and cannot be put to objective tests. It is not a decision which can be based on what the US Supreme Court has described as 'judicially discoverable and manageable standards'. It would largely be a political judgement based on an assessment of diverse and varied factors. If the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have the jurisdiction to examine it. This is the narrow minimal area in which the exercise of power under Article 356(1) is subject to judicial review.[38]

The *Bommai* judgement addressed the core issue in Article 356 as one of determining whether the assessment was one where the governance of the state *cannot* be carried on in accordance with the provisions of the Constitution. 'Cannot' implies an unresolvable impasse.

In other words, if the situation is one in which a solution other than imposition of President's rule can be worked out, then such a solution should be explored. It follows, therefore, that departure from one or other article of the Constitution cannot be ground enough; the totality of the situation should be such that in the absence of President's rule the governance of the state cannot be carried on in accordance with the Constitution.

On justiciability, the *Bommai* decision has come to the conclusion that the Court should look into whether there was any material leading to the President's satisfaction: '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.' (Per Jeevan Reddy J and Agarwal J, agreed to by Pandian J, and dissented to by Sawant J and Kuldip Singh J). The Court can also verify that the satisfaction of the President was not 'absurd, mala fide or perverse or based on extraneous and irrelevant grounds'.

A ticklish issue that arises in this context is whether the Court is not debarred from looking into the advice of the council of ministers, in view of Article 74(2) of the Constitution. Article 74(2) states that 'the question whether any, and if so what advice was tendered by ministers to the President shall not be inquired into in any court'. The *Bommai* judgement distinguished between the material based on which the President was advised and the advice itself. 'Material is not advice.'

The words 'or otherwise' in Article 356 do not debar the courts from asking for material other than the report of the Governor, and if such information is not disclosed, the Court can refuse to recognize such information even if the proclamation states mechanically that the President was satisfied on the basis of other information received by him.

On the circumstances that led to the satisfaction of the President, is included the stipulation in Article 365 of the Constitution that

> where any state has failed to comply with, or to give effect to, any directions given in exercise of the executive power of the Union under any 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.

Lest this article provide a wide turf for the Centre, the *Bommai* judgement has annotated Article 365 to mean that the directions given must be lawful and their disobedience should give rise to a situation contemplated in Article 356(1).

Elaborating on governance in accordance with the Constitution, the *Bommai* judgement dwelt on the basic structure of the Constitution. The Court's view here appears somewhat sweeping. The matter before them was the rationale or the decision to dismiss the Rajasthan, Madhya Pradesh and Himachal Pradesh governments, on the basis of the earlier dismissal of the Uttar Pradesh government in the wake of the demolition of the disputed structure at Ayodhya. While secularism is a basic feature of the Constitution, Sawant J and Kuldip Singh J held that any professions and actions which go counter to the creed of secularism are prima facie proof of conduct in defiance of the Constitution. Jeevan Reddy J and Agarwal J, interestingly, held that any party which seeks to fight elections on the basis of a plank that has the proximate effect of eroding the secular philosophy of the Constitution would be guilty of following an unconstitutional course of action. The central question, it is submitted, ought to be: Did the government in power act in any manner violative of the basic structure of the Constitution; and not, whether the party in power espoused one ideology or the other. After all, Ministers take the oath of allegiance to the Constitution and actions relevant to Article 356 should be judged on the touchstone of whether they subsequently acted in any manner repugnant to this oath and not whether their utterances or actions prior to taking the oath were contrary to the basic structure of the Constitution.

The substantial areas in which the *Bommai* judgement has provided clear illumination for the future are, (i) the insistence on the floor test and (ii) the non-dissolution of the Assembly prior to ratification by Parliament. History is replete with instances where the Governor applied his mind and discretion to determine who and how many retained the confidence of the House. The *Bommai* judgement, therefore, clearly laid down that except in extraordinary situations where, because of per-

vasive violence, a free vote is not possible in the House, the floor test alone is the constitutionally proper method for testing the strength and confidence that the government has in the House. *Bommai*, is therefore a landmark contribution to facilitate upholding of democratic values.

