

Constitutionalising Emergency Powers in India:

Evaluating the restraints on the use of Emergency Powers In line with safeguards against their misuse

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ABSTRACT

This paper provides a comprehensive constitutional analysis of India's emergency powers framework, examining the historical foundations, structural architecture, and post-independence jurisprudential evolution of Articles 352, 356, 358, and 359 of the Constitution of India. Tracing the philosophical underpinnings of emergency governance from Carl Schmitt's theory of sovereign exception and John Locke's executive prerogative to Giorgio Agamben's doctrine of necessity, the paper situates India's emergency provisions within a global constitutional discourse on the tension between state authority and individual liberty. Drawing on the Constituent Assembly debates, it reconstructs the framers' deliberate choices and their cautionary awareness of precedents such as the Weimar Constitution's catastrophic Article 48. The paper critically examines the systematic misuse of Article 356 between 1959 and 1994, culminating in an analysis of *S.R. Bommai v. Union of India* (1994), which constitutionalised the floor test doctrine, established federalism as a basic structure element, and subjected presidential proclamations to meaningful judicial review. It further analyses the critical distinction between Articles 358 and 359, with particular attention to the conceptual and practical consequences of suspending rights as opposed to remedies; a distinction rendered judicially decisive in *ADM Jabalpur v. Shivkant Shukla* (1976) and subsequently rehabilitated through Justice H.R. Khanna's celebrated dissent. The paper evaluates the Constitution (Forty-Fourth Amendment) Act, 1978, as a response to the excesses of the 1975 Emergency, including the absolute unsuspendability of Articles 20 and 21, the substitution of 'armed rebellion' for 'internal disturbance,' and the procedural safeguards on emergency proclamation. The post-amendment jurisprudential trajectory is traced through *Maneka Gandhi v. Union of India* (1978), *Minerva Mills Ltd. v. Union of India* (1980), and *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), which formally overruled *ADM Jabalpur* and dramatically expanded the substantive constitutional floor available to citizens during emergency conditions. Through comparative analysis of the German Basic Law, South Africa's Section 37, and the American experience, the paper identifies structural vulnerabilities that persist in the Indian framework, including the absence of granular proportionality review of emergency measures, the susceptibility of Article 19 rights to suppression, and the contingent nature of judicial independence as an institutional safeguard. The paper concludes that while India's constitutional architecture has made genuine and significant progress, structural consolidation; through codified sunset clauses, mandatory measure-specific parliamentary accountability, and constitutionally mandated judicial timelines, remains the unfinished work of emergency law reform.

Keywords: *Emergency Powers; Fundamental Rights; Articles 358 and 359; ADM Jabalpur; S.R. Bommai Case; Forty-Fourth Amendment; Basic Structure Doctrine; Judicial Review*

INTRODUCTION

The constitutionalisation of emergency powers presents one of the most enduring and analytically demanding problems in comparative constitutional law. Every constitutional democracy must contend with the paradox at its core: a legal order premised upon the rule of law, separation of powers, and the protection of fundamental rights must simultaneously equip the State with authority sufficient to defend itself against existential threats; threats that, by their very nature, resist the orderly operation of ordinary legal machinery. How a constitution resolves this paradox reveals much about its underlying commitments to liberty, institutional design, and democratic accountability.

India's constitutional framework, enshrined in Articles 352, 356, 358, and 359 of the Constitution of India (**Constitution, 1950**), represents one of the most elaborate and historically tested attempts to navigate this tension. Shaped by the cautionary spectre of the Weimar Constitution's Article 48, informed by British legislative practice, and refined through decades of judicial intervention, the Indian emergency provisions have evolved through a turbulent constitutional journey; from the systematic misuse of Article 356 between 1959 and 1994, through the judicial nadir of *ADM Jabalpur v. Shivkant Shukla* (1976), to the transformative constitutional corrections of the Forty-Fourth Amendment and the landmark ruling in *S.R. Bommai v. Union of India* (1994).

This paper undertakes a doctrinal and comparative constitutional analysis of India's emergency powers framework, situating its evolution within the broader global discourse on emergency constitutionalism. By reference to the German Basic Law, South Africa's Section 37, and the American constitutional experience, it evaluates whether India's post-amendment architecture constitutes a genuinely robust safeguard against authoritarian abuse, or whether structural vulnerabilities persist that render its protections contingent rather than categorical.

LITERATURE REVIEW

Scholarly treatment of emergency provisions in Indian constitutional law has evolved from early doctrinal expositions to critical rights-based analyses. **Seervai (1996, p. 2780)** provides an authoritative account of the original design of Articles 352-360, arguing that the framers intended the emergency provisions as extraordinary instruments of governance, not routine mechanisms of administrative control. He emphasises that the Constituent Assembly adopted numerous safeguards that were subsequently diluted in practice, an observation borne out by the Emergency of 1975 (**Seervai, 1996, p. 2785**).

Austin (1966, p. 58) traces the foundational compromise between parliamentary sovereignty and fundamental rights that characterises Part XVIII. He notes that the emergency provisions

reflect the framers' preoccupation with national unity and the spectre of external aggression, a preoccupation that arguably privileged state security over individual rights in moments of crisis. This constitutional ambivalence, protecting liberty in ordinary times while permitting its suspension in extraordinary ones, is the central problem this paper addresses.

Subsequent scholarship has engaged with the transformative potential of the Forty-Fourth Amendment. **Jain (2010, p. 1456)** analyses the amendment's insertion of procedural safeguards, judicial review of proclamations, the 'armed rebellion' threshold, and protection of Articles 20 and 21 from suspension, as a significant constitutional correction. However, he cautions that textual changes, while important, do not by themselves guarantee protection against executive excess in a system where parliamentary majorities control both the executive and the legislature.

The right to privacy as a fundamental right (**Puttaswamy, 2017**), established in *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, has opened new dimensions in emergency jurisprudence scholarship. Justice D.Y. Chandrachud's concurring opinion in *Puttaswamy* argues that privacy, being intrinsic to Article 21, is shielded from suspension even under Article 359, thereby expanding the constitutional floor during emergencies considerably beyond what the framers originally contemplated.

Dyzenhaus (2006, p. 34) develops the comparative concept of a constitution of emergency that must itself be constrained by constitutional norms. His framework of legality under emergency, requiring that even executive action in crisis conditions conform to rule-of-law principles of legality, proportionality, and necessity, resonates powerfully with the post-44th Amendment Indian framework and provides the normative standard against which this paper evaluates the Indian provisions.

RESEARCH GAP

While existing literature has comprehensively examined the Forty-Fourth Amendment reforms and the transformation of emergency jurisprudence following *ADM Jabalpur*, a systematic synthesis of the cumulative effect of constitutional amendments, the expanded interpretation of Article 21, the right to privacy, and evolving judicial standards for reviewing emergency proclamations remains underexplored.

In particular, the extent to which *Puttaswamy*'s recognition of privacy as an intrinsic component of life and liberty under Article 21 affects the practical scope of rights available to citizens during an emergency. Further, the question of whether the structural safeguards introduced in 1978 are sufficient to prevent a recurrence of 1975-style authoritarian abuse has not been

addressed with adequate analytical rigour in the contemporary context of India's evolving democratic institutions.

This paper addresses these gaps by providing an integrated rights-based constitutional analysis connecting the doctrinal evolution from *ADM Jabalpur* to *Puttaswamy*, assessing the sufficiency of post-emergency safeguards, and offering a normative evaluation of whether India's constitutional architecture genuinely prevents authoritarian abuse.

METHODOLOGY

This paper employs a doctrinal legal research methodology, involving systematic analysis and interpretation of primary legal sources, constitutional provisions, Supreme Court judgments, and constitutional amendment acts, supplemented by secondary scholarship in the form of academic commentary, treatises, and journal articles (**Hutchinson, 2002, p. 8**). The research is qualitative in nature.

Primary sources include the Constitution of India (1950), the Constitution (Forty-Fourth Amendment) Act (1978), the Constitution (Forty-Second Amendment) Act (1976), and key Supreme Court judgments: *ADM Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521; *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 625; *Maneka Gandhi v. Union of India* (1978) 1 SCC 248; and *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1. Secondary sources include constitutional commentaries by Seervai (1996) and Jain (2010), journal articles, and the Constituent Assembly Debates.

