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## **IN SEARCH OF THE THEORY OF CONSTITUTIONAL MACHINERY FAILURE (EMERGENCY) MODELS IN INDIA AND PAKISTAN: A COMPARATIVE EXPLORATION**

### **Abstract**

*In spite of a contextual and constitutional affinity, Comparative Constitutional Law has been an unexplored area in South Asia. The article relates to one form of Constitutional Emergency in India and Pakistan - Constitutional Machinery Failure Emergency in the provincial units, which has a colonial past and an oppressive present. With identical provision in the constitutions of India and Pakistan, it sanctions almost unfettered power to the centre to declare an emergency relating to Constitutional Machinery Failure: one of the most abused provisions of Indian and Pakistani Constitutional Polity. The unique system of Constitutional Machinery Failure has also gone through huge changes, at times influenced by each other, scaling the modification of Emergency; the article also tries to conceptualize Constitutional Machinery Failure Emergency in India and Pakistan.*

### **Keywords**

*comparative law in South Asia – constitutional emergency in India and Pakistan – theory of constitutional machinery failure in India and Pakistan – typology of emergency powers in India and Pakistan*

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## I. INTRODUCTION

The South Asian Countries have shown constitutional and legal kinship in their legal adventures and democracy. There are several common elements among the region's constitutions, political structures, and legal systems, that are influenced by their shared histories, and their struggles to establish and sustain the idea of shared power with self-power. The federal experience in South Asia has been unique, emerging out of colonialism and/or oppressive, arbitrary, unconstitutional governments; the region has to embark upon a journey towards self-power and shared power not only in its polity but also in its social, cultural, and economic life. On the one hand, the legacy of colonialism, partition, oppressive governments, and the vision of unified nation building that must be circled around national integration, contrived to create a centralized federalism. On the other hand, ongoing global transition towards decentralization, the free market, the dissolution of powers, and the demands of different units for more autonomy and powers have brought the contradiction of a centralized federal arrangement to the fore.

India and Pakistan, which contribute more than sixty five percent of the geography, seventy percent of the population, and two-thirds of the economy of South Asia, are two self-acclaimed federal states of the region. The idea of federalism in India and Pakistan was first employed by the British to control the demands of Self-Rule and Decentralization, through several governing acts with small doses of federalism. This federal idea was introduced with a unique and unparalleled Constitutional Machinery Failure Emergency, which was to take away all the decentralized power at the whim of the centre. The federal idea has been debated at length in the Constitution Drafting process both in India and Pakistan, but strangely the Constitutional Machinery Failure Emergency provision has remained exactly the same in the Constitutions of both countries. A colonial instrument to suppress decentralization and federalism has become a constitutional instrument to do the same. No wonder, the Constitutional Machinery Failure Emergency has served the central governments in the Post-Independence period as emphatically as it served British Colonial Governments. The Constitutions and courts in India and Pakistan have shown their aspiration and fundamental faith in words

in federal and decentralized government, but the centripetal bias of the polity, constitution, and economy has used the Constitutional Machinery Failure Emergency provisions to ensure that the provinces in India and Pakistan shall remain in the strong hold of the centre in action. This article provides a comparative jurisprudence of Constitutional Machinery Failure Emergency in India and Pakistan by evolving its own theory of State Emergency, its respective use and abuse, and its justifiability by the legislature and judiciary in India and Pakistan.

## II. COMPARATIVE LAW AND STUDIES OF BINARY COMPARISONS IN SOUTH ASIA— WITH SPECIAL REFERENCE TO COMPARATIVE BINARY LEGAL STUDIES ABOUT INDIA AND PAKISTAN

Since the Paris International Congress on Comparative Law, Modern Comparative Law as an academic discipline and as a research field has grown astonishingly and has been rightly summarized by Janina Boughey as “Comparison in the methodology *de rigueur* in legal scholarship today”.<sup>1</sup> The “explosive” growth of Comparative Law in the past three decades has been mostly beneficial to Constitutional Law and Western world: articles, researches and curricula in western universities are filled with Comparative Constitutional Law in European and American states, whereas the Eastern World, particularly South Asia, has been ignorant and indolent towards developing Comparative Jurisprudence particularly in Administrative Law. As observed by Sunil Khilani, South Asian scholars of public law have on the whole been reticent about undertaking regional studies<sup>2</sup>. Most scholarships in the region has been limited to their own polity and jurisprudence, and, even though the

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<sup>1</sup> J. Boughey, *Administrative Law: The Next Frontier for Comparative Law*, International & Comparative Law Quarterly 2013, vol. 62, issue 1, pp. 55-95.

<sup>2</sup> S. Khilnani, V. Raghavan, A.K. Thiruvengadam, *Introduction Reviving South Asian Comparative Constitutionalism*, in: (eds.) S. Khilnani, V. Raghavan, A.K. Thiruvengadam, *Comparative Constitutionalism in South Asia*, Oxford 2013, DOI:10.1093/acprof:oso/9780198081760.003.0001.

constitution making process in all the states has been influenced by several ideas and principles from various constitutions, very few scholars try to venture into comparative law, but their thought-process is mostly guided by ideas from the West. As Upendra Baxi explained, this approach in emphatic words of caution to Indian scholars, “the community of Indian lawpersons is a little more uncomfortable in their mimetic modes of doing jurisprudence, which truly ignores the development next door, in the search of wisdom across the seven seas”.<sup>3</sup> The infatuation of South Asian Academia with American-British and European Jurisprudence in the “mimetic modes of doing jurisprudence” has adversely impacted research and scholarship in India as well as in South-Asia. Our law-faculties, departments, and universities suffer from shortage of funds and ideas to explore the South Asian indigenous jurisprudence and comparative analogies, which has made it difficult, if not impossible, to find out and develop comparative common sense in South-Asia. As Radhika Coomaraswamy observes, this attitude has contributed to the considering of the South-Asian Nations as “the illegitimate children of the Anglo-American legal/political tradition”.<sup>4</sup> The engagement of South Asian scholarship regarding comparative jurisprudence has been narrow and selective; the intellectual agenda rotates around already settled principles and ideas from the West, correctly manifested by Sujit Choudhary as a “horizontal effect”.<sup>5</sup>

Intellectually parasitical comparative law literature in South Asia is mutually reinforcing and to counter this we need a new wave of courageous, integrated, and indigenous scholarship and research strategy. The strategy needs to be far more inclusive and subjective towards its content and area. It requires a total overhauling of the way we have studied and understood or have been made to learn or understand South Asia. Even the term “South Asia” is reflective of our colonial and

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<sup>3</sup> U. Baxi, *Comparative Constitutional Law, Constitutional Interpretation And State Formative Practices In Pakistan: A Preliminary Exploration*, in: M.P. Singh (ed.), *Festschrift in the honour of Professor P.K. Tripathi*, Lucknow 2011, pp. 202-205.

<sup>4</sup> R. Coomaraswamy, *Srilanka: The Crisis Of The Anglo-American Constitutional Traditions In A Developing Society*, New Delhi 1984, p. 1.

