

The State of Emergency in India: Böckenförde's Model in a Sub-National Context

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Abstract

The Constitution of India envisages three types of emergencies: A national emergency; a state emergency (in the federal setup, regions are called states in India, and the central government has the power to impose an emergency if there is a breakdown of law and order in that state); and a financial emergency. The problem the State faces is how it can respond effectively to exceptional situations without casting its adherence to the rule of law into question." Ernst-Wolfgang Böckenförde offers a set of solutions within a model structure anchored in constitutional laws. The model structure, which applies at the federal level, advocates a separation between the authorizing agency—the political wing—and the implementation agency, as well as creating a distinction between a "law" and a "measure," and between a most extreme and a merely difficult situation. By focusing on the actions of the higher judiciary in India, this Article tests whether the safeguards in Böckenförde's model structure function at the sub-national state level in a very different geography and context. 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. 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 organization—accentuates, rather than mitigates, this problem.

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A. Introduction

When terrorist threats and internal insurgencies pose a threat to national security, democratically elected governments find themselves jettisoning their promise to maintain a rule of law. This is not problematic for those subscribing to classical State-centered theories, which presume that the State has a pre-legal right, or non-positive right of natural law, to act in self-preservation.¹ As Carl Schmitt famously said, “[s]overeign is he who decides on the exception.” But for those who favor a constitution-centered approach to rights, the problem of maintaining a rule of law while securing the State during exceptional situations is acute and urgent. Ernst-Wolfgang Böckenförde, who was strongly influenced by Schmitt’s work but had also experienced the abuse of laws by a democratically elected Nazi government, articulates the problem in this way:

The question of how the democratic *Rechtsstaat* can respond effectively to exceptional situations without casting its adherence to the rule of law into question has taken on new urgency through the hostile actions perpetrated by terrorism against the state. Contrary to the prevailing view, the author advances the thesis that the integrity of the order of the *Rechtsstaat* cannot be achieved through increased legislation (the problem of the so-called anti-terror laws), and most certainly not through the introduction of the “supralegal state of emergency” into constitutional law. Instead, it is tied to a recognition of the possibility of the state of emergency and its anchoring in constitutional law.²

Böckenförde thinks that positive constitutional law can override, through detailed regulation, the State’s pre-positive right to existence. Focusing on the German case, Böckenförde offers us a detailed set of procedures that could circumvent the abuse of emergency powers and thus retain a modicum of a rule of law in a democratic State. Do these procedures work when applied to a state of emergency proclaimed by the central government in India at the regional, sub-national level of the State?

¹ Herbert Krüger, Hans Nawiasky, Carl Schmitt, Paul Kirchhof, Ulrich Scheuner and Klaus Stern are proponents of this approach. For a comparison of state-centered and constitution-centered theories see András Jakab, *German Constitutional Law and Doctrine on State of Emergency—Paradigms and Dilemmas of a Traditional (Continental) Discourse*, 7 GERMAN L.J., 453, 453–78 (2005).

² ERNST-WOLFGANG BÖCKENFÖRDE, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances [1978]*, in CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 100 (Mirjam Künkler & Tine Stein eds., 2017).

In March 2016, the President of India used Article 356 to dismiss the elected government in the state of Uttarakhand on grounds that the continuation of that government was “immoral and unconstitutional.” The state government was formed by the Indian National Congress party (INC), while the government at the Union level—the national level—was led by the Bharatiya Janata Party (BJP). Further, the President’s dismissal was done on the advice of the Council of Ministers belonging to the BJP. This Proclamation came after March 18, 2016, when the Speaker of the Legislative Assembly—the Parliament’s equivalent at the state level—declared the Appropriation Bill “passed” in controversial circumstances that did not allow a division pressed for by 35 members (including nine rebel INC legislators) of the Assembly.³ The rebellion within the INC meant that the government had lost its majority when the finance bill was passed. The dismissed chief minister—who functions as head of the government at the federal state level—filed a case in the High Court of Uttarakhand. The question posed before the court, and before us, is whether the President of India was right to call the Uttarakhand situation an exceptional situation requiring the imposition of a state of emergency. Did the fact that the constitution of India contains Article 356⁴—which allows the President of India to issue a Proclamation of a State of Emergency in one or several of India’s federal states in exceptional situations—create the conditions for the continuation of a rule of law or did it subvert the law? Are the procedures that Böckenförde proposes to preserve the rule of law during exceptional situations adequate in such a context?

I will assess Böckenförde’s prescriptions in the context of Article 356, which pertain to the conditions governing a state-level, regional emergency in India. I must note upfront that Böckenförde does not discuss the way his framework would apply at the regional level of a federal system, nor does the Indian case fit neatly into the normative ideas of his model.

Furthermore, when conflicts are created by constitutional rules that do not exist in the constitutional system of Germany as considered by Böckenförde, then methodologically, how can one compare a normative claim with an empirical reality that was not previously considered by such a claim?⁵

Hence, this Article’s use of Böckenförde’s model is not a straightforward testing of a normative claim on an empirical reality. Rather, it assesses the operation of some elements, namely the application of safeguards in a federal context, and pinpoints weaknesses that

³ The objective of the Appropriation Bill is to give the government the authority to withdraw the necessary capital from the Consolidated Fund of India in order to meet expenses that might occur during the fiscal year. The convention for passing Bills in Parliament and in the state legislative assemblies is through a voice vote—the legislators orally communicate “aye” or “nay” when the motion is put to vote. But when some legislators do not want a voice vote and instead demand a division, the Speaker of the House must record every vote either through an electronic system, if available, or through the physical division of the legislators into the ayes and the nays.

⁴ See *infra* Appendix 1.