The analytical framework draws upon rights-based constitutional analysis, a methodology that evaluates legal provisions and judicial interpretations against the normative standard of individual rights protection (**Dyzenhaus, 2006, p. 12**). The paper adopts a critical evaluative stance, assessing whether the existing constitutional design achieves its stated objective of balancing security and liberty.

SECTION 1 : HISTORICAL AND CONSTITUTIONAL FOUNDATIONS OF EMERGENCY POWERS IN INDIA

Incorporating emergency provisions in the Indian Constitution was not an arbitrary legislative choice but a carefully deliberated response to the complex political and security challenges facing this newly independent nation. These provisions were drawn from diverse philosophical traditions, foreign constitutional models, and the lived experiences of colonial governance. The framers of the Constitution sought to equip the Union government with the tools necessary to respond to extraordinary situations; while simultaneously erecting safeguards against their potential misuse. This section examines the philosophical underpinnings, foreign influences, Constituent Assembly debates, and the constitutional architecture of India's huge emergency framework, along with the core tensions it continues to generate.

Philosophical Foundations

The theoretical justification for emergency powers in constitutional democracies draws from several influential thinkers, each grappling with the tension between legal order and extraordinary circumstances. Carl Schmitt argued that normal constitutional machinery may face situations when ordinary legal rules are insufficient to address the crisis, therefore the sovereign authority has to exercise its authority beyond the legal norms and boundaries to protect the State, a concept he described as the 'State of Exception'. **(Philopedia, 2025)**

John Locke offered a more tempered position through his doctrine of executive prerogative. He defined the executive prerogative as "nothing but the power of doing public good without a rule" (Locke, *Second treatise of Government*, Ch. XIV). He acknowledged that rigid legal adherence may occasionally obstruct the public good. Therefore, sometimes in situations of crisis, power has to be exercised beyond the rules to ensure public safety and order.

Giorgio Agamben argued that emergency situations create a space where the boundaries of distinction between legality and extra-legality become blurred. He called that space the "Zone of Indistinction". He explained that governments often justify exceptional powers through the doctrine of necessity encapsulated in *necessitas non habet legem*; which means that "necessity knows no law". (Agamben, 2005).

Thomas Hobbes added that when state existence itself is threatened, extraordinary measures are not merely permissible but obligatory, and any constraint on sovereign authority during a grave crisis risks the state's capacity for self-preservation (Hobbes, 1651). Together, these frameworks illuminate the foundational paradox at the heart of all emergency governance: that the legal order must simultaneously authorise and constrain the very power capable of suspending it.

Influence of Foreign Constitutions and Legislation

The framers of the Indian Constitution were acutely aware of how emergency powers had functioned in other constitutional systems, and these experiences directly shaped the design of India's own provisions.

The most cautionary influence came from the Weimar Constitution of Germany where the constitution empowered the President of the Reich to take measures that were necessary to restore order and public security, which also includes the use of armed forces. While initially deployed for legitimate crisis management, this provision was catastrophically misused following the Reichstag fire of 1933, when Adolf Hitler used it to pass the Enabling Act, effectively granting himself unlimited dictatorial authority. The Constitutional Assembly was deeply conscious of this precedent and regarded it as a warning against vesting broad emergency powers in the executive without adequate democratic safeguards. **(United States Holocaust Memorial Museum, n.d.)**

The Emergency Powers Act, 1920 of the United Kingdom offered a more balanced model. This legislation empowered the executive to take necessary measures to maintain public order and essential services during crises. This act also mandated periodic parliamentary approval for the continuation of emergency conditions to prevent their unauthorised and prolonged use. The Indian Constitution reflects this feature, subjecting emergency proclamations under Articles 352 and 356 to parliamentary approval and periodic renewal; though with the additional layers of democratic accountability and judicial oversight that the British model lacked in the Indian colonial context. (**Restoration of Order in Ireland Act, 1920**)

The most direct textual influence, however, came from Section 93 of the Government of India Act, 1935, a colonial-era provision that allowed the Governor to dismiss a provincial government and assume all powers himself if he was satisfied that the provincial administration could not be carried on in accordance with the Act. This provision; based on the "failure of constitutional machinery", was reproduced almost verbatim in Article 356 of the Constitution. The key distinction, however, was one of democratic accountability: under Section 93, ultimate responsibility rested with the Parliament of Great Britain which did not represent the Indian people. Under Article 356, that responsibility is vested in the Parliament of India, elected on the basis of universal adult franchise; a distinction that Constituent Assembly member Shri Alladi Krishnaswami Ayyar considered constitutionally transformative. (**A.D.M. Jabalpur v. Shivkant Shukla, 1976**)

Constituent Assembly Debates

The Constituent Assembly extensively debated the necessity, scope, and possible misuse of emergency powers. Some members supported the inclusion of these extra ordinary powers to deal with crisis situations, others flagged the potential misuse of these powers and argued for greater safeguards in these kinds of exceptional situations.

During the debates in the assembly, (**Constituent Assembly of India (1946–1950)** H.V. Kamath warned that the emergency provisions effectively provided the executive with a wide range of powers to suppress the freedoms of the people. He called for a strong and balanced tripartite structure; one in which the legislature, executive, and judiciary operated as equally powerful institutions; and advocated for robust safeguards to protect both individual rights and the autonomy of state governments against such overriding central authority.

Shri Mahavir Tyagi took a more pragmatic position (**Constituent Assembly of India (1946–1950)**) where, while he acknowledged the risk of misuse, he argued that extraordinary powers were a necessary feature of any constitutional system facing the prospect of armed revolts or state-level political breakdown. He emphasised, however, that such powers must be accompanied by judicial protection and other institutional safeguards to prevent their abuse.

The principal architect of the Constitution, (**Constituent Assembly of India (1946–1950)** Dr. B.R. Ambedkar compared the Indian model of emergency framework with emergency frameworks in other democracies; noting that the American Constitution obligates the federal

government to maintain a republican form of government in each state, and that the Australian Constitution similarly provides for dealing with internal disorder and external aggression. He outlined a graduated approach to invoking Article 356, wherein the President would first issue a warning and consider calling for state elections before resorting to the imposition of President's Rule. Most significantly, Ambedkar expressed the hope that these provisions would remain a "dead letter"; to be invoked only in the most genuinely exceptional circumstances and never as instruments of ordinary politics.

K.T. Shah strongly criticised these powers (**Constituent Assembly of India (1946–1950)**), arguing that they would lead to an excessive centralisation of authority in the Union Executive, fundamentally weakening India's federal structure and threatening provincial autonomy. He warned that provisions designed for exceptional crises were likely to be misused for political purposes if not subject to strict constitutional limitations and clear checks on executive discretion.

Constitutional Scheme of Emergency Powers

The Constitution of India provides for three distinct categories of emergency, each addressed through specific constitutional provisions.

Article 352 — National Emergency: Article 352 authorises the President to declare a National Emergency when India faces war, external aggression, or armed rebellion. Prior to the 44th Constitutional Amendment (1978), the trigger of "internal disturbance" was deployed in place of the more precise term "armed rebellion"; a change made to narrow the grounds for invocation following the abuses of the 1975 Emergency. Once proclaimed, the constitutional distribution of powers is effectively suspended and the system shifts to a quasi-unitary structure, with the Parliament of India acquiring the power to legislate on matters ordinarily within the domain of the states. The proclamation must receive parliamentary approval by a special majority within one month, and must be renewed by the same majority every six months to remain in force.

Article 356 — State Emergency (President's Rule): Article 356 provides for central intervention when the constitutional government in that State breaks down; that is, when the state administration is unable or unwilling to function according to the constitution. Upon proclamation, the state's executive and legislative functions are transferred to the Centre. Parliamentary approval must be secured within two months, with periodic renewals required every six months thereafter. The maximum permissible duration is three years, a limit introduced following judicial and legislative scrutiny of the provision's earlier misuse.

Article 360 — Financial Emergency: Article 360 gives the Union the power to intervene when India's financial stability is considered to be under serious threat. It authorises the Union government to issue binding financial orders to states to ensure economic stability. A Financial Emergency, after being approved by Parliament within two months, continues until it is formally revoked; there is no periodic renewal requirement. In this regard, it stands different

from the other two emergencies. Notably, this provision has never been invoked in independent India.

Articles 358 and 359 — Impact on Fundamental Rights: The relationship between emergency powers and fundamental rights is governed by Articles 358 and 359, which is explained at great length in the later sections.