<sup>5</sup> S. Choudhary, *How to do Constitutional Law & Politics in South Asia*, Berkeley Law, available at: <https://www.law.berkeley.edu/files/cs/sl/Choudhry1Dec2014.pdf>.

oppressed past. As Upendra Baxi observes, “The appellation «South Asia» constitutes variegated feats of colonial and imperial geographies, subsequently reinforced by the time and place of the Cold War and disciplines curiously named «area studies».”<sup>6</sup> We need a new post-colonial and post-oppressive nomenclature, which has no space for colonial or superimposed terms like “South-Asia”, “Indochina”, “Middle East”, “Indian Subcontinent”, “Third World States”, and “Asian sibling of Latin America” etc. The agenda about study and research towards South Asia needs to be radically transformed: it should be more realistic, practical and solution-oriented towards the South Asian legal and political system. In the name of modernity the blindfold following European- American research models and principles has proved catastrophic, to winkle out the differences and complexities, South Asia need not get rid of the fabric which has been ages old, tried, tested, and performed as a model for the West once. Alongside the question of substantive focus, case selection, idea generation, comparative focus, and identification of passively common and actively difference areas of studies and research, South Asian scholarship has also suffered from methodological shortcomings like an inability to develop a comparative research data base and terminology and research designs until now. The body of comparative law literature has been broadly formal and conservative and oddly divorced from a broad principle or theory to a practical solution or suggestion.

Comparative Law in South Asia is still searching for its ground. Binary Comparison in South Asian legal literature is very rare, while it is best suited to the region. A binary comparison of macrostate structures with a common historical formation and common social-cultural-economic problems and prospects makes binary analysis more effective than analysis of n-cases of federation. It enables a researcher to focus on the theory behind the Constitutional Machinery Failure Emergency in India and Pakistan. Binary Comparative constitutional and political jurisprudence contains ground-breaking insights. J.S. Mill introduced the “method of difference” strategy for “controlled comparisons” in

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<sup>6</sup> U. Baxi, *Modelling ‘optimal’ Constitutional Design for Governmental Structures: Some Debutant Remarks*, in: (eds.) S. Khilnani, V. Raghavan, A.K. Thiruvengadam, *Comparative Constitutionalism in South Asia*, Oxford 2013, p. 24, *supra*, note 24.

two political systems with a similar background and comparative independent variables.<sup>7</sup> In this article, Constitutional Machinery Failure in both countries, India and Pakistan, has been compared as an independent variable with reference to their federal constitutional structures with a view to distinguish a borderline of the theory of the Constitutional Machinery Failure Emergency in India and Pakistan. This article is an extension of the Author's previous work involving the binary comparison of Constitutional Machinery Failure Emergency models in India and Pakistan.<sup>8</sup> Several comparative federal and political studies of South Asia, particularly of India and Pakistan, exist,<sup>9</sup> and they provide an in-depth background for the development of this article, but in respect of "President's rule" or Constitutional Machinery Failure in India and Pakistan there is a scarcity of comprehensive studies.<sup>10</sup>

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<sup>7</sup> J.S. Mill, *A System Of Logic Ratiocinative And Inductive: Being A Connected View Of The Principles Of Evidence And The Method Of Scientific Investigation*, 1875, pp. 205-206; J. McGarry, B. O'Leary, *Introduction: The Macro-Political Regulation Of Ethnic Conflict In The Politics Of Ethnic Conflict Regulation*, London 1993, pp. 1-40. J.S. Mill has recommended two strategies for controlled comparisons between two political structures: Method of Difference Versus Method of Agreement. He recommends the Method of Difference as best suited for political structures with very similar if not identical backgrounds and independent variable is compared which is making the difference between political structures of identical background. Method of Agreement approach is best suited for political structures of diverse backgrounds with a similar independent variable.

<sup>8</sup> P.R.D. Sharma, *Comparative Federalism with reference to Constitutional Machinery Failure (Emergency) in India and Pakistan*, BRICS Law Journal 2017, vol. IV, issue 2, pp. 71-94.

<sup>9</sup> A. Jalal, *Democracy And Authoritarianism In South Asia. A Comparative And Historical Perspective*, Cambridge 1995, available at: [https://warwick.ac.uk/fac/arts/history/students/modules/hi173/classesandreading/decolonization\\_and\\_india1/democ\\_\\_aut\\_-\\_pp.1-48.pdf](https://warwick.ac.uk/fac/arts/history/students/modules/hi173/classesandreading/decolonization_and_india1/democ__aut_-_pp.1-48.pdf), *idem*, *The Struggle For Pakistan: A Muslim Homeland And Global Politics*, Cambridge – Massachusetts 2014.

<sup>10</sup> I. Omar, *Emergency Powers And Courts In India And Pakistan*, The Hague 2002, pp. 23-79; K. Adeney, *Federalism and Ethnic Conflict Regulation in India and Pakistan*, New York 2007, p. 164; M.P. Singh (ed.), *Festschrift in honour of Professor P.K. Tripathi*, Lucknow 2011, pp. 178-211; J.P. Sharma, *Federal System In India And Pakistan: A Comparative Perspective*, Jaipur 1987, pp. 89-110.

### III. THE THEORY OF FEDERALISM AND CONSTITUTIONAL FAILURE EMERGENCY IN INDIA AND PAKISTAN

Federalism is a system of government where *sovereignty* is shared between a central government and its federating units<sup>11</sup>. The concept describes the constitutional consensus to establish a system of governance in a state. The consensus shows the social and legal consent of different segments, political groups, political parties, and the political elites of a society which desires to live by the conjoining territories and geographical units.

Federalism refers to the division of powers in two territorial units at least, most commonly known as Centre and Provinces which include at least two defined sets of governments, independent from each other in their sphere. India and Pakistan have both established a tertiary line of governance too, known as Local Self Government Units at Village as well as District level. In this division of power there should be non-interference between the units, but there should also be enough scope for co-operation between them. Such 'cooperative non-interference' can be ensured by a written constitution to be interpreted by an independent judiciary. Academically, federalism is a matter of debate and discussions. According to political scientists and legalists "federalism is the merger of sovereignties". As per M. Vile, the division of sovereignties in forms of powers has been ensured by the constitution to ensure proper federalism.<sup>12</sup> He further classifies it into asymmetrical and symmetrical federalism. The former's constitution does not ensure the complete merger of sovereignties and the division of power is strongly in the hands of the centre. Prof. Wheare followed the same line of thought and observed

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<sup>11</sup> Katherine Saskia Adeney has done outstanding research on the constitutional and political account of the federal structure in India and Pakistan titled *Federal formation and consociational stabilization: the politics of national identity articulation and ethnic regulation in India and Pakistan*. A thesis has been submitted for the degree of PhD at the Government Department, London School of Economics, University of London in 2003, available at: <http://etheses.lse.ac.uk/428/>.