⁵ I am grateful to the anonymous reviewer for highlighting this concern.

need to be addressed in any recalibration of the model for such an empirical reality. The Indian constitution envisages three types of emergencies: A national emergency, declared in 1962 during the Sino-Indian war, and again between 1975 and 1977; a state emergency—in the federal setup, regions in India are called states, and the central government known as the Union of states has the power to impose an emergency if there is a breakdown of law and order in that state; and a financial emergency, which has never been declared. Articles 352 through 360 of the Constitution of India detail the nature and scope of these emergency provisions. Of these, the case study detailed in this Article focuses on Article 356, which outlines the procedures in the event of a failure of constitutional machinery at the state level, and highlights how the Constitution of India deals with conflicts between the executive branch of the Union—the central State—and the governments of the several states. It must also be pointed out that Article 355 of the Indian Constitution stipulates that it is the “duty of 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.”⁶ Although Article 355 creates a duty of the Union towards the states, the Article has been interpreted by the apex court as providing a justification for emergency action under Articles 356 and 357.⁷

In situations where the Union and the states are governed by different political parties, it is not surprising that Article 356 is utilized by the party in power at the Union level to dismiss its rivals in power at the state level. By exploring the use of Article 356 in a recent case, this Article highlights the problem that within a set of constitutional rules that champion protection of states by the Union, the reality of how political power is garnered and exercised in a Westminster parliamentary democracy⁸ reduces the effectiveness of the safeguards of Böckenförde’s model, and creates conditions not for fair play, but for subverting the spirit of the law. 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 organization—accentuates rather than mitigates this problem.

⁶ INDIA CONST.

⁷ In *S.R. Bommai v. Union of India*, 3 SCC 1 (1994), Justice Sawant held, in paragraph 2, that Article 355 was not an independent source of power for interfering with the functioning of the State government but was in the nature of justification for the measures to be adopted under Articles 356 and 357.

⁸ In a Westminster parliamentary democracy, the head of the government is elected by the Parliament, unlike in a Presidential system where the President is elected directly by the people. In India, following the convention of the British system, the leader of the single largest party in Parliament is invited to form the government, which could be a majority government, if the party has a majority of legislators, or if it does not, then it could form a minority or a coalition government, with the support of some other parties in parliament. A similar system plays out at the federal state level in the legislative assemblies. It must be noted that the Indian constitution is unique in stipulating the protection of the states by the Union in Article 355; other Westminster parliamentary democracies do not contain such an Article.

This Article will first discuss the procedural safeguards evolving from the normative underpinnings of Böckenförde's model. The Article then applies them to this Indian case, with special focus on the role of the higher judiciary.

B. Böckenförde's Model and the State of Emergency

The principle of a State of Emergency (SOE) is, according to Böckenförde, "nothing less than the dissolution of the integrity of the constitution based on the rule of law and the abandonment of the principle of the constitutional state."⁹ The SOE is characterized by a fundamental discrepancy between the intended powers and the successful performance of the task at its core. If the constitution ignores or refuses to recognize a legal state of exception, then the action creates a situation where established legal boundaries are ignored, which then results in a realm devoid of legal constraints. To maintain the law of the normal situation, therefore, requires the recognition of the state of exception. Böckenförde asks, and replies to this in the affirmative:

Can—indeed, must—the principle of the supralegal state of emergency find application as the legal order of the state of exception? Is this perhaps the only way to preserve both the capacity for action on the part of the state organs in the face of extraordinary situations, whose particular nature is not foreseeable, and the coherence of the constitutional legal order, which cannot accept the proposition "this is where the law ends"?¹⁰

Otherwise, the danger is that there will be a supra-constitutional state of emergency in which there is a comprehensive breach of the constitution. Here, we see evidence of Böckenförde's view—and his distance from the statist conception—that the constitution ought to perform the function of checking and limiting state power:

The constitution based on the rule of law represents a binding, comprehensive (and not merely partial) and therefore final regulation of the authority that state organs possess to take action. And the constitution has an obligatory *limiting* effect and function also for the notion—toward which I myself am partial—according to which the constitution does not constitute the state's power to act in the first place, but constrains and limits

⁹ BÖCKENFÖRDE, *supra* note 2, at 114.

¹⁰ *Id.* at 111.

it. Thus, the principle of the supra-legal state of emergency, transposed on the constitutional level into an emergency that rises above the constitution, amounts to nothing less than the dissolution of the integrity of the constitution based on the rule of law and the abandonment of the principle of the constitutional state.¹¹

While recognizing that one cannot anticipate and make legislation for every emergency or exceptional situation—in fact, he says, it would be a mistake to do so—what is possible “is the differentiation of certain *foreseeable*, if exceptional, situations through special regulations that are substantively related to them.”¹² The structural features of Böckenförde’s model of emergency regulation include four aspects.

First, there must be a clear distinction between the normal state and a state of emergency. The distinction, he says, should be procedural and substantive. Substantive means that the State must not attempt to constantly “juridify” emergency situations that are experienced or imagined. Here, Böckenförde draws on Carl Schmitt’s distinction between a law and a measure and holds that a SOE must be conceptualized within the constitution as a measure, and not a law. A measure has three characteristics: It is goal oriented; is of a finite and temporary duration; and although enforceable and authoritative, is not given the quality of law. A measure ends once the goal is accomplished, and thus curtails the possibility of a creeping transition to a new and different kind of a normal state. Böckenförde’s reasoning is that a SOE must be legalized and bounded or circumscribed by law. Otherwise, there is a danger that actions that ignore established legal boundaries may occur and result in a realm devoid of legal constraints.

