

## **EXECUTIVE DISCRETION AND ARTICLE 356 OF THE CONSTITUTION OF INDIA: A Comparative Critique**

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### **Abstract**

Article 356 of the Constitution of India, which deals with presidential discretionary powers of emergency, has long been the favored topic of political debate - and, at times, the cause of much ire - within the legal intellectual community in India. This paper examines the rationale behind the invocation of this Article by almost every Government that came to power in India and its implications for the democratic fabric of India. The historical development of this Article helps us to gauge the rationale behind its inclusion in the original draft of the Constitution. This serves as an estimate of the severity of events that would qualify to trigger this provision and helps us examine the validity of some of the recent applications of this Article. Studying similar and contrasting provisions that deal with executive discretionary powers in two other Constitutions, the American and the Malaysian, helps us to develop an analogy between contemporaneous developments in this area in three different sociopolitical

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environments.

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## 1. Introduction

Article 356 of the Indian Constitution has acquired quite some notoriety due to its alleged misuse. The essence of the Article is that upon the breach of a certain defined state of affairs, as ascertained and reported by the Governor of the State concerned (or otherwise), the President concludes that the 'constitutional machinery' in the State has failed. Thereupon the President makes a 'Proclamation of Emergency,' dismissing the State Legislature and Executive. During a state of emergency, the President is vested with tremendous discretionary powers. Any legislation or constitutional provision that abrogates any of the basic principles of democratic freedom is anathema to most people and the more so to the people of the largest democracy in the world. Having just gained independence after a long and continuous struggle, the people of India would naturally have the greatest interest in preserving all the

freedoms envisioned in a democratic society. If the members of the Drafting Committee of the Constitution included a provision that permits a Government to dismiss a duly elected representative body of the people and suspend those freedoms in violation of even the crudest interpretation of a 'separation of powers,' then common sense suggests that it is only to deal with the direst of circumstances and nothing less. But it seems that the remedial nature of the Article has been perverted to impose the domination of the Central Government upon a State Government that does not subscribe to its views. Central control over regional governments is essential for the integrity of nations that have federal systems of government, and Article 356 was designed to preserve this integrity, but what remains to be seen is whether it is being used at the cost of sacrificing the interests of democratic freedom.

## 2. Federalism in India

Federalism in India is at once similar and distinct from other federations like that of America; distinct in that it is not a group of independent States coming together to form a federation by conceding a portion of their rights of government, but a distributed entity that derives its power from a single source - the Union. Sovereignty and the powers of governance are distributed and shared by several entities and organs within the Indian constitutional system.<sup>2</sup> Dr. Babasaheb Ambedkar, who chaired the Drafting Committee of the Constituent Assembly, stressed the importance of describing India as a 'Union of States' rather than a 'Federation of States.' He said: '. . . what is important is that the use of the word "Union" is deliberate . . . Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source.'<sup>3</sup> The similarity between the systems of government in the two countries, however, is remarkable. Both governments exhibit a strong *Union* control, where the individual States give up a significant portion of their autonomous rights to the Central Government in return for security and pursuit of common interests; in contrast, in a confederation the individual States retain most of their sovereignty and are only loosely bound together. In the words of Alexander Hamilton (the illustrious co-author of the *Federalist Papers*, along with James Madison and John Jay), when describing the proposed Constitution of the Federal Government of the United States of America,

The definition of a *confederate republic* seems simply to be an 'assemblage of societies,' or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a

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<sup>2</sup> National Commission to Review the Working of the Constitution, *A Consultation Paper on Article 356 of the Constitution*, II, ¶ 2.1 (2002), at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm> (last visited Feb. 22, 2004).

<sup>3</sup> National Commission to Review the Working of the Constitution, *Report*, I, ¶ 8.1.2 (2002), at <http://lawmin.nic.in/ncrwc/finalreport/volume1.htm> (last visited March 21, 2004).

direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a *federal government*.<sup>4</sup>

This is in essence how one would describe Center-State relations in India; excepting provisions for certain emergency situations in the Constitution of India, where the Union would exercise absolute control within the State. James Madison dealt extensively with the issues related with the relinquishing of sovereign powers by States to a Central (or 'federal') authority in the *Federalist Papers*, specifically Federalist No. 45.<sup>5</sup> He believes that, for the common good of all the members of a federal system, it is necessary for the individual States to sacrifice some of their powers to the Union.<sup>6</sup> He then goes on to examine in detail the danger this would pose to the residual powers that remain with the States (this issue comes very close to the heart of this paper).<sup>7</sup> He contends that a study of similar systems in ancient times, like the Achaean League or the Lycian Confederacy, would reveal that the danger of usurpation of authority by the Federal power would be smaller than the danger of degeneration of the federation into smaller factions that would not be able to defend themselves against external aggression.<sup>8</sup> This is precisely the rationale behind the distribution of power between the Union and the States in India. In fact, specific powers are divided into three lists - the Union List, the State List, and the Concurrent List (powers shared by both the Union and the States). Therefore the system of government in India can be considered to be 'quasi-federal' in nature, in as much as it is both federal and unitary. It can be considered federal because of the distribution of powers between the Center and States and it may be considered unitary because of the retention of Union control over certain State matters, and also because of the constitutional provisions relating to emergencies when all powers of a State would revert to the Center. India has a vast and diverse population, with a large number of people living in abject poverty. Extraordinary situations are not novel to the Indian political scene. Therefore extraordinary powers to deal with these situations become necessary. The power contained in Article 356 is both extraordinary and arbitrary, but it is an uncanny trait of extraordinary power that it tends to corrupt the wielder. A close scrutiny of the history of its application would reveal that Article 356 is no exception. But before we turn to that, a systematic analysis of the constitutional development of this controversial piece of legislation is in order.