<sup>12</sup> M. Vile, *Federalism and Confederation: the experience of the United States and the British Commonwealth*, in: P. Rea (ed.), *Political Cooperation in Divided Societies* Dublin 1982, pp. 216-228.



the constitution of India as Quasi-Federal.<sup>13</sup> There is another chain of thoughts by McGarry and O'Leary, that adopts a practical approach to federalism and describes "federalism as a means to manage, rather than eliminate, ethnic and geographical differences, as it is necessary to manage diversity such as consociationalism and multiculturalism with constitutionalism".<sup>14</sup> Federalism is also a "normative and ideological concept", as Watt believes: "Federalism as a broad genus of political organization [that] is marked by the combination of Self-Rule and Shared-Rule".<sup>15</sup> This approach could be traced in the self-rule movements of India and Pakistan and also is the foundation of the making of their respective constitutions<sup>16</sup>.

#### IV. THE COLONIAL BACKGROUND OF CONSTITUTIONAL MACHINERY FAILURE EMERGENCY POWERS IN INDIA AND PAKISTAN

It is to be noted that the Government of India Act 1935 (hereinafter referred as GoIA 1935)<sup>17</sup> was a reaction to the Congress Party's demanding

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<sup>13</sup> K.C. Wheare, *Federal Government*, London 1963. Wheare's institutional design of federalism and America centric definition of Federalism: "Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is coordinate with the others and independent of them? If so, that government is federal. It is not enough that the federal principle should be embodied predominantly in the written constitution of the country." As per this definition only USA, Canada, Switzerland, and Australia could be classified as federations.

<sup>14</sup> J. McGarry, B. O'Leary, *Introduction: The Macro-Political Regulation Of Ethnic Conflict In The Politics Of Ethnic Conflict Regulation*, London 1993, pp. 1-40.

<sup>15</sup> R. Watts, *Contemporary Views on Federalism in Evaluating Federal Systems*, in: B. De Villers (ed.), *Evaluating Federal Systems*, Boston – London 1970; R. Watts, *Federalism, Federal Political Systems and Federations*, *Annual Review of Political Science* 1998, vol. 1, pp. 117-137.

<sup>16</sup> J.S. Mill, *A System Of Logic Ratiocinative And Inductive: Being A Connected View Of The Principles Of Evidence And The Method Of Scientific Investigation*, 1875, pp. 76-77.

<sup>17</sup> The Government of India Act, 1935 was enacted by the British Parliament to regulate and control the government in British India in 1935. This act was very comprehensive, comprising of 321 Sections and 10 schedules. This act played a very vital role in the development of constitution in India and Pakistan. This act was the base on which India and Pakistan developed their constitutions and constitutionalism.



Constitutional Reform and Self-Government in Imperial India, thus reasonable caution was maintained there, so that the demands of Congress were met while keeping the interests of the British Government well protected.<sup>18</sup> Article 12(1) of GoIA 1935 is an example of such caution and protectionism in favour of Imperialism. The Governor General shall have special responsibility in “(a) the prevention of any grave menace to the peace or tranquility of India or any part thereof. This section must be read with Section 102 which empowered the Governor General to make a proclamation of Emergency. The reasoning behind Sec. 45, 93, 12(1) and 102 was to keep the Governor General as the apex and supreme authority and no popular elected government by any stretch of imagination would have any say against the Governor General. In the form and in the name of Constitutional Reform actually such provisions made a mockery of the principle of responsible government and constitutionalism. Under Sec. 45 “satisfaction of Governor-General” was not justified. It was not explained in the Act on which grounds the Governor-General was reaching to the satisfaction that Constitutional Machinery had failed. Similarly, the chapter under which Sec. 45 and 93 were entitled, “Provisions in the case of failure of Constitutional Machinery”, but the language used under Sec. 45 and 93 was so wide as to include “that a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act.” Even though the power under Sec. 45 and 93 was so grave and urgent in nature that it was never referred to as an “Emergency Provision”. Rather it was referred to as “Provisions in the case of failure of Constitutional Machinery”. Only Sec. 102 was referred to in its marginal note as the “power of Federal

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<sup>18</sup> For details see: Anonymous, *Warped Federalism*, Dawn, available at: <https://www.dawn.com/news/452966> [Government of India 1935 and reasons behind this act, details of House of Commons and its debate over the Act. The joint parliamentary committee of the British parliament on the Government of India Bill observed “It is proposed to give the governor power at his discretion, if at any time he is satisfied that a situation has arisen which for the time being renders it impossible for the government of the province to be carried on in accordance with the provisions of the constitution act”. Secretary of state for India, Sir Samuel Hoare, told the House of Commons on March 13, 1935 that he was “contemplating the last emergency, when the whole machinery or government has broken down”, a weapon of last resort not first.]

Legislature to legislate if an Emergency is proclaimed". Sec. 102 paved the way for Art. 352 and 353 in the Constitution of India, 1950 under the heading of "Emergency Provision" and rightly so Sec. 45 and 93 paved the way for Art. 355 and 356 under the same heading. There is no doubt that such provisions are needed in any workable democratic structure and particularly when a democracy is embarking on a federal structure through a constitutional arrangement. But the correct drafting was needed when the transformation of Sec. 45 and 93 into Art 356 was taking place in the constitution-making process. First and foremost it was necessary that if Sec. 45 and 93 were transformed into Art 356 as "Emergency Provision" and as "provision for failure of Constitutional Machinery", the intentionally kept wide language and misinterpreted Sec. 45 and 93 had to be kept within constitutional limits. The reasons for keeping almost the same language in Art. 356 as in Sec. 45 and 93 is beyond explanation. Sec. 45 and 93 were an intentional step by the Imperial Legislature to keep any element of Federal Polity and responsible government under direct control and check by the Governor- General. There is no space for such wide terms as "if satisfied" or "a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act". Such wide terms make federalism dilute itself and authoritarianism dominate to a large extent.

The draft Constitution of India<sup>19</sup> was submitted to the President of the Constituent Assembly of India by Dr Ambedkar, with the changes that the drafting committee sought and desired in the foot-notes of the draft constitution<sup>20</sup>. Article 277 and 278 in Part XIII of the Draft Constitution is entitled, "Emergency Provision". Amazingly and contrary to the letter of Dr Ambedkar, these articles were sidelined, but no footnote was there for the changes made by the Drafting Committee. Dr H. M. Seervai in his

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<sup>19</sup> Prepared by the Drafting Committee and published under the authority of the Constituent Assembly of India 1948.

<sup>20</sup> Dr Ambedkar submitted the draft Constitution with a covering letter in which he wrote, *inter alia* "there were however some matters in respect of which the drafting committee felt it necessary to suggest certain changes. All such changes have been indicated in the draft by underlining of sidelining the relevant portions. Care has also been taken by the drafting committee to insert a footnote explaining the reasons for every such changes." *Draft Constitution of India*, p. iii.

valuable book, "Constitution Law of India"<sup>21</sup> has shown his amusement on the absence of any footnote in these articles in the draft constitution. Art. 277 and 278 in the draft constitution have been inserted with an additional Article 277A<sup>22</sup>. The revised Art. 278<sup>23</sup> had authorized the President to intervene in the affairs of the State if, on a report of the Governor **or otherwise**, he is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution.<sup>24</sup> Article 365 of Constitution of India is based on the approach and intention of Section 45<sup>25</sup> of Government of India Act 1935 (hereinafter referred as GOI 1935) which provided a system for the Failure of Constitutional Machinery for the federation in Part II, Chapter V of the Act. Section 45 provided power to the Governor General to issue proclamation, if satisfied that the situation had arisen in which the Government of the Federation cannot be carried out in accordance

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<sup>21</sup> H. M. Seervai, *Constitutional Law of India: A Critical Commentary*, Bombay 1967, vol. 3, p. 3087.