Although the division between a law and a measure makes sense theoretically, its empirical application is more ambiguous. What if the goal of the measure is never accomplished, as may be in the particular case of an ongoing battle with terrorism or with an insurgency. His rationale that making emergency law dependent upon and constrained by its particular purpose is a way of guaranteeing that such laws do not linger. Examples of such a situation include the state of Jammu and Kashmir since 1990 and the state of Manipur in Northeast India, where a preventive detention law—the Armed Forces (Special Powers) Act of 1958—has been in place for over 40 years.¹³ In these instances, the concept of a “measure” does

¹¹ *Id.* at 114.

¹² Günter Frankenberg asks whether Böckenförde’s model can account for the unforeseeable better than, for instance, the emergency constitution of the Basic Law of post-war Germany. GÜNTER FRANKENBERG, POLITICAL TECHNOLOGY AND THE EROSION OF THE RULE OF LAW: NORMALIZING THE STATE OF EXCEPTION (2014).

¹³ The Armed Forces (Special Powers) Act, 1958 (India) <http://nagapol.gov.in/PDF/The%20Armed%20Forces%20Special%20Powers%20Act%201958.pdf>.

not safeguard the citizen from an endless incursion on her rights. In fact, a “goal-oriented” measure may result in creating a creeping normalization of these measures into the everyday rhythm of a citizen’s life in an insurgent zone, which is precisely what Böckenförde wants to avoid by making such a distinction.

Second, there must be a separation between the authority to declare an emergency and the entity which holds the emergency powers. This is because, as Böckenförde says, one must avoid the danger that the bearers of emergency authority will empower themselves and because determining a SOE always involves political decision-making. The declaratory authority must lie with the representative body of the people in a democratic constitutional arrangement. The decision of what constitutes the exception rests with the political wing, he says, echoing the words of Carl Schmitt. Here, an objection can be raised that, in the context of a parliamentary form of government within a federal setup, the distinction between the declaratory authority and the authority holding the emergency powers does not obviate the possibility of abuse of such powers. We will see this in the discussion of how Article 356 has operated in India.

Third, the preconditions and the occurrence of a SOE must be regulated so that whoever makes the decision must ensure that only the most extreme situations—and not simply difficult situations—become SOEs.¹⁴ The problem here is that the unknowable nature of an emergency makes it difficult for Böckenförde to give examples of what would constitute an extreme situation, as opposed to what would be a merely difficult one. As we shall see in India, the propensity of parliament and the executive to read difficult situations as extreme ones in the states has constantly accompanied the imposition of an emergency through Article 356. In fact, such SOEs have been imposed over 120 times since India’s independence in August 1947. Part of the problem in India’s case relates to Böckenförde’s view that the holder of emergency powers must be focused on action, and must be a political organization rather than merely an administrative one. Böckenförde says that “Parliament can be equally in charge, when declaring a state of emergency, of specifying and restrictively circumscribing the authority to take measures with respect to the *concretely* prevailing emergency situation.”¹⁵ What this fails to account for is a situation where, for example, the party with a majority in parliament refrains from imposing checks on the authority implementing the SOE in a regional state where a rival party is in power. Here, Böckenförde seems to hold an implicit assumption that the parliament will operate in good faith, as will the political party that is in power at the center.

¹⁴ Frankenberg points out that Gertrude Lübbe-Wolff is right to critique Böckenförde on this. It is not possible to effectively rule out the political temptation to use a vague general authorization in an exceptional situation by following a model of necessity as justification. This is even more the case if an emergency provision under constitutional law establishes preconditions, even if they are only minimal, for instance, with regard to powers, procedures, and purposes. FRANKENBERG, *supra* note 12, at 110–20.

¹⁵ See BÖCKENFÖRDE, *supra* note 2, at 129.

Fourth, the responsibility of and oversight over the holder of emergency powers is very important. The responsibility aspect requires that when missteps occur, they must be strongly and severely sanctioned, and not just through criminal proceedings. He refers to “a revival of the old ministerial responsibility under state and criminal law, with the corresponding possibility of bringing an indictment in cases where the authority to take measures was deliberately exceeded or abused.”¹⁶ As Mirjam Künkler and Tine Stein note, Böckenförde has a negative view of political justice and judicial activism, by which he means courts not following the law, but sidelining the law in order to arrive at a result they deem to be politically preferable.¹⁷ What he means when he speaks of “political review” is not political justice—which is located in the courts—but review by the parliament and legislators and the notion of “old ministerial responsibility,” which refers to the possibility that parliament can not only topple the prime minister by a vote of no confidence, but also his or her ministers and the members of the cabinet. He mentions the possibility of political review of these states of emergency on a case-by-case basis, while excluding legal sanctions. He states that “[w]e are not talking about judicial proceedings of the criminal kind, but about a form of political justice [political review] in the truest sense, which is in keeping with the political character of the issue.”¹⁸ His implicit assumption that the political reviewers will exhibit non-partisanship is, as we shall see shortly, highly contentious in India’s political framework.

The model does not elaborate on the role of courts, the distinction between a major and minor SOE, or the operation of such a model within a federal context. It also does not provide absolute protection against the abuse of existing emergency powers. All of these are lacunae highlighted by Böckenförde himself. Keeping these caveats in mind, let us see whether and how the procedures, particularly the safeguards, can travel to the sub-national, state-level of a distant nation.

C. India’s Constitution and Exceptional Situations

Let us examine three aspects of Böckenförde’s model. First, is the SOE treated as a law or a measure in the Indian constitution? Second, is there guidance in the constitution on distinguishing between extreme situations and merely difficult ones? And third, is there a distinction between the declarer and the holder of emergency powers, and does the authority to proclaim an SOE rest with the political wing?

¹⁶ *Id.* at 130.

