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From Weimar to the Present: Safeguards Against Misuse of Emergency Powers in Germany and India

MANEK SHARMA* AND APOORVA MISHRA**

ABSTRACT

Emergency powers are intended to uphold a constitutional order, yet in both Germany and India they have been used at times against the order they were designed to uphold. This article explores the abuse of the emergency provisions in each system and how each re-established its safeguards. The purpose is to establish which protections are the most effective. It employs a comparative doctrinal method to evaluate constitutional and statutory texts, judicial decisions, official reports and literature from both countries. It discusses how Article 48 of the Weimar Constitution, vague and without a regulating statute, enabled rule by presidential decree, the Reichstag Fire Decree and the Enabling Act of 1933, and how Articles 352 and 356 of the Indian Constitution enabled the Emergency of 1975–77 and repeated misuse of President's Rule. It then considers the corrective measures adopted: in Germany, the Basic Law of 1949, the emergency constitution of 1968 and the oversight of the Federal Constitutional Court; in India, the Forty-fourth Amendment and the judicial doctrine developed through Kesavananda Bharati*,* Maneka Gandhi *and* S.R. Bommai*. The comparison reveals that both regimes collapsed through ambiguous triggers, inadequate political balances and courts that did not restrict the executive in time, and that both now rely on legislative supermajorities, temporal limits and a protected core of rights. German protections are largely enshrined in the constitutional text, but India's are based more on judicial theory, and emergency-type authorities are increasingly exercised through ordinary law, as in the case of ordinances and communication shutdowns. The paper concludes that no single measure is sufficient. The best defence is a layering of a clear constitutional trigger, a supermajority in the legislature, time restrictions, entrenched rights, and an independent court ready and able to evaluate emergency action on the merits.*

Keywords: *Emergency powers, Weimar Constitution, Article 48, Basic Law, Article 352, Article 356, basic structure doctrine, comparative constitutional law.*

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I. Introduction

Every constitutional order sooner or later has to face the question it would rather avoid: what is to be done when ordinary law cannot meet a crisis? Most constitutions answer by creating an emergency regime that narrows rights and concentrates power in the executive. The danger is that the regime may be used to dismantle the very order it was meant to protect. Carl Schmitt put the problem in a single line when he said that the sovereign is the one who decides on the exception.[1] Clinton Rossiter, writing in the aftermath of Weimar, accepted that a democracy may need a temporary "constitutional dictatorship", but insisted that it be hedged by strict limits on who may proclaim it, for how long, and to what end.[2]

Germany and India make a useful pair for comparison. Weimar's use of Article 48 shows how emergency powers can destroy a democracy from within, and India's Emergency of 1975 to 1977 remains one of the most severe instances of emergency rule in a modern constitutional democracy. India's emergency provisions, like Weimar's Article 48 and the colonial provisions that preceded the Constitution, have attracted a good deal of scholarly attention.[3] Each country reacted to its own failures by rebuilding its emergency framework: Germany through the Basic Law of 1949 and the emergency amendments of 1968, and India through the Constitution (Forty-fourth Amendment) Act, 1978 and a body of judicial principles.

II. Weimar Germany: Article 48 and the road to 1933

A. The design of Article 48

Article 48(2) of the Weimar Constitution allowed the Reich President, where public safety and order were seriously disturbed or endangered, to take the steps needed to restore them, using the armed forces if necessary, and to suspend for the time being the rights guaranteed in Articles 114, 115, 117, 118, 123, 124 and 153.[4] Under Article 48(3) he had to inform the Reichstag without delay and had to revoke his measures if the Reichstag demanded it. Article 48(5) promised a Reich statute to regulate the details; none was ever passed.[5]

Three features of this design proved dangerous. First, "public safety and order" was left undefined, and the President alone decided whether it was under threat. Second, the "necessary

[1] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab trans., 2005).
[2] Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (1948).
[3] Venkat Iyer, States of Emergency: The Indian Experience (2000).
[4] Reichsverfassung [WRV] [Weimar Constitution], Aug. 11, 1919, Reichsgesetzblatt [RGBl.] 1383, art. 48(2) (Ger.).
[5] *Id.* art. 48(3), (5).