<sup>22</sup> "The Hon. Dr Ambedkar: Sir, I move "That after Art. 277, the following new article be inserted - 'It shall be the duty of the Union to Protect every state against external aggression and internal disturbance and to ensure that the government of each state is carried in in accordance with the provisions of the constitution", *Constituent Assembly Debates, Official Reports* 1949, vol. 9, no. 131

<sup>23</sup> "That for Article 278 the following article be substituted: 278 (1) If the President, on the receipt of a report from the Governor or Ruler of a State or otherwise, is satisfied that the Government of the State cannot be carried on in accordance with the provisions of this constitution, President may by proclamation [...]", *Constituent Assembly Debates, Official Reports* 1949, vol. 9, no. 131.

<sup>24</sup> *Ibidem*.

<sup>25</sup> "Power of the Governor-General to issue Proclamation (1) If at the time the Governor-General is satisfied that a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act, he may by Proclamation (a) declare that his functions shall be to such extent as may be specified in the proclamation be exercised by him in his direction; (b) assume to himself all or any of the powers vested in or exercisable by any Federal body or authority; and any such Proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the proclamation, including provisions for suspending in whole or in part the operation of any provision of this Act relating to any federal body or authority; Provided that nothing in this sub-section shall authorize the Governor-General to assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend either in whole or in part, the operation of any provision of this Act relating to Federal Court."

of the provision of the Act. An identical provision was there in GOI 1935 regarding Government of Federation under Section 93.<sup>26</sup>

It is to be noted that GoIA 1935 was in reply of the Congress Party's demand for Constitutional Reform and self-government in Imperial India, thus reasonable caution has been maintained there, so that the demands of Congress were met keeping the interests of the British Government well protected. Article 12 (1) of GOI 1935 is an example of such caution and protectionism in favour of Imperialism. The Governor General was to have special responsibility in "(a) the prevention if any grave menace to the peace or tranquility of India or any part thereof". This section must be read with Section 102 which empowered the Governor General to make a proclamation of Emergency. The reasoning behind Sec. 45, 93, 12(1) and 102 was to keep the Governor General at the apex and supreme authority, and no popular elected government by any stretch of imagination would have any say against the Governor General. In the form and in the name of constitutional reform actually such provisions were making mockery of the principle of responsible government and constitutionalism. Under Sec. 45 "satisfaction of the Governor-General" was not justified: on what grounds the Governor General might be satisfied that the Constitutional Machinery has failed was unexplained by the Act. Similarly, although the chapter under which Sec. 45 and 93 were instituted is titled: "Provisions in the case of failure of Constitutional Machinery", the language used under Sec. 45 and 93 was as wide to include "that a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act". Even though the power under Sec. 45 and 93 was so grave and urgent in nature it was never referred as "Emergency Provision". Rather it was referred to as "Provisions in the case of failure of Constitutional Machinery". Only Sec. 102 was referred in its marginal note as the "power of Federal Legislature to legislate if an Emergency is proclaimed". Sec. 102 paved the way for Art. 352 and 353 in the Constitution of India, 1950 under the head of "Emergency Provision" and rightly so. Sec. 45 and 93 had paved the way for Art. 355 and 356 under the same head.

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<sup>26</sup> Sec. 93 *mutatis mutandis* in which the Governor of Provinces and Government of Province were substituted for the Governor General and Government of Federation respectively.

## V. CONSTITUTIONAL MACHINERY FAILURE EMERGENCY MODEL AND CONSTITUTIONAL FORMATION

There is no doubt that such provisions are needed in any workable democratic structure and particularly when a democracy is embarking on federal structure through a constitutional arrangement. But the correct drafting was needed when the transformation of Sec. 45 and 93 into Art 356 was taking place in the constitution-making process. First and foremost it was necessary that if Sec. 45 and 93 was to be transformed into Art 356 as “Emergency Provision” and as “provision for failure of Constitutional Machinery”, then the intentionally kept broad language and misinterpreted Sec. 45 and 93 had to be kept within constitutional limits. The reasons for keeping almost the same language in Art. 356 as with Sec. 45 and 93 are beyond explanation. Sec. 45 and 93 were an intentional step by the Imperial Legislature to keep any element of Federal Polity and responsible government under direct control and check by the Governor-General. There is no space for such wide terms as “if satisfied” or “a situation has arisen in which the government of the federation cannot be carried on in accordance with the provisions of the Act”. Such wide terms make federalism dilute itself and authoritarianism dominate to a large extent. Art. 277 and 278 in the draft constitution have been inserted with an additional Article 277A<sup>27</sup>. The revised Art. 278<sup>28</sup> had authorized the President to intervene in the affairs of the State if, on a report from the Governor or otherwise, he is satisfied that a situation has arisen in which the government of the state could not be carried on in accordance with the provisions of the constitution.

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<sup>27</sup> “The Hon. Dr Ambedkar: Sir, I move “That after Art. 277, the following new article be inserted - It shall be the duty of the Union to Protect every state against external aggression and internal disturbance and to ensure that the government of each state is carried in in accordance with the provisions of the constitution.”, *Constituent Assembly Debates, Official Reports 1949*, vol. 9, no. 131.

<sup>28</sup> “That for Article 278 the following article be substituted: 278 (1) If the President, on the receipt of a report from the Governor or Ruler of a State or otherwise, is satisfied that the Government of the State cannot be carried on in accordance with the provisions of this constitution, the President may by proclamation [...]”, *Constituent Assembly Debates, Official Reports 1949*, vol. 9, no. 131.

Constituent Assembly Debates have interesting insights regarding the development and transformation of Sec. 45 and 93 of GOI 1935 into Art. 277A, Art. 278 of the Draft Constitution and the final drafting of Art. 355 and Art 356 in the Constitution of India, 1950. Earlier in the drafting stage of the constitution, the power to issue a proclamation of Emergency for Constitutional Machinery Failure was also conferred on the Governor by Article 188 of the Draft Constitution. At that time the Governor was deemed an Elected Body. More recently, after due consultations, the Governor's Post was decided to have been nominate by the President, so in that situation Article 188 became irrelevant. In the words of Dr Ambedkar, "It is now felt that no useful purpose could be served, if there is a real emergency by which the President is required to act, by allowing the Governor at the first instance, the power to suspend the constitution for the fortnight. If the President is ultimately to take the responsibility of entering into the provincial field in order to sustain the constitution embodied in this constitution, it is much better that the President should come into the field right at the very beginning".<sup>29</sup> The Constituent Assembly is having a furious debate on "or otherwise" particularly from Mr. H. B. Kamat, who believed such a wide term would allow uncontrolled and arbitrary powers to the centre to demolish the federal structure as well as exhaust all the possibilities of vesting discretionary powers in the Governor of the States. He observed in very strong words that, "Firstly, the President is empowered to act under Art.278 not merely if he gets a report from the Governor ... but also otherwise. What that "otherwise" is, God only knows."<sup>30</sup> Mr. Kamat further asserted that "... after all we have already decided that the Governor shall be the nominee of the President, if that be so, cannot the President have confidence in his own nominees? If we do not have confidence in our own nominees let's wind up our government and go home, let us wind up assembly and go back home, this is not the place for us".<sup>31</sup> He summarized such an addition as folly, and a stupid and constitutional crime, as it would limit state autonomy and federalism.