Core Areas of Tension

India's emergency framework generates three enduring and structurally significant tensions that continue to define the constitutional debate around these provisions.

National Security and Federalism

One of the central constitutional dilemmas created by emergency provisions concerns the balance between national security and India's federal structure. During emergency situations, the Constitution allows Union intervention in matters that ordinarily fall in the state's jurisdiction. Although this concentration of power may be justified for the preservation of national unity, its repeated or politically motivated use can erode state autonomy which will eventually harm the federal balance in the long term. The repeated invocation of Article 356 for political purposes during the 1970s and 1980s clearly shows how emergency powers can disturb the federal equilibrium, when exercised with partisan motives.

National Security and Civil Liberties

Emergency powers are intended to enable the State to respond to exceptional threats such as war or armed rebellion. However, the exercise of such powers almost inevitably comes at the cost of individual freedoms. The widespread misuse of emergency powers during the 1975 Emergency shows how restrictions imposed in the name of national security resulted in widespread suppression of political dissent, press freedom and civil liberties of the people.

Necessity and Constitutionalism

A further constitutional challenge arises from the relationship between the doctrine of necessity and the principle of constitutionalism. While the doctrine of necessity recognizes that exceptional situations may require extraordinary governmental action, constitutionalism upholds that even emergency powers remain subject to legal limitations, institutional oversight, and democratic accountability. The fundamental challenge lies in ensuring that emergency measures are temporary, strictly proportional, and consistent with constitutional values.

SECTION 2 : MISUSE OF ARTICLE 356 AND THE GOVERNOR'S DISCRETIONARY POWERS : PRIOR TO THE BOMMAI JUDGEMENT

Article 356 grants the President the authority to issue a proclamation if he/she is convinced that a situation has arisen in which the state's government cannot function in accordance with the

provisions of the constitution (**Constitution of India, 1950, art. 356**). It is popularly known as President's Rule. It can be proclaimed on 2 grounds (Article 356 and Article 365) wherein;

Article 365 - if the state fails to implement the directions issued by the centre, the president is authorised to determine that a situation has arisen where the state's government cannot operate in accordance with the constitution (**Constitution of India, 1950, art. 365**). President rule was first imposed in Punjab in 1951. Almost all states have experienced president rule at least once. Gradually, the provision became a political tool for dismissing opposition governments, thereby weakening the federal structure of the Constitution (**Jain, 2010; Seervai, 1996**).

Under the President's Rule, the Governor is expected to act impartially and in accordance with constitutional principles. However, prior to the *S. R. Bommai v. Union of India* judgment, Governors were often criticised for acting as puppets in the hands of the Central Government. In several instances, discretionary powers were allegedly used against state governments, particularly those ruled by opposition parties, rather than for the protection of constitutional machinery.

This chapter examines the misuse of Article 356 and the Governor's discretionary powers prior to the *S. R. Bommai v. Union of India* judgment. Furthermore, it analyses how the Bommai judgment restored constitutional supremacy by imposing judicial limitations on the arbitrary use of Article 356.

Historical Misuse of Article 356

Kerala Dismissal (1959)

One of the earliest controversial uses of Article 356 took place in Kerala in 1959. The elected Communist government led by E.M.S. Namboodiripad was dismissed on the grounds of failure of law and order and constitutional machinery in the state (**Jain, 2010**).

It is believed that the Central Government under Jawaharlal Nehru invoked Article 356 not merely as a constitutional measure, but as a political tool to regain influence and power in the state (**Seervai, 1996; Jain, 2010**).

1970s misuse

In 1970, Indira Gandhi again used Article 356 as a political tool to topple the government of West Bengal. Without conducting a floor test to determine the majority of the government, the state government was dismissed and West Bengal remained under President's Rule for nearly one year (**Jain, 2010; Seervai, 1996**).

Post Emergency dismissal of State Governments (1977)

The Janta party came to power in 1977. Soon after that, nine Congress-ruled state governments were dismissed under Article 356, wherein Home Minister Charan Singh justified the decision by stating that the Congress governments had lost their "moral right to govern" after the party's defeat in the General Elections. The governments were dismissed without any proof of a breakdown of constitutional machinery in the states (**Jain, 2010**).

A report published by the New York Times in 1977 observed that India was facing a major constitutional challenge. The report highlighted the controversy surrounding the role of the Acting President, whose position is generally regarded as constitutional and ceremonial (**The New York Times, 1977**).

The dismissal of nine state governments is significant examples of the misuse of Article 356 as the provision was used largely on political grounds rather than constitutional necessity (**Seervai, 1996; Jain, 2010**).

1980 Misuse

The return of the Congress government at the Centre in 1980 led to the dismissal of nine non-Congress state governments under Article 356. The dismissals were not based on any actual breakdown of constitutional machinery. Instead, they were largely seen as a move to re-establish political control over the states (**Jain, 2010; Seervai, 1996**).

A provision that was intended to act as a constitutional safeguard was repeatedly used by ruling parties to remove opposition governments. The events of 1977 and 1980 clearly demonstrate how Article 356 became a political weapon in the hands of political parties to assert their dominance over the states through the office of the President.

State of Rajasthan v. Union of India (1977)

The judgment in *State of Rajasthan v. Union of India* (1977) is regarded as an important case concerning the scope of Article 356 and Centre–State relations (**State of Rajasthan v. Union of India, 1977**). Following the change of government at the Centre in 1977, efforts were made to dismiss several state governments ruled by the opposition party. This raised concerns that Article 356 was being used not to address a genuine breakdown of constitutional machinery but to serve the political interests of the ruling party at the Centre.

SECTION 3 : POST-BOMMAI CONSTITUTIONALISATION OF ARTICLE 356

Introduction & Context of the Judgment

“Article 356 is provision without a parallel. The Constitution of no other country contains a similar provision” (*S.R. Bommai v. Union of India*, 1994). For decades the state emergency provision of 356 has worked less as an emergency safeguard and more as a political tool for the central government against inconvenient state governments. This systematic imbalance was challenged in the case of *S.R. Bommai v. Union of India* which is a landmark judgment that changed the landscape of Indian federalism by restricting arbitrary misuse of Article 356. To

understand the full impact and scope of this ruling, alongside the influential jurisprudential groundwork laid by Justice V.M. Tarkunde in the *State of Rajasthan v Union of India* case, one must examine the core constitutional issues that the judiciary sought to resolve.

The case of SR Bommai arose with the 7 state governments being dismissed by the president and the imposition of the president rule. The presidential proclamation was challenged in State of Karnataka S. R Bommai, became Chief Minister 1988. However, some legislators defected from the party and presented a letter to Governor P Venkatasubbaiah stating their decision to withdraw support to the Bommai government. In April 1989, the Governor sent a report to the Centre recommending President's Rule citing breakdown of constitutional machinery, as provided under Article 356 (**Frontline,2022**). Subsequently, Bommai's Government is dismissed by the President without giving him an opportunity to prove a majority on the floor of the assembly. Further in 1988, the Nagaland government was dismissed based on a report sent by the Governor to the President. The Governor had cited horse-trading and the relationship of some legislators with the insurgents as chief reasons for imposition of the President's Rule. And in October 1991, the President issued a proclamation dismissing the Meghalaya government on grounds of unconstitutional governance. The assembly was dissolved immediately after. Finally, after the demolition of the Babri Masjid in December 1992, the Centre dismissed not just the government of Uttar Pradesh, but also the Bharatiya Janata Party (BJP) governments in Madhya Pradesh, Rajasthan, and Himachal Pradesh leading to the famous case of S.R. Bommai v Union of India. (**Frontline,1997**)

On a plain reading of 356, court interpreted it as the provision which empowers the president to remove the state government, and dissolve the legislative assembly of the state and take over the functions of the government of the state as per his satisfaction on whether the governance of the state is carried on in accordance to the provisions of the constitution or not. As we read the president's power through the aid and advice clause as per which president is read as council of ministers and prime ministers at the centre. The power laid under 356 is meant to be used for exceptional circumstances as a measure to protect and preserve the constitution at the discretion of the president. The satisfaction aspect mentioned in the provision may be formed on the basis of the report submitted by the governor or on the basis of the information received by the president or both. The existence of the relevant material is a pre-condition to the formation of satisfaction.