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<sup>4</sup> Alexander Hamilton, *The Union as a Safeguard Against Domestic Faction and Insurrection*, THE FEDERALIST NO. 9, INDEPENDENT JOURNAL, Nov. 1787.

<sup>5</sup> James Madison, *The Alleged Danger from the Powers of the Union to the State Governments Considered*, INDEPENDENT JOURNAL, Jan. 1788 at [http://memory.loc.gov/const/fed/fed\\_45.html](http://memory.loc.gov/const/fed/fed_45.html) (last visited Feb. 22, 2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

### 3. The development of Article 356

#### 3.1 The Government of India Act, 1935

This Act first introduced the concept of 'Division of Powers' in British India. It was an experiment where the British Government entrusted limited powers to the Provinces. But since there was very little faith lost between the British and the Indian people, the British took precautions to keep a sufficient check on the powers given to the Provinces. These precautions were manifested in the form of emergency powers under Sections 93 and 45 of this Act, where the Governor General and the Governor, under extraordinary circumstances, exercised near absolute control over the Provinces.<sup>9</sup>

#### 3.2 Drafting Committee of the Constituent Assembly

On August 29, 1947, a Drafting Committee was set up by the Constituent Assembly. Under the chairmanship of Dr. B.R. Ambedkar, it was to prepare a draft Constitution for India. In the course of about two years, the Assembly discussed 2,473 amendments out of a total of 7,635 amendments tabled.<sup>10</sup>

When it was suggested in the Drafting Committee to confer similar powers of emergency as had been held by the Governor-General under the Government of India Act, 1935, upon the President, many members of that eminent committee vociferously opposed that idea. Dr. Babasaheb Ambedkar then pacified the members stating:

'In fact I share the sentiments expressed by my Hon'ble friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces.'

He added: 'I hope the first thing he will do would be to issue a clear warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution.'<sup>11</sup>

By virtue of this earnest advice given by the prime architect of the Indian Constitution, we can safely conclude that this is the very last resort to be used only in the rarest of rare events. A good Constitution must provide for all conceivable exigencies. Therefore this Article is like a safety valve to counter disruption of political machinery in a State.

Article 355 states: 'It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State

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<sup>9</sup> National Commission to Review the Working of the Constitution, *supra* note 2, at ¶ 2.1.

<sup>10</sup> *First Day in the Constituent Assembly*, at <http://parliamentofindia.nic.in/debates/facts.htm> (last visited Feb. 22, 2004).

<sup>11</sup> National Commission to Review the Working of the Constitution, *supra* note 2, at ¶ 2.2.

is carried on in accordance with the provisions of this Constitution.’<sup>12</sup> The word ‘otherwise’ in Article 356(1) was not included in the original draft; it was later introduced through an amendment, despite protests from members of the original Drafting Committee, stating that it was an open invitation to abuse the Article. Dr. Ambedkar justified its introduction saying that Article 277A (now Article 355, cited above) imposed a duty upon the Center to ensure that the States are governed in accordance with constitutional provisions and that hence it would not be proper for the President to base his decision solely on the report of the Governor of the State.<sup>13</sup>

### 3.3 An analogy between Article 356 and Sections 45 and 93 of the Government of India Act, 1935

There are certain differences in the provision relating to the failure of the constitutional machinery under the present Constitution and the powers dealt with in Sections 45 and 93 of the Government of India Act, 1935.<sup>14</sup> Firstly, the 1935 Act empowered the Governor-General to deal with a failure of the constitutional machinery at the Center (Section 45). It also empowered the Governor-General to deal with a similar situation in a Province (Section 93).<sup>15</sup> The present Constitution, however, does not intend to suspend the Constitution of a State, but empowers the President to take steps in this regard, though he shall have to act on the report of the Governor or Ruler of the State. Secondly, under Section 93 of the 1935 Act, the executive and legislative powers of a State could be assumed by the Governor, acting at his discretion.<sup>16</sup> The present Constitution has separated the two powers: the President, assuming executive powers, and the Union Parliament, assuming legislative powers.

## 4. The Sarkaria Commission Report, 1987

### 4.1 Background

In spite of the precautions laid down in Article 356, the Article was invoked on several occasions by the Center due to ambiguities in its wording. It was only in 1987 when the Sarkaria Commission submitted its report that part of the obscurity surrounding Article 356 was cleared. The Commission, headed by Justice R.S. Sarkaria, was appointed in 1983 and spent four years researching reforms to improve Center-State relations.

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<sup>12</sup> *India - Constitution*, at [http://www.oefre.unibe.ch/law/icl/in00002\\_.html](http://www.oefre.unibe.ch/law/icl/in00002_.html) (last visited Feb. 22, 2004).

<sup>13</sup> D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (5th edn. 1990). A graphic record of this debate is also available at <http://www.tribuneindia.com/1998/98nov08/sunday/head.htm> (last visited Feb. 22, 2004).