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<sup>29</sup> *Ibidem*, no. 132-133.

<sup>30</sup> *Constituent Assembly Debates, Official Reports 1949*, vol. 9, no. 139.

<sup>31</sup> *Ibidem*, no. 140.

The similar provision under Article 48 of the Weimar Constitution<sup>32</sup> was also referred to, wherein the President had conferred wide and sweeping powers in the name of Emergency, and Hitler used it to wipe out all democratic values and established one of the worst autocratic regimes the world has ever witnessed.

Article 277A was an interesting addition by the drafting committee in the constitution. It imposes a duty of the union to protect the states from external aggression, internal disturbances and, more importantly, a duty to ensure that the state is run in accordance with the provisions of the constitution. Dr Ambedkar, while submitting the provision to the Constituent Assembly, has defended it, "... I think it is agreed that our constitution, notwithstanding the many provisions whereby the centre has given powers to override the constitution, nonetheless our constitution is federal. It means states are sovereign in their field ... if the centre is to interfere in the administration of provincial affairs, as we propose to authorize the centre by virtue of Art. 277 and 278-A, it must be under the obligation which the constitution imposes. The invasion must not be an invasion which is wanton, arbitrary, and unauthorized by law."<sup>33</sup> Dr Ambedkar further defended such a provision as it is in various federal constitutions like the Constitution of the USA and Australia.

Dr Ambedkar explained during the Constituent Assembly the reason of a changed of language of Art 278 and 278-A, as a part of the same of article. He asserted that under the draft article the satisfaction of the President could be on the basis of the report of the Governor or

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<sup>32</sup> If a state fails to perform the duties imposed upon it by the federal constitution or by federal law, the President...may enforce performance with the aid of the armed forces. If public order and security are seriously disturbed or endangered within the Federation, the President...may take all necessary steps for their restoration, intervening, if need be, with the aid of the armed forces. For the said purpose he may suspend for the time being, either wholly or in part, the fundamental rights described in Articles 114, 115, 117, 118, 123, 124, and 153...The President...has to inform the Reichstag without delay of any steps taken in virtue of the first and second paragraphs of this article. The measures to be taken are to be withdrawn upon the demand of the Reichstag. Where delay is dangerous a state government may take provisional measures of the kind described in paragraph 2 for its own territory. Such measures are to be withdrawn upon the demand of the President or of the Reichstag.

<sup>33</sup> *Constituent Assembly Debates, Official Reports 1949*, vol. 9, no. 134.



“otherwise”, because of Art. 277-A, now imposes an obligation upon the centre and it would be not proper to restrict and confine the actions of the President. If the President feels his intervention is necessary and imminent, he should wait for the report of the Governor. It may happen that the Governor does not report at all.

Another prominent member of the Constituent Assembly, Prof. Shibbanlal Saxena, had also criticized the rationale of taking away almost all the discretionary powers of the Governor and characterized the provisions of Art. 278 as “for too sweeping”, but his emphasis was that, although these provisions remove the State’s Autonomy and place it in the hands of Parliament, it is an “important safeguard and makes the Indian Parliament a strong sovereign and final authority responsible for the administration of the province”. No constitutional thinker in Constituent Assembly denied and argued against Parliamentary check and balance in respect of a Constitutional Emergency. Maybe they must have not visualized the party politics of frivolous State Constitutional Emergencies. It opened a vent which has blown away all the necessary elements of State Autonomy. Maybe that is why Prof. Saxena further explained that, “the introduction of Art. 277A and 278 is not desirable and these articles, in fact, lay us open to the charge that our provincial autonomy is a farce. In fact, what does Art. 278 say? If you see the GOI 1935, you will find that this article is almost a word for word reproduction of Sec.93 of the Act; only for the Parliament of England, you have substituted the Houses of the Parliament in India, and the primary duration of an Emergency has been reduced from six months to two months”. While making a constitution we were not just changing the names of regimes, but rather transforming an arbitrarily, though through law, tyrannically colonized country into a Sovereign Socialist Secular Democratic Republic, which was going to be uniquely federal. This federal element was critical, and so limiting State Autonomy in respect of a Constitutional Machinery Failure to almost the same level as that of a product of Imperial Legislation was not logical and would bring serious consequences in days to come.

## VI. EMERGENCY POWERS IN POST-COLONIAL INDIA AND PAKISTAN: IN THE VIEW OF CONSTITUTIONAL MACHINERY FAILURE EMERGENCY IN INDIA AND PAKISTAN

The concept of Emergency has cemented a constitutional bedrock in global polities and the power to declare an emergency has indeed been used quite frequently: between 1985 and 2017, 142 countries declared a state of emergency at least once. With respect to South Asia the percentage is quite high comparatively, particularly in Pakistan, which has lived the maximum part of its independent life under one or another kind of emergency. At least two intuitive reasons for declaring a state of emergency come to mind: the government identifies an “exceptional and imminent danger”<sup>34</sup>, which could be caused by natural disasters, but also by man-made dangers such as a terrorist attack.<sup>35</sup> Bjornskov and Voigt’s views can be extended to an emergency threatening “National Security” because of the “presence or possibility of War, External Aggression, Armed Rebellion, Internal Disturbance, or any one of them.” As has been extended in the context of India and Pakistan, a notable feature is the radical power to declare a state of emergency on National Security arising out of War, External Aggression, or Armed Rebellion.

Experiences of provincial emergencies in India and Pakistan are the distinct instantiation of a shared emergency powers discourse

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<sup>34</sup> Quote from the *Siracusa, Principles on the Limitations and Derogations Provisions in International Convention on Civil and Political Rights (ICCPR)*, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>. In section II. A39(a)(b) of the Principles, such a threat is defined as one that “affects the whole of the population and either the whole or part of the territory of the State and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the basic functioning of institutions indispensable to ensure and project the rights recognized in the covenant.”