On Federalism

Writing for the majority, Justice B.P. Jeevan Reddy (alongside Justice S.C. Agrawal) re-established federalism as a core element of the Basic Structure of the Indian Constitution. The Court in Bommai rejected the position that States are mere administrative sub-units or appendages operating at the mercy of the Central Government. Drawing directly from Dr. B.R. Ambedkar's historical assertions in the Constituent Assembly debates, the judgment emphasized that our Constitution is explicitly federal in its architecture (**S.R. Bommai v. Union of India, 1994, para. 211**)

The States possess an independent constitutional existence and are as sovereign within their designated, assigned legislative fields as the Centre is within its own. Consequently, any unauthorized or wanton invocation of Article 356 does not merely represent an administrative shift; it constitutes an unconstitutional invasion of a distinct, democratically mandated sovereign sphere.

Dissolution of State Assembly

The Court resolved a major point of historical abuse by ruling that the dissolution of a State Legislative Assembly is not an immediate or automatic consequence of issuing an Article 356 proclamation. Justice Jeevan Reddy held that while the power to dissolve the Assembly is implicitly located within the broad language of Article 356(1), it cannot be exercised unilaterally upon the initial issuance of the proclamation.

The President is constitutionally restricted from permanently dissolving the State Assembly until the proclamation has successfully secured the explicit approval of both Houses of Parliament under Clause (3). Prior to this parliamentary ratification, the President can only utilize Article 356(1)(c) to place the Legislative Assembly in a state of suspended animation, preserving the status quo until legislative oversight is completed.

Revival of State Assembly

In tandem with the restrictions on dissolution, the *Bommai* bench established a potent judicial remedy: the doctrine of the revival of the State Assembly. If a proclamation is subsequently disapproved by either House of Parliament under Article 356(3), or if it fails to be approved within the mandatory two-month window, the proclamation immediately lapses.

In such a scenario, an automatic *status quo ante* is triggered. The dismissed State Government is legally restored to its office, and the suspended or prematurely dissolved Legislative Assembly is instantly revived and reinstated to full functionality. Justice Jeevan Reddy affirmed that the High Courts and the Supreme Court possess the plenary power under judicial review to order this complete restoration if a presidential proclamation is struck down as unconstitutional, ensuring that executive overreach can be entirely unwound.

Sarkaria Commission Recommendations

The judgment gave strong legal and judicial force to the findings of the Sarkaria Commission on Centre-State Relations. The Commission had previously warned that Article 356 was being systematically subverted to achieve partisan political ends rather than addressing genuine constitutional failures.

The Supreme Court adopted the Commission's strict guidelines, ruling that Article 356 must be treated strictly as a measure of ultimate last resort. (***S.R. Bommai v. Union of India, 1994, para. 232***). The Court endorsed the mandate that the Centre must exhaust all alternative administrative remedies, such as issuing explicit warnings or directions to the errant State under Article 355, before resorting to the extreme step of dismissing an elected government.

On *State of Rajasthan* Judgment – Justice Ahmadi

Justice A.M. Ahmadi directly evaluated the problematic legacy of *State of Rajasthan v. Union of India* (1977). In that earlier decision, the Supreme Court had largely retreated from checking executive overreach, viewing the President's "satisfaction" as a purely political question that was insulated from thorough judicial scrutiny. Justice Ahmadi highlighted the jurisprudential evolution since 1977, noting that the absolute deference shown in the *State of Rajasthan* case was unsustainable.

By analyzing the historical context where the freshly elected Central Government had summarily dismissed nine state governments purely because the ruling parties there had lost national Lok Sabha elections, the *Bommai* court overruled this logic. Justice Ahmadi and the bench affirmed that political shifts at the federal level do not imply a breakdown of constitutional machinery in the states, marking a definitive shift from judicial deference to strict executive accountability.

On Secularism

A defining aspect of the *Bommai* judgment was its declaration that Secularism is an immutable feature of the Basic Structure of the Constitution. Justice Jeevan Reddy observed that a State Government is constitutionally obligated to maintain a strictly neutral, non-religious stance in its administrative operations. If a political party comes to power in a State and begins directing governance along unsecular or communal lines, it strikes at the core of the constitutional fabric.

The Court ruled that when a State Government deliberately subverts secularism, acts in a non-secular manner, or actively facilitates religious friction, such conduct directly amounts to a "failure of constitutional machinery." (*S.R. Bommai v. Union of India*, 1994, para. 243).

This subversion supplies a legally valid ground for the Centre to intervene and impose President's Rule under Article 356.

Scope of Article 74(2)

The Union Government sought to block judicial scrutiny by raising the shield of Article 74(2), which states that the question of whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court. The Supreme Court decisively limited this defence.

Justice Jeevan Reddy clarified that while Article 74(2) completely bars the judiciary from inspecting the actual, literal *advice* or recommendations made by the Council of Ministers to the President, it does not extend any immunity to the objective, foundational material upon which that advice was based. The Union Government is legally bound to produce the underlying facts, intelligence reports, and records before the Court so the judiciary can verify that relevant material genuinely existed to justify the emergency declaration.

356 and Political Vendetta

The Court issued an explicit constitutional caution against converting an emergency safeguard into an instrument of political vendetta or partisan destabilization. The majority observed that the historical application of Article 356 in the 1970s and 1980s had degenerated into a weapon used by ruling parties at the Centre to dissolve opposition-led State Assemblies.

The Court held that the mere fact that a State Government is run by a political party different from the one at the Centre is entirely irrelevant. Using the emergency provisions to clear out political adversaries or alter the composition of state representations constitutes a severe “fraud on power” that directly violates the democratic mandate.

Judicial Review

The Supreme Court conclusively established that a proclamation issued under Article 356(1) is fully amenable to judicial review. While the judiciary will not act as an appellate authority to evaluate the sheer *adequacy* or sufficiency of the material, it retains the absolute power to scrutinize the following elements such as whether any objective, authentic material existed at all to form the basis of the satisfaction; whether the material relied upon was legally relevant to a breakdown of constitutional machinery. And whether the issuance of the proclamation was a clear product of *mala fide* (bad faith) exercise of power or based on wholly extraneous grounds etc. The Court further shifted the procedural dynamics by ruling that once a challenger establishes a *prima facie* case of arbitrariness, the burden of proof shifts entirely onto the Union Government to present the material and demonstrate its relevance to the Court.

Floor Test and Article 356 – President's Rule in Karnataka

In reviewing the arbitrary dismissal of S.R. Bommai's government in Karnataka; where the Governor relied on letters from defecting legislators to bypass the Ministry; the Court articulated the foundational Floor Test Doctrine. In the judgment laid down an unyielding constitutional mandate: the floor of the Legislative Assembly is the only legal and legitimate arena to test a government's majority. (*S.R. Bommai v. Union of India*, 1994, paras. 323, 327)

A Governor cannot substitute their subjective, backyard assessments, private correspondence, or personal calculations for an objective vote. Unless an extraordinary situation of widespread physical violence completely paralyzes the assembly premises, a Floor Test must be mandatorily conducted. The Governor is obligated to give the incumbent Chief Minister an explicit opportunity to prove their strength on the floor of the House before drawing any conclusions regarding a breakdown of constitutional machinery.

President's Rule in BJP-Ruled States During the Babri Masjid Demolition

The Court directly applied these newly formulated legal tests to the post-Babri Masjid demolition dismissals of the BJP-led governments in Madhya Pradesh, Rajasthan, and Himachal Pradesh. The Court conducted a careful review to ascertain if “relevant material” was present to support the proclamations (*S.R. Bommai v. Union of India*, 1994, para. 364).

The Court upheld these dismissals as constitutionally valid. It noted that the ministries and high-ranking public officials in those states had open, active affiliations with religious organizations that had been legally banned during the communal crisis, and they had actively encouraged or failed to restrain actions that led to violent communal instability. Because Secularism is a basic feature of the Constitution, these actions represented a direct, verifiable failure to govern in accordance with constitutional provisions, providing the objective, relevant material required to sustain the invocation of Article 356.

V.M. Tarkunde's reasoning in *State of Rajasthan* (1977)

The entire architectural framework of the *Bommai* ruling traces its jurisprudential roots back to the prophetic dissent of J V.M. Tarkunde (acting as counsel/jurist whose formulations influenced this lineage) and the initial judicial discussions in the *State of Rajasthan* (1977) case. Tarkunde had pioneered the argument that the President's satisfaction under Article 356 cannot be treated as an unreviewable, absolute political question. He asserted that if the satisfaction was rooted in non-existent or completely extraneous material, it must be brought within the protective net of judicial review.

