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## Unpacking Emergency Provisions in the Indian Constitution in Comparison with the Böckenförde Model

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*The Constitution of India, when drafted by our Constituent Assembly, was envisaged to fit all possible circumstances, including the worst-case scenario that could occur. With this in mind, our Constitution makers created the emergency provisions. These emergency provisions, when composed, were held to the standard that they would only be used during emergencies. However, our Constitution makers were still susceptible to making errors while formulating these provisions, leaving a lot of scope to be abused by political leaders. This paper explores the extent and characteristics of emergency provisions, aiming to critically assess the authority vested in the President and whether these powers surpass the requirements for their role as the constitutional head. Employing Böckenförde's Model, which provides constitutional law-grounded solutions, the study will evaluate the emergency provisions enshrined in the Constitution. The analysis will delve into the discussion of safeguards and fail-safes, exploring potential solutions to mitigate the risk of power misuse. This research paper will use a doctrinal method of research in order to determine whether the usage of emergency truly outweighs the various negatives that follow the usage of such overarching powers.*

**Keywords:** *emergency provisions, Böckenförde model, president's powers, state emergency, national emergency.*

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## **INTRODUCTION**

Federalism serves as a unifying element within a diverse array of States, providing coherence to India's sociological fabric, which inherently possesses federal characteristics. The pluralistic nature of Indian society underscores the essence of federalism, with a constitutional trend favouring increased centralisation of powers while preserving regional consciousness and cultural distinctiveness. India's founding fathers recognised the imperative of framing a federal constitution to accommodate the country's particularism and territorial diversity. Federalism entails a dual polity, yet the absence of indestructibility among federating units places the Union in a position of dominance over the States. India, therefore, operates as a centrally-oriented federation, aiming to mitigate the disruptive influence of particularism while upholding federal principles. The evolution toward Monistic Federalism in India is evident, manifested by a single constitution governing the Union and the constituent units in normal circumstances and during emergencies.

Across historical and contemporary constitutions, emergency governance has become integral to political theory. Specific emergency provisions within the constitution safeguard against the inadvertent emergence of dictatorship resulting from war, external aggression, or internal disturbances. Such provisions are essential to maintaining constitutional order and preventing the undue concentration of power during times of crisis.

## **BACKGROUND**

Despite the contemporary instances of the misuse of power, there is still a question yet to be answered. Why would the founding fathers make such provisions with a lacuna for misuse? The Constitution is designed in such a way that the government needs to be aware of the needs of the people during normal and abnormal times. It is essential to understand the circumstances the country was undergoing during the framing of the Constitution. This leads to the formulation of an inkling of why the emergency provisions were introduced. The incidents

compelled the Constitution's fathers to consider India's environment before and after independence to focus on creating emergency provisions.<sup>1</sup>

The period following the partition was marked by significant societal upheaval and unrest. Instances of arson, murder, looting, and political turmoil were prevalent, contributing to an atmosphere of tension and instability.<sup>2</sup> The communal conflict that ensued as a result of partition resulted in the displacement of millions from their homes, constituting an unparalleled event in human history.

The fractious elements of linguism, communalism, regionalism, and casteism precipitated discord and disrupted the peace and stability of the nation. Particularly, heightened communal tensions between Hindus and Muslims were exacerbated by the efforts of the Muslim League, leading to a surge of communal fervour. These divisive forces posed significant challenges to establishing and sustaining democracy in the country.

The inception of the Kashmir issue coincided with the transition period following the lapse of the Crown's paramountcy, concurrent with the formulation of our constitution. Despite Kashmir not aligning with either Dominion, the Indian government undertook the responsibility of safeguarding Kashmir against persistent threats of military intervention from Pakistan. The looming danger posed by Pakistan necessitated proactive measures. Additionally, the reluctance of certain Native States to integrate into the Indian Union further compounded the challenges.<sup>3</sup>

Instances such as Junagarh's decision to accede to Pakistan and Hyderabad's declaration of independence on the eve of India's Independence posed significant tests for the Indian government. Such separatist actions were deemed incompatible with the integrity of the nation-state, prompting decisive military interventions in Junagarh and Hyderabad due to geographical exigencies.<sup>4</sup> Moreover, the presence of reactionary feudal elements, exemplified

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<sup>1</sup> Akshay Shandilya, 'Emergency Provisions in the Indian Constitution: A Study of the 'Internal Disturbance' of 1975' (2013) SSRN <<https://dx.doi.org/10.2139/ssrn.2260728>> accessed 02 September 2024