<sup>35</sup> Ch. Bjornskov, S.Voigt, *Why do governments call for a state of Emergency? – on the determinants of using Emergency Constitutions*, [2017], available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2988014](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2988014).

inherited from the British Colonial State.<sup>36</sup> While India and Pakistan both have been governed by constitutions incorporating commitments to democracy and fundamental rights, both countries' legal frameworks build upon colonial-era laws, institutions, and norms that were designed not to facilitate democratic governance and accountability, but rather to establish and maintain centralized control by the Executive.<sup>37</sup> Emergency and emergency-like powers were vitally important to this end, and their use in independent India and Pakistan, whether constitutionally or unconstitutionally, has often continued to function as a means of displacing democratic processes, rather than primarily as a 'provisional and exceptional measure to deal with existential crises of the order of war or rebellion.'<sup>38</sup>

The experience of other federations like that of the US and Australia has shown that the courts rise to the occasion of emergency, and rescue situations by giving an expansive meaning to the federal powers, though the US Supreme Court proved uncooperative initially during the period of recession of the 1930s. Consequently, the framers of the Indian Constitution and Pakistani Constitutions have chosen to provide for the Union Government's powers to be enlarged if the President of India proclaims an emergency concerning the security of India or financial stability. Apart from that, both in India and Pakistan, the Central Government is also empowered to take care of the governance of the state if the President is satisfied that the constitutional machinery of the State

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<sup>36</sup> A. Jalal, *Democracy And Authoritarianism In South Asia. A Comparative And Historical Perspective*, Cambridge 1995, available at: [https://warwick.ac.uk/fac/arts/history/students/modules/hi173/classesandreading/decolonization\\_and\\_india1/democ\\_\\_aut\\_-\\_pp.1-48.pdf](https://warwick.ac.uk/fac/arts/history/students/modules/hi173/classesandreading/decolonization_and_india1/democ__aut_-_pp.1-48.pdf), pp. 249-50 (challenging a simple dichotomy between democracy in India and military authoritarianism in Pakistan and Bangladesh, and arguing instead that India, Pakistan, and Bangladesh appear to exhibit alternate forms of authoritarianism).

<sup>37</sup> V. Iyer, *States of Emergency: The Indian Experience*, New Delhi 2000, pp. 67-75; I. Omar, *Emergency Powers and the Courts in India and Pakistan*, New York 2002, pp. 13-14; A. Kalhan, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, *Columbia Journal of Asian Law* 2006, vol. 20, issue 93, pp. 111, 125-129.

<sup>38</sup> G. Agamben, *State of Exception*, Chicago 2005, p. 3; see also N. Hussain, *The Jurisprudence of Emergency: Colonialism and Rule of Law*, Ann Arbor 2003, pp. 136-40; A. Kalhan, *Constitution and "Extraconstitution": Colonial Emergency Regimes in Postcolonial India and Pakistan*, in: V.V. Ramraj, A. K. Thiruvengadam (eds.), *Emergency Powers in Asia: Exploring the limits of legality*, Cambridge 2010, pp. 89-120.

(Province) has failed. Parliament is trusted to ensure that the vast powers given to the Central Government are not abused. Of late both in India and Pakistan, of course by taking motivation from each other, the courts have also invoked the jurisdiction in the case of one variety of emergency, that is brought about by the failure of Constitutional Machinery.<sup>39</sup>

## VII. THE TYPOLOGY OF CONSTITUTIONAL MACHINERY FAILURE EMERGENCY PROVISION IN INDIA AND PAKISTAN

John Ferejohn and Pasquale Pasquino, in their exceptional work *The Law of Exception: A Typology of Emergency Powers*<sup>40</sup> have discussed and developed two famous emergency models which detail distinct structural models for the exercise of emergency powers: the Executive Model and the Legislative Model.<sup>41</sup> On the basis of the proclaiming authority of the emergency (i.e. the executive or the legislature), the classes of emergency powers permissible, the framed time period for the emergency, and the review and control of emergency powers, the two scholars determine whether the particular emergency is based on executive dominance or on legislative checks and balances. On the basis of this classification, India and Pakistan both emphatically follow the Executive Model of emergency which is borrowed from colonial times. There is scholarly literature<sup>42</sup> in political jurisprudence which lays down that any emergency – and particularly constitutional failure emergency – has to be used as the “last resort” in a “time-bound framework” and should be checked and balanced by the legislature. John Ferejohn and Pasquino claim that these checks reflect a kind of distrust of those who wield the authority of the state, at least with respect to the protection of individual rights, and

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<sup>39</sup> U.R. Rai, *Constitutional Law Structure: Emergency Proclamations and their impact on the Distribution of Powers*, Lucknow 2017.

<sup>40</sup> J. Ferejohn, P. Pasquino, *The Law of Exception: A typology of Emergency Powers*, I.CON 2004, vol. 2, pp. 210, 210-239.

<sup>41</sup> *Ibidem*, p. 48.

<sup>42</sup> G. Amamben, *State of Expression*, Chicago-London 2005, pp. 1-31; Carl Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty*, 1965, Chicago-London, pp. 1-207.

that the distrust is at its greatest when it comes to the exercise of the executive power. In case of an urgent threat to the regimes or state, the constitution allows the delegation of powers to the President, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights. The reason and rationale behind such provisions is by default conservative and protective, it is targeted at resolving the threat or machinery failure in such a way that the legal-constitutional polity is restored to its previous state.<sup>43</sup>

South Asia has a unique journey towards shared power starting from self-power. India and Pakistan, both emerging out of colonial rule, both establishing shared governance, both claiming constitutional democracy within a structured polity, have both contained patches of Colonial Rule to give way to oppressive centralized and at times autocratic arbitrary rule by a party or person at the centre level.

Pakistan has claimed itself as a model Islamic Republic which believes in a parliamentary form of governance, but their polity has suffered not only from military intervention in domestic polity resulting from National Emergency and provincial emergency treated as Constitutional Machinery Failure Emergency. Pakistan confirmed its republican status in 1956. Pakistan has had two more Constitutions, one in 1962<sup>44</sup> and another in 1973<sup>45</sup>. The present constitution of Pakistan, adopted in 1972 has given wide discretionary powers<sup>46</sup> to the President of Pakistan, which included even the extraordinary power to dismiss the Prime Minister and National

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<sup>43</sup> E. Özbudun, M. Turhan, *European Commission for Democracy through Law, (Venice Commission) Emergency Powers*, Strasbourg 1995, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e).

<sup>44</sup> Constitution of Pakistan of 1962, as a result of abrogation of the Constitution of Pakistan 1956. For details of abrogation of this Constitution of Pakistan of 1956, see for example: G.W. Chaudhary, *Constitutional Development in Pakistan*, Vancouver 1969.

<sup>45</sup> Constitution of Pakistan, 1973, as a result of abrogation of the Constitution of Pakistan, 1962. For details of abrogation of this Constitution of Pakistan of 1962 see: M. Munir, *Constitution of Islamic Republic of Pakistan*, Lahore 1962.