<sup>14</sup> National Commission to Review the Working of the Constitution, *supra* note 2, at ¶ 2.2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

#### 4.2 Rare use of Article 356

The Sarkaria Commission recommended extremely rare use of Article 356. The Commission observed that, although the passage, ‘. . . the government of the State cannot be carried on in accordance with the provisions of this Constitution . . .’ is vague, each and every breach and infraction of constitutional provisions, irrespective of their significance, extent, and effect, cannot be treated as constituting a failure of the constitutional machinery. According to the Commission, Article 356 provides remedies for a situation in which there has been an actual breakdown of the constitutional machinery in a State. Any abuse or misuse of this drastic power would damage the democratic fabric of the Constitution. The report discourages a literal construction of Article 356(1).<sup>17</sup>

The Commission, after reviewing suggestions placed before it by several parties, individuals and organizations, decided that Article 356 should be used sparingly, as a last measure, when all available alternatives had failed to prevent or rectify a breakdown of constitutional machinery in a State. Before taking recourse to the provisions of Article 356, all attempts should be made to resolve the crisis at State level.<sup>18</sup>

#### 4.3 Avoiding disastrous consequences

According to the Commission’s report, these alternatives may be dispensed with only in cases of extreme emergency, where failure on the part of the Union to take immediate action under Article 356 would lead to disastrous consequences. The report further recommended that a warning be issued to the errant State, in specific terms that it is not carrying on the government of the State in accordance with the Constitution. Before taking action under Article 356, any explanation received from the State should be taken into account. However, this may not be possible in a situation in which not taking immediate action would lead to disastrous consequences.<sup>19</sup>

#### 4.4 The Governor’s obligation to explore alternatives

In a situation of political breakdown, the Governor should explore all possibilities of having a Government enjoying majority support in the Assembly. If it is not possible for such a Government to be installed and if fresh elections can be held without delay, the report recommends that the Governor request the outgoing Ministry to continue as a caretaker government, provided the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and agrees to continue.<sup>20</sup> The Governor should then dissolve the Legislative Assembly, leaving the resolution of the

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<sup>17</sup> THE SARKARIA COMMISSION REPORT, ¶ 6.3.23 (1987).

<sup>18</sup> *Id. at* ¶ 6.8.01.

<sup>19</sup> *Id. at* ¶ 6.8.02.

<sup>20</sup> *Id. at* ¶ 6.8.04.

constitutional crisis to the electorate.<sup>21</sup> During the interim period, the caretaker government should merely carry on the day-to-day government and should desist from taking any major policy decision.<sup>22</sup>

Every Proclamation of Emergency is to be laid before each House of Parliament at the earliest, in any case before the expiry of the two-month period stated in Article 356(3).<sup>23</sup>

The State Legislative Assembly should not be dissolved either by the Governor or the President before a Proclamation issued under Article 356(1) has been laid before Parliament and the latter has had an opportunity to consider it. The Commission's report recommends amending Article 356 suitably to ensure this.<sup>24</sup> The report also recommends using safeguards that would enable the Parliament to review continuance in force of a Proclamation.<sup>25</sup>

#### 4.5 The Proclamation of Emergency and the Governor's Report

The report recommends appropriately amending Article 356 to include in a Proclamation material facts and grounds on which Article 356(1) is invoked. This, it is observed in the report, would make the remedy of judicial review on the grounds of mala fides more meaningful and the check of Parliament over the exercise of this power by the Union Executive more effective.<sup>26</sup> The Governor's Report, which moves the President to action under Article 356, should be a 'speaking document, containing a precise and clear statement of all material facts and grounds on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356.' The Commission's report also recommends giving wide publicity in all media to the Governor's Report.<sup>27</sup>

It will be seen from this peremptory examination of the important passages of the Sarkaria Commission Report that its recommendations are extensive and define the applicability and justification of Article 356 in full. The views of Sri P.V. Rajamannar, former Chief Justice of the Madras (Chennai) High Court, who headed the Inquiry Commission by the State of Tamil Nadu to report on Center-State relations, concur broadly with the views of the Sarkaria Commission. But it is unfortunate that the principles and recommendations given by them are disregarded in the present day and that actions have been taken that are prima facie against the letter and spirit of the Constitution of India.

### **5. S. R. Bommai v. Union of India**

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<sup>21</sup> *Id. at* ¶ 6.8.04.

<sup>22</sup> *Id. at* ¶ 6.8.04.

<sup>23</sup> *Id. at* ¶ 6.8.05.

<sup>24</sup> *Id. at* ¶ 6.8.06.

<sup>25</sup> *Id. at* ¶ 6.8.07.

<sup>26</sup> *Id. at* ¶ 6.8.08.

<sup>27</sup> *Id. at* ¶ 6.8.09 and ¶ 6.8.10.

*S. R. Bommai v. Union of India* was a landmark in the history of the Indian Constitution. It was in this case that the Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function. In the words of Soli Sorabjee, eminent jurist and former Solicitor-General of India, 'After the Supreme Court's judgment in the *S. R. Bommai* case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.'<sup>28</sup>

The views expressed by the various judges of the Supreme Court in this case concur mostly with the recommendations of the Sarkaria Commission and hence need not be set out *in extenso*. However, the summary of the conclusions of the illustrious judges deciding the case, given in paragraph 434 of the lengthy judgment deserves mention:

- (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 at its head. The satisfaction contemplated by the article is subjective in nature.
- (2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material - which may comprise of or include the report(s) of the Governor - is a pre-condition. 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 of 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 by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of 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 period of the 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 enquiry 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

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<sup>28</sup> Soli Sorabjee, *Constitutional Morality Violated in Gujarat*, INDIAN EXPRESS, PUNE, INDIA, Sept. 21, 1996.

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 into 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 38th (Amendment) Act] by the 44th (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 enquiry 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.<sup>29</sup>

Thus it can be seen from the conclusions of this Bench of the Supreme Court that the President's power under Article 356 is not absolute or arbitrary. The President cannot impose Central rule on a State at his whim, without reasonable cause.