Though that view was rejected by the majority in 1977, the nine-judge bench in *S.R. Bommai* fully resurrected, adopted, and expanded this dissent. They elevated it from a minority critique into the landmark cornerstone of contemporary Indian constitutional law, forever restricting the arbitrary misuse of the President's Rule and reinforcing the structural accountability of the Union to the text of the Constitution.

SECTION 4 : ARTICLES 358 & 359 AND CIVIL LIBERTIES DURING EMERGENCIES

Article 358: Automatic Suspension of Article 19 Rights -

Upon proclamation of an emergency, Article 358 operates automatically to suspend the rights conferred by Article 19 of the Constitution; the six fundamental freedoms of speech and expression, peaceful assembly, association, movement, residence, and profession (**Constitution of India, 1950, art. 358**). This suspension takes effect by operation of law, without the need for any separate presidential order, for the duration of the emergency.

The Forty-Fourth Amendment introduced two material limitations on Article 358's operation. First, its application is now restricted to emergencies arising from **external aggression or war** and does not extend to emergencies grounded in armed rebellion (***Constitution (Forty-Fourth Amendment) Act, 1978***).

Second, the Amendment requires that laws enacted or executive actions taken under the cover of Article 358 must bear a nexus to the emergency itself; they cannot sweep up all Article 19 rights across the board merely because an emergency is in force. These limitations address the

1975-era experience of blanket suppression of freedoms in circumstances that bore no genuine relationship to any security threat.

Article 359: Discretionary Suspension of Remedies -

Article 359 operates on an entirely different basis. It does not automatically suspend any fundamental right; rather, it confers upon the President the discretionary power, by order, to declare that the right to move any court for the enforcement of specified fundamental rights shall be suspended for the duration of the emergency or a shorter period. Article 359 thus targets the remedy for enforcement, not the right itself (*Constitution of India, 1950, art. 359*).

The most significant reform introduced by the Forty-Fourth Amendment with respect to Article 359 is the insertion of an absolute proviso: the presidential order *cannot* suspend the right to move any court for enforcement of Articles 20 and 21. Protection against double jeopardy, self-incrimination, and ex post facto criminal liability (Article 20), and the right to life and personal liberty (Article 21), are thereby rendered constitutionally unsuspendable under any emergency, regardless of its nature or duration. This provision constitutes the most durable safeguard introduced by the post-emergency constitutional corrections. (*Constitution (Forty-Fourth Amendment) Act, 1978*).

THE CRITICAL DISTINCTION BETWEEN ARTICLES 358 AND 359

Automaticity Versus Discretion

The most immediate distinction between the two provisions concerns the mechanism of operation (Seervai, 1996, p. 2780; Jain, 2010, p. 1456). Article 358 takes effect automatically upon the proclamation of a national emergency; no executive order, no further administrative act is required. Article 359, by contrast, requires an affirmative presidential order specifically identifying the fundamental rights whose enforcement remedies are to be suspended. The absence of such an order leaves Article 359 inoperative, regardless of whether an emergency is in force.

This distinction has practical implications. The automatic operation of Article 358 means that legislative and executive action inconsistent with Article 19 becomes permissible from the moment the emergency is proclaimed; without deliberate executive engagement with the trade-offs involved. Article 359 at least compels the executive to identify and articulate, through a formal order, which rights it considers necessary to render non-justiciable.

Scope: Rights Covered

Article 358 applies exclusively to the rights guaranteed by Article 19. Article 359 is broader in potential scope, wherein the presidential order may target any fundamental right contained in

Part III, with the sole and non-negotiable exception of Articles 20 and 21. In practice, presidential orders under Article 359 have targeted Articles 14, 21, and 22, as occurred during the 1975 emergency; though the unsuspendability of Article 21 post-amendment now foreclosed that combination.

Nature of Suspension: Rights Versus Remedies

The conceptually most important distinction lies in the nature of what each provision suspends. Article 358 suspends the rights guaranteed by Article 19 themselves; for the duration of an emergency arising from external aggression or war, Parliament may enact legislation and the executive may take action inconsistent with Article 19 without constitutional infirmity. The rights, in a technical sense, do not exist during this period.

Article 359, by contrast, suspends only the *remedy*; the right to approach a court for enforcement; not the right itself. The underlying fundamental right continues to subsist in the constitutional text; it is simply rendered non-justiciable for the period of the order. If the order lapses or is revoked, the right immediately becomes enforceable again. This conceptual distinction preserves the formal integrity of the fundamental rights framework even during a state of emergency.

This distinction was the precise jurisprudential crux of *ADM Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521. The majority treated the suspension of the remedy under Article 359 as equivalent, in practical effect, to the extinction of the right; reasoning that without a court remedy, no operative right remained. Justice H.R. Khanna's dissent fundamentally challenged this conflation, insisting that the right to life and personal liberty is a pre-constitutional natural right that the Constitution recognises and protects, and that the suspension of the Article 21 remedy cannot extinguish the right's underlying existence (*ADM Jabalpur v. Shivkant Shukla*, 1976, p. 736).

ADM JABALPUR V. SHIVKANT SHUKLA: THE NADIR OF EMERGENCY JURISPRUDENCE

The Majority Judgment

The Supreme Court in *ADM Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521 was called upon to determine a question of extraordinary constitutional importance; whether, with the presidential order in force suspending enforcement of Article 21, a person detained under Maintenance of Internal Security Act (MISA) could approach a High Court by way of habeas corpus to challenge the legality of detention. The majority, comprising Chief Justice A.N. Ray, and Justices M.H. Beg, Y.V. Chandrachud, and P.N. Bhagwati; answered in the negative.

They applied a methodology of strict constitutional positivism. The reasoning proceeded as follows: the presidential order, validly issued under Article 359, suspended the right to move any court for enforcement of Article 21; therefore, no legal foundation existed for the issuance

of a writ of habeas corpus; and therefore, no court had jurisdiction to entertain a habeas corpus petition challenging preventive detention. The executive could detain a citizen indefinitely, with no court empowered to inquire into the legality, sufficiency, or proportionality of the detention.

The majority explicitly declined to recognise any rule of law principle, natural law foundation, or common law right to personal liberty that could operate independently of the constitutional text. In the court's analysis, the Constitution was the sole source of rights and remedies, and with both suspended by the presidential order, the legal universe of the detenu was reduced to zero. The breadth of this reasoning; its complete abnegation of any non-textual constitutional value; is what rendered the judgment not merely wrong in its result but dangerous in its philosophical premises.

Justice Khanna's Dissent

Justice H.R. Khanna's dissent is among the most celebrated and, in retrospect, most prescient judicial opinions in the history of the Indian Supreme Court. Justice Khanna held that the right to life and personal liberty is not the creation of the Constitution; it is a natural, pre-constitutional right that antedates the Constitution and upon which the Constitution confers formal protection. He reasoned that even absent the express guarantee of Article 21, no authority in a constitutional democracy possesses the power to deprive a person of life or liberty without legal authority (*ADM Jabalpur*, 1976, p. 736). The presidential order could suspend the enforcement remedy but could not annihilate the underlying right, which continued to demand that deprivation of liberty be grounded in legal authority. Justice Khanna's dissent was at the time a minority of one. His opinion is now universally recognised as the jurisprudential foundation upon which the post-emergency constitutional corrections were built. Baxi (1985, p. 116) characterises it as one of the finest judicial statements on constitutional liberty in Indian jurisprudence.

Formal Overruling in Puttaswamy

The majority judgment in *ADM Jabalpur* was not merely abandoned by subsequent courts; it was formally and unanimously overruled by a nine-judge bench of the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1. Every member of the bench wrote separately to repudiate the 1976 majority's reasoning and conclusion. Justice D.Y. Chandrachud's concurring opinion stated without equivocation that *ADM Jabalpur* was wrong in its conception and wrong in its result (*Puttaswamy*, 2017, para. 119). The overruling represents not merely jurisprudential correction but the constitutional community's collective moral repudiation of judicial capitulation to executive authority at the precise moment when judicial protection was most necessary.