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measures" were not confined to executive action; in practice emergency decrees came to stand in for ordinary statutes. Third, the President's power under Article 25 to dissolve the Reichstag could blunt the one political check available, namely the Reichstag's right to demand repeal. The text gave no court an express role in reviewing the President's judgment.[6]

B. From Ebert to the presidential cabinets

Under President Friedrich Ebert, Article 48 was invoked repeatedly to meet the disorder of 1923: civil unrest, attempted coups and separatist movements. When passive resistance in the Ruhr was called off in September 1923, Ebert proclaimed a state of emergency and handed executive authority to the Minister of Defence. In October and November the central government also moved against the governments of Saxony and Thuringia, in which Social Democrats and Communists sat together.[7] However one judges these steps, they answered a genuine breakdown of order. After 1930 the provision was put to a different use.

By 1930 Article 48 had moved from being a response to disorder to being an ordinary instrument of government. President Paul von Hindenburg named Heinrich Brüning Chancellor although he lacked a parliamentary majority, and when the Reichstag rejected Brüning's budget he enacted it by emergency decree. The Reichstag relied on Article 48(3) to demand repeal of the decrees; Hindenburg answered by dissolving it under Article 25 in July 1930. In the elections of September 1930 the National Socialists rose from twelve to 107 seats.[8] Parliament was progressively pushed aside as presidential decrees multiplied. The governments of Brüning, Franz von Papen and Kurt von Schleicher were all "presidential cabinets", resting on Hindenburg's confidence and not on parliamentary support.[9]

C. The Prussian coup and the court

The coup of July 20, 1932 showed how far the mechanism could be bent. Papen, by decree, removed the Prussian government led by the Social Democrat Otto Braun, named himself Reich Commissioner for Prussia, and defended the step on the ground that Prussia had failed in its duties to the Reich.[10] The ministers did not resist their removal by force; they brought

[6] *Id.* arts. 25, 48.

[7] Rossiter, *supra* note 2; MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945 (Thomas Dunlap trans., 2004).

[8] RICHARD J. EVANS, THE COMING OF THE THIRD REICH (2003).

[9] ELLEN KENNEDY, CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR (2004).

[10] Verordnung des Reichspräsidenten, betreffend die Wiederherstellung der öffentlichen Sicherheit und Ordnung im Gebiete des Landes Preußen [Decree of the Reich President Concerning the Restoration of Public Safety and Order in the Territory of Prussia], July 20, 1932, RGBl. I at 377 (Ger.).

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proceedings before the *Staatsgerichtshof* (State Court),[11] where Carl Schmitt argued for the Reich.[12]

In its judgment of October 25, 1932[13] the Court accepted that the Reich could appoint a commissioner and transfer to him the executive powers of the Prussian ministry. It held, however, that the Reich could not strip the Prussian ministers of Prussia's representation in the Reichstag, the Reichsrat and the Prussian Landtag. The ruling was a partial vindication of Prussia, yet it left the real character of the coup untouched. On February 6, 1933 a further presidential decree gave the Reich Commissioner the powers the Court had left with the Prussian ministers, pointing to the Prussian government's reaction to the judgment.[14] Judicial review existed, but it was too weak and too slow to stop the process.

D. 1933: the Fire Decree and the Enabling Act

Hitler became Chancellor on January 30, 1933, and the major events followed quickly. On February 28, the day after the Reichstag building burned, the Reich President issued the Decree for the Protection of the People and the State.[15] It authorised the Reich to take over the powers of the Länder and to suspend the basic rights referred to in Article 48(2); in effect it legalised "protective custody" free of judicial review, and it stayed in force until 1945.[16]

On March 23, 1933 the Reichstag adopted the Enabling Act (*Gesetz zur Behebung der Not von Volk und Reich*), which was promulgated on March 24, 1933; it obtained the two-thirds majority needed for constitutional amendments under Article 76. The chamber met in an atmosphere of intimidation: Communist deputies had been arrested or kept from attending, and the Social Democrats alone voted against the measure. The Act empowered the Reich Government to enact laws, including laws that departed from the Constitution.[17] The upshot was that Article 48 was used to suspend rights, and a formally constitutional parliamentary vote then abolished the separation of powers.