¹⁷ *Id.*

¹⁸ *Id.*

I. Law and Measure

Böckenförde's model advocates anchoring the SOE within a constitutional context. The state of emergency in India is constitution centered; it is not an extra-constitutional situation, that is, it is not a constitution-less State. India's Constitution regulates the state of emergency through constitutional clauses, not through measures that entail executive decrees or bureaucratic regulations. Part XVIII of the Indian Constitution sets out emergency provisions in Articles 352 through 360.¹⁹ At the same time, the measures detailed in Article 356 are goal specific, and determined by and dependent upon a concrete situation. The tenor of these articles echoes the prescriptions of Böckenförde model's:

[T]heir temporary nature, and their immediate termination once their purpose has been accomplished, must remain clear and safeguarded. As measures they do not create any finality, they do not take on the force of law; they do not bring about a change, but only a temporary overlay upon or suspension of the prevailing legal status While measures to deal with a state of emergency must be enforceable and authoritative, they must not be given the quality of law and thus the same rank as the law of the normal state. Their character as measures that are goal-specific.²⁰

The Constituent Assembly (CA) debated Article 356 in Draft Article 278 on August 4, 1949. The discussion pertained to whether such an Article was indeed required. The draft Article was inspired by section 93 of the Government of India Act of 1935—enacted under British colonial rule—which states that the Governor of a province could assume all powers outside of those reserved by the High Court if he was convinced that the provincial government could not be carried on. In Article 356, the President was given this power.²¹

¹⁹ INDIA CONST.

²⁰ See *supra* note 8, at 120.

²¹ See *infra* Appendix 1 for the full text of Article 356. The British colonial government introduced Section 93 as an insurance policy after the Government of India Act of 1935 delegated powers of governance to ministries formed by elected Indian political parties. The Congress Party—which had won the elections in eight of the 11 provinces at the time—protested strongly against the undemocratic provision of Section 93. It demanded that the British Viceroy give an assurance that the governor would not interfere with the working of the elected provincial governments. Viceroy Linlithgow did and Congress subsequently assumed office. See Shoaib Daniyal, *A Short History of the Colonial Origins of President's Rule and its Misuse in Independent India*, SCROLL.IN, (Feb 1, 2016, 11:30 AM) <https://scroll.in/article/802736/a-short-history-of-the-colonial-origins-of-presidents-rule-and-its-misuse-in-independent-india>.

Feelings ran high in the CA when several members pointed out that the Article reincarnated an imperial legacy. A critic called for several changes in the language of the Article:

The President must be satisfied that a grave emergency has arisen which threatens the peace and tranquility of the state and that—not ‘or that’—the government of the State cannot be carried on in accordance with the provisions of this Constitution. Otherwise the President may use this article when the dangers are that on the pretext of resolving a ministerial crisis or on the pretext of purifying or reforming maladministration.²²

He went on to add that a mere crisis or vote of no confidence in the legislature ought not to empower the President to proclaim an emergency. Kamath warned to “be aware of the dangers of arming the executive with tyrannical powers,” and in so doing referred to Hitler’s use of Article 48 of the Weimar Constitution to destroy democracy in Germany.²³

Other delegates wondered why the critics were so suspicious of the President’s motives, and whether it was not a dangerous thing for the newly independent India to be “too democratic.” While recognizing the danger that political prejudice could motivate the use of Article 356 when the party ruling at the center and that at the regional state are different, several delegates voiced the hope that the remedy would emerge from “the growth of healthy conventions.”²⁴

The tussle within the CA was between those who viewed the Article as giving overarching powers to the President and the center at the expense of democracy and federalism, and those who thought that the President and the central government were merely intervening to assist the regional state to tide over difficult times—the “helping hand” view. Ultimately, the helping hand view prevailed. In reply to the criticism that such provisions were not found in any other Constitution, it was pointed out that they were based on the principle underlying Section 4 of Article IV of the United States Constitution, which provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.”²⁵ The first part of this provision is known as the Guarantee Clause and the second part as the Protection Clause. In principle, the Guarantee Clause conformed to Article 355, which is

²² H.V. Kamath, *CA Debates*, Volume IX, 142–144.

²³ *Id.*

²⁴ *Id.* at 154.

²⁵ U.S. CONST. art. IV, § 4.

designed to maintain in every state the form of responsible Government as contemplated by the Constitution. The Protection Clause of Section 4 of Article IV corresponded to the first part of Article 355, with the difference that, instead of the expressions “invasion” and “domestic violence,” the framers of India’s Constitution preferred to use the terms “external aggression” and “internal disturbance,” respectively, which are of relatively wider amplitude.²⁶

The CA debates evoke the following hypothesis. Laws are made by framers who have interpreted their experience in particular ways and have generated expectations based on these interpretations. Let us use conceptual history’s terminology—a frame of experience and a horizon of expectations—to understand how the majority of CA delegates thought about emergency laws. We could say that the larger the gulf between their previous experience with the colonial state’s legal apparatus, and their hopes infusing their expectation of how political and constitutional functionaries would behave—for example, in a fair and unbiased manner—the more likely it is that they would not incorporate measures into the emergency laws in independent India. Conversely, those delegates whose experience with the draconian colonial state colored their expectation that an independent Indian state would not behave any differently from its predecessor because their experience and expectations overlapped significantly, insisted on amendments that would make the SOE more measure-like.

The debates in the CA on Article 356 demonstrates this proposition. Before the final vote on this Article, the chairman of the drafting committee, Dr. Balasaheb Ambedkar said he would not accept the amendments proposed by a minority, whose experience and expectations overlapped significantly:

The proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces.²⁷

While parts of the Article are akin to a measure, the circumstances under which a proclamation can be issued—requiring the President’s satisfaction—are more ambiguous and mimic the form of a law. The ambiguity can be linked to the victory of those in the CA who expressed the hope that the President and the political wings would act judiciously on

²⁶ Sarkaria Commission Report, para. 6.2.07, [http://interstatecouncil.nic.in/wpcontent/uploads/2015/06/CHAPTER VI.pdf](http://interstatecouncil.nic.in/wpcontent/uploads/2015/06/CHAPTER_VI.pdf).