## 6. Judicial review

The susceptibility of a Proclamation under Article 356 to judicial review is beyond dispute, because the power under Article 356(1) is a conditional power. In the exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. So the controversy actually revolves around the scope and reach of judicial review. From the decisions in the case of *State of Rajasthan v. Union of India* and the *Bommai* case, it is clear that there cannot be a uniform rule applicable to all cases.<sup>30</sup> It is bound to vary depending upon the subject matter, nature of the right, and other factors. However, where it is possible the existence of satisfaction can always be challenged on the ground that it is 'mala fides or based on wholly extraneous and irrelevant grounds.'<sup>31</sup> The relevance of judicial review in matters involving Article 356 is also emphasized in the Supreme Court judgment *in re State of Madhya Pradesh v. Bharat Singh*, where the Supreme Court held that it was not precluded from striking down a law passed prior to a Proclamation of Emergency, as *ultra*

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<sup>29</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297, ¶ 434.

<sup>30</sup> State of Rajasthan v. Union of India, A.I.R. 1977 SC 1361.

<sup>31</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297, ¶ 434.

*vires* to the Constitution, just because the Proclamation was in force at that time.<sup>32</sup>

Judicial review of the Proclamation under Article 356(1) was first tested in *State of Rajasthan v. Union of India*.<sup>33</sup> The Supreme Court, being the ultimate interpreter of the Constitution, has the power of judicial review on all actions emanating from or empowered by any constitutional provision. Though the power of the President under Article 356 concerns his political judgment and the courts usually avoid entering the political thicket, this power does not enjoy blanket immunity from judicial review. It has to be determined in the individual cases on the basis of justifiability, which is distinct from judicial review. But unless the mala fides of the Presidential Proclamation is shown, the Courts have been exhorted by the Supreme Court to avoid delving into the President's satisfaction for want of judicially manageable standards. This point is amply evident in the case of *Minerva Mills and Others v. Union of India and Others*, where the Supreme Court dwelt extensively on its power to examine the validity of a Proclamation of Emergency issued by the President. The Supreme Court in this matter observed, *inter alia*, that it should not hesitate to perform its constitutional duty merely because it involves considering political issues. At the same time, it should restrict itself to examining whether the constitutional requirements of Article 352 have been observed in the declaration of the Proclamation and it should not go into the sufficiency of the facts and circumstances of the presidential satisfaction in the existence of a situation of emergency.<sup>34</sup>

Thus we can safely conclude that, though limited, the Presidential Proclamation under Article 356 is subject to judicial review.

## 7. Comparative analysis

### 7.1 Emergency powers of the President of the United States of America

The Constitution in a democracy can be considered a written manifestation of the will of the general public; and hence the Constitution should be considered superior to any of the three organs of Government. Therefore, it cannot be assumed that any power that has not been expressly granted by the Constitution is implied. Article 1 § 8 of the US Constitution gives Congress the power to make rules and regulations to deal with and provide for emergencies. Harold C. Relyea, has pointed out:

It may be argued, however, that the granting of emergency powers by Congress is implicit in its Article I, section 8 authority to 'provide for the common Defense and general Welfare,' the commerce clause, its war, armed forces, and militia powers, and the 'necessary and proper' clause empowering it to make

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<sup>32</sup> State of Madhya Pradesh v. Bharat Singh, A.I.R. 1967 SC 1170; Centre for International and Comparative Human Rights Law, *States of Emergency Database*, Queen's University, Belfast at <http://www.law.qub.ac.uk/humanrts/emergency/india/ind6.htm> (last visited Feb. 22, 2004).

<sup>33</sup> State of Rajasthan v. Union of India, A.I.R. 1977 SC 1361.

<sup>34</sup> Minerva Mills and Others v. Union of India and Others, A.I.R. 1980 SC 1789; Centre for International and Comparative Human Rights Law, *States of Emergency Database*, Queen's University, Belfast; <http://www.law.qub.ac.uk/humanrts/emergency/india/ind6.htm> (last visited Feb. 19, 2004).

such laws as are required to fulfill the executions of ‘the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’<sup>35</sup>

These powers, it would seem, are for Congress to grant, and are not vested directly in the President. So we can say that only Congress has such powers, which have been assigned to it by the Constitution.<sup>36</sup> But instead Presidents (Chief Executives) have assumed that these emergency powers are an executive privilege. For example, during the Civil War, President Lincoln suspended habeas corpus and curtailed other individual freedoms such as free speech and private property. When Congress intervened and his actions were questioned, he responded: ‘It is believed that nothing has been done beyond the constitutional competency of Congress.’<sup>37</sup> It was Chief Justice Taney who pointed out that ‘[the] president is commander in chief, but the two-year limit on military appropriations ensures that the House can disband the army if, in their judgment, the president used, or designed to use it for improper purposes.’<sup>38</sup> He further stated that, while curtailing liberties of individuals, the only power the President had was to ‘take care that the laws shall be faithfully executed.’<sup>39</sup> According to Chief Justice Taney, the President’s authority was to ‘aid judicial authority,’ not executing them himself or through officers appointed by him.<sup>40</sup>

According to the Constitution, during national emergencies only the ‘habeas corpus clause’ can be suspended by Congress and the President.<sup>41</sup>

Justice Jackson, concurring in the judgment in the 1952 *Steel Seizure* case, outlined a practical test for the constitutionality of executive action:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures

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<sup>35</sup> Harold C. Relyea, *National Emergency Powers*, 2001 CRS REPORT FOR CONGRESS 2, <http://www.usembassy.it/pdf/other/98-505.pdf> (last visited Feb. 20,2004).

<sup>36</sup> DANIEL FARBER, *LINCOLN’S CONSTITUTION* 18 (2003).

<sup>37</sup> *Id.* at 118.