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[11] *Preußen contra Reich*, Staatsgerichtshof für das Deutsche Reich [StGH] [State Court for the German Reich], Oct. 25, 1932, RGZ 138, Anhang 1 (Ger.).

[12] On Schmitt's role, *see* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997).

[13] *Preußen contra Reich*, RGZ 138, Anhang 1.

[14] Verordnung des Reichspräsidenten zur Herstellung geordneter Regierungsverhältnisse in Preußen [Decree of the Reich President for the Restoration of Orderly Government in Prussia], Feb. 6, 1933, RGBl. I at 43, § 1 (Ger.).

[15] Verordnung des Reichspräsidenten zum Schutz von Volk und Staat [Decree of the Reich President for the Protection of the People and the State], Feb. 28, 1933, RGBl. I at 83 (Ger.).

[16] Evans, *supra* note 8.

[17] WRV art. 76; Gesetz zur Behebung der Not von Volk und Reich [Law to Remedy the Distress of People and Reich], Mar. 24, 1933, RGBl. I at 141 (Ger.) (adopted by the Reichstag on Mar. 23, 1933).

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Weimar fell for many reasons and no single cause explains it. Still, its emergency regime displays the dangers that Rossiter later identified: the same official decided whether an emergency existed, the emergency became a lasting condition, and the measures served to change the constitutional framework rather than to restore it.[18] Giorgio Agamben observes that Weimar illustrates how the state of exception can become the normal technique of government.[19] Kennedy and Dyzenhaus show that the legal thought of the period helped to lend this situation legitimacy.[20]

III. Germany after 1949: safeguards in the Basic Law

A. The original Basic Law

The Parliamentary Council drafted the Basic Law (*Grundgesetz*, GG) in 1948–49 and consciously left out any counterpart to Article 48. The Basic Law embodies the idea of "militant democracy" put forward by Karl Loewenstein in 1937, according to which a democracy must be able to defend itself while staying faithful to its own principles.[21] Several devices were adopted to prevent a repeat of 1933. Article 79(3) bars any amendment touching the division of the Federation into Länder, their participation in principle in the legislative process, or "the principles laid down in Articles 1 and 20" (human dignity and the democratic and social federal state under the rule of law), so an enabling act could not lawfully abolish them. Article 19(2) forbids any encroachment on "the essence of a basic right", and Article 19(4) guarantees recourse to the courts against acts of public authority. The Federal Constitutional Court (*Bundesverfassungsgericht*) reviews both legislation and executive measures.[22]

The one emergency provision in the original text was the "legislative emergency" of Article 81. Where the Federal Chancellor has lost a vote of confidence but the Bundestag has not been dissolved, the Federal President may, at the request of the Federal Government and with the consent of the Bundesrat, declare a state of legislative emergency, so that for six months bills rejected by the Bundestag can become law with the consent of the Bundesrat alone; no law made in this way may amend, abrogate or suspend the Basic Law.[23] Drawing on militant

[18] Rossiter, *supra* note 2; Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism (1997).
[19] Giorgio Agamben, State of Exception (Kevin Attell trans., 2005).
[20] Kennedy, *supra* note 9; Dyzenhaus, *supra* note 12.
[21] Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 Am. Pol. Sci. Rev. 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 Am. Pol. Sci. Rev. 638 (1937).
[22] Grundgesetz [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBl.] 1, arts. 1, 19, 20, 79(3), 93 (Ger.).
[23] *Id.* art. 81.