<sup>46</sup> Constitution (Eighth Amendment) Act 1985 was the major source of arbitrary powers of the executive, even to dissolve the National and Provincial Assemblies and Prime Minister. The changes were made in Article 48(2) and 58(2) of the Constitution, which were relied on by the President in 1990 and 1993 to dissolve the National Assembly(ies) and by Prime Minister(s), Benazir Bhutto and Nawaz Sharif respectively. The Supreme Court of Pakistan examined the scope of these amended provisions in *Ahmad Tariq Rahim*

Assembly. Some of these arbitrary powers were curtailed by subsequent constitutional amendments to the Constitution of Pakistan, 1972, by the 13<sup>th</sup> Amendment 1997<sup>47</sup>, and later by the 18<sup>th</sup> Amendment 2010<sup>48</sup> 49. As is evident from the polity of South Asia, the obsessing of concentration of the power is expressively present in all the constitutions of Pakistan. This constitutional concentration of power is reflective of its colonial past and oppressive present central governments.

Federalism and Constitutional Machinery Failure Emergency provisions have developed in favour of a strong central bias in Pakistan. In the constitutional history of Pakistan, there are several illustrations of the supersession of the constitutional powers of the province. Some of them are reproduced here.<sup>50</sup> Under the interim Constitution, and the Constitutions (of 1956, 1962, and 1973), as reproduced thereafter, there is an unparalleled attitude towards the dominant role of the centre over the provinces. Under Military rule, Pakistan became a totally centralized state because the Military Government was not subject to any constitution and was the supreme authority for both federal and provincial systems, although the official resources continue to describe it as a federal state.<sup>51</sup>

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*v. Federation of Pakistan* (1992) PLD SC 646 and *Mohd. Nawaz Sharif v. President of Pakistan* (1993) PLD SC 473.

<sup>47</sup> Constitution (Thirteenth Amendment) Act, 1997, the statement and object of reasons for adopting it is as follows: "in order to strengthen parliamentary democracy it has become necessary to restore some of the powers of the Prime Minister which were taken away by the Constitution (Eighth Amendment) Act 1985."

<sup>48</sup> Constitution of Pakistan (Eighteenth Amendment) Act, 2010.

<sup>49</sup> P.R.D. Sharma, *Comparative Federalism with reference to Constitutional Machinery Failure (Emergency) in India and Pakistan*, "BRICS Law Journal", 2017, vol. IV, issue 2, pp. 71-94.

<sup>50</sup> The dismissal of the Khan Shaib Ministry in NWFP on 22 August 1947, M. A. Khuhro on April 20, 1948 in Sindh, Mamdoth's on January 25, 1949 and Fazal-ul-Haq's in 1954 in East Pakistan (Under Sec. 92-A of 1935 Act) despite the fact that each government enjoyed a majority in its Assembly, was a reflection of the federal principles the country was created on, this led to a precedent which later on led the central government to restore their reserve powers to dismiss provincial ministries. The rise of the military to the Powers in October 1958, March 1969, July 1977, and October 1999 undermined the prospects of federalism and provincial autonomy. The military governments either abolished the prevailing constitutions (October 1958 and March 1969) or suspended completely or partly (July 1997 and October 1999) causing the fall of the basis of federalism.

<sup>51</sup> See *Briefing paper: Dynamics of Federalism in Pakistan: Current challenges and future directions*, Pakistan Institute of Legislative development and transparency, Lahore 2006.

To trace the current development in the Pakistani approach towards a Constitutional Machinery Failure Emergency, the third Constitution adopted in 1973 and certain amendments made afterwards are critically important. The Third Constitution of Pakistan, 1972 did not contain a Provincial List; it contained the Federal List of 67 subjects and the Concurrent List of 47 subjects. Part X of the Constitution of Pakistan 1972 made special mention of “Emergency Provisions” in six broad articles, Art. 232 to Art. 237; wherein Art. 234 specifically mentions, a “Power to issue proclamation in case of failure of Constitutional Machinery in a province”, which details the procedure as:

Art. 234(1) “If the President, on the receipt of a report from the Governor of a Province is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may, or if a resolution in this behalf is passed by the each house separately shall, by proclamation (a) assume to himself or direct the Governor to assume on his behalf all or any of the functions of the Government of the province ...”<sup>52</sup>

Though the most damaging features of the amendment were done away with by the 13th Amendment, they made a spectacular comeback in the 17th Amendment, then were again neutralised by the 18th Amendment 2010.

With respect to the third constitution, its suspension in 1977 and its putting in abeyance in 1999 by the successive military take-overs by General Zia and General Musharraf was a dark patch, as at that time the Constitutional Machinery Failure Emergency was widely misused. The watershed mark in the history of the Constitution in Pakistan is the 18<sup>th</sup> Amendment, which has drastically changed the character of the Pakistani Federal System, trying to make it drastically decentralized. It specifically worked on two areas: A. a province’s relations with the centre and B. a constitutional machinery failure emergency in Pakistan. B. the 18<sup>th</sup> Amendment to the Constitution of Pakistan 1972 was the most federal constitutional adventure any state of South Asia had ever tried: it was intended to serve the age-old demand for Shared Power by the people of Pakistan, certainly one of the foundational principles of Pakistan.

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<sup>52</sup> S.M.S. Hussain, *Federalism in Pakistan: Theory And Practice*, Quaid-i-Azam 1994.



The journey of Constitutional Machinery Failure Emergency has been less adventurous in India than it has been with Pakistan, as the provision has served very well its current master i.e. the Central Government of India. The provision is referred to under Article 356 of the Constitution of India as follows:

If the President, on the request of the Governor or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation-

- a) assume to himself all or any of the functions of the Government of the state;
- b) declare that the power of the Legislature of the State shall be exercisable by or under the authority of parliament;
- c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effects to the object of the proclamation.

The phraseology used in Article 356 in the Indian constitution is identical to that of its colonial predecessor and so has been subjected to criticism both during the formation of the Constitution and afterwards. The infamous 38<sup>th</sup> Constitutional Amendment Act 1975 in the regime of Mrs. Indira Gandhi had added clause (5) to article 356 which barred any form of Judicial Review on any ground over the proclamation of the Emergency. This arbitrary and unconstitutional provision was substituted and removed by 44<sup>th</sup> Constitutional Amendment Act, 1978.

Article 356 has been invoked more than 121 times in India, and in several cases, there was absolutely no reason for invoking the emergency, as the broad terms of Article 356 of the Constitution provide wide liberty to the Central Government to manipulate it as per their political needs and aspiration. An emergency proclamation under Article 356, and its invocation at the whim of Central Government is a blow to the federal aspiration of India. Like its Pakistani counterpart, Article 356 has also not gone through path-breaking amendments. The reform of the article started with judicial intervention, which has used the justiciability of Presidential Satisfaction to predict that the Constitutional Machinery of the State has failed. After the 44<sup>th</sup> Amendment, now judicial review

of the proclamation could be based<sup>53</sup>, as held by 9 Judges decision of the Supreme Court, on any grounds upon which an executive determination founded on “subjective satisfaction” can be questioned. Other than that, article 257(1)(2)(3) empowers the Union Government to give directions to a state as therein provided. Non observance of that would result in the view that the constitutional machinery has failed in the state, as per Article 365<sup>54</sup>. In this respect Article 355 also casts the duty on the Union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this Constitution. This duty acts as a justification for the exercise of the extraordinary centralized power under Article 356 with yet to be concretely defined and open ended expressions, specifically used to empower the centre over the states.