It has often happened that despite much erudition, courts have not been able to dispense final relief in accordance with their findings. The reason is that irreversible steps had been taken before the court concerned began adjudicating the issue. With a view to providing relief that does not become infructuous, the Court held that the dissolution of the Assembly should not be undertaken prior to the ratification of the proclamation by Parliament. Pending parliamentary approval, the Assembly can be placed in suspended animation.

In the event that Parliament disapproves promulgation, the proclamation lapses at the end of the two-month period. In such a case, a government that was dismissed, revives, and the legislative assembly kept in suspended animation gets reactivated. Since the proclamation lapses, and is not retrospectively invalidated, the acts done, orders made, and laws passed during the period of two months do not become illegal or void.

If the court strikes down the proclamation, it will be open to it to restore the dismissed government to office, and revive and reactivate the legislative assembly wherever it may have been dissolved or kept under suspension. The court will also have the power to declare that acts done, orders passed, and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid.

V

Besides Article 352 and 356 type of emergencies, the Constitution also provides for a financial emergency to be declared under Article 360 in a situation in which the financial stability or credit of India or of any part of the territory is threatened.[39] During such an emergency the executive authority of the Union can extend to giving suitable directions to the state. The finances of the states and Union are interwoven through the structures of the Finance Commission and the Planning Commission. The state of finances of the states is most frequently a consequence of certain actions of the central government; for example the pay and dearness relief revisions by the central government result in similar revisions by state governments. Most of the state debts are owed to or based on guarantees provided by the central government. The mounting debts and increasing fiscal deficits (currently 4.3 per cent of GDP) of the states are already a matter of concern. With globalization of financial

management and monitoring, the financial health of both the Union and the states will come under active scrutiny in future, and increasingly form part of the new international financial architecture. It is expected that the emerging framework will itself provide checks and balances, and the necessity of declaring financial emergencies and devising surgical solutions may not be necessary in the future.

Moreover, in the three types of emergencies, there is an implicit connecting thread of faith in the infallibility of the structures and institutions of the Union in contrast to those of the states. However, the same body politic governs the panchayats, local bodies, the states and the Union. Seen in this context, the real efficacy of all emergency provisions would appear to be of minimal value.

VI

Perhaps disparate situations, emergencies and non-emergencies, have been brought together in a chapter of the Constitution that deals with emergencies. It may be possible to regroup the articles into those that are concerned with infractions of fundamental rights and those that are departures from the division of legislative powers.

Indeed, the detailed enunciation and elaborate amendment made in Part XVII of the Constitution stand in striking contrast to the brevity that shrouds emergencies in Constitutions, written and unwritten, elsewhere in the world. One is sometimes led to feel that the overkill in elaborate delineation of checks and balances is likely to make governance during real emergencies complex and difficult, if not ineffective and impossible. A real crisis or emergency situation needs expert and firm handling. It can be argued that this will be possible only if one of the three arms of governance, usually the executive, expands and those of the others, namely the legislature and judiciary remain static or are curtailed. However, the Forty-fourth Amendment has virtually expanded the scope and amplitude of all three arms of the state. Whether this will lead to chaos during real emergencies is yet to be seen. The plethora of constitutional amendments against the backdrop of Punjab terrorism could not have been possible had the ruling party not had a substantial majority in Parliament. We have fast moved into a situation where governance in the country has moved into the hands of makeshift coalitions, not of national parties alone but also of regional ones. It is one thing that after 1975 there has been no proclamation of national emergency, but should such a situation develop, there can be fresh challenges to effective governance.