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democracy, the Federal Constitutional Court banned the Socialist Reich Party in 1952 and the Communist Party in 1956.[24]

B. The emergency constitution of 1968

The Western Allies kept reserved rights over the security of their forces in Germany until 1968, and those rights were to lapse once the German authorities held equivalent powers.[25] That created a need for a domestic emergency constitution, which became one of the most bitterly contested debates of the early Federal Republic; trade unions, students and sections of the Social Democratic Party opposed it.[26] The *Notstandsverfassung* (emergency constitution) entered the Basic Law through the Seventeenth Amendment of the Grand Coalition, promulgated on June 24, 1968.[27]

It was a thorough response to the failures of Weimar. The Bundestag, on the Federal Government's proposal and with the consent of the Bundesrat, determines whether a state of defence (*Verteidigungsfall*) exists, by "a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag" (Art. 115a(1)). Only if the Bundestag is unable to meet may the determination be made, under the same voting thresholds, by the Joint Committee, made up of forty-eight members, thirty-two drawn from the Bundestag and sixteen from the Bundesrat (Arts. 53a and 115a(2)). A law made by the Joint Committee may not amend, abrogate or suspend the Basic Law (Art. 115e(2)), and the position and functions of the Federal Constitutional Court must remain intact (Art. 115g). Legislative terms are prolonged so that the executive always stays under parliamentary supervision (Art. 115h), and the Bundestag, with the consent of the Bundesrat, can at any time repeal laws made by the Joint Committee and declare the state of defence terminated (Art. 115l). Armed forces deployed in an internal crisis must be withdrawn if the Bundestag or the Bundesrat so requests (Art. 87a(4)).[28] The same 1968 reform inserted Article 20(4), which gives every German the right "to resist any person seeking to abolish this constitutional order", where "no other remedy is

[24] *Socialist Reich Party Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Ger.); *Communist Party of Germany Case*, BVerfG Aug. 17, 1956, 5 BVerfGE 85 (Ger.).

[25] Convention on Relations Between the Three Powers and the Federal Republic of Germany art. 5(2), May 26, 1952, as amended by Schedule I to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954.

[26] DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (3d ed. 2012).

[27] Siebzehntes Gesetz zur Ergänzung des Grundgesetzes [Seventeenth Law Supplementing the Basic Law], June 24, 1968, BGBl. I at 709 (Ger.).

[28] GG arts. 53a, 87a(4), 115a, 115e(2), 115g, 115h, 115l.

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available".[29] In practice the machinery has never been used, since the Federal Republic has never declared a state of defence.

C. Judicial supervision

The Federal Constitutional Court has nonetheless applied related constitutional limits outside a state of defence: to the surveillance powers added to Article 10, to the domestic deployment of the armed forces and to pandemic measures. In the *Abhörurteil* (1970) the Court, by five votes to three, upheld the 1968 amendment to Article 10 permitting covert surveillance without informing the person affected, but read Article 79(3) as requiring that the substitute parliamentary oversight be genuinely effective. The dissenting judges thought that the amendment violated Article 79(3).[30] The European Court of Human Rights later endorsed the same scheme in *Klass v. Germany*, stressing that adequate safeguards against abuse are essential.[31]

In 2006 the Court invalidated a provision of the Aviation Security Act that would have allowed the military to shoot down a hijacked aircraft carrying innocent passengers, holding that it violated the right to life and human dignity (Articles 2(2) and 1(1)).[32] In its 2012 plenary decision the Court held that the armed forces may be deployed domestically with military weapons only in situations of catastrophic proportions, and only on a decision of the Federal Government as a collective body.[33]

The Covid-19 pandemic tested the system once more, and the answer came through legislation rather than decrees. In March 2020 Parliament amended the Infection Protection Act so that the Bundestag could determine whether an "epidemic situation of national significance" existed. A nationwide "federal emergency brake" followed in April 2021.[34] In November 2021 the Court reviewed the curfews and contact restrictions and upheld them after a full proportionality analysis; in a separate decision on school closures it recognised a right to education.[35] The German model thus combines parliamentary authorisation, entrenched rights, and a court that assesses emergency measures on their merits.