<sup>2</sup> Benjamin N Schoenfeld, 'Emergency Rule in India' (1963) 36(3) Pacific Affairs <<https://doi.org/10.2307/2754348>> accessed 02 September 2024

<sup>3</sup> *Ibid*

<sup>4</sup> Imtiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (Springer 2002)

by influential zamindars, added complexity to the socio-political landscape. This was exemplified by the peasants of Telangana who supported communist activities, thereby threatening the democratic institution of the nation. Therefore, the makers came up with Article 356<sup>5</sup> to prevent a breakdown of constitutional machinery due to the influence of ideologies and communities that might be reasonably swayed by these ideologies that would threaten to break apart the fabric of federalism and democracy.<sup>6</sup>

These multifaceted challenges collectively underscored the imperative for constitutional provisions such as Article 352<sup>7</sup>. Such provisions are designed to address emergent threats to the sovereignty and integrity of the nation, serving as a mechanism for ensuring the preservation of democratic norms amidst turmoil and disintegratory forces. The economic situation during the partition and before and after independence was abysmal, which prompted the creation of Article 360<sup>8</sup> to prevent any legal difficulties in the international sphere.

## INSTANCES OF MISUSE OF EMERGENCY POWERS

In Part XVIII, the Constitution of India lays down provisions concerning emergencies, granting the President the authority to declare them. These emergencies come in three forms: national, state, and financial. A National Emergency can be declared under Article 352<sup>9</sup>, but only upon the written request of the Prime Minister. This emergency can be triggered by 'external aggression' or 'armed rebellion,' although the latter was replaced with 'internal disturbance' by the Forty-Fourth Amendment Act of 1978<sup>10</sup>. National Emergencies expire after one month and require a special two-thirds majority vote in either House of Parliament for an extension. Despite their intended purpose, such emergencies have been historically subject to misuse by political authorities, notably demonstrated in cases like *ADM Jabalpur v Shivkant Shukla*<sup>11</sup> during the tenure of late Prime Minister Indira Gandhi. These instances led to significant judicial interpretations, particularly regarding the suspension of fundamental rights during

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<sup>5</sup> Constitution of India 1950, art 356

<sup>6</sup> P R Bowie et. al., *Studies in Federalism* (Brown & Company 1954)

<sup>7</sup> Constitution of India 1950, art 352

<sup>8</sup> Constitution of India 1950, art 360

<sup>9</sup> Constitution of India 1950, art 352

<sup>10</sup> The Constitution (Forty-fourth Amendment) Act 1978

<sup>11</sup> *ADM Jabalpur v Shivkant Shukla* 1(976) AIR 1207

emergencies, a notion challenged and eventually altered in the landmark case of *K.S. Puttuswamy v Union of India*.<sup>12</sup>

Article 356<sup>13</sup> outlines provisions for a State Emergency triggered by the failure of constitutional machinery within a state. Unlike Article 352<sup>14</sup>, this provision necessitates the satisfaction of the Governor for the President to declare an emergency. However, Article 356<sup>15</sup> has been frequently misused, with over 124 declarations recorded. It permits an initial imposition of six months, extendable by renewal, with a maximum limit of three years. Notably, prolonged state emergencies, as witnessed in Jammu and Kashmir and Punjab, have raised concerns despite existing safeguards.

Article 360<sup>16</sup> addresses the potentiality of a Financial Emergency, though such a situation has not yet arisen in India. However, the criteria for declaring emergencies, particularly the President's satisfaction as a standard, have been criticised for their potential arbitrariness and lack of democratic oversight, a concern prevalent across Articles 352<sup>17</sup>, 356<sup>18</sup>, and 360<sup>19</sup>.

In the case of *ADM Jabalpur v Shivkant Shukla*<sup>20</sup>, Prime Minister Indira Gandhi's declaration of a National Emergency led to a significant legal controversy. With a majority ruling of 4:1, the verdict upheld the suspension of habeas corpus during emergencies, effectively allowing the override of fundamental rights. Though later overturned, this decision marked a prolonged period of ambiguity regarding emergency provisions until the *K.S. Puttuswamy v Union of India*<sup>21</sup> case. In this case, a nine-judge bench acknowledged the breach of the Constitution's Basic structure by suspending fundamental rights during emergencies, leading to a significant shift in interpretation.