To conclude, the efficacy of the arrangements will be shown by the outcome. Emergent situations need effective governance. It is a moot point whether such a result flows from the detailed enunciation of checks and balances (which would indeed lead to lapses and omissions) or whether it would be preferable to leave much unsaid and relegate the situation to statesmanly handling and the sane judgement of the nation. In the ultimate analysis, nations speak and act with one voice during crises and emergencies.

Notes

[1] *The Oxford English Dictionary*, 2nd edn, Vol. V, Clarendon Press, Oxford, p. 176 defines 'emergency' as a political term, to describe a condition approximating that of war; *occas* as a synonym or euphemism for War; also *state of emergency*, wherein normal Constitution is suspended.

[2] Article (4) of the US Constitution states that 'The United States shall guarantee to every State in this Union a republican form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence'.

[3] Section 91 of the British North America Act 1867 (the Canadian Constitution) confers on the federal Parliament, the power 'to make laws for the peace, order and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces'.

[4] Section 51 of the Commonwealth of Australia Constitution Act, 1900 states that 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good Government of the Commonwealth, with respect to ...'.

[5] *R v Hampden* (1637) 3 State Tr 826.

[6] *Anti Inflaction Act* 1976 2 SCR 373.

[7] Section 45 of the Government of India Act, 1935.

S.45 *Power of Governor General to Issue Proclamations*

If at any time the Governor General is satisfied that a situation has arisen in which Government of the Federation cannot be carried on in accordance with the provisions of this Act, he may, by Proclamation—(a) declare that his functions shall to such extent as may be specified in the Proclamation be exercised by him in his discretion; (b) assume to himself all or any of the persons vested in or exercisable by any Federal body or authority; and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority.

Section 93 of the Government of India Act, 1935 was, *mutatis mutandis*, the same except that the Governors of Provinces were substituted for the Governor General, and the Government of the Province was substituted for the Government of the Federation.

[8] B. Shiva Rao (ed.), *The Framing of India's Constitution*, A Study, N.M. Tripathi, Bombay, 1968, p. 803.

[9] Minutes: Meeting of the Union Constitution Committee on 8 June 1947, item 8; *Select Documents, supra* n. 8, Vol. II, p. 555.

[10] The points contained in the Secretary's note dated 7 June 1947 were taken up seriatim.

Point (a) (1)—The Provincial Constitution Committee has decided that the Governor of a Province shall have the authority in his discretion to issue Ordinances for the purpose of preventing any grave menace to the peace and tranquillity of the Province or any part thereof. A suggestion was made that in view of the all-India repercussions of serious disturbances in any Province, such an Ordinance shall only be issued in consultation with the President of the Union.

It was decided that where a Governor thought that there was grave menace to the peace and tranquillity of his Province or any part thereof, he might report to the President of the Union and the latter would, thereupon, take appropriate action under the Emergency Powers listed in the Union by the Constitution.

(Minutes of the Joint Meeting of the Union and Provincial Constitution Committee, 10 June 1947, in *supra* n. 8, *Select Documents*, Vol. II, pp. 610–11.)

[11] Dr Ambedkar expressed the hope that the draft Article 278 (now Article 356) would be a dead letter, and added, 'I hope the first thing [the President] will do would be to issue a mere warning to a province that has erred that things were not appearing in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people to settle matters by themselves. It is only when these two remedies fail, that he would resort to this Article' (*Constituent Assembly Debates*, Vol. 9, p. 177).

[12] Could an emergency be declared by the President if a grave threat was posed to the country's financial stability or credit? A last-minute proposal to enable the Union government to deal with a financial emergency was introduced by Ambedkar on 16 October 1949. The view of the Finance Minister was that, as an economic crisis was analogous to war, it would be difficult to decide when the President would declare a situation as one which threatened the financial stability or credit of the country. It would be better if the centre were placed in a position to issue directions to the states in financial matters, at any time when it felt that any action taken by a state was at variance with the economic and financial policy of the centre.