²⁷ CA Debates, *supra* note 22, at 177.

the issue. Hence, the refusal to include amendments—such as the substitution of “internal insurrection or chaos” for “internal disturbance”—from those whose expectations of the post-colonial Indian state overlapped with their experience under the imperial one.

Thus, Article 356 is a mix of measure and law. Its operation is finite²⁸ and the procedures for its continuance require confirmation from the Parliament, the political representatives. Other features are more ambiguous. For example, although its use can be challenged in court, the language pertaining to the President’s “satisfaction” does not indicate the parameters for eliciting such satisfaction. The Article simply says: “If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.”²⁹

II. Merely Difficult Versus Exceptional Situations

The second question, whether Article 356 offers guidance on distinguishing between a merely difficult and an exceptional situation, has an easier answer in the Indian context. One of the CA delegates³⁰ outlined three types of circumstances for the issuance of the proclamation of an SOE: The physical breakdown of the government; political breakdown, like the inability to form ministries; and economic breakdown, like the bankruptcy of a state. Because not all situations could be identified, many CA members rested their hopes on the Parliament and the integrity of the President. The final result is that the Article does not give guidance on how to distinguish between difficult and exceptional situations; the courts have had to figure out a way to make this distinction.

III. Declarer and Holder

Finally, the question of whether the Indian constitution makes a distinction between the declarer of an SOE and the holder of emergency powers, and whether the authority to proclaim an SOE rests with the political wing, can be answered in the affirmative. The President, who is elected by the people’s representatives in the Parliament on the advice of the Union Council of Ministers, the Cabinet, or elected representatives, issues the Proclamation. Parliament, then, is supposed to vote on the proclamation, either to endorse or to reject it within two months. The Indian Constitution echoes Böckenförde’s prescription that, ultimately, authorization rests with the peoples’ representatives. The implementation is carried out under the authority of the President. The Constitution outlines a process similar to the one preferred by Böckenförde. In contravention to Böckenförde’s model, the

²⁸ See Article 356, cl. 3.

²⁹ See Article 356.

³⁰ K. Santhanam, Madras General, Vol. IX, 153.

Article does not contain specific penalties attached to misuse of emergency powers, nor does it call for review of the use of these powers by a specific body.

The CA debates as well as the final language of Article 356 highlight three problems in Böckenförde's prescriptions as applied to the center of a federal system like India. First, because exceptional situations are not knowable in advance, and it is therefore not possible to delineate the circumstances that would call for a SOE, a measure does not diminish the probability of misuse by the political organs, nor is it amenable to a clear interpretation by courts. We see this in the vagueness of the definition of a state of emergency in the Indian Constitution, specifically the phrases "breakdown of constitutional machinery" and "satisfaction" of the President. As we shall see shortly, the judiciary has mulled over whether the satisfaction is supposed to be subjective or must be based on objective facts, as well as which events can be legitimately viewed as a breakdown of constitutional machinery.

Second, political representatives cannot be trusted to be non-partisan, especially in a situation where the system does not function according to a strict separation of powers between the executive and the legislature. To elaborate, Böckenförde notes that "Parliament can be equally in charge, when declaring a state of emergency, of specifying and restrictively circumscribing the authority to take measures with respect to the *concretely* prevailing emergency situation."³¹ What this fails to account for is a situation where the party with a majority in parliament, and hence in power at the center, could refrain from imposing checks on the authority implementing the SOE in a regional state where a rival party is in power. Although the Böckenförde model's emphasis on authorization being placed with the political representatives is understandable in a democratic framework, the reality militates against fair-play. In India, although Article 53 vests the executive power with the President, he or she must follow the advice of the Council of Ministers in exercising that power. This introduces the danger that political prejudice could taint the proclamation of an emergency, especially if a single party gains a majority in parliament and has formed the government and the cabinet. There seems to be, in Böckenförde's theory, a hope that the people's representatives will act in a fair manner, a hope that was echoed by the majority of the constitution framers in India's Constituent Assembly.

Third, Böckenförde's prescription for review of the SOE by a constitutional court or a special body after the emergency has passed, is not an adequate check on the abuse of power in the context of India where the law is silent on the justiciability of the issue. While Clause C of Article 356 specifically states that the President cannot appropriate the powers of the court, it is silent on the question of whether the proclamation of a state of emergency is justiciable or not. This has muddled the issue considerably for the judiciary, whose responses will be assessed in the next section. While the lacuna in India cannot be attributed to a deficit in Böckenförde's prescription, what we can say is that even if the law were not silent on

³¹ See BÖCKENFÖRDE, *supra* note 2.

justiciability, the review process advocated by the theory is not straightforward, and would contain ambiguities that any reviewing body would find difficult to resolve—for example, the distinction between a difficult and an exceptional situation.

As to whether a special commission is indeed an effective deterrent to the abuse of emergency powers, let us examine the report of one such commission in India. On March 24, 1983, a commission headed by Justice R.S. Sarkaria was appointed to assess center-state relations, which included the operation of Article 356. It highlighted the main criticisms in regard to the use of Article 356, namely that it has been interpreted and applied differently in similar situations to suit the political interests of the party in power at the Union level. The Commission concluded that, more often than not, power under Article 356 was wrongly exercised, and in a worryingly frequent fashion.³² The Commission analyzed seventy-five cases of President's Rule from June 1951 to May 1987, and found that in fifty-two of the seventy-five cases, the Article had been misused. It classified the cases where the Article was imposed in an improper fashion into four categories. In thirteen cases, President's Rule was imposed even though the government in that state commanded a majority in the Legislative Assembly. In fifteen cases, other claimants were not given a chance to form an alternative government. In three cases, where a viable government could not be formed and fresh elections were necessary, no caretaker government was formed. The report concluded that in twenty-six cases, President's Rule was inevitable. The Commission suggested several measures to strengthen federalism and prevent misuse, but these recommendations were not given statutory form and subsequent central governments continued to dismiss state governments on the pretext of a breakdown of constitutional machinery.³³

If commissions are not adequate deterrents, let us now turn to whether a constitutional court, as proposed but not elaborated by Böckenförde, is more successful in limiting the abuse of emergency powers and in maintaining a rule of law.