THE FORTY-FOURTH AMENDMENT: CONSTITUTIONAL CORRECTION

Substitution of 'Armed Rebellion' for 'Internal Disturbance'

The Constitution (Forty-Fourth Amendment) Act, 1978, amended Article 352 to replace 'internal disturbance' with 'armed rebellion' as a ground for proclaiming a national emergency. This change is of profound practical significance. 'Internal disturbance' is a capacious and malleable expression that could, and did in 1975, encompass legitimate political opposition, judicial decisions unfavourable to the government, and mass democratic protest. 'Armed rebellion' imposes a factual threshold: organised, armed resistance to the authority of the state. The amendment thus removed the constitutional pretext under which the 1975 emergency was most egregiously abused (**Jain, 2010, p. 1456; Austin, 1999**).

Procedural Safeguards for Proclamation and Continuation

The amendment significantly strengthened the procedural framework surrounding the proclamation and continuation of emergency rule. The presidential proclamation now requires prior written communication to the Cabinet (effectively requiring collective Cabinet decision and formal countersignature), approval by each House of Parliament within one month by a special majority; a majority of two-thirds of members present and voting and a majority of total membership; and periodic renewal every six months by the same special majority.

The Lok Sabha is empowered to revoke the proclamation by simple majority resolution passed at a sitting to which notice has been given by not less than one-tenth of the total membership. This right of revocation, which may be exercised even by the opposition if one-tenth of the membership can be assembled, constitutes a meaningful legislative check that did not exist before 1978. It means that emergency rule, once proclaimed, is not self-sustaining and requires continuous parliamentary affirmation.

Absolute Protection of Articles 20 and 21

The most durable and constitutionally significant reform introduced by the Forty-Fourth Amendment is the insertion of a provision to Article 359 that renders Articles 20 and 21 absolutely unsuspendable by presidential order. These rights cannot be made non-justiciable under Article 359, regardless of the nature of the emergency, its duration, or the magnitude of the security threat invoked to justify it.

This reform directly responds to the 1975 presidential order, which had specifically targeted Articles 14, 21, and 22. Under the amended framework, no president can issue an order removing the right to approach courts for enforcement of Article 21; the provision upon which the entire constitutional right to life jurisprudence rests. Given the dramatic expansion of Article 21's substantive content through subsequent judicial interpretation (discussed below), this protection secures an extensive constitutional floor during any future emergency.

Limitation on Article 358

Article 358's operation was restricted by the Forty-Fourth Amendment in two important respects. First, the article now applies only to emergencies arising from external aggression or war and not from armed rebellion. This means that during an internal armed rebellion

emergency, Article 19 rights are not automatically suspended; any restriction on those rights requires separate justification. Second, laws enacted or executive actions taken under Article 358's cover must have a nexus to the emergency. Legislation that is not connected to the emergency does not receive immunity from challenge under Article 19.

These limitations prevent the extension of Article 358's sweep to internal security situations and require that any restriction on the six Article 19 freedoms be demonstrably linked to the security situation, rather than being used as a general licence for suppressing public discourse and political activity.

JUDICIAL REINTERPRETATION: FROM ADM JABALPUR TO PUTTASWAMY

Maneka Gandhi and the Substantive Reading of Article 21

The first landmark departure from the positivist approach of *ADM Jabalpur* came in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248, where a seven-judge bench unanimously held that the procedure for deprivation of life and liberty under Article 21 must be not merely a procedure established by law, but one that is just, fair, and reasonable. The court repudiated the narrow holding in *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, which had treated each fundamental right as a self-contained compartment and declined to read Articles 14, 19, and 21 together. In *Maneka Gandhi*, the court read these articles as forming an integrated constitutional framework “*a procedural and substantive protection of liberty that requires meaningful judicial scrutiny of any law or action purporting to restrict it.*”

The significance of *Maneka Gandhi* for emergency jurisprudence is structural; by establishing that Article 21 contains a substantive due process component, the court made it constitutionally impossible; even where Article 21 is technically applicable; to justify arbitrary, capricious, or disproportionate deprivation of life or liberty. Any future emergency law purporting to rely on Article 21 must now pass substantive scrutiny, not merely formal legislative authorisation.

Minerva Mills and the Basic Structure Limitation

In *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 625, the Supreme Court invalidated clauses (4) and (5) of Article 368 as inserted by the Constitution (Forty-Second Amendment) Act, 1976 provisions that had sought to place constitutional amendments beyond the scope of judicial review and to subordinate fundamental rights to directive principles. Chief Justice Y.V. Chandrachud; who had been part of the majority in *ADM Jabalpur*, a role he publicly regretted; authored the lead judgment holding that fundamental rights are part of the basic structure of the Constitution and cannot be abrogated, even by a constitutional amendment.

The *Minerva Mills* ruling creates a double layer of protection for fundamental rights in the context of emergencies. At the first layer, the Forty-Fourth Amendment protects Articles 20 and 21 from suspension under Article 359. At the second layer, the basic structure doctrine means that Parliament cannot, by constitutional amendment, remove or abridge fundamental rights in a manner that destroys the basic structure; including the constitutional guarantee of

individual liberty. An executive or legislature determined to eliminate rights protection during emergencies would have to overcome not only the Forty-Fourth Amendment's specific provisions but also the judicially-enforced basic structure doctrine.

The Right to Privacy and the Expanded Constitutional Floor

The culmination of the post-*ADM Jabalpur* jurisprudential evolution arrived in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1, where a nine-judge bench unanimously held that privacy is a fundamental right under the Constitution of India, protected as part of the rights guaranteed by Articles 14, 19, and 21. The right encompasses informational self-determination, bodily integrity, personal autonomy, and decisional privacy. Because privacy is an integral component of the right to life and personal liberty under Article 21, and because Article 21 cannot be suspended under Article 359 as amended, the substantive content of privacy as a constitutional value enjoys protection even during a national emergency.

Justice D.Y. Chandrachud's concurring judgment in *Puttaswamy* draws the explicit inference: "Life and liberty are not the creations of the Constitution. They existed prior to and independent of it" (*Puttaswamy*, 2017, para. 119). The right to life and personal liberty, as now understood, encompasses privacy, dignity, health, livelihood, fair trial, and a wide range of derivative entitlements developed through decades of Article 21 jurisprudence. All of this substantive content is now shielded from presidential suspension. The constitutional floor during emergency rule is dramatically higher than it was in 1975; or even than the framers of the Forty-Fourth Amendment anticipated in 1978.

DISCUSSION: POST-1975 REFORMS-GENUINE SAFEGUARD OR STRUCTURAL VULNERABILITY?

The Case for Adequacy

The post-1975 constitutional framework presents a substantially more robust architecture of rights protection than existed during the Emergency of 1975-1977. Several pillars support the case for adequacy.

First, and most fundamentally, the absolute constitutional protection of Articles 20 and 21 from suspension under any emergency is a near-inviolable guarantee. Given the expansive judicial interpretation of Article 21 to encompass privacy, dignity, health, livelihood, and procedural fairness, the substantive floor of rights available to citizens during an emergency is considerably higher than the framers originally contemplated. A presidential order cannot remove the right to approach courts to enforce these rights; meaning that habeas corpus for illegal detention under Article 21 remains available even during the most severe national emergency.

Second, the procedural requirements surrounding emergency proclamation and continuation; Cabinet countersignature, special parliamentary majority, periodic renewal, and the Lok Sabha's power of revocation; impose genuine institutional constraints on the unilateral exercise of emergency power. Each procedural hurdle creates an opportunity for deliberation and potential political resistance.

Third, the substitution of 'armed rebellion' for 'internal disturbance' removes the most readily abused ground for emergency proclamation. A government cannot constitutionally invoke emergency powers to suppress electoral opposition, judicial challenge, or democratic protest; all of which were among the targets of the 1975 emergency; without meeting the higher factual and legal threshold of demonstrating actual armed rebellion.

Fourth, the *Minerva Mills* basic structure doctrine provides a supraconstitutional limit; even where Parliament commands sufficient numbers to amend the Constitution, it cannot abrogate fundamental rights or eliminate judicial review of emergency powers without violating the basic structure and inviting judicial invalidation (*Minerva Mills Ltd. v. Union of India, 1980*).

The Case for Structural Vulnerability

Notwithstanding the above, the case for structural vulnerability is equally compelling, and in some respects more sobering.