Moving the article in the Constituent Assembly on 16 October 1949, Dr Ambedkar explained that it was drawn up more or less on the lines of the National Recovery Act of 1930 passed in the USA which gave powers to the President to make similar provisions in order to remedy the economic and financial difficulties that had overtaken the American people as a result of the great depression. (Ambedkar was presumably referring to the National Industrial Recovery Act, 1933, which was declared unconstitutional in 1935.)

(*Supra* n. 8, pp. 820–1.)

[13] Presidential Proclamation, 3 December 1971.

[14] Presidential Proclamation, 25 June 1975.

[15] Clause (4) as inserted by the Forty-second Amendment has been renumbered clause (9) by the Forty-fourth Amendment Act 1978 and reads as follows:

... The power conferred on the President by this Article shall include the power to issue different Proclamations of different grounds, being war or external aggression or armed rebellion or imminent danger of war or external aggression or armed rebellion, whether or not there is a Proclamation already issued by the President under Clause (1) and such Proclamation is in operation....

[16] Article 352(3) inserted by the Forty-fourth amendment reads as follows: The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Ar-

ticle 75) that such a Proclamation may be issued has been communicated to him in writing....

[17] ...*359-A. Application to this Part to the State of Punjab*—Notwithstanding anything in this Constitution, this Part shall, in relation to the State of Punjab, be subject to the following modifications, namely:

(a) in Article 352,

(i) in clause (1),

(A) for the opening portion, the following shall be substituted, namely: 'If the President is satisfied that a grave emergency exists whereby:

(a) the security of India or of any part of the territory thereof is threatened, whether by war of external aggression or armed rebellion, or

(b) the integrity of India is threatened by internal disturbance in the whole or any part of the territory of Punjab,

he may, by Proclamation, make a declaration to that effect in respect of the whole of Punjab or of such part of the territory thereof as may be specified in the Proclamation...'

(B) in the Explanation:

(1) after the words 'armed rebellion', the words 'or that the integrity of India is threatened by internal disturbance in the whole or any part of the territory of Punjab', shall be inserted;

(ii) in clause (9), after the words 'armed rebellion' at both the places where they occur, the words 'or internal disturbance' shall be inserted;

(b) In Article 358, in clause (1), after the words 'or by extenal aggression', the words 'or by armed rebellion, or that the integrity of India is threatened by internal disturbance in the whole or any part of the territory of Punjab', shall be inserted;

(c) In Article 359, for the words and figures 'Articles 20 and 21', at both the places where they occur, the word and figures 'Article 20' shall be substituted.

(2) The amendment made to the Constitution by sub-section (1) shall cease to operate on the expiry of a period of two years from the commencement of this Act, except as respects things done or omitted to be done before such cesser.

[18] During the Kargil cirsis (1999) there was an apprehension that had it escalated further, a proclamation of emergency might have to be invoked, the Lok Sabha having been dissolved prior to the crisis and the Lok Sabha elections being held just prior to the expiry of the six-month period. Had the Kargil crisis deepened, the conduct of elections itself might have become difficult due to the operational difficulties caused by a paucity of paramilitary forces. The Constitution contains no flexibility about the six-month period.

[19] *Makhan Singh v State of Punjab* (1964) 4 SCR 797.

[20] *Additional District Magistrate, Jabalpur v S.S. Shukla* (1976) Supp SCR 172.

[21] (1772) 16 Cri. Pract. 289.

[22] 1 Crown 161.

[23] Universal Declaration of Human Rights, Articles 8 and 9:

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

[24] (i) 'Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well housed, well fed and well treated, is almost maternal' (Per Beg, J in *ADM Jabalpur v Shivkant Shukla* (1976 Supp SCR 172 at pp. 370–1).

(ii) 'People who have faith in themselves and in their country will not permit pictures of diabolic distortion and mendacious malignment of the governance of the country' (Per Ray CJ in *ADM Jabalpur v Shivkant Shukla*).