³² See MANJU CHOUDHARY, CRITICAL EVALUATION OF SOME ASPECTS OF WORKING OF PARLIAMENTARY FORM OF GOVERNMENT AND FEDERAL SYSTEM IN INDIA, Chapter 8 (2004), http://shodhganga.inflibnet.ac.in/bitstream/10603/58893/15/15_chapter%208.pdf.

³³ The report recommended that in a situation of political breakdown, the Governor should explore all possibilities of having a government that enjoyed majority support in the Assembly. If it is not possible for such a government to be installed, and if fresh elections can be held without avoidable delay, he should ask the outgoing Ministry if there is one to continue as a caretaker government. Such would require that the Ministry was defeated solely on a major policy issue, unconnected with any allegations of maladministration or corruption and that it would be agreeable for the outgoing Ministry to continue. The Governor should then dissolve the Legislative Assembly, leaving the resolution of the constitutional crisis to the electorate. During the interim period, the caretaker government should be allowed to function. As a matter of convention, the caretaker government should merely carry on the day-to-day government and desist from taking any major policy decision. See Sarkaria Commission Report, *supra* note 26, para. 6.8.04. Having been invoked only thrice between 1950 and 1954, the number increased to nine occasions between 1965 and 1969; to twenty-one instances between 1975 and 1979, and eighteen times between 1980 and 1987. By 2016, it had been invoked 120 times.

D. The Judiciary and the Question of Justiciability of Article 356

As mentioned earlier, Article 356 does not specify whether the proclamation of an emergency by the President is justiciable in a court of law. Initially, the high courts held that the exercise of the power by the President was not within the court's jurisdiction. The rationale was that the President was not acting on behalf of the executive, but in a constitutional capacity. The constitution excluded review by the courts and vested the power to approve or disapprove of the Proclamation with parliament. Thus, the courts had no jurisdiction to require disclosure of the material that formed the basis of the President's decision.

From 1975 to 1977, India experienced its only bout of Emergency rule. In June 1975, Article 352 was invoked on grounds of internal disturbance by the then Prime Minister of India, Indira Gandhi, the leader of the INC. Fundamental rights were suspended, and the power of the judiciary was curtailed while the power of the Union was enhanced in the Forty-Second Amendment to the Constitution at the expense of the federal states.³⁴ In 1977, after Emergency rule ended, the Supreme Court weighed in on the use of Article 356 in six states. The apex court said for the first time that judicial review was not completely barred and that it could be exercised in some circumstances.³⁵ For instance, as regards the satisfaction of the President, while the court could not go into the correctness or adequacy of the facts, if the satisfaction was mala fide or based on wholly extraneous and irrelevant grounds, the court had the jurisdiction to examine it. The judges made a distinction between "satisfaction" and "existence of satisfaction," saying that the latter could not exist if the grounds taken were mala fide or irrelevant.³⁶

After the demolition of the Babri Masjid mosque in northern India in 1992, the INC-led minority government at the center imposed President's rule in four states—Uttar Pradesh, Himachal Pradesh, and Rajasthan and Madhya Pradesh. The BJP, which led the government in these four states, challenged the proclamation in the high courts.³⁷ The Madhya Pradesh

³⁴ The forty-second Amendment extended the period for seeking Parliament's approval of the proclamation of Emergency under Article 356 to one year, as opposed to the earlier six-month limit. After the lifting of President's Rule, states had to enact new laws to undo the emergency provisions by amending Article 357. The Amendment also gave the Union Government the right to authorize the use of any central military force "for dealing with any grave situation of law and order in any State." The President was empowered, in consultation with the Election Commission, to disqualify members of State Legislatures. See Forty-Second Amendment: <http://indiacode.nic.in/coiweb/amend/amend42.htm>.

³⁵ *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 (India).

³⁶ This case was decided when Article 356 contained Clause 5, where the satisfaction of the President was final, and not to be questioned in a court. Clause 5 was deleted by the forty-fourth Amendment.

³⁷ The procedure for challenging president's rule is to first approach the relevant high court, and only later, the Supreme Court.

High Court struck down the proclamation as being unconstitutional, saying that only an extremely difficult situation warranted the proclamation. A sudden outbreak of riots did not justify President's rule.³⁸

The judgment was challenged in the Supreme Court. In *Bommai v. Union of India*, a nine-judge constitutional bench unanimously found that the presidential proclamation under Article 356 was not completely beyond judicial review, though they differed on the extent of such review and on the justiciability of a presidential proclamation.³⁹ The majority opinion said that the Supreme Court could call on the Union of India to disclose the materials upon which the President had found the requisite satisfaction. They also agreed that the floor test in the House was the proper procedure to test the strength of the ruling government to see if it had lost the majority in the Legislative Assembly. The Sarkaria Commission had found that the Governors did not always follow this procedure for political reasons, and would wrongly recommend President's rule even when the government enjoyed a majority in the House. In the *Bommai* judgment, the judges agreed that if the proclamation was made in mala fide, despite its having been approved by the parliament, it would be open to the court to restore status quo ante. With this, the court introduced the principle of judicial review to the operation of Article 356.