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[29] *Id.* art. 20(4).
[30] *Abhörurteil* [Eavesdropping Case], BVerfG Dec. 15, 1970, 30 BVerfGE 1 (Ger.).
[31] *Klass v. Germany*, App. No. 5029/71, 2 Eur. H.R. Rep. 214 (1978).
[32] *Aviation Security Act Case*, BVerfG Feb. 15, 2006, 115 BVerfGE 118 (Ger.).
[33] *Domestic Deployment of the Armed Forces Case*, BVerfG (Plenary Chamber) July 3, 2012, 132 BVerfGE 1 (Ger.).
[34] Infektionsschutzgesetz [IfSG] [Infection Protection Act], July 20, 2000, BGBl. I at 1045, §§ 5(1), 28b (Ger.).
[35] *Federal Emergency Brake I (Curfews and Contact Restrictions) Case*, BVerfG Nov. 19, 2021, 159 BVerfGE 223 (Ger.); *Federal Emergency Brake II (School Closures) Case*, BVerfG Nov. 19, 2021, 159 BVerfGE 355 (Ger.).

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IV. India: emergency powers and their misuse

A. Colonial inheritance and constitutional design

The framers of the Indian Constitution took over emergency practices from colonial rule. The Constitution was born in a period of unrest and repressive legislation, notably the Defence of India Act, 1915 and the Anarchical and Revolutionary Crimes Act, 1919 (the Rowlatt Act), and, constitutionally, sections 93 and 102 of the Government of India Act, 1935. Section 93 allowed the Governor to assume the government of a province in the event of constitutional breakdown, while section 102 let the federal legislature make laws for the provinces once an emergency had been declared.[36] These models were carried into Part XVIII of the Constitution (Articles 352 to 360). Article 352 empowers the President to proclaim an emergency when the security of India is threatened by war, external aggression or "internal disturbance". Article 356 deals with the assumption of a State's government when it cannot be carried on in accordance with the Constitution, and Article 360 with financial emergencies. Article 358 suspended Article 19 automatically during an emergency, and Article 359 empowered the President to suspend by order the right to move the courts for the enforcement of other fundamental rights.[37]

In the Constituent Assembly debates Dr. B.R. Ambedkar admitted that these powers could be abused for political ends, but hoped that they would remain "a dead letter".[38] Later history badly dented that hope.

B. Article 356 and President's Rule

Article 356, rather than Article 352, was the provision most frequently misused in India. President's Rule was first imposed in Punjab in 1951, and in 1959 the Communist-led government of Kerala was dismissed although it still commanded a majority in the Assembly, one of the cases the Sarkaria Commission later counted among proclamations made while the Ministry enjoyed majority support.[39] In 1977 the newly formed Janata Party government at the Centre imposed President's Rule in nine Congress-ruled States and dissolved their Assemblies. In *State of Rajasthan v. Union of India* the Supreme Court recognised a limited scope for judicial

[36] The Defence of India Act, No. 4 of 1915, India Code (1915); The Anarchical and Revolutionary Crimes Act, No. 11 of 1919, India Code (1919); Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8 c. 2, §§ 93, 102 (U.K.).
[37] India Const. arts. 352, 356, 358–360 (as originally enacted); Granville Austin, The Indian Constitution: Cornerstone of a Nation (1966).
[38] 9 Constituent Assembly Debates (Aug. 4, 1949) (statement of Dr. B.R. Ambedkar), https://www.constitutionofindia.net/debates/04-aug-1949/.
[39] *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (India) (Jeevan Reddy, J.) (noting that Article 356 had been invoked on "ninety or more occasions"); Comm'n on Centre-State Rels., *Report*: Part I ch. VI, ¶¶ 6.1.03, 6.6.30 & annex. VI.4 (1988).

review but refused relief.[40] After returning to power in 1980, the Congress in turn imposed President's Rule in nine States ruled by other parties and dissolved their Assemblies.[41] The Sarkaria Commission later found many proclamations improper, describing those of 1977 and 1980 as "wholesale misuse of Article 356 for political purposes", and recommended that the power be used only "as a measure of last resort".[42]