(iii) 'It seems to me that the Emergency Provisions could themselves be regarded as part of the basic structure of the Constitution. At any rate, they are meant to safeguard the basis of all orderly government, according to law' (Per Beg, J, (1976) Supp SCR 172 at p. 366).

[25] White Paper on the issue of mass media during the internal Emergency (August 1977), App. 13; Sept.: Serial No. 11.

[26] Article 20 of the Constitution of India:

> 20. *Protection in respect of conviction for offences:* (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
>
> (2) No person shall be prosecuted and punished for the same offence more than once.
>
> (3) No person accused of any offence shall be compelled to be a witness against himself....

[27] Article 21 of Constitution of India

> 21. *Protection of life and personal liberty:* No person shall be deprived of his life or personal liberty except according to procedure established by law.

[28] Article 1.19 of the Commonwealth of Australia Act states: 'The Commonwealth shall protect every state against the invasion and on the application of the executive government of the State, against domestic violence.'

[29] Pandit H.N. Kunzru: Is it the purpose of Article 278 and 278A to enable the Central Government to intervene in provincial affairs for the State of good government in the provinces?

Dr Ambedkar: No, no. The centre is not given that authority ... Whether there is good Government or not in the Province is not for the centre to determine. I am quite clear on the point.

Pandit H.N. Kunzru: The House is entitled to know from the Hon'ble Member what is his idea of the meaning of the phrase 'in accordance with the provisions of the Constitution'?

Dr Ambedkar: The expression 'failure of machinery', I find, has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore with its de facto and de jure meaning.

(*Constituent Assembly Debates*, Vol 9, pp. 176–7.)

[30] Article 163 of the Constitution

> 163. *Council of Ministers to aid and advise Governor:* (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court....

[31] The first instance of defections leading to President's Rule took place as far back as in November 1954, when T. Prakasam's Ministry in Andhra was brought down by the ruling party members voting with the opposition in the no-confidence motion. Defections became more frequent after the 1967 general elections. In Haryana (1967 November) defections had become endemic. These had made a mockery of the Constitution and had brought democracy to ridicule (*President's Rule in the States and Union Territories*, Lok Sabha Secretariat, New Delhi, 1996).

President's Rule had to be imposed, consequent to break-up of ruling coalitions in Kerala (1979, 1981, 1982), Manipur (1992), Orissa (1961 and 1971), Punjab (1968), Tripura (1979), and Uttar Pradesh (1970).

Resignation of the Chief Minister led to President's Rule in Kerala (1970, 1979), Gujarat (1976), Punjab (1951), Sikkim (1979), Uttar Pradesh (1968, 1975) and West Bengal (1970).

Public agitations leading to President's Rule took place in Andhra Pradesh (1973), Assam (1979), Gujarat (1974), Kerala (1959), Punjab (1983 and 1987).

The rout of the Congress Party in the March 1977 Lok Sabha elections led to the imposition of President's Rule in the nine states of Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. A repeat of this occurred in February 1980 following the resurgence of the Congress party in the January 1980 Lok Sabha elections. The states involved were Bihar, Gujarat, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Tamil Nadu, and Uttar Pradesh.

[32] The Supreme Court cannot ... interdict use of powers under Article 356(1) unless and until resort to the provision, in a particular situation, is shown to be so grossly perverse and unreasonable as to constitute patent misuse of this provision or an excess of power on admitted facts. The most that one could say is that a dissolution against the wishes of the majority in a State Assembly is a grave and serious matter. Perhaps, it could be observed that it should be resorted to under Article 356(1) of the Constitution only when 'a critical situation' has arisen. 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 an opportunity of giving a fresh verdict. A decision on such a question undoubtedly lies in the Executive realm. (*State of Rajasthan v Union of India* (1977) 3 SCC 592.)

[33] In Article 356 of the Constitution, after clause (4) the following clause shall be inserted, and shall be deemed always to have been inserted, viz '(5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground'. (Constitution 38th Amendment Act, 1975.)