It is not clear if the majority of the judges were of the view that the judicial review of the presidential proclamation extended to examining the truth or correctness of the basic facts that had informed the President's view.⁴⁰ A.G. Noorani—an eminent constitutional scholar and lawyer—thus concluded:

To sum up, what the Supreme Court did is to make judicial review of the Proclamation under Article 356 far more effective by circumscribing the conditions in which the Article can be invoked; it asserted the right to call for the production of records on the basis of which Union Council of Ministers advised the President; put a restraint on the dissolution of the Assembly prior to parliamentary ratification of the Proclamation; asserted the court's power to order revival of the Assembly and

³⁸ Sunderlal Patwa v. Union of India (UOI) and ORS, 1993 AIR 214.

³⁹ Bommai v. Union of India, AIR 1994 SC 1918. Also see, Soli J. Sorabjee, *The Bommai Judgment: A Critique*, (1994) 3 SCC (JOUR) 1.

⁴⁰ Judges in India tend to write separate judgments wherein they may agree with parts or the whole of their colleague's judgment. Notably, these separate judgements may be silent on some aspects. This makes it difficult to identify a majority ruling. One eminent constitutional scholar and lawyer has suggested that if a silence ought to be construed as agreement, and if a majority have similar views on an aspect of the case, that ought to be regarded as a majority ruling.

the restoration of the government, even after Parliament has approved the Proclamation, if the court finds them to be unconstitutional; and, not least, it asserted the power to grant interim relief, to prevent the holding of elections to the Assembly in order to defeat a legal challenge to the Proclamation under Article 356 by which the Assembly had been dissolved.⁴¹

A review of the judgments of the higher judiciary does not demonstrate a consistent pattern of rulings, nor does it indicate that courts have been more effective than special commissions in limiting and circumscribing the power of the central government to proclaim President's rule in a state. Judges have struggled to set the limits of a state of emergency and of the president's powers. They have disagreed amongst themselves on how to distinguish between extreme and difficult situations, how to gauge the accuracy of the president's actions, and what the criteria ought to be on establishing the president's "satisfaction." The judgments in the Uttarakhand dismissal in 2016 reflect this struggle and highlight the difficulties inherent in Böckenförde's model structure as applied to a federal, Westminster-type democracy, like that found in India.

E. Uttarakhand Judgments

Let us return to the proclamation of president's rule in Uttarakhand in April 2016. After being approached by the Chief Minister of the State of Uttarakhand, who had been dismissed as a result of the order, a division bench of the High Court comprised by the Chief Justice and a judge ruled that President's rule in this instance undermined the foundation of federalism and had toppled a democratically elected government.⁴² It ordered a floor test in the legislative assembly.

The High Court judgment illuminates the way in which several of Böckenförde's distinctions crop up while assessing the validity of the proclamation of president's rule. First, it brings up Böckenförde's distinction between a difficult and an impossible situation. The judgment noted the appropriate basis for such a proclamation encompassed "not every situation arising in the state but a situation which shows that the constitutional government has become an impossibility."⁴³ The judgement also highlights the differing viewpoints on what constitutes a valid basis of satisfaction: "While the petitioner says that the President's

⁴¹ A.G. Noorani, *President's Rule: Limits and Checks*, 28 FRONTLINE (Jun. 4–17, 2011), <http://www.frontline.in/static/html/fl2812/stories/20110617281204500.htm>.

⁴² Harish Chandra Singh Rawat v. Union of India, Writ Petition (M/S) No. 795 of 2016.

⁴³ *Id.* at para. 60.

satisfaction (on the impossibility) depends on objective facts, the respondent argues that the satisfaction is subjective and can be left to the president's discretion."⁴⁴

The High Court concluded that regardless of subjective or objective nature of satisfaction, the president's action must appear to be called for and justifiable under the constitution if challenged in a court of law. The President cannot simply say like Caesar, it is my will, opinion, or discretion, said the court.⁴⁵ The constitutional jurisdiction of the court, said the judgment, is confined to saying whether the limits on the powers conferred by the constitution have been observed or transgressed. So, while the court cannot examine and determine whether the subjective satisfaction of the President is valid, it can examine if the satisfaction is based on wholly extraneous and irrelevant grounds. The word cannot, said the court, emphatically cause a situation of impasse. The judges added that it would be an inexcusable error to examine the provisions of Article 356 from a purely legalistic angle because "the Constitution is essentially a political document."⁴⁶ The judgment concluded that Article 356 had been misused by both parties. The government, when it takes action under the Article, is expected to be completely non-partisan⁴⁷ and only a floor test would be the proper method to determine if the incumbent commanded the confidence of the legislative assembly.

BJP, the ruling party at the center, approached the Supreme Court without an order, saying that the High Court's ruling was oral and not written and therefore did not exist. Legal scholar Rajeev Dhavan noted that it was "[o]dd . . . that the Attorney General was asking the court to set aside an order, which, according to him was not there, but whose effect was known."⁴⁸

The Supreme Court admitted the Center's challenge to the High Court decision and brought back President's rule in the State for the simple reason that the judgment, dictated on April 21 by Uttarakhand Chief Justice K.M. Joseph in open court, was not yet available in the public domain. During the hearing, the Supreme Court Bench probed the issues including whether a delay in the floor test—to gauge the government's majority in the Assembly—could be grounds for proclamation of President's rule, and whether the money bill was indeed not passed, the convention is when money bill fails to pass, the government has to go.⁴⁹ These

⁴⁴ *Id.* at para. 69.

⁴⁵ *Id.* at para. 14.

⁴⁶ *Id.* at para. 96.

⁴⁷ *Id.* at para. 59.

⁴⁸ Rajeev Dhavan, *The Supreme Court's Order on Uttarakhand is Absurd*, THE WIRE (Apr. 4, 2016).