The justifiability of satisfaction of the President has paved the way for a much needed reform of Article 356 of the Constitution. The Supreme Court of India, in the wake of the 1975 National Emergency, became vigilant about abuse of the Emergency provision. In *Rameshwar Prasad (VI) v. Union of India*<sup>55</sup>, the Supreme Court of India declared that the satisfaction of the President cannot be based on whims or personal aspirations, it means the satisfaction of the Council of Ministers headed by the Prime Minister. The judgment favours India’s faith in representative government, and acts as a safeguard against frivolous emergency declarations under Article 356. But the main issue is to date not addressed, because an Emergency can be proclaimed, not only on the report of the Governor (who in actuality acts as an agent of the

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<sup>53</sup> *A. K. Roy v. Union of India*, AIR 1982, SC 710; anything to the contrary said in the *State of Rajasthan v. Union of India*, AIR 1977 SC 1361, is no longer good law; *S. R. Bommai v. Union of India*, 1994 (2) JT 215.

<sup>54</sup> Article 365 (1) “Where any state has failed to comply with, or to give effect to, any direction given in the exercise of the executive power of the Union under any provision of the constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this Constitution. Without this provision of the constitution there would have been no means to enforce the directions issued by the Union under Article 257 and also it works as prerequisite for Article 355 to hold that the constitutional Machinery of the state has been failed.”, India Constitution of 1950

<sup>55</sup> *Rameshwar Prasad (VI) v. Union of India*, (2006) 2 SCC 1, 94 (para 96).

Central Government), but also otherwise. The term “otherwise” is of wide amplitude<sup>56</sup> and most often it is the report prepared and submitted by the Union Council of Ministers or Union Home Ministry. Thus the satisfaction as well as the proclamation is in the hands of the Union Council of Ministers headed by the Prime Minister. More so in *Rameshwar Prasad (VI) v. Union of India*<sup>57</sup>, the Supreme Court also established that the sufficiency or the correctness of the factual positions indicated in the Governor’s report is not open to judicial review. The truth and correctness of the materials cannot be questioned by the court, nor would it go into adequacy of the materials and it would also not substitute its opinion for that of the President. Interference is called for only when there is a “clear abuse or misuse of the power and will make allowance for the fact that the decision-making authority is the best judge of the situation.”<sup>58</sup>

The justiciability of the proclamation issued under Article 356 has been established by the 44<sup>th</sup> Amendment, but is still disputed as to its scope and application. The question was widely discussed by 9 Judges<sup>59</sup> in multiple opinions in *S.R. Bommai v. Union of India*<sup>60</sup> in which all of them agreed on the justiciability and judicial review of the proclamation, but there was wide difference about the “extent of justiciability”; *Ahmadi J.* and *K. Ramaswami J.* were of the opinion that the advice rendered by the Council of Minister is not immune from Judicial Review while *Verma J., Dayal J., Sawant J.* and *Kuldeep J.* were of the opinion that limited judicial review of the proclamation and advice so rendered is outside the purview of review.

The judgment delivered in the *S. R. Bommai*<sup>61</sup>, has been important for India as well as for Pakistan, as it has the “watermark of judicial review” in respect of Constitutional Failure Emergencies on both sides of the border, and Indian as well as Pakistani Supreme Courts have often quoted from the judgment. As observed by Soli J. Sorabjee, it “is a very

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<sup>56</sup> *Arun Kumar Raichaudhary v. Union of India*, AIR 1992 All. 1 (para 7).

<sup>57</sup> *Rameshwar Prasad (VI) v. Union of India*, (2006) 2 SCC 1, 94 (para 96).

<sup>58</sup> *Ibidem*.

<sup>59</sup> Judges: *Ahmadi, Yogeshwar Dayal, Verma, Sawant, Kuldeep, Ramaswami, Jeevan Reddy, Pradhan, Aggrawal.*

<sup>60</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

<sup>61</sup> *S. R. Bommai V. Union of India*, (1994) 3 SCC 1.

salutary development and will go a long way towards minimizing an onslaught on the State".<sup>62</sup> On this basis the Indian Supreme Court has laid down several instances as a permissible proclamation<sup>63</sup> or as an impermissible proclamation<sup>64</sup>. These judgments have also guided the judiciary in Pakistan to confine arbitrary actions of the State machinery in the name of a Constitutional Emergency.

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<sup>62</sup> S.J. Sorabjee, *Decision of the Supreme Court in S. R. Bommai V. Union of India: A Critique*, "The Practical Lawyer" 1994, available at: [https://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=54&do\\_pdf=1&id=223](https://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=223).

<sup>63</sup> Instances of judiciously permissible proclamations under Article 356 in India: 1. Where the Ministry has resigned and the Governor finds it impossible to form an alternative government - Case of *Sreeramulu* AIR 1974 AP 106; 2. Where no party is able to secure a working majority in the legislature - *Aboo K.K. v. Union of India*, AIR 1965 Ker. 229; 3. Gross mismanagement, corruption, abuse of power leading to law and order problems in the state, even after several directives and warnings from the Union Government under Article 257(2), (3), 335A, 360(3), 339(2); the state government has not tried enough measures to control the situation - *Bommai S.R. v. Union of India*, AIR 1994 SC 1918. 4. A state government which has lost the majority in the state legislature and is now failing to meet and control unprecedented ethnic violence, or a natural calamity, or widespread epidemic whose failure amounts to an abdication of its governmental powers - *Sreeramulu A., in re.*, AIR 1974 AP 106 (para 9).

<sup>64</sup> Instances of judicially impermissible proclamations under Article 356 in India: 1. Where the Governor recommends action under Article 356, after the dismissal of the Ministry, without probing the possibility of the formation of an alternative government - in the case of *Bijayanand Patnaik* AIR 1974 Ori.52; 2. Where the dissolution of the assembly is proclaimed as the Chief Minister of a particular caste or creed or the proclamation is announced on no ground just to punish the state, within a short period - *State of Rajasthan v. Union of India* AIR 1977 SC 1361; 3. Where the allegation of Good Governance has been imposed on the State Government and every non-compliance of the central government's order does not call off the imposition of Emergency under Article 356 - *Bommai S.R. V. Union of India*, AIR 1994 SC 1918; 4. Where the Governor declines the request of a Ministry which has not been defeated on the floor of the House and recommends its supersession, without giving the Ministry an opportunity to demonstrate its majority support through the 'floor-test' and acting solely on his subjective assessment that the Ministry no longer commands the confidence of the assembly, the floor test may be dispensed with only in exceptional circumstances, such as an atmosphere of violence in the state which would make it impossible to convene a sitting of the Assembly for the purpose - *Bommai S.R. v. Union of India*, AIR 1994 SC 1918; various illustrations of impermissible and permissible proclamations have been detailed by Durga Das Basu, *Shorter Constitution of India*, vol. II, Nagpur 2011, pp. 2171-2174.