<sup>38</sup> *Id.* at 119.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 146.

on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>42</sup>

This gives rise to the aspect of questionability of executive exercise of powers. The power of judicial review was established by the Supreme Court as early as 1803 in the matter of *Marbury v. Madison*.<sup>43</sup> In this case, a suit was brought against the then Secretary of State, James Madison, in the form of a petition for a writ of mandamus. This judicial remedy in the original jurisdiction was available to the Supreme Court under the Judiciary Act of 1789. In denying the writ, Chief Justice Marshall ruled that the original jurisdiction of the Supreme Court was established by the Constitution and could not be enlarged or reduced by any means other than constitutional amendment, and therefore he held that the Judiciary Act of 1789 was unconstitutional.

Thus it can be seen that the judiciary does have the right to question executive authority with respect to national emergencies and, furthermore, that any dispute arising thereof is considered to be 'judicially reviewable.'

Though the situations of emergency envisaged in the American context differ from those in the Indian context, there is definitely a commonality as to the magnitude of events qualifying as an emergency. In 1934, a Supreme Court ruling defined an emergency as 'urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.'<sup>44</sup> This ruling concurs with the rare invocation of emergency rule in India according to the Indian Constitution.

It was the National Emergencies Act (50 U.S.C. 1601-1651) by which the President was asked to 'declare formally the existence of a national emergency and to specify what statutory authority, activated by the declaration, would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought.'<sup>45</sup>

And it was President Theodore Roosevelt who 'declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it.'<sup>46</sup> He also believed that 'it was not only his right but duty to do anything that the needs of the Nation demanded unless such action was forbidden

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<sup>42</sup> *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=343&invol=579> (last visited Feb. 19, 2004).

<sup>43</sup> Robert W. Langran, *Presidents versus the Court*, at <http://www.supremecourthistory.org/myweb/77journal/langran77.htm> (last visited Feb. 20, 2004).

<sup>44</sup> Harold C. Relyea, *supra* note 35, at 4.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> Theodore Roosevelt quoted in *id.* at 2.

by the Constitution or by the laws.<sup>47</sup> This is exactly the opposite to the Indian context, where executive powers must have express authority from a specific constitutional provision. The next President of the United States, President William Howard Taft, was of the opinion ‘that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.’<sup>48</sup> Taft concluded: ‘There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest . . .’<sup>49</sup> This view is more in accordance with the situation in India. The underlying principle is that all three organs of government in a democracy derive their authority to act for the common people from the Constitution and, hence, every power exercised is by specific delegation and should not be assumed to be implied unless explicitly denied. Apart from the above two views on presidential emergency powers, there is one authority who is of the opinion that ‘emergency powers are not solely derived from legal sources. The extent of their invocation and use is also contingent upon the personal conception which the incumbent of the Presidential office has of the Presidency and the premises upon which he interprets his legal powers. In the last analysis, the authority of a President is largely determined by the President himself.’<sup>50</sup> In the Indian context, the only interpreter of the Constitution is the Supreme Court and no other person or body has a right to interpret it.

The President of the United States has some powers that are permanently available to him for dealing with emergencies. A good example of this is the Defense Production Act, originally adopted in 1950 to prioritize and regulate the manufacture of military materials. This is similar to powers available to the President of India as the Supreme Commander of the Armed Forces.

Apart from these permanent powers, there is a variety of standby laws - which are statutory provisions that have been delegated by Congress to the Executive - that convey special emergency powers once the President of the United States of America has formally declared a national emergency. The National Emergencies Act of 1976 prescribes formal procedures for invoking these authorities, accounting for their use and regulating their activation and application. These can be equated to the clauses of Article 356 (of the Indian Constitution), which regulates its invocation and use.<sup>51</sup>

The aspects of an emergency condition as put forward by Edward Corwin reflect characteristics strikingly similar to Article 356 of the Indian Constitution.<sup>52</sup> The first is the *temporal character of national emergency - sudden, unforeseen, and of unknown duration*. This can be compared to the Drafting Committee and Sarkaria Commission’s envisaged

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<sup>47</sup> Theodore Roosevelt quoted in *id. at 2*.

<sup>48</sup> William Howard Taft quoted in *id. at 2*.

<sup>49</sup> William Howard Taft quoted in *id. at 3*

<sup>50</sup> Albert Sturm quoted in *id. at 3*.

<sup>51</sup> *Id.*

<sup>52</sup> *Id. at 4*.

‘rarest of rare circumstances’ application of Article 356 in India. The extension of Article 356 in gradual time intervals concurs with the ‘unknown duration’ aspect of a national emergency in the United States.

The second aspect according to Corwin is *potential gravity - a dangerous and life-threatening situation*. This is in concurrence with the Sarkaria Commission Report’s recommendations to resort to Article 356 only if not doing so would lead to ‘disastrous consequences.’

The third aspect is *perception - who discerns a phenomenon of emergency?* Corwin’s conclusion is that the American Constitution is guiding but not conclusive; this is analogous to our finding that the Indian Constitution, though it prescribes symptoms and criteria for qualifying an emergency, leaves it primarily to the judgment of the Governor of the State, in the form of the ‘Governor’s Report,’ and to presidential discretion, in the form of the well-known ‘otherwise’ term in Article 356, to decide that a situation of emergency has arisen.

The fourth aspect of a national emergency according to Corwin is the *element of response to a sudden situation that cannot always be dealt with according to rule and that requires immediate action*. This aspect is a combination of other aspects and adds a qualifier, viz. that there is no existing active rule that can counter the situation. This aspect is personified in the very first clause of Article 356: ‘a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.’