C. The Emergency of 1975–77

National emergencies were proclaimed in 1962 and 1971 on external grounds. The proclamation of June 25, 1975, by contrast, rested on "internal disturbance". It followed the Allahabad High Court's ruling of June 12, 1975 setting aside Prime Minister Indira Gandhi's election to the Lok Sabha for corrupt electoral practice, and the Supreme Court's conditional stay of that ruling on June 24.[43] According to Granville Austin, the Cabinet learned of the proclamation only after the President had signed it.[44] Press censorship and mass arrests of opposition leaders under the Maintenance of Internal Security Act, 1971 (MISA) followed, together with a Presidential Order dated June 27, 1975 under Article 359 that suspended the right to move any court for the enforcement of Articles 14, 21 and 22.[45]

Parliament then amended the Constitution to remove the remaining constraints. The Constitution (Thirty-eighth Amendment) Act, 1975 provided, among other things, that the President's satisfaction under Articles 123, 352 and 356 was final and could not be questioned in any court of law.[46] The Thirty-ninth Amendment of the same year sought to place the election of the Prime Minister beyond the jurisdiction of the courts,[47] but the Supreme Court struck down the relevant clause in *Indira Nehru Gandhi v. Raj Narain*.[48] The Forty-second Amendment, enacted during the Emergency in 1976, restricted judicial review of constitutional amendments and lengthened the term of the Lok Sabha from five to six years.[49]

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[40] *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 (India).
[41] *Bommai*, *supra* note 39 (Jeevan Reddy, J.); COMM'N ON CENTRE-STATE RELS., *supra* note 39, ¶ 6.1.08 & annex. VI.4.
[42] COMM'N ON CENTRE-STATE RELS., *supra* note 39, ¶¶ 6.6.10, 6.8.01.
[43] *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159 (India) (order of June 24, 1975 granting a conditional stay of the Allahabad High Court's judgment of June 12, 1975).
[44] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE (1999).
[45] The Maintenance of Internal Security Act, No. 26 of 1971, INDIA CODE (1971); INDIA CONST. art. 359(1) (Presidential Order of June 27, 1975).
[46] INDIA CONST. amend. XXXVIII (1975).
[47] INDIA CONST. amend. XXXIX (1975).
[48] *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 (India).
[49] INDIA CONST. amend. XLII (1976).

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The decisive judicial moment was *ADM Jabalpur v. Shivkant Shukla*.[50] Despite the Article 359 order, several High Courts held habeas corpus petitions maintainable. A majority of the Supreme Court disagreed: while the order was in force, no person could approach a court to challenge the legality of, or the bad faith in, a detention under MISA, because the right to life and personal liberty had its sole source in Article 21, and so no common law or natural law right survived the suspension. Khanna J. dissented, holding that even in the absence of Article 21 the State has no power to deprive a person of life or personal liberty without the authority of law. In January 1977 he was passed over for the post of Chief Justice of India, and M.H. Beg J. was appointed.[51]

The Shah Commission of Inquiry, set up after the Emergency ended, documented arbitrary detentions under MISA, press censorship, compulsory sterilisation drives, and demolitions carried out by executive authorities with little oversight.[52] The Emergency was revoked on March 21, 1977, after the Congress lost the general election held that month.[53]

V. INDIA AFTER 1977: SAFEGUARDS

A. The Forty-fourth Amendment

In light of the experience of 1975, the Constitution (Forty-fourth Amendment) Act, 1978 reworked the emergency provisions. Article 352(1) now speaks of "armed rebellion" instead of "internal disturbance". The President may proclaim an emergency only when the decision of the Union Cabinet has been communicated to him in writing. Each House of Parliament must approve the proclamation within one month, and approval requires two majorities at once: more than half of the House's total membership and at least two-thirds of those present and voting. An approval runs for six months, after which a fresh resolution is needed to continue the emergency. A meeting to disapprove the proclamation may be requisitioned by one-tenth of the members of the Lok Sabha.[54] The automatic suspension of Article 19 under Article 358 was confined to emergencies declared on grounds of war or external aggression, and Articles 20 and 21 can no longer be suspended under Article 359. The provisions that shielded proclamations from judicial review were deleted, and the continuation of President's Rule under Article 356 beyond one year was made subject to conditions.[55]