[34] (1994) 3 SCC 1.

[35] The main points of the above (Bommai) judgement are as follows:

(1) Article 356 of the Constitution confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister as its head. The satisfaction contemplated by the article is subjective in nature.

(2) The power conferred by Article 356 upon the President is a conditional power. It is not an absolute power. The existence of material—which may comprise or include the report(s) of the Governor—is a precondition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Article 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving the Legislative Assembly can be said to be implicit in clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme, that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly under sub-clause (c) of Clause (1). The dissolution of the Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the Proclamation.

(4) The Proclamation under clause (1) can be issued only where the situation contemplated by the clause arises. In such a situation, the Government has to go. There is no room for holding that the President can take over some of the functions and powers of the State Government while keeping the State Government in office. There cannot be two Governments in one sphere.

(5) (a) clause (3) of Article 356 is conceived as a check on the power of the President and also as a safeguard against abuse. In case both Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two-month period. In such a case, Government, which was dismissed, revives. The Legislative Assembly, which may have been kept in suspended animation gets reactivated. Since the Proclamation lapses—and is not retrospectively invalidated—the acts done, orders made and laws passed during the period of two months do not become illegal or void. They are, however, subject to review, repeal or modification by the Government/Legislative Assembly or other competent authority.

(b) However, if the Proclamation is approved by both the Houses within two months, the Government (which was dismissed) does not revive on the expiry of the period of Proclamation or on its revocation. Similarly, if the Legislative Assembly has been dissolved after the approval under clause (3), the Legislative Assembly does not revive on the expiry of the period of Proclamation or on its revocation.

(6) Article 74(2) merely bars an inquiry into the question whether any, and if so, what advice was tendered by the ministers to the President. It does not bar the Court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the President had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked at by or shown to the President, it does not partake the character of advice. Article 74(2) and section 123 of the Evidence Act cover different fields. It may happen that while defending the Proclamation, the minister or the official concerned may claim the privilege under section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of section 123.

(7) The Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds.

The deletion of clause (5) (which was introduced by the Thirty-eighth (Amendment) Act)—by the Forty-fourth (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The Court will not go into the correctness of the material or its adequacy. Its inquiry is limited to see whether the material was relevant to the action. 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.

(8) If the Court strikes down the Proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may

have been dissolved or kept under suspension. In such a case, the Court has the power to declare that acts done, orders passed and laws made during the period the Proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/Legislative Assembly or other competent authority to review, repeal or modify such acts, orders and laws.

(9) The Constitution of India has created a federation but with a bias in favour of the Centre. Within the sphere allotted to the states, they are supreme.

(10) Secularism is one of the basic features of the Constitution. While freedom of religion is guaranteed to all persons in India, from the point of view of the State, the religion, faith or belief of a person is immaterial. To the State, all are equal and are entitled to be treated equally. In matters of State, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed. Any state government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Article 356. (*President's Rule in the States and Union Territories*, Lok Sabha Secretariat, New Delhi, 1996, Introduction, pp. ix, x.)

[36] (1945) 328 US 549.

[37] (1962) 369 US 186.

[38] ... 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. It is not a decision which can be based on what the Supreme Court of United States has described as 'judicially discoverable and manageable standards'. It would largely be a political judgement based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and response of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affiars and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot therefore, by its very nature be a fit subject matter for judicial determination and hence it is left to the subjective satisfaction of the central government which is best in a position to decide it. The Court cannot in the circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the central government is based. That would be a dangerous exercise for the Court, both because it is not a fit instrument for the determining a question of this kind and also because the Court would thereby usurp the function of the central government and in doing so, enter the 'political thicket', which it must avoid if it is to retain its legitimacy with the people... (Per Bhagwati J in *State of Rajasthan v Union of India* (1977) 3 SCC 592.)

[39] Supra note 12.