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<sup>12</sup> *K.S. Puttuswamy v Union of India* (2018) 1 SCC 1

<sup>13</sup> Constitution of India 1950, art 356

<sup>14</sup> Constitution of India 1950, art 352

<sup>15</sup> Constitution of India 1950, art 356

<sup>16</sup> Constitution of India 1950, art 352

<sup>17</sup> Constitution of India 1950, art 352

<sup>18</sup> Constitution of India 1950, art 356

<sup>19</sup> Constitution of India 1950, art 360

<sup>20</sup> *ADM Jabalpur v Shivkant Shukla* (1976) 1 SCR 172

<sup>21</sup> *K.S. Puttuswamy v Union of India* (2018) 1 SCC 1

Similarly, the *State of Rajasthan v UOI*<sup>22</sup> highlighted limitations on judicial review regarding Emergency Proclamations. While the courts initially lacked the power to scrutinise such proclamations, the Supreme Court clarified that continuous imposition of a State Emergency could be challenged if deemed arbitrary. Nonetheless, the necessity for adequate safeguards to prevent such situations from arising underscores the importance of statutory provisions and democratic participation in decision-making concerning emergencies.

Article 360<sup>23</sup> discusses the scenario of a financial emergency. It can only be declared in case of financial instability in the country. To date, such an emergency has not been declared in India. However, the fundamental logic behind the declaration of emergency is the standard of the satisfaction of the President, which is a flawed standard to exist, and it also leaves room for arbitrariness, especially when it comes to Articles 360<sup>24</sup> and 352<sup>25</sup>. This standard for declaration of emergency is also present in Article 356<sup>26</sup>, which requires the satisfaction of the Governor. Moreover, such provisions do not refer to the advice of the Council of Ministers on whose advice a state of emergency can be declared. Hence, the democratic institution of the country does not participate in a decision that can potentially alter citizens' quality of life.

## **ANALYSIS USING THE BÖCKENFÖRDE MODEL**

The Böckenförde Model was devised by Ernst Wolfgang Böckenförde who was a German legal scholar and devised this model to find a potential solution anchored in constitutional laws at the federal level, which could entail implementing a model structure that emphasises the separation of powers between the authorising agency, representing the political wing, and the implementation agency. This structure would also delineate between a 'law,' which establishes overarching principles, and a 'measure,' which outlines specific actions for implementation. Furthermore, it would distinguish between situations of extreme urgency and those of lesser

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<sup>22</sup> *State of Rajasthan v Union of India* (1977) 1 SCR 1

<sup>23</sup> Constitution of India 1950, art 360

<sup>24</sup> *Ibid*

<sup>25</sup> Constitution of India 1950, art 352

<sup>26</sup> Constitution of India 1950, art 356

severity.<sup>27</sup> By clearly defining these distinctions and roles within the constitutional framework, this model structure aims to provide a systematic approach to addressing complex issues while upholding the principles of governance and the rule of law.

This structure can be applied to emergencies within the constitutional framework by focusing on the actions of the higher judiciary in India in order to test the safeguards in the Böckenförde model at the sub-national level in different geographies and contexts. It must also be kept in mind that the model was devised for Germany, whose political and constitutional structure is vastly different from India.<sup>28</sup> Hence, it also becomes important to keep these differences in mind while trying to apply this structure. However, the essence of the model is the separation of the authorising agency, which is the political wing and the implementation of the agency.

This separation of powers is extremely difficult in the context of India since the legislature and executive structure of India are interchangeable. The results highlight the concern that the dynamics of democracy and the reality of how political power is garnered in a federal Westminster-style framework effectively stymie the procedural innovations introduced by Böckenförde's model by creating conditions not for fair play but for subverting the spirit of the law.<sup>29</sup> Even the procedures outlined by Böckenförde – such as an emphasis on making the agent who holds the emergency powers a political, and not merely an administrative organisation – accentuates, rather than mitigates, this problem.<sup>30</sup> In a Westminster parliamentary democracy, the head of government is elected by Parliament, differing from a Presidential system where the President is directly elected by the populace. In India, following the British convention, the leader of the largest party in Parliament is typically invited to form the government, which may be a majority, minority, or coalition government, depending on legislative support. This pattern extends to federal and state levels. Notably, the Indian constitution uniquely includes Article

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<sup>27</sup> Mirjam Künkler and Tine Stein, 'Statism, Secularism, Liberalism - Böckenförde's Contributions to German Staatsrechtslehre in the Light of Contemporary Challenges within and beyond the State' (2018) 19(2) German Law Journal <<http://dx.doi.org/10.1017/S2071832200022641>> accessed 07 September 2024