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[50] *Additional District Magistrate, Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521 (India).
[51] 3 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th ed. 1996) (offering a sustained critique of the majority's reasoning).
[52] SHAH COMM'N OF INQUIRY, *Third and Final Report* (Aug. 6, 1978).
[53] *Baburao alias P.B. Samant v. Union of India*, (1988) 2 SCR 431, 440–41 (India) (setting out the Proclamation of March 21, 1977 revoking the Proclamation of Emergency of June 25, 1975).
[54] INDIA CONST. amend. XLIV (1978); INDIA CONST. art. 352(1), (3)–(8).
[55] INDIA CONST. arts. 356(5), 358, 359(1).

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B. Judicial doctrine

The judiciary also reshaped its own role through doctrine. In *Kesavananda Bharati v. State of Kerala* the Court had already held that Parliament cannot amend the "basic structure" of the Constitution.[56] That doctrine was applied in *Minerva Mills Ltd. v. Union of India* (1980) to invalidate the provisions of the Forty-second Amendment that had shut out judicial review of constitutional amendments.[57] *Maneka Gandhi v. Union of India* (1978) seriously weakened the narrow approach of *ADM Jabalpur* by holding that Article 21 demands that any procedure depriving a person of personal liberty be "fair, just and reasonable".[58] In *K.S. Puttaswamy v. Union of India* (2017) the plurality opinion of D.Y. Chandrachud J. declared *ADM Jabalpur* wrongly decided and overruled it.[59]

The leading authority on Article 356 is *S.R. Bommai v. Union of India*, decided by a bench of nine judges. The Court held that a proclamation under the Article is justiciable, so that the Court may examine whether relevant material existed to support the President's satisfaction. If the proclamation is found invalid, the dismissed government and the dissolved Assembly may be restored. Until Parliament approves the proclamation, the State Legislative Assembly may be kept in suspended animation but may not be dissolved. A government's majority, moreover, must be tested on the floor of the House and not by the subjective satisfaction of the Governor. The proclamation against the Bommai government in Karnataka was held invalid, and secularism was declared a fundamental element of the basic structure.[60] Later decisions built on these principles. In *Rameshwar Prasad v. Union of India* the dissolution of the Bihar Assembly in 2005 was held unconstitutional,[61] and in *Nabam Rebia v. Deputy Speaker* the status quo was restored in Arunachal Pradesh after the Governor had summoned the Assembly without authority.[62] No national emergency has been proclaimed since the proclamations then in force were revoked in March 1977.[63]

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[56] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India); SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).
[57] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 (India).
[58] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).
[59] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).
[60] *Bommai*, *supra* note 39.
[61] *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1 (India).
[62] *Nabam Rebia v. Deputy Speaker*, (2016) 8 SCC 1 (India).
[63] COMM'N ON CENTRE-STATE RELS., *supra* note 39, ¶¶ 6.1.05–6.1.06 (both proclamations then in force revoked in March 1977; Article 352 not invoked since the Forty-fourth Amendment); *Baburao*, *supra* note 53, at 438–41 (Proclamations of March 27, 1977 and March 21, 1977 revoking the Proclamations of December 3, 1971 and June 25, 1975).

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C. Continuing challenges

Emergency-type powers have also seeped into ordinary law. One is the ordinance-making power under Article 123. In Bihar, the Governor promulgated 256 ordinances between 1967 and 1981 and kept them alive for periods of up to fourteen years by repeated re-promulgation, a practice the Supreme Court condemned in *D.C. Wadhwa v. State of Bihar*.[64] A seven-judge bench later held in *Krishna Kumar Singh v. State of Bihar* that re-promulgation is a fraud on the Constitution.[65] Preventive and security legislation is another example, which scholars trace to colonial continuities.[66] In *Anuradha Bhasin v. Union of India*, concerning the communication blackout in Jammu and Kashmir, the Court held that restrictions on internet access must satisfy proportionality, cannot be indefinite, must be published, and must remain open to judicial review.[67]

VI. Comparative assessment

The two histories yield three insights. First, the failures had structural similarities. Both countries gave the executive emergency powers on vague grounds ("public safety and order" in Weimar, "internal disturbance" in India); political checks on the executive were weak or bypassed, through the dissolution of the Reichstag in Germany and a Parliament dominated by the ruling party in India; and the courts failed or declined to restrain the executive in time, as the Prussian judgment and *ADM Jabalpur* show. In each case the emergency outlived the crisis that brought it into being.