In a parliamentary democracy where a single party commands a large majority; a condition that obtains regularly in Indian politics; the requirement of a special parliamentary majority may not function as a genuine deliberative check. A government commanding two-thirds of members present and voting can, on the face of it, satisfy the formal threshold while eliminating substantive parliamentary scrutiny. The requirement of a majority of total membership adds some constraint, but a disciplined majority can meet this condition without meaningful opposition engagement.

Article 19 rights; freedom of speech and expression, peaceful assembly, and association; which are the lifeblood of political opposition and democratic accountability, remain suspendable under Article 358 during emergencies arising from external aggression or war. They may also be targeted under Article 359 orders during armed rebellion emergencies (subject to the nexus requirement introduced by the Forty-Fourth Amendment). As the 1975 experience demonstrated, **it is precisely the suppression of these freedoms**; the imprisonment of journalists, the closure of newspapers, the banning of political gatherings; through which authoritarian abuse manifests most comprehensively. A formal reading of the amended provisions does not exclude such suppression in the right factual circumstances.

Preventive detention legislation presents a specific and persistent vulnerability. The suspension of the enforcement remedy under Article 359, while it cannot now reach Articles 20 and 21, can still target Article 22 (protection against arbitrary arrest and detention). An expansive preventive detention law, combined with a presidential order suspending Article 22

enforcement, could substantially constrain individual liberty even within the post-1978 framework; particularly since habeas corpus for Article 22 violations would be suspended even though Article 21 protection remains formally available.

The independence of the judiciary remains the most critical and least controllable structural variable. *ADM Jabalpur* demonstrated that a court of exceptional judges can capitulate to executive authority under political pressure. The institutional independence of the judiciary; encompassing the processes of judicial appointments, transfers, the executive's public attitudes toward judicial accountability, and the willingness of judges to enforce constitutional limits in the face of government displeasure; is not guaranteed by constitutional text alone. The *Minerva Mills* basic structure doctrine depends entirely on judicial willingness to enforce it against a determined executive, a vulnerability examined in Singhvi's (2019, p. 194) reassessment of the basic structure doctrine's role in emergency governance. Historical experience, including *ADM Jabalpur* itself, counsels caution about assuming that doctrinal advances translate automatically into institutional behaviour.

The Indian framework, post-*Minerva Mills* and *Puttaswamy*, approximates the ideals of Dyzenhaus (2006, p. 34) more closely than it did in 1975, but the approximation remains incomplete. Proportionality and necessity review of emergency measures remains jurisprudentially underspecified in the Indian context. Parliamentary review of emergency proclamations is a significant check; but only if Parliament functions as a genuine deliberative body rather than as an instrument of executive authority.

Synthesis

The post-1975 constitutional framework represents a genuine and significant advancement over the legal architecture that permitted the Emergency of 1975-1977. The absolute unsuspendability of Articles 20 and 21, the dramatically expanded substantive content of Article 21, the basic structure doctrine, and the procedural constraints on emergency proclamation collectively create a constitutional environment materially more protective of civil liberties than existed prior to 1978.

However, structural safeguards embedded in constitutional text operate only as well as the institutional actors; the executive, Parliament, and the judiciary; who are charged with interpreting and enforcing them. The genuine prevention of authoritarian abuse requires, in addition to constitutional architecture, three institutional conditions: an independent and courageous judiciary willing to enforce constitutional limits even under political pressure; a Parliament that exercises its oversight function as more than a procedural formality; and a democratic culture that sustains public vigilance and political accountability. The Constitution provides the framework; its vitality depends upon institutional integrity and civic commitment.

SECTION 5 : COMPARATIVE ANALYSIS AND REFORM FRAMEWORK

The constitutionalisation of emergency powers is, at its core, a problem of institutional design under conditions of extreme political stress. It asks whether a constitutional framework can be engineered to restrain power precisely at the moment when those who hold power are both incentivised and politically emboldened; to exercise it without restraint. This is not a problem unique to India, and the comparative experience of Germany, South Africa, and the United States offers more than illustrative contrast; it offers a diagnostic vocabulary through which India's own constitutional journey can be critically evaluated. What emerges from that evaluation is a framework that has made genuine and significant progress; through judicial intervention, constitutional amendment, and doctrinal evolution; but which remains structurally incomplete in ways that matter precisely because they are most likely to be exposed under conditions of institutional stress, when informal norms erode and political incentives override constitutional fidelity.

The German Model

The German Basic Law represents one of the most deliberate and architecturally self-conscious responses to the dangers of emergency power in modern constitutional history. The framers of the Basic Law in 1949 were not working in the abstract; they were constitutionalising in the shadow of Article 48 of the Weimar Constitution, whose open-ended grant of presidential emergency authority had been operationalised to dismantle the very democratic order it was meant to protect (*Basic Law for the Federal Republic of Germany, 1949*).

The response was a framework of extraordinary specificity and procedural stringency. The defence emergency provisions under Articles 115a through 115l require concurrent determination by both the Bundestag and the Bundesrat, impose *strict temporal limits subject to automatic lapse*, and, critically, preserve the plenary jurisdiction of the Federal Constitutional Court throughout the emergency period (*Basic Law for the Federal Republic of Germany, 1949, arts. 115a–115l*).

No emergency proclamation can suspend the Court's authority to review, and no constitutional amendment may be passed during a state of defence (*Basic Law for the Federal Republic of Germany, 1949*). More fundamentally, Article 79(3) renders certain core provisions; including human dignity under Article 1 and the federal structure under Article 20; to be permanently unamendable, even outside emergency conditions (*Basic Law for the Federal Republic of Germany, 1949, arts. 1, 20, 79(3)*). The logic underlying this architecture is what German constitutional theory identifies as *streitbare Demokratie*, or militant democracy under which the constitutional order must be designed to defend itself against its own subversion, including subversion laundered through formally legal emergency powers. When mapped onto India's framework, the contrast is instructive. India's Basic Structure doctrine, performs a functionally analogous role by insulating the constitutional core from amendment even under emergency conditions. (*Kesavananda Bharati v. State of Kerala, 1973; Minerva Mills Ltd. v. Union of India, 1980*).

However, it does so as a judicially constructed, case-by-case doctrine rather than a textually codified prohibition. Its durability is therefore contingent on judicial independence and

institutional willingness to apply it against a determined executive, a contingency that the history of *ADM Jabalpur v. Shivkant Shukla* demonstrates cannot be taken for granted (*ADM Jabalpur v. Shivkant Shukla*, 1976).

The German model suggests that constitutional entrenchment of non-derogable values is a structurally superior safeguard.

South Africa's post-apartheid approach

South Africa's Section 37 of the Constitution of 1996 offers a different but equally rigorous model, shaped by a post-apartheid constitutional consciousness acutely aware of how state-declared emergencies had historically served as instruments of oppression rather than protection (*Constitution of the Republic of South Africa*, 1996, sec. 37). Section 37 is notable for three features that distinguish it sharply from the Indian framework.

First, it enumerates a catalogue of non-derogable rights; including the right to life, human dignity, and freedom from torture; that cannot be suspended under any emergency (*Constitution of the Republic of South Africa*, 1996, sec. 37) with no exceptions and no executive discretion to derogate from them. Second, it places the burden of justification explicitly on the state in any judicial proceeding, requiring the government to demonstrate that each specific measure taken under the emergency is strictly required by the exigency (*Constitution of the Republic of South Africa*, 1996, sec. 37). Third, it grants courts express constitutional authority to review not merely the declaration of emergency but each individual measure taken pursuant to it, applying a proportionality standard that is textually mandated rather than judicially implied. This last feature is particularly significant for India. The doctrine of proportionality has entered Indian constitutional jurisprudence most meaningfully through *Justice K.S. Puttaswamy v. Union of India*. However, its application to emergency measures specifically; to the suspension of rights under Articles 358 and 359, or to the specific executive actions taken during a proclaimed emergency; remains judicially underdeveloped and textually unsupported. There is no provision in the Indian Constitution equivalent to Section 37's explicit proportionality requirement for emergency measures, meaning that the test, however analytically powerful, must be imported into emergency law through interpretive effort rather than constitutional command. The South African model demonstrates that this is a drafting gap, not a constitutional inevitability, and that closing it through either constitutional amendment or a comprehensive statutory emergency framework would significantly strengthen the accountability architecture.