<sup>28</sup> *Ibid*

<sup>29</sup> Alexander Somek, 'The European Model of Transnational Democracy: A Tribute to Ernst-Wolfgang Böckenförde' (2018) 19(2) German Law Journal <<https://doi.org/10.1017/S2071832200022756>> accessed 07 September 2024

<sup>30</sup> Künkler (n 27)

355<sup>31</sup>, safeguarding states by the Union, a provision absent in other Westminster parliamentary democracies hence, the effectiveness of democracy is reduced as per the Böckenförde model.<sup>32</sup>

The model calls for a supra-constitutional state of emergency in which there is a comprehensive breach of the constitution. The main function of the constitution in such a scenario is limiting the power of the three organs of the government - legislature, executive and judiciary. There must be a difference between the normal state and the state of emergency, the state of emergency in such a case must be procedural and substantive. In order to establish the same and keep in line with the 'measure' concept devised by the model, there are three requirements that need to be fulfilled. A measure possesses three distinct attributes: it is purpose-driven, operates within a specific and temporary timeframe, and while enforceable and authoritative, it does not hold the status of law. Once its objective is achieved, the measure concludes, thereby preventing a gradual transition to a fundamentally altered normal state.<sup>33</sup>

An example of such a situation would be the political state of Jammu and Kashmir since 1990 and the state of Manipur due to the implementation of the Armed Forces (Special Powers) Act of 1958<sup>34</sup>, which has been in place for over 40 years. Hence, the situation begs the question of whether this would be classified as an emergency or a normal state since, in normal times, there is a violation of rights and the goal to prevent insurgencies may go awry since this would end up normalising the emergency situation.

Following the *S.R. Bommai v Union of India*<sup>35</sup> as well, there has been a notable decline in the indiscriminate imposition of the President's rule, with instances of refusal by the President in 1997 and 1998 upon requests from the Council of Ministers. This trend coincided with periods where central governments lacked an absolute majority. However, since 2014, with a single-party majority government at the centre in India, there has been a resurgence in attempts to invoke Article 356<sup>36</sup>. Accordingly, this shift challenges Böckenförde's model, which places the

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<sup>31</sup> Constitution of India 1950, art 355

<sup>32</sup> Künkler (n 27)

<sup>33</sup> Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar Pub. Limited 2014)

<sup>34</sup> The Armed Forces (Special Powers) Act 1958

<sup>35</sup> *S.R. Bommai v Union of India* (1994) 3 SCC 1

<sup>36</sup> Constitution of India 1950, art 356



responsibility for identifying and authorising a state of emergency with the political wing. When democracy is viewed purely as a mechanism for transferring power within society rather than a set of values, Böckenförde's model proves vulnerable when tested empirically in the Indian context.

## CONCLUSION

The emergency provisions embedded within the Constitution of India serve as a testament to the foresight of the Constituent Assembly, which endeavoured to account for all potential scenarios, including the gravest crises imaginable. However, these provisions, while essential for maintaining constitutional order during tumultuous times, have been subject to misuse and exploitation by political leaders. Despite the intentions behind their creation, flaws in the formulation of these provisions have left significant room for abuse, thereby undermining democratic principles and eroding public trust in governmental institutions.

The analysis conducted through the lens of the Böckenförde Model sheds light on the inherent challenges in implementing effective safeguards and fail-safes to prevent the misuse of emergency powers. While the model offers a systematic approach to addressing complex issues and upholding constitutional principles, its applicability within the Indian context is fraught with difficulties due to the unique dynamics of the country's political and constitutional framework.

Moreover, the empirical evidence presented underscores the need for a nuanced understanding of democracy beyond mere procedural mechanisms of power transfer. In a parliamentary democracy like India's, where the executive and legislative branches are closely intertwined, the separation of powers envisioned by the Böckenförde Model becomes increasingly challenging to uphold.

Nevertheless, the resurgence of attempts to invoke emergency provisions in recent years underscores the urgency of addressing these systemic challenges. Moving forward, there is a pressing need for comprehensive reforms aimed at strengthening democratic institutions, enhancing accountability mechanisms, and safeguarding fundamental rights. Only through

concerted efforts to address these underlying issues can India ensure the preservation of its democratic fabric and uphold the principles enshrined in its Constitution.