The striking difference between emergencies as envisaged in the American Constitution is that they pertain solely to national emergencies. Hence, even if the situation affects a part of the country or a particular State, the scope of the stand-by powers of emergency of the President of the United States is national in character, whereas the scope of the powers under Article 356 of the Indian Constitution is restricted to particular States. This has its advantages and disadvantages. The advantage in the American instance is obvious; it gives the President wider latitude in mobilizing the whole country to deal with an emergency situation in one part. The disadvantage is that national emergency powers curtail individual rights at a national level, even if the emergency is regional in character.<sup>53</sup> Out of concerns arising from the continued use of emergency powers by the Chief Executives long after the situation of emergency has passed (specifically the continued existence of President Truman’s 1950 national emergency proclamation long after the conditions prompting its issuance had disappeared), the ‘Special Committee on the Termination of the National Emergency’ was chartered in June of 1972. At that time, the Committee established that four proclamations (those of 1933, 1950, 1970, and 1971) were in effect. The Special Committee - later reconstituted as the ‘Special Committee on National Emergencies and Delegated Emergency Powers’ - ascertained that no process existed for automatically terminating the four outstanding national emergency proclamations. This situation was in contrast to the provisions of Article 356(3) and (4) of the Indian Constitution, which stipulates checks and balances against the potential of prolonged impositions of arbitrary powers of discretion of

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<sup>53</sup> *Id.* at 8.

the Executive.<sup>54</sup>

The recommendations of the Special Committee and a series of congressional debates culminated in the 1976 enactment of the National Emergencies Act, which rendered ineffective the four existing proclamations of emergency, requiring a new proclamation to activate standby extraordinary powers of the President.

The Act in essence returned all standby emergency powers to dormancy two years after the Statute's approval. It further provided a procedure for future declarations and their congressional regulation. The checks and balances prescribed under the National Emergencies Act, are similar to the controlled method of escalation provided by the extensions of proclamations in graded time intervals, required under Article 356 of the Indian Constitution.

In a legislative sense, the regulation of emergency powers of the Executive in the United States of America and in India are pretty similar, theoretically. Practically, it is a totally different story altogether. Public opinion in the United States of America is active enough to act as a restraint against executive excesses, whereas public opinion in India is yet to become such a substantive force. This is partially compensated by the vigilance of judicial activism.

## 7.2 Executive discretion under the Malaysian Constitution

The Malaysian Constitution could be considered the other end of the spectrum of executive discretionary powers. In Malaysia, these powers are largely concentrated in the area dealing with emergency provisions. Malaysia, being a former British colony, has a constitutional structure very similar to that of India: a bicameral division of Parliament and a Westminster model of the separation of powers, with an overlap between the Executive and the Legislature, and an independent judiciary. The only difference is the equivalent of the President - a monarch, known as the *Yang di Pertuan Agong*, and, whereas the Indian Constitution is secular, the Malaysian Constitution recognizes Islam as the country's official religion. The *Yang di Pertuan Agong* can absolutely suspend fundamental rights like the liberty of person, life, the freedoms of speech, expression, and movement in a State (or the country), as was pointed out by Poh-Ling Tan, Lecturer at the Faculty of Law at Queensland University of Technology, Australia, in her paper entitled 'Human Rights and the Malaysian Constitution Examined through the Lens of the Internal Security Act 1960.'<sup>55</sup> In this paper, Poh-Ling Tan also underlines the severe restrictions on the powers of judicial review of executive discretionary powers by the Apex Court and the rank disregard for all theories on the separation of powers shown by the Executive in the dismissal of the *Lord President of the*

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<sup>54</sup> The duration ('continuance in force') of a Proclamation of Emergency under Article 356(3) and (4) is two months unless approved by resolutions of both Houses of Parliament, and would still cease to be in operation after a period of six months from the date of the last resolution. This could be further extended for another six months by resolutions of the Houses of Parliament. See Appendix I.

<sup>55</sup> Poh-Ling Tan, *Human Rights and the Malaysian Constitution Examined through the Lens of the Internal Security Act 1960* (2001), at [http://rspas.anu.edu.au/pah/human\\_rights/papers/2001/Tan.rtf](http://rspas.anu.edu.au/pah/human_rights/papers/2001/Tan.rtf), section 'Numerous regressive measures since 1957' (last visited March 21, 2004).

*Supreme Court*, in 1988, followed by the dismissal of two Supreme Court judges.<sup>56</sup> This is in stark contrast to the absolute level of the independence of the judiciary in India and the unquestioned authority of the Supreme Court of India as the supreme interpreter and guardian of the Constitution.

The history of constitutional emergency in Malaysia started in 1948, before the country's independence, when the British Government declared a state of emergency, preceding a 12-year communist insurgency, when 11,000 people were reportedly killed and the British High Commissioner assassinated.<sup>57</sup> Since independence in 1957, the new government has made its first Proclamation of Emergency in 1964 due to a conflict with Indonesia.<sup>58</sup> Despite the cessation of the Indonesian threat, the Proclamation was never revoked.<sup>59</sup> The second Proclamation of Emergency by the Government of independent Malaysia, issued in 1966, was restricted to the State of Sarawak, to deal with the constitutional impasse caused by the dismissal of the Chief Minister of Sarawak.<sup>60</sup> This Proclamation again was never formally revoked. The third Proclamation, which was nationwide, was issued in 1969 to deal with election-related rioting and racial violence. Several sections of the Constitution were suspended, restricting individual liberty. In spite of the restoration of normalcy and the Legislature, this Proclamation, like its predecessors, was never revoked.<sup>61</sup>

Another political standoff in the State of Kelantan, due to nonalignment of interests between the Central and State leaderships, resulted in the fourth Proclamation of Emergency in 1977.<sup>62</sup> The circumstances preceding this Proclamation - the Union or Central leadership suspending a State Government where it is not able to impose leadership aligned to it - is reminiscent of the Proclamation of Emergency in the State of Uttar Pradesh, in India, which will be discussed in more detail in the next section.