The United States parallel

The United States presents the most cautionary comparative case precisely because it illustrates what happens when emergency powers are left structurally under-defined and institutionally under-checked. The American constitutional text contains no comprehensive codified emergency powers regime; presidential emergency authority is instead assembled from broadly interpreted Article II powers, a sprawling body of emergency statutes, and executive orders whose legality is frequently contested but rarely definitively resolved (*U.S. Constitution*, art. II). The consequences of this structural ambiguity have been historically severe; from the

internment of Japanese-American citizens under Executive Order 9066, upheld in *Korematsu v. United States* through a degree of judicial deference that the Supreme Court itself later repudiated in *Trump v. Hawaii*, to the post-September 11 surveillance architecture authorised under the *Authorization for Use of Military Force (AUMF) (Authorization for Use of Military Force, 2001)* and conducted without meaningful congressional or judicial oversight for years. What the American experience reveals is that institutional culture, political convention, and even an assertive judiciary cannot fully substitute for structural constitutional design when executive incentives align with emergency expansion. This lesson resonates with particular force in the Indian context. Post-Bommai, the Indian framework has moved significantly toward judicial accountability; the justiciability of Article 356 proclamations, the floor test doctrine, the requirement of parliamentary approval; (*S.R. Bommai v. Union of India, 1994*) but much of this architecture is judge-made rather than constitutionally or legislatively codified. The Governor's discretion, while now constitutionally constrained by *Bommai's* logic, is not governed by any codified standards specifying the conditions under which a report recommending President's Rule may legitimately be made. The risk, as the American experience suggests, is not that the current framework will fail under ordinary political conditions, but that it will be tested precisely when institutional goodwill is absent, and found to be resting on foundations less secure than they appear.

It is against this comparative backdrop that the reform agenda for India's emergency law framework must be formulated, and it must be formulated with two principles in mind: that effective safeguards must be structural rather than discretionary, and that accountability mechanisms must operate automatically rather than contingently. The most critical structural gap in the current framework is the absence of constitutionally embedded sunset and mandatory review provisions that impose granular, time-bound accountability on emergency measures independently of parliamentary willingness to act. The existing requirement of periodic parliamentary approval under Article 352 (*Constitution of India, 1950, art. 352*) is a necessary but insufficient safeguard; it treats the emergency proclamation as a single instrument to be renewed or revoked in its entirety, without requiring that individual measures taken pursuant to the proclamation be separately justified and independently evaluated for proportionality and necessity. A more robust framework would require the executive to table before Parliament, at defined intervals, a detailed accountability report enumerating each measure taken, the specific constitutional or statutory basis for it, the rights affected, and the proportionality of the restriction imposed; with each measure subject to independent parliamentary scrutiny rather than bundled into a general renewal vote. This proposal reflects standard practice in constitutional democracies with mature emergency law frameworks, and its absence from the Indian scheme is an anomaly that cannot be justified by reference to parliamentary sovereignty, since genuine sovereignty requires genuine information.

Equally indispensable is the question of judicial timelines. The structural lesson of 1975 is not merely that courts may be unwilling to intervene; but that even a willing court operates too slowly to prevent rights violations from consolidating into facts on the ground before relief can be granted. A constitutionally or legislatively mandated timeline for the hearing and disposal of petitions challenging emergency measures would transform judicial review from a theoretical entitlement into a practically effective guarantee. This reform connects directly to

the doctrine of constitutional morality, which the Supreme Court has increasingly deployed as a standard requiring that constitutional provisions be implemented in ways that honour the transformative vision of the Constitution rather than merely its literal text. Constitutional morality, as elaborated in judicial precedents of *Navtej Singh Johar v. Union of India* and *Indian Young Lawyers Association v. State of Kerala*, is not a free-floating judicial value but a demand that institutions; legislative, executive, and judicial; design and operate their procedures in ways that make constitutional rights real rather than nominal. Applied to emergency powers, it demands a framework capable of resisting abuse not under favourable conditions, but under precisely the conditions of institutional stress in which abuse is most likely. India's constitutional trajectory in this domain reflects genuine and hard-won progress. What it has not yet achieved is the structural consolidation of that progress into a framework whose safeguards do not depend on the next constitutional crisis to reveal the next inadequacy. This consolidation which is; textual, procedural, and institutional; is the unfinished work that this paper's analysis points towards. (*S.R. Bommai v. Union of India*, 1994; *Minerva Mills Ltd. v. Union of India*, 1980; *Constitution (Forty-Fourth Amendment) Act*, 1978).

A path towards specific Institutional Reforms

The structural vulnerabilities identified through comparative analysis point toward a single legislative conclusion: India requires a dedicated Emergency Powers Act that moves beyond the proclamation-level accountability currently embedded in Articles 352 and 356, and establishes a measure-specific legal regime governing the exercise of emergency authority from invocation to termination. Such legislation would not duplicate constitutional provisions but would operationalise them, supplying the procedural and institutional infrastructure that constitutional text, by its nature, cannot provide.

Statutory Proportionality Review

No existing provision in the Indian constitutional framework requires that individual measures taken during an emergency satisfy a proportionality standard as a condition of their legal validity. A dedicated Emergency Powers Act should remedy this by establishing a statutory proportionality test applicable to every executive action taken pursuant to an emergency proclamation. Each measure should be required to demonstrate a direct nexus to the emergency condition, restrict the relevant fundamental right only to the extent strictly necessary, and be capable of surviving independent judicial scrutiny on those grounds. This would close the gap between *Puttaswamy's* expansive recognition of Article 21's substantive content and the absence of any enforcement mechanism calibrated specifically to emergency conditions.

Mandatory Judicial Timelines

A statutory framework should prescribe fixed, non-extendable timelines within which courts must hear and dispose of petitions challenging emergency measures. The absence of such timelines means that judicial review, however doctrinally robust, remains procedurally contingent. Rights violations sustained over months of litigation delay are not meaningfully

remedied by eventual judicial relief. Codified timelines would convert the theoretical availability of judicial review into a practically operative guarantee, ensuring that the institutional lessons of *ADM Jabalpur* are addressed not merely through doctrinal evolution but through enforceable procedural design.

Conclusion

The evolution of emergency powers in India reflects a continuing effort to balance the imperatives of state security with the principles of constitutional governance. Drawing upon philosophical foundations and comparative constitutional experiences, the Constitution's framers established a framework that enables the State to respond to extraordinary crises while incorporating safeguards against the concentration and abuse of power. Nevertheless, historical experiences, most notably the misuse of Article 356 and the excesses of the 1975–77 Emergency, demonstrated that constitutional provisions alone cannot guarantee the protection of democratic values; effective institutional checks, accountability, and constitutional morality remain equally essential. As Ambedkar observed in his closing speech on 25 November 1949, "However good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot." This observation underscores that the effectiveness of constitutional safeguards ultimately depends upon the political actors and institutions responsible for implementing them.

In response to these challenges, significant constitutional and judicial developments have reshaped the emergency framework. The 44th Constitutional Amendment, together with progressive judicial interpretation and landmark decisions such as *ADM Jabalpur v. Shivkant Shukla* (later effectively overruled) and *S. R. Bommai v. Union of India*, strengthened safeguards against executive overreach by narrowing the grounds for emergency proclamations, enhancing parliamentary oversight, protecting fundamental rights under Articles 20 and 21, and affirming the centrality of judicial review. These reforms have reinforced constitutional supremacy and the rule of law, making the exercise of emergency powers more accountable and constitutionally restrained. Comparative constitutional experiences further suggest that stronger procedural safeguards, greater transparency, proportionality-based review, and clearer accountability mechanisms can enhance democratic resilience.

Despite these advancements, certain vulnerabilities persist. Executive dominance, limitations on civil liberties during emergencies, the discretionary role of constitutional authorities, and dependence on judicial intervention continue to raise concerns regarding potential misuse.

Ultimately, the effectiveness of India's emergency provisions depends not only on constitutional design but also on the integrity of institutions, the independence of the judiciary, and the vigilance of civil society. Emergency powers must remain exceptional in both principle and practice; they should be exercised only when strictly necessary and always subject to constitutional morality, transparency, and democratic accountability. India's constitutional

experience demonstrates that while emergencies test the strength of the State, the true measure of a democracy lies not in its ordinary functioning, but in its commitment to preserving constitutional values even in times of crisis.

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