Second, the corrective designs share a rationale. Both now rely on legislative supermajorities and periodic reauthorisation, which resembles what Bruce Ackerman calls a "supermajoritarian escalator", under which a continuing emergency requires ever greater legislative support.[68] In Germany the Bundestag decides by a two-thirds majority, a Joint Committee of fixed composition exists, no law made by that Committee may amend, abrogate or suspend the Basic Law (Article 115e(2)), and the core principles protected by Article 79(3) are beyond the reach of any amendment. The Indian scheme demands a special majority within a month, Cabinet approval and renewal every six months. Germany shields a minimum core of rights through Articles 1, 19(2) and 79(3); India does so through the inviolability of Articles 20 and 21 and the basic structure doctrine.

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[64] *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).
[65] *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).
[66] Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006).
[67] *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637 (India).
[68] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

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Third, the security of these protections is uneven. The German safeguards are written into the text of the Basic Law and applied by a judiciary whose position is constitutionally protected during a state of defence (Article 115g).[69] India's main judicial safeguards are largely doctrinal: the basic structure doctrine and the limits placed on Article 356 in *Bommai* come from judicial interpretation, and the events of 1975 show that a court can yield to executive pressure. That does not make them worthless, but they depend more on political culture and judicial independence. The German emergency constitution, for its part, has never been tested in an actual state of defence, so the design remains untried under the conditions for which it was made.

A global benchmark also exists. Both states are parties to the International Covenant on Civil and Political Rights, Article 4 of which permits derogation only "to the extent strictly required by the exigencies of the situation".[70] The UN Human Rights Committee has said that states of emergency must be time-limited, proportionate and respectful of non-derogable rights,[71] and the Venice Commission's opinion points the same way.[72] Together these standards supply an external yardstick.

The analysis suggests that formal emergency provisions do not eliminate emergency risk. Oren Gross and Fionnuala Ní Aoláin argue that the real danger to constitutional democracies lies in the use of emergency-type powers through ordinary legislation and the normalisation of extraordinary measures.[73] The Indian cases on ordinances and communication shutdowns, and the German cases on domestic military deployment and pandemic restrictions, illustrate this.

VII. Conclusion

Weimar collapsed for many reasons, but its emergency system lacked the basic safeguards now regarded as necessary in later constitutions: a clear basis for declaration, limits on changes to the constitutional structure, mandatory parliamentary oversight, time limits and strong judicial review. India's Emergency of 1975 to 1977 showed how a constitution with a strong rights framework and a formally independent judiciary can be subverted by an executive that controls

[69] GG art. 115g.
[70] International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171.
[71] U.N. Hum. Rts. Comm., *General Comment No. 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Joan Fitzpatrick, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency (1994).
[72] Eur. Comm'n for Democracy Through L. (Venice Comm'n), *Opinion on the Protection of Human Rights in Emergency Situations*, CDL-AD(2006)015 (2006).
[73] Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice (2006); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011 (2003).

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Parliament and faces a reluctant judiciary. Both countries drew the same lesson and both rebuilt their systems in response.

The two accounts show that no single measure suffices. Judicial review without institutional independence, or procedural limits without parliamentary strength, can be compromised. The best protection lies in layering: a precise constitutional trigger, a legislative supermajority, time limits, a protected core of rights, and a judiciary both willing and able to assess emergency action on its substance. Germany and India have built this structure in different ways. As before, whether it survives will depend on the readiness of institutions and citizens to insist that an emergency is a temporary aberration that must end, not a political device.

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