This situation of overlapping Proclamations of Emergency in Malaysia is constitutionally possible, as was pointed out by Ramdas Tikamdas in a paper presented at the [2002 Workshop of the Research School of Pacific and Asian Studies](#), at the Australian National University, on 'National Security and Constitutional Rights in the Asia Pacific

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<sup>56</sup> *Id.*; A detailed analysis of the constitutional structure of Malaysia and the issues regarding the independence of the Malaysian judiciary can be found in a report published by the International Commission of Jurists, at <http://www.icj.org/IMG/pdf/malaysia.pdf> (last visited Feb. 22, 2004).

<sup>57</sup> Poh-Ling Tan, *supra* note 55.

<sup>58</sup> *Id.* at Fn. 24.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Fn. 24.

<sup>61</sup> *Id.* at Fn. 24.

<sup>62</sup> Centre for International and Comparative Human Rights Law, *States of Emergency Database*, Queen's University, Belfast, at <http://www.law.qub.ac.uk/humanrts/emergency/malaysia/mal9.htm> (last visited Feb. 22, 2004).

Region: The Malaysian Experience.’<sup>63</sup> Article 150(2A) of the Malaysian Constitution clearly states that the *Yang di Pertuan Agong* may issue a Proclamation even when a previous Proclamation is in operation.<sup>64</sup> This is similar to the overlapping Proclamations before the passing of the National Emergencies Act in 1976 in the United States of America and, again, in sharp contrast to the provisions in the Indian Constitution. Another major difference is that presidential satisfaction as to the existence of a situation of emergency is not entirely exempt from judicial review under the Indian Constitution, as was pointed out above, whereas satisfaction of the *Yang di Pertuan Agong* enjoys a high degree of immunity from judicial review under Article 150(8)(a) of the Malaysian Constitution.<sup>65</sup>

It is difficult to analyze the total impact of executive discretionary powers under the Malaysian Constitution and of laws passed under the protection of Proclamations of Emergency without leaving the domain of Constitutional Law and transcending into the domain of Human Rights Law. Although both are interwoven and, to a certain degree, interdependent, it would be extraneous to the purposes of this discussion. It would suffice to say that this might be a good example to prove why it is dangerous to take an ad hoc approach to constitutional development and legislation, i.e. without analyzing the full spectrum of its ramifications.

## 8. The current situation in India

The present situation in India shows that the ‘dead-letter’ provision - as Dr. Ambedkar hoped it would be - has become a frequently invoked, not-so-dead Article; it has been activated more than a hundred times till today.<sup>66</sup> The National Commission to Review the Working of the Constitution (NCRWC), which was established on February 22, 2000, on the basis of a joint resolution of the Government of India, Ministry of Law, Justice and Company Affairs (Department of Legal Affairs), submitted its extensive report in March 2002.<sup>67</sup> In its analysis, the NCRWC stated that in at least twenty out of the more than one hundred instances, the invocation of Article 356 might be termed as a misuse.<sup>68</sup> It is difficult to believe that, during his tenure as the Governor of the State of Uttar Pradesh, Romesh Bhandari made any real effort to install a popularly elected government or to conduct a constitutionally mandated floor-test to test the strength of the Legislative Assembly in the State for identifying a

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<sup>63</sup> Ramdas Tikamdas, *National Security and Constitutional Rights in the Asia-Pacific Region: The Malaysian Experience*, at [http://rspas.anu.edu.au/pah/human\\_rights/papers/2002/tikamdas.rtf](http://rspas.anu.edu.au/pah/human_rights/papers/2002/tikamdas.rtf), section ‘Article 150 - Emergency (Overlapping Emergencies)’ (last visited Feb. 22, 2004).

<sup>64</sup> See full text cited in Appendix I.

<sup>65</sup> *Id.*

<sup>66</sup> Ahmadi J., S.R. Bommai v. Union of India, (1994) 3 SCC 1, 296-297, ¶ 434.

<sup>67</sup> National Commission to Review the Working of the Constitution, *supra* note 3, at ¶ 1.1.1.

<sup>68</sup> *Id.* at ¶ 8.16.

majority party before prompting the application of the Article by the President.<sup>69</sup> After the fall of the Mayawati Government in the State of Uttar Pradesh, it might have been justifiable to impose President's Rule. But it was also necessary to hold fresh elections as soon as possible. The mala fides of the Union Executive in preventing the assumption of office by an unfavorable political entity became clearly manifest in Governor Bhandari's actions and the decision of the United Front Government at the Center, to re-impose President's Rule in Uttar Pradesh. The worst damage may possibly have been done through the office of the Governor, because the Governor cannot be held responsible for his or her actions. H. M. Seervai pointed out that the Governor can be removed only by the President and that the President acts on the advice of the Council of Ministers; hence the Governor is in office pretty much at the pleasure of the Union Executive.<sup>70</sup> This may act as a bias whenever the Governor's duty requires him to go against the desires of the Union Executive. In its report, the NCRWC recommended that the President should appoint or remove the Governor in consultation with the Chief Minister of the State. This may act as a restraint on the misuse of power by the Office of the Governor.<sup>71</sup>

Another example of misuse of Article 356 was the imposition of President's Rule in the State of Gujarat from September 1996 to October 1996, following the incidents of violence indulged in by members of the Gujarat Legislative Assembly. Soli Sorabjee pointed out that violence within the Assembly cannot be treated as an instance of failure of the constitutional machinery; it would otherwise become very easy for malicious legislators to dissolve a duly elected legislative body by creating pandemonium in the Assembly and thereby prompting improper invocation of Article 356.<sup>72</sup> The correct procedure to be followed in such a situation is to pass suitable legislation for disqualifying the guilty legislators.