⁴⁹ The Supreme Court asked the Center: How can the Union Cabinet sitting in New Delhi determine that a Money Bill was not validly passed in the Uttarakhand State Assembly and pave the way for imposing President's rule in the State? Accordingly, Justice Dipak Misra asked the Center, "[t]he million dollar question is when the Assembly

questions highlight the problem faced by the higher judiciary in deciding what qualified as destabilization or a breakdown in constitutional machinery. In the *Bommai* judgments, although there was no consensus among the nine judges on what would not be regarded as a SOE, some judges gave examples of what would not qualify as an SOE. These included “mere internal disturbance short of an armed rebellion,” and “to get rid of an inconvenient state government for good or bad governance.”⁵⁰ While these criteria were not discussed by the apex court, the Supreme Court of India suspended the High Court order and restored President’s rule in Uttarakhand on the grounds that the judgment of the High Court could not be implementable until a copy of the judgment was made available to the public. As *The Hindu* newspaper reported:

Aghast at the turn of events, senior advocate Dr. Abhishek Manu Singhvi, counsel for Mr. Rawat objected that the apex court could not allow the State to slip back into President’s Rule merely because the judgment copy was not out. “How can the only ground for stay (of High Court judgment) be non-availability of the judgment?” Mr. Singhvi asked. “We are only making the judgment of the Uttarakhand High Court not implementable till the copy of the judgment is out,” Justice Singh explained. He said it was not quite proper for the High Court to have dictated the judgment without immediately making available the signed copies for parties.⁵¹

The Supreme Court said that a floor test ought to be conducted to determine the government’s majority in the Legislative Assembly. The test was duly conducted, and with the nine rebel MLAs barred from voting because they had already been disqualified by the

Speaker said the Money Bill was passed on March 18, how did you say it was not?” In response, the Center insisted that the non-passage of the Money Bill would have seen the State slip into chaos and the President could not have let that happen. It submitted that the Speaker had refused a division of votes on the Money Bill despite a request from the “majority”—35 MLAs made up of 26 BJP MLAs and nine Congress rebels—in the House on March 18. This had proved that the government was already a “minority” from that day; insofar as the Center was concerned the real floor test happened on March 18 itself and there was no need for a further no-confidence motion. See Krishnadas Rajagopal, *President’s Rule to Continue in Uttarakhand*, THE HINDU (Apr. 27, 2016), <http://www.thehindu.com/news/national/uttarakhand-supreme-court-frames-seven-questions-to-centre/article8528152.ece>.

⁵⁰ *Bommai v. Union of India*, AIR 1994 SC 1918.

⁵¹ Krishnadas Rajagopal, *SC Stays Uttarakhand HC Judgement Quashing President’s Rule*, THE HINDU (Apr. 22, 2016), <http://www.thehindu.com/news/national/other-states/SC-stays-Uttarakhand-HC-judgement-quashing-Presidents-Rule/article14251707.ece>.

Speaker under an anti-defection law, the former Chief Minister was able to demonstrate a majority and was thus reinstated.⁵²

F. Conclusion

The politics of democracies functioning within a federal Westminster style framework effectively stymie the procedural innovations in Böckenförde's model. In a Westminster style parliamentary democracy, the safeguards that Böckenförde builds into his model—the separation of the authorizing and implementing agency—do not operate as they would in a unitary model. The safeguards built into the model in the form of penalties for misuse of emergency powers, and the review of the use of these powers by autonomous bodies, become ineffective when confronting single party majorities determined to bring down rivals. For instance, the Uttarakhand judgments highlight two negative aspects of justiciability for governance. First, until the court decides, governance is in limbo especially when “President’s rule” is imposed. “President’s rule” in a federal setup like India, is in practice “Prime Minister’s rule,” which in the case discussed was BJP rule that contravened the people’s mandate for the Congress party in the State.

After the *Bommai* judgment of 1994, the President refused to impose Article 356 in 1997 and 1998 when asked to do so by the Council of Ministers. Since then, as noted by senior advocate for the Supreme Court Sanjay Hegde, the wanton imposition of President’s rule has dwindled considerably. This coincided with a situation where central governments did not have an absolute majority. Since 2014, with a single party majority government at the center in India, there has been an increase in the attempts to impose Article 356. For Böckenförde, the onus of identifying and authorizing the state of emergency rests with the political wing. But if we view democracy, not as a set of values, but as simply a mechanism of changing who holds power in society, then it is not surprising that Böckenförde’s model is vulnerable when tested in an empirical context in India.

⁵² The reason for allowing the disqualification to stand is articulated by one of the Supreme Court judges:

As of today, rightly or wrongly, you are disqualified, that too on the decision of the Speaker. The challenge against your disqualification is pending in the High Court. We are passing an order based on the Attorney-General’s submission to have a floor test But once disqualified, we cannot permit you to vote We will not say anything more

Justice Misra addressed senior advocate C.A. Sundaram, appearing for the nine dissident MLAs. Krishnadas Rajagopal, *Uttarakhand Floor Test on May 10; Cong. Rebels Can’t Vote*, THE HINDU (May 6, 2016), <http://www.thehindu.com/news/national/Uttarakhand-floor-test-on-May-10-Cong.-rebels-cant-vote/article15618466.ece>.

Appendix 1**Article 356 in the Constitution of India 1949:**

356. Provisions in case of failure of constitutional machinery in State:

(1) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation;

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the president to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this constitution relating to anybody or authority in the State provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts;

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation;

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

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

often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operating, but no such Proclamation shall in any case remain in force for more than three years: Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People;

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

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

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned: Provided that in the case of the Proclamation issued under clause (1) on the 6th day of October, 1985 with respect to the State of Punjab, the reference in this clause to any period beyond the expiration of two years.