## **9. Failure to invoke emergency provisions**

On the other extreme of misuse of Article 356 was the failure of the Union Executive - which was of the same political belief as the Government of Narendra Modi in Gujarat - to invoke Article 356 during the carnage following the Godhra train incident on February 27, 2002, in the State of Gujarat. To quote the words of Fali Nariman, noted lawyer and nominated member of the Upper House (*Rajya Sabha*) of the Indian Parliament during a parliamentary debate: 'Vital statistics tells us that there are more than 100000 persons in refugee camps and more than 30,000 people have been chargesheeted. Are these figures not enough to compel

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<sup>69</sup> Press Trust of India, *HC Order Speaks of Bhandari's Haste*, EXPRESS INDIA, Feb. 26, 1998, at <http://www.expressindia.com/ie/daily/19980226/05750654.html> (last visited Feb. 22, 2004).

<sup>70</sup> H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, vol. 3, 3103 (4<sup>th</sup> edn. 1996).

<sup>71</sup> National Commission to Review the Working of the Constitution, *supra* note 3, at ¶ 8.14.2.

<sup>72</sup> SOLI SORABJEE, *supra* note 28.

the Government to take action under articles 355 and 356?’<sup>73</sup> Fali Nariman also rightly pointed out in an interview with a newspaper correspondent that the Constitution may not have envisaged a situation where an emergency has arisen in a State where the ruling party is of the same political persuasion as the one at the Center and, hence, the Center might be biased against dissolving that government by invoking Article 356. He also pointed out that the word ‘otherwise’ in the text of Article 356 becomes instrumental in such a situation to allow the President to act without waiting for the ‘Governor’s Report.’<sup>74</sup>

## 10. Conclusion

It is evident that there is a lack of effective safeguards against the abuse of Article 356 of the Indian Constitution. The safeguard of ‘parliamentary approval’ - outlined in Article 356(3) - of a Proclamation under Article 356(1) could be biased because the Party that is in power at the Center generally dominates Parliament by a majority vote. Furthermore, even a vote in Parliament declaring a particular imposition (or failure to impose) of President’s Rule to be wrongful cannot undo the damage already done.

However, the repeal of Article 356 is not advisable because the Indian polity is rife with crises and there has to be some contingency against a constitutional deadlock in a State. The NCRWC also advised against the repeal of Article 356, stating that this would create an imbalance in Union-State relations in upholding constitutional governance throughout India and that in many more instances than not the use of Article 356 was inevitable.<sup>75</sup> Another option is to introduce further checks on the exercise of power under Article 356, by amendment. Even this is not advisable because it defeats the very purpose of the Article of dealing expeditiously with emergencies of constitutional failure in a State.

Therefore, the most practical course left open may be to let history take its course. Eventually, the public opinion in India, we fervently hope, will awaken to the fact that Article 356 may veritably have become a noose that is slowly tightening around the neck of democracy in India, suffocating the right of the people under the Constitution. In the meantime, to nurture budding public opinion we do have a resource not to be underestimated, which is the power of judicial review of the Supreme Court, which has on more than one occasion shown that it is a power to be reckoned with.

So we will have to suffice for now with occasional outcries against the Union Executive unsheathing or failing to unsheathe, at its sweet pleasure that double-edged sword called Article 356.

## Appendix I: Specific sections of Part XI of the Constitution of Malaysia

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<sup>73</sup> Rajya Sabha, *Supplement to the Synopsis of Debates* (May 2, 2002), at <http://rajyasabha.nic.in/rsdebate/synopsis/195/s02052002.htm> (last visited Feb. 22, 2004).

<sup>74</sup> Manoj Mitta, *If NHRC Indicts Modi, He Must Be Sacked*, INDIAN EXPRESS, March 31, 2002, at <http://www.indianexpress.com/ie20020331/op1.html>.

<sup>75</sup> National Commission to Review the Working of the Constitution, *supra* note 3, at ¶ 8.18.

Special powers against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers

149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -
- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
  - (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
  - (c) to promote feelings of ill-will and hostility between different races or other classes or the population likely to cause violence; or
  - (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
  - (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
  - (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and
- Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.
- (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.
150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.
- (2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.
- (2A) The power conferred on the Yang di-Pertuan Agong by this Article shall include the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.
- (2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

- (2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.
- (3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).
- (4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.
- (5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.
- (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
- (6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or custom in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.
- (7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.
- (8) Notwithstanding anything in this Constitution -

- (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
  - (b) No court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of -
    - (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
    - (ii) the continued operation of such Proclamation;
    - (iii) any ordinance promulgated under Clause (2B); or
    - (iv) the continuation in force of any such ordinance.
- (9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.<sup>76</sup>

## **Appendix II: Article 356**

### Article 356 Provisions in case of failure of constitutional machinery in States<sup>77</sup>

- (1) If the President, on receipt of a report from the Governor of a State or otherwise, is 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, the President may by Proclamation -
- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;
  - (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
  - (c) make such incidental and consequential provisions as appear to the President 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 Constitution relating to any body or authority in the State:
- Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.
- (2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

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<sup>76</sup> Centre for International and Comparative Human Rights Law, *States of Emergency Database*, Queen's University, Belfast, at <http://www.law.qub.ac.uk/humanrts/emergency/malaysia/mal4.htm> (last visited Feb. 22, 2004).

<sup>77</sup> From the International Constitutional Law website, at [http://www.oefre.unibe.ch/law/icl/in00002\\_.html](http://www.oefre.unibe.ch/law/icl/in00002_.html) (last visited March 25, 2004).

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People:

Provided also that in the case of the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first provision to this clause to 'three years' shall be construed as a reference to five years.

(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless -

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned:

Provided that nothing in this clause shall apply to the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.